
Inheritance Laws in Indonesia

Irawaty

irawaty@unj.ac.id/ irawaty.moechoar@gmail.com

Universitas Negeri Jakarta

Diyantari

diyantari@unj.ac.id

Universitas Negeri Jakarta

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Abstrak

Indonesia merupakan negara yang menerapkan sistem hukum yang disebut civil law. Ada tiga sub sistem yang diterapkan sampai saat ini: sistem hukum positif/nasional, sistem hukum Islam, dan sistem hukum adat. Mayoritas penduduk Indonesia adalah pemeluk agama Islam. Bangsa Indonesia mengklaim mereka adalah bangsa yang religius. Hukum waris yang diimplementasikan berbeda antara hukum Islam dan hukum adat. Salah satu grup etnis yang memiliki aturan berbeda terkait hukum waris adalah suku Minangkabau. Hukum adat waris Minangkabau kerap menjadi kontroversi. Hal ini dikarenakan mereka muslim tetapi mereka menerapkan hukum waris yang disebut melanggar hukum waris Islam. Di dalam Islam, warisan diturunkan kepada anak laki-laki dan perempuan dengan laki-laki mendapat dua bagian dibanding dengan yang diperoleh perempuan. Banyak orang yang mengira hukum waris Minangkabau mengatur bahwa warisan diturunkan hanya ke anak perempuan. Artikel ini membahas: 1) bagaimana hukum waris diatur di dalam tiga sub sistem hukum yang telah disebutkan di atas.? 2) bagaimana hukum waris diatur di dalam hukum adat Minangkabau?

Kata kunci: hukum waris Minangkabau; Pusaka Tinggi; Pusaka Rendah; Hukum Waris Islam

Abstract

Indonesia implements civil law system. There are three sub legal systems which are implemented until today. They are: positive/national law system, Islamic law system, and Adat law system. The majority of Indonesians are Islamic believers. The people claim that they are a religious nation. However, the implementation of the inheritance law in accordance with the Islamic law and the Adat law is sometimes different. One of the ethnic groups which has different regulation in heritance is Minangkabau. Minangkabau inheritance adat law has been a controversy. It is because while they claim that all Minangkabau people are Islam, they implement an inheritance law that is said as violating the Islamic inheritance law. In Islam, inheritance is passed down to children, both daughter(s) and son(s) with the composition son(s) inherits two parts compared to daugther(s). Many people mislead that the Minangkabau inheritance law passes down the inheritance to daughter(s) only. This paper discusses: 1) how are inheritance matter regulated in each of the aforementioned sub legal system? 2) how is inheritance matter regulated in Minangkabau ethnic group?

Keywords: Minangkabau inheritance law, Pusaka Tinggi, Pusaka Rendah, Islamic Inheritance Law

Background

Indonesia implements civil law system. It is influenced by the Dutch as Indonesia was colonized since 1800 by the Dutch (C.S.T. Kansil & S.T., 2011, p. 177). Indonesian legal system is formed by several sub-system of laws, namely: religious/Islamic law, adat law and national law. Religious/Islamic law and adat law which are incorporated into the national legal system are the principles of the law; while the law inherited from the Dutch is a structure which is incorporated into the national law. Indonesia also gets influences from international regulations which implemented in the field of civil law and public law—as a consequence of globalization (Wahyud, 2014, p. 8).

Up until now, the three sub systems of laws are still recognized and implemented in Indonesia. The national law is made by the government and applied to all, however, there are some codes which are established by the Dutch are still implemented.¹ Islamic law, which are accommodated by the Government by establishing some regulations and applied to muslims. Adat law, which is based on the traditions of each ethnic groups and could be applied to the ethnic group (the implementation depends on each ethnic group).

Indonesia is the fourth most populous country in the world, which has 238 million people (in 2010) (M & Sidik (ed), 2017). Numbers of Muslims are 207,2 people (87.18 percent in 2010) (BPS, 2010, p. 10). With such percentage of Muslims, placing Indonesia as the country with the largest Muslim population in the world (13.1 percent in 2010). It is estimated that by 2030 the Muslim population in the world will reach as high as 26 percent of the total population in the world. Indonesians live by holding the spirit of communalism. It is stated that they conduct *musyawarah mufakat* (deliberation) to seek solutions for problems. That spirit and way of live influence tradition and adat law in each ethnic group.

Adat law is one of sources of Indonesian laws. Adat law is defined as a law that is inherited from ancestors and passed on from generation to generation (Mustafa, 2003). The Indonesian nation is a nation that is united by history. The history refers to their experience colonized by the Dutch nearly three and a half centuries. Dutch colonialism covered the archipelago, colonizing more than 300 ethnic groups. Those hundreds of ethnic groups which are part of the Indonesian nation today.

With so many number of the ethnic groups, Indonesia becomes a country with very diversity of people who have their own Adat laws. This is a challenge for the government and

¹ The Codes are: Civil Code (*Kitab Undang-Undang Hukum Perdata*); Commercial Code (*Kitab Undang-Undang Hukum Dagang*); and Penal Code (*Kitab Undang-Undang Hukum Pidana*)

people of Indonesia until today. The second amendmend of the Constitutional gives recognition on the existence of indigenou peoples, as stated in:

1. Article 18B (2)

"The State recognizes and respects the communities of indigenous people and their traditional rights as long as they still exist and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which is regulated by law."

