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Questioning the Customary Inheritance Law After Law No. 3 of 2006 about Religious Jurisdiction

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Abstract: Customary inheritance dispute might occur when the heirs cannot reach agreement between divisions of property or during inheritance law point which will be used. Indonesia acknowledges 3 existing inheritance laws which are western civil inheritance law, Moslem's inheritance law, and customary inheritance law. Legal action of inheritance law is usually resolved by deliberation but if there is no agreement reached between these processes, therefore court mechanism can be used to make lawsuit and dispute resolution. UU No 3 of 2006 about religious jurisdiction is a legal product that is issued to provide improvement (Amendment) against UU No 7 of 1989 about religious jurisdiction. UU No 3 of 2006 is giving significant impact against the existence of custom inheritance law in Indonesia. Before this constitution is created, religious jurisdiction can accept customary inheritance disputes for Moslem people according to the criteria which have been stated in UU No 7 of 1989. Since UU No 3 of 2006 is created, therefore customary inheritance law, even though the heirs are Moslem, must follow the district court mechanism. This will provide increasingly narrow space for the existence of customary law in the future. This program is held in Pati, Central Java, where custom inheritance law still exists and is being used in Pati community. Dissemination and harmonization regarding customary law is important to maintain sustainability and existence of customary law in Indonesia.

Keywords: Customary Inheritance, Religious Jurisdiction, Inheritance Law

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A. Introduction

Inheritance law in Indonesia is a living law and the embodiment of the real awareness of law from the people. Inheritance law, which is the original Indonesian law, which created through the social process based on legal feeling from the real needs of community life, and based on the basic thinking of society, also being supported and obeyed by the community. The practice of customary law is still practiced and has its own observance by the Indonesian people.

Customary law is an unwritten law but is respected and obeyed by the people in the belief that these regulations are valid as law. It coexists with the national law, which is the written one, and is promulgated by the authorities of the country. Even though customary law is unwritten law, it is still well obeyed by the Indonesian people. Customary law practices exist in the fields of family, property, land, agreements, and inheritance. This shows that customary law still has its existence in Indonesian society. Even customary law itself can be known for its existence in the national legal system in Indonesia.

The existence of customary law in the national legal system in Indonesia will continue to exist. In this case, Soepomo gave his views, namely[1]: (1) that in the field of family life, customary law will still dominate the Indonesian people; (2) whereas the criminal law of a country is obliged to be in accordance with the features and characteristics of the nation or society itself; (3) whereas customary law as unwritten customary law will remain as a source of a new law for other matters that have not been / are not stipulated by the law.

Customary law is an unwritten rule that lives in the custom society of an area and will remain alive as long as the community still fulfills the customary law that has been passed on to them from their ancestors before them. Therefore, the existence of customary law and its position in the national legal system cannot be denied even though it is unwritten and based on the principle of legality is illegal law. It will always exist and live in Indonesian society.

The recognition of customary law as a law in Indonesia can be seen in the regulation of inheritance law in Indonesia. Indonesia recognizes three inheritance law systems, namely western civil inheritance law, Islamic inheritance law and customary inheritance law. The western civil inheritance law system is based on the Civil Code, and the Islamic inheritance legal

[1] See R. Soepomo, *Bab-bab Tentang Hukum Adat,* (Jakarta: Pradnya Paramita, 1996), p. 52. see St. Laksanto Utomo, *Hukum Adat,* (Depok: Rajawali Press, 2017), p.14.

system is based on the Quran, and customary inheritance law is based on regional customary law in Indonesia.

Customary inheritance law is the rules or legal norms that regulate or determine how legacy or inheritance is passed on or distributed to the heirs from generation to generation in the form of assets that are material or immaterial through the way and process of transferring them[2]. This customary law of inheritance has its own distinctive features and characteristics, which are distinct from Islamic law and Western law. It is because the difference lies in the natural background of the Indonesian people who have the philosophy of Pancasila with a diverse and unified society. This background is basically a community life that has characteristics to create harmony, conformity, and peace in life[3].

