

A COMPARATIVE STUDY BETWEEN THE CUSTOMARY INHERITANCE LEGAL SYSTEM OF THE COMMUNITY AND THE ISLAMIC INHERITANCE LEGAL SYSTEM ON INHERITANCE DISTRIBUTION IN MUKOMUKO CITY DISTRICT OF MUKOMUKO REGENCY

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ABSTRACT

The writing of this research aims to: (1) understand and explain the inheritance distribution system according to the customary inheritance law of the Mukomuko community; (2) understand and explain the inheritance distribution system according to the Islamic inheritance law; (3) understand, study, and compare between the customary inheritance system of the community and the Islamic inheritance legal system on the inheritance distribution. This research used a normative research method with a comparative approach. A comparative approach is an approach to investigate the similarities and differences in things, people, work procedures, ideas, and critics towards other people, groups, and people's perspectives on a group, a country, or an event. This research revealed that: (1) the inheritance distribution system according to the clan customary inheritance law, either high heirloom property (known as *Harta Pusaka Tinggi*) or matrimonial property, is subjected to matrilineal principles (the inheritance right of daughters are greater than the sons); (2) the inheritance distribution system according to the Islamic inheritance system is subjected to Qur'an with patrilineal principles (the inheritance right of sons are greater than the daughters); (3) the comparison of inheritance distribution according to the customary legal system of the community and the Islamic inheritance legal system have some similarities and differences. Both systems have tangent points in which the customary law of the community is individual-collective which is under the matrilineal principles while the Islamic inheritance law is individual-bilateral which is under the patrilineal principles.

Keywords: A comparative study, the customary inheritance law of the community, the Islamic inheritance law.

A. INTRODUCTION

1. Background Research

Custom is a cultural idea that consists of cultural values, norms, habits, institutions, and customary law that regulates human behavior between one and other communities which are commonly practiced in a community group. In contrast, customary community law is not a written legal regulation, but it is oral based on traditions and customs that have long been entrenched and obeyed by the local community with certain sanctions for violators in customary areas. Besides being able to be passed down orally, customary law can also dynamically develop along with changes and renewals in society.¹

Customs that have sanctions are called customary law, while those that do not have sanctions are called habits. The customary law itself plays an important role, including in terms of customary inheritance law. There are also various kinds of inheritance law provisions that are not the same in customary inheritance, which is largely determined by the dissimilarity forms of inheritance law. This is due to differences in the prevailing family system and the existence of different

customary legal systems in each customary law in each group of people in Indonesia. One of the groups is the indigenous people (known as *Masyarakat Adat Kaum*) of Mukomuko Regency in Bengkulu Province.

Based on the book entitled “*Adat Istiadat, Hukum Adat, Seni Budaya dalam Kabupaten Mukomuko – Mores, Customary Law, and Culture Arts of Mukomuko Regency*” published by Customary Council (known as BMA - *Badan Musyawarah Adat*) of Mukomuko regency, the Mukomuko community has a special customary philosophy that functions to regulate the way of life, between human relations with humans, human relations with nature, and human relations with their Creator, namely *Adat Bersendi Syarak, Syarak Bersendi Kitabullah* (which means the custom is based on syarak (Islam) and syarak is based on the Book of Allah) based on the *Qur'an* and Hadith of the Prophet of *Muhammad SAW, Qias (Qiyas), Jima (ijma), and Syarak Berkato Adat Memakai* (according to syarak, the customs apply).² The most numerous community group in Mukomuko

¹ Sumanto Al-Qurtuby, *Agama, Seni, dan Budaya di Indonesia*, (Semarang: eLSA Press, 2022), p. 77.

² Customary Council of Mukomuko Regency, *Adat Istiadat, Hukum Adat, Seni Budaya dalam Kabupaten Mukomuko - Mores, Customary Law, and Culture Arts of Mukomuko Regency* (Bengkulu: Badan Musyawarah Adat Mukomuko, 2008), p. 5.

