UNTAG Law Review (ULREV)
Volume 9, Issue 1, November 2024-April 2025, PP 9-18
ISSN 2549-4910 (online) & ISSN 2579-5279 (print)
http://jurnal.untagsmg.ac.id/indeks.php/ulrev/indeks
www.fakhukum.untagsmg.ac.id

KONTRIBUSI HUKUM ADAT DALAM PEMBAHARUAN DAN PEMBANGUNAN HUKUM WARIS NASIONAL

Mahmuda Pancawisma F[1], Budi Prasetyo[2], Hadi Karyono[2]
[1,2,3]Lecturer of Faculty of Law,17 Agustus 1945, Semarang, Indonesia
[1]mahmudapancawisma31@gmail.com, [2]*budiprasetyo1201@gmail.com*
[3]karyonohadi08@gmail.com

ABSTRACT; *Indonesia as the country with the largest Muslim population in the world has unique problems. In the life of society, there are some people who use the customary inheritance system, western inheritance law and some who use Islamic inheritance. In the formation of national inheritance law in Indonesia, we cannot deny that the Indonesian nation is a nation rich in very diverse customs and in that customary law there are already rules or provisions regarding inheritance law as well, so it is necessary in the renewal of national inheritance law in Indonesia should not set aside customary inheritance rules. This is because the Indonesian people still highly respect their customs which are inherited from their ancestors.*

Keywords: Customary Law, National Inheritance Law

INTRODUCTION

Indonesian society is trying to re-establish the basic values of the State based on law. The supremacy of law requires that in resolving every problem faced, the legal system must be used as the sole highest measure. Thus, the enforcement of the supremacy of law does not need to ignore attention to other aspects of development. Development is a conscious effort made to change a condition from a level that is considered less good to a new condition at a level of quality that is considered good or the best.[1] The development that is carried out is of course development that has a clear legal basis, can be accounted for, is directed and proportional between physical (growth) and non-physical aspects.

All developing societies are always characterized by change, however development is defined and whatever measures are used for society in development. The role of law in development is to ensure that change occurs in a peaceful and orderly atmosphere.[2] The term legal reform actually has a broad meaning that includes the legal system. According to Friedman, the legal system consists of a legal structure (structure), legal substance/material (substance), and legal culture (legal culture).[3]

When discussing legal reform, the reform in question is the reform of the legal system as a whole, which includes legal structure, legal materials and culture. In its process, development has also brought consequences for changes or reforms in other social aspects, including the role of law. This means that the changes made (in the form of development) in its journey require changes in the form of law. This legal change has a positive meaning in order to create new laws that are in accordance with development conditions and the legal values of society.

Almost no legal expert disagrees that law (always) requires reform. This happens because society is always changing, not static. According to Satjipto Rahardjo, changes that occur in people's lives can be classified into two categories:[4]

1. Slow, little by little changes;

2. Large-scale changes, revolutionary changes.

For slow changes, adaptation between law and society is sufficient by making small changes to the existing regulatory system, either by changing or adding to it. The method of legal interpretation and legal construction is also included in the equipment for adapting to changes that are not large-scale. Another problem is if the change is large-scale. Small-scale reforms such as those above are no longer sufficient to overcome it.

Law is only part of a political process that may also be progressive and reformative.

---

[1] Niniek Suparni, *Pelestarian Penegakan Hukum Lingkungan*, Sinar Grafika, Jakarta, 1992, hlm. 36

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

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

[4] Satjipto Rahardjo, *Membangun dan Merombak Hukum Indonesia*, Genta Publishing, Yogyakarta, 2009, hlm 190

Legal reform here then only means as a renewal of the law. As a political process. In this case, law is a product of the political activities of the sovereign people, which are driven by the interests of the sovereign people which may be inspired by economic needs, social norms, or the ideal values of the people's culture itself.

Abdul Manan explained that there are two dominant views related to changes (of course in the sense of renewal) of the laws that apply in the lives of people in a country, namely the traditional view and the modern view. In the traditional view, society must change first before the law comes to regulate it. On the other hand, in the modern view, in order for the law to accommodate all new developments, the law must always be in line with the events that occur.