The issue of customary inheritance is not immune to the disputes that occur. Customary inheritance disputes can occur because of disputes between the heirs. These disputes cannot be underestimated, because they can have a negative impact on the heirs who are left behind, as a result of which kinship between the heirs is broken up. If the strife or dispute over inheritance cannot be resolved by deliberation, it can be resolved through the court.

The court that has the authority to resolve civil disputes (including inheritance disputes) is the District Court. The District Court has the authority to handle civil cases in general, except for civil cases which fall under the authority of the Religious Court. In addition, Moslem people who have inheritance cases can file a lawsuit at the Religious Court.

In the explanation of UU No. 7 of 1989 about the Religious Court, it is known that the inheritance sector is about determining who will be the heirs, the inheritance, the share of each heir, and implementing the distribution of the inheritance, if the inheritance is carried out based on Islamic law. In this regard, the parties before the litigation may consider choosing what law will be used in the distribution of inheritance.

The logical consequence of UU No. 7 of 1989, for Moslem people who resolve cases at the Religious Court can reconsider what inheritance law will be used (Western civil inheritance law, customary inheritance law, or Islamic inheritance law). In this case, it is possible if the heirs who have dispute at the Religious Court ultimately decide to resolve their inheritance dispute by using traditional inheritance.

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[2] See Catharina Dewi Wulansari, *Hukum Adat Indonesia,* (Bandung: Refika Aditama, 2014), p. 71.

[3] Hilman Hadikusuma, *Hukum Waris Adat,* (Bandung: PT. Citra Aditya Bakti, 2015), p. 9

However, with the publication of UU No. 3 of 2006 about Religious Court, the provisions regarding the choice of inheritance law are lost. UU No. 3 of 2006 about Religious Court is a legal product issued to provide improvements (amendments) to UU No. 7 of 1989 about Religious Court. This law was released in 2006 and contains 42 articles which are amendments to UU No. 7 of 1989. UU No. 3 of 2006 provides a broad power of authority for religious court with the aim of meeting legal needs for the community.

The authority of the Religious Court after the enactment of UU No. 3 of 2006 in resolving cases in the field of marriage is almost the same as the authority contained in UU No. 7 of 1989, it is just one more authority is added, which is the determination of the status of children based on Islamic law. The authority of the Religious Court in resolving cases of inheritance, wills, grants, endowments, zakat, infaq, and shadaqah as well as syariah economics[4].

The authority of the Religious Court regarding inheritance is stated in Article 49 and Article 50 of UU No. 3 of 2006 about Religious Court. The Religious Court has the duty and authority to examine, decide, and settle cases at the first level between people who are Moslem in the field of: (1) marriage; (2) inheritance; (3) testament; (4) grants; (5) waqf; (6) zakat; (7) infaq; (8) shadaqah; and (9) syariah economics.

Explanation of Article 49 of UU No. 3 of 2006: Settlement of disputes is not only limited to the field of syari'ah banking, but also in other areas of syari'ah economics. What is meant by "between Moslem people" includes people or legal entities which automatically submit themselves voluntarily to Islamic law. Regarding matters which fall under the authority of the Religious Court related to inheritance, there are provisions in Article 49 letter (b), namely: "What is meant by "inheritance" is the determination of who is the heir, what is the inheritance, how is the share amount of each heir, and the distribution of the inheritance, as well as a court order on the request of a person regarding the determination of who will be the heir, the determination of the share of each heir."

Disputes over the distribution of inheritance can have a negative impact on the heirs who are left behind, because fighting over the inheritance of the family relationship between the heirs can be damaged or broken kinship between the heirs. Therefore, this inheritance problem cannot be underestimated. Many of these inheritance disputes have ended in court, because they want to get a fair settlement. The settlement of inheritance

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[4] Fataruba, Sabri. "Kompetensi Absolut Pengadilan Agama dan Kekhususan Beracaranya Pasca Amandemen Undang-undang Nomor 7 Tahun 1989 Tentang Peradilan Agama." *Sasi* 22.1 (2016): 59-73.

problems requires thoroughness, accuracy, and fairness so that it will not cause disputes and bad effect on the heirs, and the kinship between the heirs can be maintained properly[5].