("Negara mengakui dan menghormati kesatuan-kesatuan masyarakat hukum adat beserta hak-hak tradisionalnya sepanjang masih hidup dan sesuai dengan perkembangan masyarakat dan prinsip Negara Kesatuan Republik Indonesia, yang diatur dalam undang-undang.")

2. Pasal 28I (3)

"Cultural identity and traditional peoples' rights are respected in conformable with the times and civilizations."

("Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban.")

The Article 18B (2) clearly states that the state provide public recognition of adat law and customary rights as long as they still exist. The existences of public law and adat rights should not conflict with the development of society and the principles of the country. The recognition was expressed in the Laws. However, the Article 28I (3) is actually gives lack of certainty over how the protection afforded to cultural identity and the state of traditional society. Challenges which appear, for example is problems of indigenous rights to lands (*hak ulayat*) and the recognition local belief.

Public anxiety over the issue of recognition to further protect the existence and the rights of indigenous communities likely to be solved with the formulation of the Draft Law on Recognition and Protection of the Rights of Indigenous People (*Rancangan UU Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat (PPMHA)*) (Wibowo , 2014, p. 4).

West Sumatera is one of regions in Sumatera Island—Indonesia. The indegenous ethnic of the region is called Minangkabau. One of the uniqueness of Minangkabau is that it applies matrilineal family system. The implementation of the matrilineal system is that children inherit their mother's line instead of their fathers' (Hamka, 1984, p. 108). This particular system is still implemented until today. It can be seen, for example, that *Mahkamah Agung* (The Supreme Court of Indonesia) used the Minangkabau inheritance law system to drop the

verdict in Case Number 2887 K/Pdt/2012.² The interesting point is that while Indonesians are majority muslims, however there is an ethnic group which applies inheritance law that does not based on Islamic law.

Based on the above discussion, this particular article will examine inheritance laws of the aforementioned three sub legal systems in Indonesia, they are: national law system, Islamic law system and adat law system. In addition, it also will examine the inheritance law which is applied to Minangkabau ethnic also.

Research Method

This article implements descriptive qualitative approach. The data are collected from various regulations (among others are *Kitab Undang-Undang Hukum Perdata/Civil Code* and *Kompilasi Hukum Islam/The Compilation of Islamic Law*, books and articles (both from journals and online mass media) which are relevant to the topic.

Inheritance Based on Indonesia Sub Legal Systems

A. The Positive/National Law System

Indonesia is a rich natural resources country. Other than the Dutch, actually there were some other country which colonialized Indonesia. The discussion of the Indonesian positive law covers the law which implemented by the Dutch and the Government of Indonesia. The Dutch implemented regulations which were accordance with their country and other regulations which were established by the General Governor. (C.S.T. Kansil & S.T., 2011, p. 131) At that time, based on Constitution which is called *Indische Staatsregeling (IS)* the population are divided into three categories. The categories are: the westerns (including all Europeans and Japanese); east foreigners (including chinese, and other east foreigners); and indigenou.

At 18 August 1945, one day after Indonesia's independence day, the Indonesia's constitution's was passed by the *Panitia Persiapan Kemerdekaan Indonesia* (Indonesian's Independence Preparation Committee). In the Article II of the Transitional Rules of the Constitution stated that: "*Segala badan negara dan peraturan yang ada masih langsung berlaku, selama belum diadakan yang baru menurut Undang-Undang Dasar ini.*" (all of the government bodies and regulations are still valid, unless which are regulated by this Constitution).

There were three codes which were still implemented at that time, and still untill today with some adaptations here and there. The codes has been implemented in Nusantara

² The case is a family feud over the parties' grandmother's inheritance.

(now Indonesia) since the Dutch colonialization. They were: *Kitab Undang-Undang Hukum Perdata* (the Civil Code), *Kitab Undang-Undang Hukum Pidana* (the Penal Code) and *Kitab Undang-Undang Hukum Dagang* (the Commercial Code).

In regards to inheritance law, this particular matter is regulated in the Civil Code. The regulations in this particular Code are commonly implemented to Indonesians who are not muslims. There are many articles which regulate inheritance matter. Some of those articles which can be stated here are: (Civil Code)

1. Article 830, which stated *Pewarisan hanya terjadi karena kematian* (that inheritance only occur when someone is passed away).
2. Article 832, which stated that based on the law, person who will become the heirs are all family through the bloodlines, partners who lives longer. When the people who passed away does not have partner who still live, than his/her wealth will belong to the country.

“Menurut undang-undang, yang berhak menjadi ahli waris ialah keluarga sedarah, baik yang sah menurut undang-undang, maupun yang diluar perkawinan, dan suami atau isteri yang hidup terlama, menurut peraturan-peraturan berikut ini. Bila keluarga sedarah dan suami atau isteri yang hidup terlama tidak ada, maka semua harta peninggalan menjadi milik negara, yang wajib melunasi utang-utang orang yang meninggal tersebut, sejauh harga harta peninggalan mencukupi untuk itu.”

3. Article 838, which stated on conditions which make someone cannot become a heir. One of the conditions is that the person(s) who killed the devisor(s).