Abdul Manan also explained that in the neutral legal field, changes must be aimed at creating legal certainty, whereas in the field of personal life, law must function as a means of social control in community life.[5] According to Law Number 17 of 2007 concerning the National Long-Term Development Plan for 2005-2025, which is summarized by the law as the 2005-2025 National RPJP.

According to the 2005-2025 National RPJP, legal development is carried out through: "Renewal of legal materials while still paying attention to the diversity of the applicable legal order and the influence of globalization as an effort to increase legal certainty and protection, law enforcement and human rights, legal awareness, and legal services that are based on justice and truth, order and welfare in the context of organizing a state that is increasingly orderly, regular, smooth, and globally competitive"

In another section, a statement like this appears again with a slight change in words (marked in bold) as below: "Legal development is carried out through legal reform while still paying attention to the diversity of the applicable legal order and the influence of globalization as an effort to increase legal certainty and protection, law enforcement and human rights, legal awareness, and legal services that are based on justice and truth, order and welfare in the context of organizing a more orderly and regular state, so that the implementation of national development will be smoother".

In another section, there is also a statement that reads: "The development of legal material is directed to continue the renewal of legal products to replace colonial legacy laws and regulations that reflect the social values and interests of the Indonesian people".

The quotes above illustrate that the 2005-2025 National RPJP requires legal reform, especially in the form of legal material reform, which means none other than the renewal of laws and regulations. This is proven by the frequent emergence of new laws that revise previous laws. Based on Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it states that judges are given absolute authority to explore, follow, and understand the legal values and sense of justice that live in

[5] Abdul Manan, *Aspek-Aspek Pengubah Hukum*, Prenada Media, Jakarta, 2005, hlm 7

society.

In practice, legal reform based on National Legal Politics can also be seen from several revised laws and regulations, including the Law on Judicial Power and several laws on justice in the General Courts, Religious Courts, and State Administrative Courts. In Indonesia, legal reform is indeed more evident in the law. Although other forms should not be ignored, such as court decisions (jurisprudence) which are the main legal concepts applicable in Anglo Saxon countries such as America.

But what is certain is that the conceptual development of law as a means of social renewal in Indonesia is broader in scope and reach than in its birthplace (America), for several reasons:

1. Legislation is more prominent in the process of legal renewal in Indonesia, although jurisprudence also plays a role, unlike in the United States where Pound's theory is aimed primarily at the expected role of renewal from court decisions, especially the Supreme Court's decision as the highest court.

2. Anyone who shows sensitivity to the reality of society rejects the mechanical application of the concept of law as a tool of social engineering. Such a mechanistic application, as described by the word tool, will result in results that are not much different from the application that in the history of law in Indonesia (the Dutch East Indies) has been strongly opposed. In its development in Indonesia, the (theoretical) conception of law as a tool/means of renewal was also influenced by the cultural philosophy approaches of Northrop and the policy-oriented approaches of Laswell and Mc. Dougal.[6]

Legal reform in Indonesia is more directed towards legislation, whereas unwritten law is more progressive and developed towards the common good. Legal reform and legal development must be directed towards building both private and public law. Unwritten law has a significant role in the development and construction of private law in Indonesia. One of them is civil law, especially regarding inheritance. Indonesia as the country with the largest Muslim population in the world has unique problems.

In community life, there are some people who use the customary inheritance system, western inheritance law and some use Islamic inheritance. In the formation of Islamic inheritance law in Indonesia, we cannot deny that the Indonesian nation is a nation rich in very diverse customs and in customary law there are also rules or provisions regarding inheritance law, so it is necessary that in the renewal of Islamic inheritance law in Indonesia, customary inheritance rules should not be ignored.

This is because Indonesian society still highly respects their customs which are inherited from their ancestors. However, the influence of customary inheritance law in Islamic inheritance law must be in accordance with and in line with the provisions of Islamic law, if customary inheritance law is not in accordance with Islamic law, then the customary law system should be rejected.

[6] Mochtar Kusumaatmadja, *Hukum Masyarakat, dan Pembinaan Hukum Nasional*, Putra Bardin, Bandung, hlm. 9.