Article 49 and Article 50 of UU No. 3 of 2006 if read in a literal way, it will have its own consequences. It is necessary to break these articles. The general elucidation of UU No. 7 of 1989 about the Religious Court which states: "Prior to the litigation, the parties may consider choosing what law to use in the distribution of inheritance", is declared to be omitted. Since UU No. 3 of 2006 was published, there is no option for Moslem people to resolve inheritance disputes by using traditional inheritance.

B. Method

This research is a result of the program that has been carried out by the author team. The program carried out is the dissemination of laws and regulations related to customary inheritance. This program also used socialization and mentoring methods in a holistic manner. The purpose of this program is to provide legal insight and awareness to preserve customary law, especially customary inheritance in people's lives and provide solutions to problems of customary inheritance. The location of this program is in Pati, Central Java, Indonesia. The location was chosen because Pati is an area that the people still have strong belief in customary law and also to accommodate national law in their life.

C. Results and Discussion

Basically, the inheritance laws that apply in Indonesia are Western civil inheritance law, Islamic inheritance law, and customary inheritance law. All of them are valid and still recognized as laws that can be used by the community to solve problems regarding inheritance.

Customary inheritance law includes legal norms that determine which material and immaterial assets of a person can be handed over to their heirs and also regulate the time, method and process of the transition[6]. The law of

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5 Rahmatullah, R. (2016). Kewenangan Pengadilan Agama Dalam Menyelesaikan Sengketa Perkara. *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum*, *3*(1), 126-133.

6 Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat*, (Jakarta: CV Haji Masagung, 1992), page 161. Soerojo Wignjodipoero referred to in the term Adat Waris Law.

traditional inheritance shows features that are typical to the Indonesian conservative thought. Inheritance customary law is based on the principles that arise from the concrete and communal thought of the Indonesian nation[7]. The practice of customary inheritance in Indonesia is still followed and become part of the laws that live in society.

The practice of customary inheritance law has the potential for a dispute to arise. The issue of inheritance often creates polemics and can also be prolonged disputes. Inheritance disputes can divide fraternal relations and the resolution can take years.

The provisions in the UU of customary inheritance dispute can be resolved through the court and it is the final step after the disputing parties have attempted to resolve the dispute through an out-of-court settlement mechanism.

1. The Authority of Religious Court in Resolving Customary Inheritance Disputes after the Enactment of UU No. 3 of 2006 about Religious Court

Religious Court is a court for people who are Moslem. It has the authority to handle certain cases and regarding certain groups of people, who are Moslem, is equal to other courts. The power of the Religious Court is exercised by the Religious Court and the High Religious Court as well as the Supreme Court. The Religious Court is the first level court while the High Religious Court is the court of appeal. Judicial power within the Religious Court culminates in the Supreme Court as the Supreme State Court.

The legal basis for the authority of the religious court, which is UU No. 7 of 1989, was amended by UU No. 3 of 2006, which was subsequently amended by UU No. 50 of 2009. Important changes to UU No. 7 of 1989 became UU No. 3 of 2006, states: (a) strengthening the supervision of judges, both internal supervision by the Supreme Court and external supervision of the behavior of judges carried out by the Judicial Commission in maintaining and upholding the honor, dignity and behavior of judges; (b) tightening the requirements for the appointment of judges, both judges at religious courts and judges at high religious courts, among others through a transparent, accountable and participatory selection process for judges and having to go through a process or pass judge education; (c) arrangements regarding special courts and ad hoc judges; (d) regulating the mechanisms and procedures for the appointment and dismissal of judges; (e) the safety and welfare of judges; (f) transparency of decisions and limitations in providing copies of decisions; (g) transparency of case fees as well as examination of management and

[7] St. Laksanto Utomo, *Hukum Adat,* (Depok: Rajawali Pres, 2017), p. 101.

accountability of case costs; (h) legal assistance; and (I) Honorary Panel of Judges and the obligation of judges to comply with the Code of Ethics and Code of Conduct of Judges.

Amendments in general to UU No. 7 of 1989 about Religious Court as amended by UU No. 3 of 2006 about Religious Court are basically to realize the implementation of independent judicial power and a clean and authoritative judiciary, which is carried out through an restructuring of the judicial system an integrated justice system, especially religious courts are constitutionally a judicial body under the Supreme Court.