Regency is the Mukomuko Malays, especially in Mukomuko City District, known as *Kaum* (community or tribe). In general, the life of the indigenous people of the Mukomuko City District still adheres to the cultural values inherited from their ancestors.³

The principle of descent of the indigenous people in Mukomuko is calculated through maternal (female) descent, also known as the principle of matrilineal descent. This is because the indigenous people of Mukomuko City District adhere to Minangkabau culture which is passed down from generation to generation, including the principle of maternal descent (matrilineal). Thus, all relatives on the mother's side are within the boundaries of the customary kinship of the clan while all relatives of the father (male) are outside the boundaries of the customary kinship of the clan.⁴ This system makes the daughters more dominant in the distribution of inheritance because according to the customary principles of the community, this community group considers daughters to be weak people and need to be considered in a family or a group.

³ Andry Harijanto, Budiyono, *Memelihara Ketahanan dan Ketertiban Kehidupan Masyarakat Adat Kaum Berbasis Norma-Norma Hukum Adat Mukomuko di Kota Mukomuko Provinsi Bengkulu*, (Bengkulu: Universitas Bengkulu 2016) p. 1.

⁴ Andry Harijanto, Budiyono, *Op.Cit.*, p. 33.

In contrast, in the Islamic inheritance law, the principle of inheritance distribution is that sons receive a larger share than daughters with the intention that it will be used as well as possible for their family in the future. A son has dependents on his wife and children, so he can use the inheritance to meet the needs of his family.⁵

As aforementioned, it can be concluded that there are conflicting rules between the customary inheritance law of the Mukomuko community and Islamic inheritance law. According to the customary law of the Mukomuko community, the distribution of inheritance is mostly given to daughters, while according to Islamic inheritance law, the distribution of inheritance is mostly given to sons.

2. Identification of Problems

Based on the research background, the problems of this research are addressed as follows:

- a. How is the inheritance distribution system according to the customary inheritance law system of the community in

⁵ IndonesiaGO, *Pembagian Harta Warisan Anak Laki-laki dan Perempuan*, <https://medium.com/@indonesiagodigital1/pembagian-harta-warisan-anak-laki-laki-dan-perempuan-ad3b94e65785>, Retrieved on April 19th, 2022.

Mukomuko City District of Mukomuko Regency?

- b. How is the inheritance distribution system according to the Islamic inheritance law system?
- c. How is the comparison of inheritance distribution according to the customary inheritance legal system of the community in Mukomuko City District of Mukomuko Regency with the Islamic inheritance law system?

B. RESEARCH METHODOLOGY

1. Type of Research

The research method used by the authors was a type of normative research. Normative legal research is legal research conducted by examining library materials or secondary data.⁶ This research aimed to find out how the distribution of inheritance according to the customary inheritance law system of the community in Mukomuko City District of Mukomuko Regency was compared with the Islamic inheritance legal system.

2. Research Approach

Comparative research is also known as a comparative study or causal-comparative, or non-experimental

research, which is part of descriptive research. Even comparative research is similar to descriptive research because it is used to find answers fundamentally about cause and effect, by analyzing the factors that cause the occurrence or emergence of a certain phenomenon.⁷

Therefore, the authors, in this case, would like to explain how the comparison of inheritance distribution according to the customary inheritance legal system and the Islamic inheritance legal system with the research title "A Comparative Study between the customary Inheritance Law System of the Community and the Islamic Inheritance Legal System on Inheritance Distribution in Mukomuko City District of Mukomuko Regency"

3. Legal Material Sources

Based on the type of legal material, the source of legal materials in this research was gathered from a secondary source of legal material which was carried out by studying and analyzing legal materials which were grouped into two categories; primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are the binding legal materials consisting of norms,

⁶ Soerjono Soekanto, Sri Mamudji, *Metode Penelitian Normatif*, (Jakarta : Penerbit Rajawali, 1985), Hal. 15

⁷ H. Abdullah, *Berbagai Metodologi dalam Penelitian Pendidikan dan Manajemen*, (Gowa: Gunadarma Ilmu, First Edition, 2018) p. 17

bases, laws and regulations, invitations, jurisprudence, and treaties⁸; Secondary legal materials are materials that explain primary legal materials. Tertiary legal materials are materials that provide instructions and explanations for primary and secondary legal materials.