This is what is called the theory of receptio a contrario which states that the law that applies to society is its religious law, customary law only applies if it does not conflict with religious law.[7] With the renewal of Islamic inheritance law in Indonesia, it is hoped that an inheritance law will be formed that can be implemented by its adherents on the basis of justice for all parties. For this reason, it is relevant to discuss the contribution of customary law in the renewal and development of national inheritance law in Indonesia.

PROBLEM

What is the position and influence of customary inheritance law in Islamic inheritance law?
How do customary law and Islamic law contribute to the renewal of national inheritance law in Indonesia?

RESEARCH METHODS

The normative legal research method is an approach to legal research that focuses on the analysis of legal norms or rules written in laws and regulations, legal doctrine, and jurisprudence, without prioritizing social interaction or empirical aspects of the application of law in society.

In this method, researchers place more emphasis on the study of norms in the legal system, as well as legal principles that are theoretical or conceptual in nature. This method focuses on written legal sources, such as laws, government regulations, court decisions, and existing legal doctrines. Researchers will examine these legal norms to understand how legal rules are applied and developed.

This research seeks to analyze legal norms from a theoretical or conceptual perspective. This means that research focuses more on understanding the legal rules and principles contained in legal texts, as well as the relationship between legal norms and existing legal theories.

DISCUSSION

Contribution of Customary Law to the Reformation of National Inheritance Law

In the reality of community life, sometimes the heir lives with someone who is not his own family or descendant. For example, he lives with his adopted child or adoptive parents. In the Islamic inheritance system, there is no provision for adopted children. This will create a problem when in the distribution of inheritance later, the adopted child or adoptive parent who has lived with, taken care of and cared for the testator for a long time does not receive anything from his inheritance.
Ethically, the testator should give a portion of his assets to the adopted child or adoptive parent. One way is by implementing a mandatory will. In customary law, an

[7] H. Ichtijanto, *Perkembangan Teori Berlakunya Hukum Islam Di Indonesia* Dalam *Hukum Islam Di Indonesia : Perkembangan dan Pembentukan*, Rosdakarya, Bandung, 1991, hlm. 102.

adopted child or adoptive parent can receive inheritance from the testator's inheritance. There is even a system of replacement inheritance.[8]

The Compilation of Islamic Law (KHI) has also accommodated the provisions of a mandatory will for adopted children or adoptive parents. This is contained in Article 209 of the Compilation of Islamic Law (KHI). In relation to this problem, a balance of rights and positions between adopted children and adoptive fathers in inheritance relations is formulated. In paragraph (1) it is explained: the inherited assets of adopted children are divided based on Articles 176 to 193 KHI.

Meanwhile, adoptive parents who do not receive a will are given a mandatory will of up to 1/3 of the inheritance of their adopted child; then paragraph (2) reads: Children who do not receive a will are given a mandatory will of up to 1/3 of their adoptive parents' inheritance.

In this case, adoptive parents and adopted children can inherit from each other through a compulsory will as much as 1/3 of the inheritance. The existence of inheritance provisions and arrangements for adoptive parents and adopted children based on the legal construction of mandatory wills, according to Abdullah Kelib, will make Islamic inheritance law in line with living values with a sense of justice that is in accordance with society's legal awareness.

According to experts, the formulation of Article 209 KHI is considered a new pattern that can distribute assets in a fair manner to people who are not heirs. So that with this pattern can accommodate parties who have done great service to the testator but are not listed in the order of heirs. In the distribution of inheritance in indigenous communities, there is usually a culture to sell inherited land to relatives first.

This is intended so that the land they get from their ancestors (inheritance) is not scattered or even sold to other people so that one day they can buy it again from their relatives. In this case, KHI accommodates this. In Article 189 paragraph (1) it is stated that if the inheritance to be divided is in the form of agricultural land with an area of less than 2 (two) hectares, so that its unity is maintained as before, and used for the common benefit of the heirs concerned.

The text of paragraph (1) of Article 189 of the KHI is confirmed through paragraph (2) which reads: "If the provisions in paragraph (1) of this article are not possible because among the heirs concerned there are those who need money, then the land can be owned by one or more heirs by paying the price to the entitled heirs according to their respective shares.