In implementing its authority, it turns out that the Religious Court is experiencing disturbances. The disturbances arising from these articles are: (a) Becoming an obstacle for the Religious Court in exercising their powers; (b) Creating confusion in the case resolution process and procedure; (c) Settlement of cases becomes convoluted and takes a long time; (d) Incurs high costs, torments justice seekers, and consumes energy; (e) Not in line with the basic principles of a trial that is fast, light and low cost[8]. Nevertheless, the Religious Court shows, first: that the institution of the Religious Court has gradually been accepted by the Indonesian people along with debates about their duties, functions and competences. Second: that the political law that is going to take place the Religious Court institution proportionally as a state institution and a symbol of syari`ah in accordance with the constitution and Islamic syari`ah has been realized, although further refinement is still needed, especially in the field of facilities and infrastructure[9].

The Religious Court, which is part of the religious court, has the duty and authority to examine, decide, and resolve cases at the first level between people who are Moslem in the fields of marriage, inheritance, wills, and grants, endowments and shadaqah.

Given the existence of legal pluralism in the field of inheritance in Indonesia and if there are restrictions where Moslem people are forced to resolve their inheritance disputes through the Religious Court using Islamic law, it can actually conflict with the Indonesian constitution and UU No. 39 of 1999 about Human Right, which these regulations give rights and freedom to the community as well as mandate the obligation to the state to guarantee the freedom of the people to be able to practice their religion and beliefs, the

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8 Matrais, S. (2008). Kemandirian Peradilan Agama dalam Perspektif Undang-Undang Peradilan Agama. *Jurnal Hukum Ius Quia Iustum*, *15*(1). DOI: https://doi.org/10.20885/iustum.vol15.iss1.art6

9 Fariana, A. (2016). Peran Strategis Pengadilan Agama Dalam Penyelesaian Sengketa Ekonomi Syariah. *Al-Ihkam: Jurnal Hukum dan Pranata Sosial*, *10*(2), 228-251.DOI: 10.19105/al-ihkam.v10i2.720

state is also obliged to respect the existence of customary laws that exist and live in society[10].

Inheritance is one of the cases that can be resolved through the mechanism of the Religious Court. In accordance with the explanation in UU No.7 of 1989 that the field of inheritance is about determining who the heir is, what the inheritance, the share amount of each heir, and implementing the distribution of the inheritance, if the inheritance is carried out based on Islamic law. In this regard, the parties before the litigation may consider choosing what law will be used in the distribution of inheritance. This provision opens an opportunity for Moslem people who dispute over inheritance to settle by using traditional inheritance.

In Indonesia, legal pluralism still applies in the field of inheritance law. There are three legal systems that apply side by side, which are Western inheritance law (hereinafter referred to as the Civil Code), customary inheritance law, and Islamic inheritance law. Likewise, in the procedural law in inheritance cases in Indonesia, the dualism of the judiciary is still valid, which are the District Court and the Religious Court. In UU No. 7 of 1989, it recognizes the existence of choice of law (hereinafter referred to as legal option) in inheritance cases. Option right is the right to determine what law will be used to solve a problem. This legal option has consequences for which court will hear an inheritance case[11]. However, with the publication of UU No. 3 of 2006, the option right was lost. With the provisions of Article 49 and Article 50 of UU No. 3 of 2006 will actually close the freedom of society to resolve inheritance disputes in the Religious Court and as a solution it will be resolved through the general courts.

In fact, Article 49 paragraph 1 b of UU No. 7 of 1989 clearly states that the issue of inheritance between Moslems is the authority of the Religious Court. However, the content of the article at first glance contradicts the general explanation which states that the parties before the litigation can consider choosing what law to use in the distribution of inheritance. It can be concluded that the parties can make legal choices, whether to use Islamic inheritance law, customary law, or western inheritance law. Thus choice of law can be interpreted as the will of the parties to choose what law will be used as a law to decide the cases they are going to submit. From the contents

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10 Adli, A. S. M. (2020). Penyelesaian Sengketa Waris Adat Bagi Masyarakat Beragama Islam Berdasarkan Undang-Undang Nomor 3 Tahun 2006. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, *9*(1), 74-91. DOI: https://doi.org/10.24843/JMHU.2020.v09.i01.p06

11 Ramli, M. (2019). Peranan Advokat dalam Mewujudkan Kewenangan Pengadilan Agama dalam Bidang Kewarisan. *Ulumuna: Jurnal Studi Keislaman*, *5*(2), 146-160. DOI: https://doi.org/10.36420/ju.v5i2.3646

of the general explanation it is clear that the choice of law must occur outside the judiciary so that if an agreement is not reached, as long as the parties are Moslem, then the case should be examined and decided by a religious court[12].