“Orang yang dianggap tidak pantas untuk menjadi ahli waris, dan dengan demikian tidak mungkin mendapat warisan, ialah:

- a. *dia yang telah dijatuhi hukuman karena membunuh atau mencoba membunuh orang yang meninggal itu;*
- b. *dia yang dengan putusan Hakim pernah dipersalahkan karena dengan fitnah telah mengajukan tuduhan terhadap pewaris, bahwa pewaris pernah melakukan suatu kejahatan yang diancam dengan hukuman penjara lima tahun atau hukuman yang lebih berat lagi;*
- c. *dia yang telah menghalangi orang yang telah meninggal itu dengan kekerasan atau perbuatan nyata untuk membuat atau menarik kembali wasiatnya;*
- d. *dia yang telah menggelapkan, memusnahkan atau memalsukan wasiat orang yang meninggal itu.”*

4. Article 852, which stated that all children can become heirs whether they are men or women. They share the same amount of the wealth.

“Anak-anak atau keturunan-keturunan, sekalipun dilahirkan dan berbagai perkawinan, mewarisi harta peninggalan para orang tua mereka, kakek dan nenek mereka, atau keluarga-keluarga sedarah mereka selanjutnya dalam garis lurus ke atas, tanpa membedakan jenis kelamin atau kelahiran yang lebih dulu.

Mereka mewarisi bagian-bagian yang sama besarnya kepala demi kepala, bila dengan yang meninggal mereka semua bertalian keluarga dalam derajat pertama dan masing-masing berhak karena dirinya sendiri; mereka mewarisi pancang demi pancang, bila mereka semua atas sebagian mewarisi sebagai pengganti.”

From the articles above, it can be concluded that:

1. Inheritance is only valid when someone has passed away;
2. Partners who live longer will become the heirs of their late partners;
3. All children can inherit their parents wealth (regardless what their sex are) with the same portions;
4. Immediate family could become heirs (regardless of what their sex are);
5. There are some conditions which could inclosed partner(s) and/or children and/or immediate families to inherit the wealth of the late person.

Another articles which need to be discussed is Articles 913, 914 and 915. These articles stated about legitime portie principle. The principle regulates the amount of every heir could inherit. When there is a dispute in regards of inheritance matter which implements positive/national law, the parties could bring the case to *Pengadilan Negeri* (district court).

B. The Islamic Law System

Mardani wrote that Ismail Saleh, former Justice Minister. said that Islamic law essentially sets two things, namely, how people connects with God and how humans relate to fellow human beings (*mu'amalah*). The first thing mentioned is described in detail while the second is not so detailed (the main points of guidance only). Further provisions on how the implementation on how humans relate to each other can be set more details by leaders or government (Mardani, 2014, p. 270).

As Ismail Saleh said that the detailed arrangements regarding the *mu'amalah* are handed over to the government or leader; in this case is the government of Indonesia. Nevertheless, the ulama or muslim's leaders need to conduct logical and constructive dialogues with the government of Indonesia to have some regulations which are required by the Muslims in Indonesia to be issued (Kusnadi, 2014, p. 3).

1. Pre-independence day
 - a. Kingdom era

Islamic law has been effective since the beginning of the teaching arrived in the archipelago (7th century AD) (Mardani, 2014, p. 267). When the Islamic kingdoms formed, Islamic courts were established. Islamic courts had different names: *pengadilan penghulu*/judicial prince (Java), Shari'ah courts (Sumatra), and judicial

qadi (Sultanate of Banjar and Pontianak) (Ridwan, 2014, p. 268). At the time Sultan Agung of Mataram kingdom's ruling, the Court which was established and used Islamic law was named *Surambi* Court. But by the time Amangkurat I was ruling in Mataram, the court was eliminated. After the period of Amangkurat I ended, the court was reactivated. At that time, Islamic law code was published. The name of the code was *Sirath al-Mustaqim*, it was written by Nurudin Ar-Raniri. The code was used as reference by the judges in the archipelago (Ridwan, 2014, p. 268).

b. Colonial era

Compendium Freijer was compiled by D.W. Freijer based on order from the VOC. It was used as the basic material in court for the community of Muslims. When the colonial was in power in the archipelago, Islamic law was the law which was used for Muslims. In 1882, the colonial government established a religious court for Muslims. In 1931, State Gazette No. 53 was issued which authorized the Religious Court to deal with matters of marriage, divorce and inheritance under Islamic law. In 1937, State Gazette No. 116 through the authority of religious courts regarding issues related to inheritance and property court ruling revoked and all religious court verdicts should get confirmation from the district court (Ridwan, 2014, p. 268).

2. Independence era

As stated above that at the end of period of its colonialism, the Dutch decided not to give power to Islamic court. After Indonesia had its independence, such view was disregard. At that time there were some scholars who raised the issue of the importance of Islamic law to be enacted again for Muslims.? The scholars were: Hazarin, Suyuti, and Ismail Talib Sunny (Ridwan, 2014, pp. 269-270).

From the description of the history and development of Islamic law above, it can be concluded that Islamic law was recognised and enforced since Islam was introduced in the archipelago; it was since the time of the kingdoms, the colonial government (except for some time after the issuance of Government Gazette No. 116 in 1937) and in the days after Indonesia independence.

After Indonesian independence, the various regulations made under Islamic law and religious courts were established. Even in the reformation era, local governments are given discretion to impose Islamic law in accordance with the needs of the local community. One important principle that must be followed is the procedures in establishing regulations which

are based on Islamic law must be constitutional and in line with Pancasila (Kusnadi, 2014, p. 13). Here are the rules that apply nationally in Indonesia (Kusnadi, 2014, p. 15):

1. Rules of courts

The Law Number 7 year 1989 regarding Religious Courts (*Peradilan Agama*). The law was amended with the Law Number 3 year 2006 regarding Religious Courts. Based on the law, the religious courts have the authorities to prosecute matters related with: marriage, inheritance, testamentary, grants, benefaction, zakah, infaq (Pengadilan Agama Anaaha, Kewenangan Pengadilan Agama, 2014).