For that reason, the concept of maintaining the Integrity and Unity of Land is based on the spirit of interest in maintaining and increasing production in the agricultural sector. However, the legal formulation in Article 189 paragraph (1) of the KHI is not rigid as a fixed price. Because the possibility and opportunity to not be able to maintain the integrity and unity of the land is very open, if among the heirs there are

[8] Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat*, Alumni, Bandung, 1979, hlm. 164.

those who are really in need of money, while among the other heirs do not have the ability to pay, either individually or together.

Then it seems that the land can be sold to another party who is able to buy it. The term substitute heir in Indonesian Islamic inheritance law was popularized by Hazairin in the late 70s. He called the concept of substitute heirs with the term Mawali. In the Mawali concept, the children and children of siblings are placed as substitutes and the two direct heirs (children and siblings).[9] The KHI has several principles in inheritance law, namely (1) the ijbari principle, (2) the bilateral principle (3) the individual principle, (4) the principle of balanced justice, and (5) the principle which states that inheritance exists if someone dies.

According to Hazairin, "the main line of replacement has nothing to do with replacement. He was just a way to show who the heirs were. Each heir stands alone as an heir, he does not replace another heir, because a link that no longer exists is not an heir."[10] The substitute heir in question is not appointing someone who is not an heir to become an heir. Because the qualifications of heirs have received clear legal certainty through the principle of ijbari inheritance law.

In the KHI it has been stated that a substitute heir is an heir who "replaces" the position of someone who has died before the testator. In the KHI, the substitute heir is formulated in Article 185 with the following wording: "(1) An heir who dies before the testator can be replaced by his child, except for those mentioned in Article 173, namely a person who is punished for (a) being accused of killing or attempting to kill or seriously abusing the testator, or (b) being accused of slanderously filing a complaint that the testator has committed a crime that is punishable by a sentence of 5 years in prison or a heavier sentence. (2) The portion for the substitute heir may not exceed the portion of the heir who is equal to the one being replaced".

The existence of the concept of a substitute heir is a balanced concept of justice because the problem of grandchildren whose parents died before the testator becomes a matter of true justice.[11] So the formulation of the substitute heir is very reasonable, because it can fulfill the sense of justice and humanity in the family community environment. This can also cover the disappointment of certain parties. Meanwhile, in terms of brotherhood, it is expected to maintain the integrity and harmonious relationship with family members.

In Article 183 of the Compilation of Islamic Law it is stated that heirs can agree to make peace in the division of inheritance after each is aware of their share. With this formulation, it is possible to divide inheritance with the same portion mathematically (1:1) among all heirs through the peace route, as a deviation from Article 176 of the KHI which regulates the provisions for sons and daughters (2:1); and between brothers and sisters, brothers and sisters as a deviation from Article 182 of the KHI.

---

[9] Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadits*, Tinta Mas, Jakarta, 1992, hlm. 137

[10] *Ibid*, hlm. 24-25.

[11] Mohammad Daud Ali, *Hukum Islam : Pengantar Tata hukum Islam di Indonesia*, Rajawali Press, Jakarta, 2003, hlm. 236.

The principle of peace (al-shulh) has been justified as stated in the Qur'an, Surah al-Nisa (4): 127, as long as it is not intended to set aside the teachings. Indeed, in responding to this, a wise and prudent attitude is needed for all heirs so that all heirs can receive their respective shares, but they still think about the situation of other relatives who get a smaller share while their burden of life is heavier.

So through this peace, a relative can give part of his inheritance to be given to his female relatives. This can also allow for an equal division of inheritance for all heirs. It is possible that with this peace, an alternative settlement model can be used, so that there will be no impression of "winners and losers", "superior and inferior". Thus, decisions through peaceful media seem more beneficial, which can calm and soothe the hearts of all parties.