The explanation of UU No. 3 of 2006 confirms that the sentence contained in the general explanation of UU No. 7 of 1989 about Religious Court which states: "Prior to litigation, parties may consider choosing what law to use in the distribution of inheritance", is declared to be deleted.

The logical consequence is that if Moslem people voluntarily submit to Islamic law, the settlement of their inheritance dispute cases is in the Religious Court, but if Moslem people who are not subject to Islamic law (use traditional inheritance), the settlement of their inheritance dispute cases will be resolved in the District Court[13]. Settlement of disputes with Islamic law is carried out through the Religious Court as stipulated in UU No. 3 of 2006 about amendments to UU No. 7 of 1989 about Religious Court. Meanwhile, dispute resolution based on the source of the Civil Code and Customary Law is carried out through the District Court.

2. The Existence of Customary Inheritance Law in the Future

Customary inheritance law is one of the three inheritance laws that apply in Indonesia. The use of customary inheritance law is based on the provisions of each region or the customs that apply in the community. Indonesia is a country that has a lot of customs and it is clear that there are also many customary inheritance laws that apply. Generally, every region in Indonesia still has customary inheritance that applies, it is just difficult to find it in the current era because customary inheritance has been lost and not well documented.

Customary law is seen as the source of the formation of national law in Indonesia, because it is the embodiment of the original law of the Indonesian nation. However, customary inheritance law will still be recognized for its existence in Indonesia as long as it is still alive and used by the Indonesian people and it is in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia. The concept of limited recognition makes customary inheritance law difficult to develop.

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12 Susylawati, E. (2019). Sengketa Kewenangan Pengadilan Dalam Perkara Waris Akibat Adanya Pilihan Hukum. *Al-Ihkam: Jurnal Hukum dan Pranata Sosial*, *1*(1), 81-96. DOI: http://dx.doi.org/10.19105/al-lhkam.v1i1.2554

13 Thohari, I. (2015). Konflik Kewenangan Antara Pengadilan Negeri dan Pengadilan Agama Dalam Menangai Perkara Sengketa Waris Orang Islam. *UNIVERSUM: Jurnal KeIslaman dan Kebudayaan*, *9*(2). DOI: https://doi.org/10.30762/universum.v9i2.84

The recognition and respect for the existence of customary law in the constitution has provided a clear picture that the Indonesian nation has a unique culture in law. Customary law is law that is born from the legal needs and feelings of the Indonesian people. So, it can answer all legal problems faced by the people in their daily life[14]. This includes the existence of customary inheritance law which will remain as long as the Indonesian people still use or practice it, otherwise Indonesia must be ready to lose its customary inheritance law.

D. Conclusion

The provisions in UU No.3 of 2006 have eliminated the authority of the Religious Court to examine and decide traditional inheritance cases. Before UU No.3 of 2006 was published, it was still possible for customary inheritance disputes to be resolved through the Religious Court on the basis of what is stated in the explanation of UU No. 7 of 1989, called the option right for the disputing parties to choose what law is used in the distribution of inheritance. With the provisions of UU No.3 of 2006, customary inheritance disputes must be resolved through the District Court. The presence of UU No. 3 of 2006 about Religious Courts, if it is read literally by people who are 'laymen' of the law, it will provide an understanding that there is no room for the existence of customary law. The existence of customary inheritance law in Indonesia needs to be developed because preservation efforts are not enough. If the development is not carried out, the customary inheritance law may disappear or die because it is crushed by the times and changes in society.

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[14] Maladi, Y. (2010). Eksistensi hukum adat dalam konstitusi negara pasca amandemen. *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada*, *22*(3), 450-464. DOI: https://doi.org/10.22146/jmh.16235

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