2. The Compilation of Islamic law

The compilation was established through the Presidential Instruction (*Instruksi Presiden*) Number 1 year 1991. The compilation is used by all judges at the Religious Court (Mardani, 2014, p. 274). It consists of three books which are: (1) Book I which regulates matters in regard with marriage law; (2) Book II which regulates matters in regard with inheritance law; and (3) Book III which regulates matter in regards with benefaction (Kompilasi Hukum Islam, 2014).

3. Regulations on familiy matters

The Law Number 1 year 1974 regarding Marriage. The government issued further regulation on that Law, which is Government Regulation (*Peraturan Pemerintah*) Number 9 year 1975 regarding the Implementation Guidelines of the Regulation on the Marriage Law (Kusnadi, 2014, p. 15).

4. The regulation in economic law

The Law Number 7 year 1992 regarding Shari'a Banking which has been amended through the Law Number 21 year 2008 regarding Shari'a Banking. Shari'a Banking consists of General Bank of Shari'a and Shari'a People's Financing (Article 1 Number 7).

5. Regulation on the management of Hajj

The Law Number 17 year 1999 regarding the Hajj Organizing. This law has been amended with the Law Number 13 year 2008 regarding the Hajj Organizing. Hajj is a worship which should be conducted once in a lifetime of Muslims who can afford it. It is based on the fifth of pillars of Islam (Article 1 Number 1). The hajj is performed in Makkah and Madinah.

6. Regulations regarding giving property to another party

- a. Law Number 38 year 1999 regarding Zakah Management.³ The law was amended with the Law Number 23 year 2011 regarding Zakah Management. Islamic law regulates that a person or a legal person must give some of their wealth to those who entitled to receive it. In order this matter can be well managed, than it should be regulated by government through a definitive law.
 - b. Law Number 41 year 2004 regarding Benefaction/Waqf. Waqf is to separate and/or give part of wealth. The aim is for worship need and/or for public welfare. The guidelines regarding Waqf is based on Shari'a law (as stated in the Article 1 Number 1).
7. Regulation in education

Mardani stated that Islamic Law gave contribution in the establishment of the purposes of the national education. The purposes were stated in Law Number 2 year 1989 regarding the System of Education. One of the purposes was, to generate human who is pious to the Only One God.⁴ The law has been amended with the Law Number 20 Year 2003 regarding National Education System. This law stated that religious values must be used as one of the foundations of national education (Article 1 Number 2).

8. Regulations regarding local regulations based on Islamic Law

Law Number 44 year 1999 regarding the Special Authonomy of Nangroe Aceh Darussalam (NAD). Related to the law, the President issued the Presidential Instruction Number 4 year 2000 regarding the NAD Special Authonomy Problem Management (*Penanganan Masalah Otonomi Khusus di NAD*).⁵

The Law Number 44 year 1999 has been amended through the Law Number 18 year 2001 regarding Province Special Authonomy of Aceh Special Area as Nangroe Aceh Darussalam Province. The Article 1 Number 7 states that Shari'a Court is effective for Muslims.

As has been stated before, in *Kompilasi Hukum Islam* (the Compilation of Islamic Law), inheritance matter is stipulated in Book II. The stipulations, of course, is based on Islamic inheritance law. Heirs is regulated in article 172 to 175 and *the amount is regulated in article 176 to 193*.

Some of articles which need to be discussed are:

³ Mardani, Ibid, pp. 276-277

⁴ Mardani, Ibid, p. 273

⁵ Didi Kusnadi, Ibid, p. 15

1. Article 171 a, which states the definition of inheritance law.

“Hukum kewarisan adalah hukum yang mengatur tentang pemindahan hak pemilikan harta peninggalan (tirkah) pewaris, menentukan siapa-siapa yang berhak menjadi ahli waris dan berapa bagiannya masing-masing.”

2. Article 171 b, which states that devisor at the time he/she passed away is a muslim, has heirs and possesses legacy.

“Pewaris adalah orang yang pada saat meninggalnya atau yang dinyatakan meninggal berdasarkan putusan Pengadilan beragama Islam, meninggalkan ahli waris dan harta peninggalan;”

3. Article 171 c, which states that heir(s) is/are someone who has bloodline with the person who passed away or the husband or wife, muslim(s) and there is no condition which inclosed him/her to become heir(s).

“Ahli waris adalah orang yang pada saat meninggal dunia mempunyai hubungan darah atau hubungan perkawinan dengan pewaris, beragama Islam dan tidak terhalang karena hukum untuk menjadi ahli waris.”

4. Article 171 d, which states that legacy could be tangible and intangible.

“Harta peninggalan adalah harta yang ditinggalkan oleh pewaris baik yang berupa benda yang menjadi miliknya maupun hak-haknya.”

5. Article 171 e, which states that the amount of legacy.

“Harta waris adalah harta bawaan ditambah bagian dari harta bersama setelah digunakan untuk keperluan pewaris selama sakit sampai meninggalnya, biaya pengurusan jenazah (tajhiz), pembayaran hutang dan pemberian untuk kerabat.”