The discourse of equal distribution (by setting aside the 2:1 provision in the Qur'an) is a fairly radical discourse in the discourse of inheritance law reform. The most famous figure in terms of the discourse of equal inheritance distribution between men and women is the former Minister of Religion H. Munawir Syadzali MA. He proposed that the practice of Islamic inheritance distribution be reactualized with an equal comparison. This happened because according to him in the wider community and especially in certain areas where religious beliefs were clearly strong, in reality the division of inheritance in faraid was not carried out and tended to use customary law.

They argue that by using customary inheritance law, they can distribute inheritance equally to the heirs. In addition, families often tend to go to the District Court to resolve their inheritance problems. Munawir Syadzali calls this a direct deviation. The practice of indirect deviations includes the culture of families who take pre-emptive policies during their lifetime, distributing most of their wealth to their children, each receiving an equal share without distinguishing between genders.[12]

Munawir Syadzali with this discourse does not mean to say that the concept of inheritance in the Qur'an is unfair, but rather he highlights the attitude of society that seems to no longer believe in the justice of faraid law. The majority of scholars have argued that the verses about inheritance are verses that are qoth'i dalalah. However, in reading a text, people's perceptions will differ.

In terms of verses about inheritance, some contemporary scholars provide the opportunity for ijtihad in this area because they assume that it can still be reinterpreted and this is what they mean is still in the dzani dalalah area. Therefore, some scholars who have this opinion state that verses about inheritance must be seen in the context of their writings and adjusted to the spirit of the times.[13]

[12] Munawir Syadzali, *Reaktualisasi Ajaran Islam Dalam hukum Islam di Indonesia : Perkembangan dan Pembentukan*, Rosdakarya, Bandung, 1991, hlm. 84

[13] Mun'im A. Sirry, *Fiqih Lintas Agama: Membangun Masyarakat Inklusif-Pluralis*, Paramadina, Jakarta, 2004, hlm. 167

In the explanation above, there is inspiration from the reality of society in the field which causes us to need to accommodate the principle of equality in customary inheritance law for the renewal of Islamic inheritance law in Indonesia. Although this is still in the discourse stage and has not been accommodated by the Compilation of Islamic Law as a basis for religious judges to decide on problems, especially in matters concerning inheritance.

CONCLUSION

The renewal and development of inheritance law in Indonesia which has been directly or indirectly influenced by the real conditions of Indonesian society with its customary inheritance law. So by considering the conditions of Indonesian society (customary), Islamic inheritance law in Indonesia can be implemented properly without any deviations from inheritance law either directly or indirectly. Of course, all of this is still within the corridor of sharia and is still based on the spirit of the Qur'an which is humanistic, just and universal. The noble values of customary inheritance that have been mixed with Islamic inheritance law basically need to be adopted in the national inheritance law system in Indonesia through the renewal of ideas including mandatory wills, maintaining the integrity and unity of land, substitute heirs, peace in the distribution of assets, and the discourse of equal inheritance distribution.

REFERENCES

Ali, Mohammad Daud. 2003. *Hukum Islam : Pengantar Tata Hukum Islam di Indonesia*. Rajawali Press. Jakarta.

Hazairin. 1992. *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadits.* Tintamas. Jakarta.

Ichtijanto, H. 1991. *Perkembangan Teori Berlakunya Hukum Islam Di Indonesia* Dalam *Hukum Islam Islam Di Indonesia : Perkembangan Dan Pembentukan.* Rosdakarya. Bandung.

Kusumaatmaja, Mochtar. 1976. *Hukum Masyarakat. dan Pembinaan Hukum Nasional.* Putra Bardin. Bandung.

-------------------------------. 1986. *Pembinaan Hukum dalam Rangka Pembangunan Hukum.* Bina Cipta. Bandung.

Lawrence M. Friedman. 1930. *American Law*. W.W. Norton & Company. New York.

Munawir Syadzali. 1991. *Reaktualisasi Ajaran Islam* Dalam *Hukum Islam Di Indonesia Perkembangan dan Pembentukan.* Rosdakarya. Bandung.

Sirry, Mun'im A. 2004. *Fiqih Lintas Agama: Membangun Masyarakat Inklusif-Pluralis.* Paramadina. Jakarta.

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

Wignjoedipoero, Soerojo. 1979. *Pengantar Dan Asas-Asas Hukum Adat.* Alumni. Bandung.