6. Article 172, which states how to determine whether the heir(s) is/are muslims or not.

“Ahli waris dipandang beragama Islam apabila diketahui dari Kartu Indentitas atau pengakuan atau amalan atau kesaksian, sedangkan bagi bayi yang baru lahir atau anak yang belum dewasa, beragama menurut ayahnya atau lingkungannya.”

7. Article 173, which states condition(s) that could inclosed someone to become heir.

“Seorang terhalang menjadi ahli waris apabila dengan putusan hakim yang telah mempunyai kekuatan hukum yang tetap, dihukum karena:

- a. *dipersalahkan telah membunuh atau mencoba membunuh atau menganiaya berat para pewaris;*
- b. *dipersalahkan secara memfitnah telah mengajukan pengaduan bahwa pewaris telah melakukan suatu kejahatan yang diancam dengan hukuman 5 tahun penjara atau hukuman yang lebih berat.”*

8. Article 174, which explains the groups of heirs.

a. *kelompok-kelompok ahli waris terdiri dari:*

- 1) menurut hubungan darah:
 - golongan laki-laki terdiri dari: ayah, anak laki-laki, saudara laki-laki, paman dan kakek.
 - golongan perempuan terdiri dari: ibu, anak perempuan, saudara perempuan dari nenek.
- 2). menurut hubungan perkawinan terdiri dari: duda atau janda.

b. apabila semua ahli waris ada, maka yang berhak mendapat warisan hanya: anak, ayah, ibu, janda atau duda.”

9. Article 175, which states about responsibility of heir(s) of one who passed away.

- a. kewajiban ahli waris terhadap pewaris adalah:
 - 1) mengurus dan menyelesaikan sampai pemakaman jenazah selesai;
 - 2) menyelesaikan baik hutang-hutang berupa pengobatan, perawatan, termasuk kewajiban pewaris maupun penagih piutang;
 - 3) menyelesaikan wasiat pewaris;
 - 4) membagi harta warisan di antara ahli waris yang berhak.
- b. tanggung jawab ahli waris terhadap hutang atau kewajiban pewaris hanya terbatas pada jumlah atau nilai harta peninggalannya.”

10. Article 183, states that heirs could make an agreement in deciding the amount of their shares only after they aware of their allocation each.

“Para ahli waris dapat bersepakat melakukan perdamaian dalam pembagian harta warisan, setelah masing-masing menyadari bagiannya.”

Furthermore on the amount of the legacy, it is stipulated in the Articles 176 to 193. These stipulations are also based on what is stated in Al Qur'an. What could be summed up from all the articles above is that all children could become heir(s) as long as he/she does not do something which can inclosed him/her to become heir. Nevertheless, the interesting point is as stated in Article 183, that the heirs may make an agreement in regards to the amount of the shares after they aware of their allocation.

C. The Adat Law System

Henley dan Davidson stated that ‘custom’ or ‘tradition’ refers to “a peaceful order and consensus” (Henley & Davidson, 2010, p. 1). Christian Snouck Hurgronje (1857-1936) was the first person who used the term ‘Adat Law’ (*‘hukum adat’*) as stated in his book *De Atjehers* (Fasseur, 2010, p. 58).

1. Colonialism era

The study of Indonesia customary law at this era was often conducted by foreigners. Two names that have an important role in the Indonesian customary law are Christian Snouck Horgronje dan Van Vollenhoven (Fasseur, 2010, p. 59). The results of their research on Indonesia Adat Law are still used until today.

Tracing back on the history of adat law in Indonesia in the twentieth century, adat law has a different legal system to the western law.⁶ The differences that affect both the legal system can be seen from the following points (Henley & Davidson, 2010, pp. 27-28):

- a. The idealism. Customary/Adat Law is based on communalism while western law is based on individualism.
- b. The distinction on judicial power with the other government elements and measurements of freedom in interpreting the judge rules. Customary law does not distinguish judicial power with other government agencies. In customary law, a judge is not bound rigidly in interpreting the rules because customary law is believed to be the law of life.

From the points which are stated above, it can be seen the differences of the stress between Adat Law and western law. Henley dan Davidson stated that (Henley & Davidson, 2010, p. 28). “Adat, thus, be spiritual, community-oriented, humane, and protect the poor farmers of Indonesia; while Western law, and, more broadly, Western culture, worldly, individualistic, inflexible, and supports a rich capitalist.”

(“Adat, dengan begitu, bersifat spiritual, berorientasi kepada komunitas, berperikemanusiaan, dan melindungi kaum petani miskin Indonesia; sementara hukum Barat, dan lebih luas lagi, kebudayaan Barat, bersifat duniawi, individualistis, tidak fleksibel, dan mendukung kaum kapitalis yang kaya.”)

From the explanation above, it can be concluded that adat law which is held by the people of Indonesia is actually in line with situation of the Indonesians who are religious while the aim is to protect Indonesian people who are mostly poor farmers (Henley & Davidson, 2010, p. 29).

2. Post-independence era

Right after the independence, the regime which has the power is called the Old Era. In this era, the discussions regarding the enforcement of democratic principles—which are derived from adat law—arose again. Some experts who supported that matters are: Brigadier-General Soetjipto, Soediman Kartohadiprojo, Hazairin and Colonel Abdulkadir Besar (Bourchier , 2010, pp. 134-135).

In New Order Era, the term of Adat Communities refers to isolated communities. The meaning of the word isolated is separated, even from their own communities who has the same origin (Henley & Davidson, 2010, p. 30). The use of the term ‘Adat

⁶ Western law is the Dutch’s Law

communities', (*masyarakat adat*) not isolated communities (*masyarakat terasing*) is seen as a positive effort that considers them as parts of the Indonesian people. Therefore, it is hoped that it will generate love for Indonesia (Henley & Davidson, 2010, p. 14).

Nevertheless, Henley dan Davidson wrote that the New Order regime has ransacked and oppressed the existence of the Adat communities (transmigration program as an example) (Henley & Davidson, 2010, p. 14), so that they can no longer hold and implement customary law which has been used as a reference that is the legacy of their ancestors. For example, customary rights to land and traditional governance systems (Henley & Davidson, 2010, pp. 13-18) .

As in the Reformation era, the existence of Adat communities seems to get proper acknowledgement. Bouchier stated that indigenous peoples began to rise through the Indigenous Peoples Alliance of the Archipelago (AMAN) which was formed after the fall of President Suharto. In the era of President Habibie, the Law No. 22 of 1999 regarding Regional Government that recognizes the rights of indigenous peoples was issued (Bouchier , 2010, p. 137). In 2001, AMAN gave definition regarding Adat communities as stated below (Bouchier , 2010, p. 138).

“communities that are living together based on ancestry for generations in an indigenous territory, which have sovereignty over land and natural resources, social and cultural life are governed by customary laws and traditional institutions that deal with the sustainability of community”

(“komunitas yang hidup bersama berdasarkan asal-usul leluhur secara turun-temurun dalam suatu wilayah adat, yang memiliki kedaulatan atas tanah dan sumber daya alam, kehidupan sosial budaya yang diatur oleh hukum adat dan lembaga adat yang mengurus kelangsungan kehidupan komunitas.”)

In each regime, the influence of adat law to the Indonesia law system is different. The differences are discussed below:

1. Colonialism era

At this time, the Dutch applied criminal and civil law to cases of the Netherlands against the Indonesian people which were processed in courts. The Dutch Government tried to construct an appropriate law for Indonesia, but this could not be realized.

TH der Kinderen was the Dutch who composed criminal law which disregard Adat law. One of the Adat communities which were not satisfied with the criminal law for the Europeans was the Dayak community. This dissatisfaction was shown with the

reestablishment of the tradition of headhunting. Before the criminal laws were enacted, rules governing compensation were implemented to dampen the headhunting tradition (Fasseur, 2010, pp. 64-65).

In civil and trade cases, it was difficult to determine which of the tribal Adat laws was used to the parties which came from different ethnic groups (Fasseur 2010, 66). Adat laws which were implemented were family law and inheritance law (Fasseur 2010, 64-69). Nevertheless, the Dutch established Adat court in the decade prior to the end of colonialism in the archipelago. The courts were particularly established outside Java as places to seek justice for people who are in the countryside. In the second world war the Adat courts were abolished (Fasseur 2010, 69).

2. Old Order Era

Old Order era is the era after independence until the replacement of Indonesian President Soekarno by President Soeharto. In this era, the law which was used was the western law. Although the Constitution that existed at that time (UUD 1945) recognized the existence of indigenous peoples, but in the implementation it was ignored. A similar thing happened also when the state constitution was changed into RIS Constitution (Bourchier, 2010, p. 131).

The thought that existed at the time was that Indonesian law requires unification which would be implemented nationally. It was as an effort to show the world that Indonesian was a united nation. It was not like adat law that only applies to certain people in certain areas which made the Indonesian people fragmented (Fasseur, 2010, pp. 75-76).⁷ In one of the laws, the existence of indigenous customary land law is stated in Articles 2 (4) and 3 of the Law No. 5 of 1960 regarding the Primary of the Agrarian Law.

3. New Order Era

The Law Number 5 year 1960 regarding the Primary of the Agrarian Law was still effectively implemented in Soeharto regime. In the implementation, the rights on lands which were derived from Adat law were changed into new titles of rights. The same things happened with the titles which were given from the Dutch (Fitzpatrick, 2010).

The inclusion of the recognition of customary rights was also included in the Primary Forestry Law of 1967. Nevertheless, the recognition of Adat law showed that Adat

⁷ C. Fasseur, *Ibid*, pp. 75-76

law was placed under national law. Article 17 shows such arrangements, namely, that in the exercise of customary rights should not be interfered with the implementation of national programs. Actually the same thing happened also to the Primary Agrarian Law (Fitzpatrick, 2010, hal. 154-155).

4. Reformation era

Bourchier stated that the results of research which was conducted by Simarmata Ricardo (2003) that legal recognition of indigenous peoples actually are contained in several laws and Bills (Agricultural, Natural Resources, Human Rights, Forestry, Mining, Water Management and Education) and also the amendment of the 1945 Constitution in 2000 (Fitzpatrick, 2010, hal. 137).

Furthermore, the government has tried to accommodate the need of the recognition of Adat communities by establishing the Recognition and Protection on the Rights of Adat Law Communities. The aforementioned law has been composed (Wibowo, 2014, p. 4).

In regards to inheritance matters, according to adat law, inheritance does not occur only because someone has passed away. The legacy could be distributed while a devisor is still alive. The nature of adat inheritance law are (Samosir, 2014, pp. 305-306):

1. Based on adat law, legacy does not only about wealth which could be valued by money. The legacy could be something which may be distributed among the heirs based on types and benefit;
2. The equality of rights among the heirs;
3. The legacy could be handed down before someone passes away;
4. The settelement of inheritance disputes implement principles, among others, deliberation, self control and kinship.

In addition, Sulistyowati Irianto stated that the adat inheritance law are varies. The variations which caused the differences are based on (Irianto, 2016, p. 5):

1. The family system that of ethnic group, whether the ethnic group implement matrilineal system, parental system or patrilineal system;
2. How far the ethnic group incorporate islamic inheritance law to theirs;
3. The recogrition of the courts on adat inheritance law;
4. The position of women as heirs or not.

D. Adat Law of Minangkabau Ethnic Group in Regards of Inheritance

Adat basandi syarak, syarak basandi katabullah (adat based on syari'ah, syari'ah based on Al Qur'an). This sentence considered as the principle of the Minangkabau ethnic group. From the aforementioned sentence, it can be understood that they hold Islamic teaching strongly. Minangkabau is an ethnic group which has been well administered. They have a well formed adat law and implemented it in their daily lives. Hamka stated that when Islam entered Minangkabau, Islamic teaching was accommodated and seen as a teaching which could better their ideology. Nevertheless Islam would not abolish what had been solid or strongly hold and implemented by the ethnic group. One example of matters which adat law is different from Islamic teaching is Minangkabau ethnic group implements matrilineal while Islam more of patrilineal. It is important to be noted that later on the process in implementing Islamic teaching there was a war which is known as *Perang Paderi* (*Paderi* war). This war ended after there was an agreement, that is *adaik basandi syara'* (adat based on syariah). The idea was adat and Islamic teaching are both hold and implemented equally (Muftisany (ed), 2017).

Actually, before Islamic teaching came to Minangkabau, religion which were held by the ethnic were Hindu and Budhist. It is believed that Datuak Perpatieh Nan Sabatang and Datuak Katumanggungan were the persons who established the Minangkabau adat law (Penghulu, 1997, hal. 13). Minangkabau consists of three areas, they are: *darek*, *pasisia* and *rantau* (Penghulu, 1997, hal. 20). At that time, the people always stay in groups which follow their grandmothers. The people worked together in fields and rice fields. They pledged not to sell their fields. The reason is that if they sell them, it will reduce the living area for their children, nephew and niece.

Chairul Anwar stated societies are bound to others could be by territory, genealogy, or both. Minangkabau is the example of society which is bound by both teritorry and genealogy. Furthermore, the genealogy which is used is matrilineal system. The unit of the matrilineal system is named *paruik* (stomach) which refers to one big family. The members of *paruik* are families of a great grand mother. When such family considered too big, then it will be divided into smaller units which are called *jurai* (Anwar, 1997, pp. 8-9). When *jurai* flourishes with many more members, then what was known as *jurai* could become *suku* (Anwar, 1997, p. 16).

Hamka explained that the initial Minangkabau adat law regulated that men did not have obligations to earn living for their wives and children. It was because the one who had the responsibility was their *mamak* (uncle). The treasures that a man gained had to be given to his nephew(s) and niece(s). After Islam came, this inheritance law was strongly maintained.

However, there is one type on legacy which could implement Islamic law. That is *harta pencarian* (wealth earn by husband and wife) (Hamka, 1984, p. 26).

In regards with inheritance matter, it is said that the inheritance system is different compared to Islam inheritance law. However, the wealth which are inherited also different. There are two categories of legacy which can be inherited. They are (Hamka, 1984, p. 103):

1. *Pusako Tinggi* is wealth which has been possessed and passed down by *paruik* or *jurai* from generation to generation to daughters only. This type of wealth is categorized as *harta syubuhah* or *ganggam bauntuak* (one can not sell the wealth, one only can take the yield). There are four conditions that make the wealth transferred to another party:
 - a. *Keperluan biaya pemakaman* (funeral costs);
 - b. *Keperluan biaya menikahkan anak gadis* (wedding costs for daughters);
 - c. *Membiayai perbaikan rumah adat* (cost of adat house renovation) ;
 - d. *membayar hutang* (to pay debt(s)).
2. *Harato Pancarian* is wealth which is earned by husband and wife. This kind of wealth is inherited to their children and implements Islamic inheritance law.

Chairul Anwar stated that *pusako tinggi* ideally is not lessen. In case, there is reduction because of the four conditions aforementioned, it can be increased again through what is called *Pusako Randah*. *Pusako randah* is *harato pancarian* which has been passed down to generation to generations (Anwar, 1997, pp. 94-95).

Conclusion

The majority of Indonesians (more than 80 percent) are muslims. However, the inheritance law which is implemented does not majorly based on Islamic teaching. In Indonesia, there are three sub legal systems. Each of them have their own regulation. The national law implements legitime portie principle as stated in the Civil Code; the Islamic law implements inheritance law based on Al Qur'an, which is regulated in the Compilation of Islamic law; while the adat law in Indonesia is varies. As for Minangkabau ethnic group, there are two different types of legacy. They are *pusako tinggi* which implement their adat law (the legacy only inherit to daughters) and *harato pencarian* which implement Islamic inheritance law.

References

- C.S.T. Kansil, K., & S.T., C. (2011). *Pengantar Ilmu Hukum Indonesia*. Jakarta,; PT. Rineka Cipta.
- Henley, D., & Davidson, J. (2010). *Pendahuluan: Konservatisme Radikal-Aneka Wajah Politik Adat, Dalam Buku berjudul Adat Dalam Politik Indonesia*. Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- Kusnadi, D. (2014, April 20). *Hukum Islam Di Indonesia (Tradisi, Pemikiran, Politik Hukum Dan Produk Hukum)*. Retrieved from <http://www.badilag.net/data/ARTIKEL/WACANA%20HUKUM%20ISLAM/HUKUM%20ISLAM%20DI%20INDONESIA.pdf>.
- Muftisany (ed), H. (2017, August 11). Dipetik 05 15, 2008, dari <http://www.republika.co.id/berita/koran/dialog-jumat/15/05/08/no0x0830-adat-basandi-syara-syara-basandi-kitabullah>.
- Wahyud, T. (2014, April 20). *The Urgency of Indonesia's Law System in the Perspective of Establishment of National Law Based on Pancasila*. Retrieved from <http://www.pta-banten.go.id/makalah/urgensi-sistem-hukum-indonesia.pdf>.
- Kompilasi Hukum Islam*. (2014, April 20). Retrieved from <http://hukum.unsrat.ac.id/ma/kompilasi.pdf>.
- Pengadilan Agama Anaaha, Kewenangan Pengadilan Agama*. (2014, May 14). Retrieved 2013, from <http://www.pa-unaaha.go.id/page/view/168/kewenangan-pengadilan-agama>.
- Anwar, C. (1997). *Hukum Adat Indonesia: Meninjau Hukum Adat Minangkabau*. Jakarta: PT. Rineka Cipta.
- Badan Pusat Statistik. (2010). *Kewarganegaraan Suku Bangsa, Agama, dan Bahasa Sehari-hari Penduduk Indonesia: Hasil Sensus Penduduk*. Jakarta: Badan Pusat Statistik.
- Bourchier , D. (2010). *Kisah Adat Dalam Imajinasi Politik Indonesia Dan Kebangkitan Masa Kini, Dalam Buku berjudul Adat Dalam Politik Indonesia*. Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- BPS. (2010). *Kewarganegaraan. Suku Bangsa, Agama, dan Bahasa Sehari-hari Penduduk Indonesia: Hasil Sensus Penduduk*. Jakarta: Badan Pusat Statistik.
- Fasseur, C. (2010). *Dilema Zaman Kolonial: Van Vollenhoven Dan Perseteruan Antara Hukum Adat Dan Hukum Barat Di Indonesia, Dalam Buku berjudul Adat Dalam Politik Indonesia*. Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- Fasseur, C. (2010). *Dilema Zaman Kolonial: Van Vollenhoven Dan Perseteruan Antara Hukum Adat Dan Hukum Barat Di Indonesia: : Dalam Buku berjudul Adat Dalam Politik Indonesia*. Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- Fitzpatrick, D. (2010). *Adat Dalam Politik Indonesia*. Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- Hamka. (1984). *Islam dan Adat Minangkabau*. Jakarta: PT Pustaka Panjimas.

- Henley, D., & Davidson, J. (2010). "Preliminary: Radical Conservatism-Varieties of Adat Politic" in "Adat In Politic of Indonesia" (Originally in Bahasa Indonesia). Jakarta: Yayasan Pustaka Obor Indonesia dan KITLV-Jakarta.
- Irianto, S. (2016). *Pluralisme Hukum Waris dan Keadilan Perempuan*. Jakarta: Yayasan Pustaka Obor Indonesia.
- M, J., & Sidik (ed). (2017, August 11). *Penduduk Indonesia Terbanyak Keempat di Dunia*. Retrieved 2010, from <http://www.antaraneews.com/berita/214559/penduduk-indonesia-terbanyak-keempat-di-dunia>.
- Mardani. (2014, April 20). *Kedudukan Hukum Islam dalam Sistem Hukum Nasional*. Retrieved 2009, from <http://law.uui.ac.id/images/stories/jurnal%20Hukum/2%20Mardani.pdf>.
- Mustafa, B. (2003). *Sistem Hukum Indonesia Terpadu*.
- Penghulu, I. H. (1997). *Pokok-Pokok Pengetahuan Adat Alam Minangkabau*. Bandung: PT Remaja Rosdakarya.
- Ridwan, A. (2014, April 20). *Kompetensi Peradilan Agama Sebelum Kemerdekaan RI*. Retrieved from <http://www.pa-kalianda.go.id/gallery/artikel/191-kompetensi-peradilan-agama-sebelum-kemerdekaan-ri.html>.
- Samosir, D. (2014). *Hukum Adat Indonesia: Eksistensi dalam Dinamika Perkembangan Hukum di Indonesia*. Bandung: CV. Nuansa Aulia.
- Wahyudi, T. (2014, April 20). *The Urgency of Indonesia's Law System in the Perspective of Establishment of National Law Based on Pancasila, n.d.* Diambil kembali dari <http://www.pta-banten.go.id/makalah/urgensi-sistem-hukum-indonesia.pdf>.
- Wibowo, S. (2014). *Bill of PPMHA: Protect the Adat Community of Indonesia (Originally in Bahasa Indonesia)*. Koran Sindo.
- Wibowo, S. (2014, April 21). RUU PPMHA: Lindungi Masyarakat Adat Indonesia. 4.