4. Legal Material Collection Method

The method of data collection in normative legal research was carried out by using the literature study of legal materials; primary legal materials, secondary legal materials, and tertiary legal materials.⁹

5. Legal Material Processing Techniques

The collection of materials for this research was carried out by combining primary legal materials and secondary legal materials and then proceeding with tracing sources related to the research. These materials are classified according to the issues raised, the materials were read and then quotations were made so that they become valid secondary legal materials.

6. Legal Material Analysis Techniques

Data analysis in this legal research had several characteristics, including

descriptive and prescriptive. Descriptive means that in analyzing the authors provided an overview or explanation of the subjects and objects of research as the results of the research that they did.¹⁰ The prescriptive was intended to provide an argument for the results of research that had been done by the authors. The arguments here were made by the authors to give a prescription or judgment about right or wrong¹¹ and what should be according to the law on the facts or legal events under the research.

C. RESULTS AND DISCUSSION

1. The Distribution of Inheritance According to the Customary Inheritance Legal System of the Community

The principle of descent of the indigenous people in Mukomuko is calculated through maternal (female) descent, also known as the principle of matrilineal descent. This is because the indigenous people in Mukomuko regency adhere to Minangkabau culture which is passed down from generation to generation, including the principle of maternal descent (matrilineal). Thus, all relatives on the mother's side are

⁸ Soerjono Soekanto, Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, (Jakarta: Rajawali Press, 2001), p. 13

⁹ Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 2010), p. 52.

¹⁰ Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif dan Empiris*, (Yogyakarta: Pustaka Pelajar, 2010), p. 183.

¹¹ *Ibid*, p. 184

within the boundaries of the customary kinship of this people group. While all the relatives of the father (male) are outside the boundaries of the customary kinship (kinship) of their community.¹²

In the customary law of the Mukomuko community, daughters are more dominant in the distribution of inheritance. It is because this community considers daughters to be weak people and needs to be considered in a family or a group according to their customary principles and roles. Meanwhile, the position of sons in the distribution of inheritance with daughters is not equal because the customs of the Mukomuko people adhere to the matrilineal system. So, heirs based on maternal lineage, namely daughters have a strong position to receive the inheritance, both high heirloom property and low heirloom property.

Indigenous people of Mukomuko recognize several kinds of inheritance. They are high heirloom property, low heirloom property, matrimonial property (known as *gono gini*-marital assets/joint property), and prenuptial property, known as *Sawarang/Suarang* property (innate assets before

marriage). Both low inheritance and matrimonial property, in the distribution system, are subject to matrilineal principles. The low heirloom property can be distributed when the heir is still alive after all the heirs or children are married or can be distributed after the heir dies where the right to determine the distribution of inheritance is to the living parents and the distribution is prioritized to the daughters. Meanwhile, matrimonial property (marital property/joint assets) in its distribution, is still subject to the matrilineal system and can be divided in the event of a divorce, either living divorced or one of them dies.

2. The Inheritance Distribution System according to the Islamic Inheritance Law

The distribution of rights for heirs in the Islamic inheritance law is regulated in the Qur'an with detailed mathematical calculations as mentioned in Q.S An-Nisa verses 7, 11, 12, 33, 176, so that in terms of the distribution, both in terms of causes, in terms of parts - the share received, and from far and near, each heir gets a clear, systematic, and non-interchangeable amount.

Based on the amount of rights that will be received by the heirs, the

¹² Andry Harijanto, Budiyono, *Op.Cit.*, p. 33.

heirs in Islamic inheritance law are divided into three groups:¹³

- a. The heirs of *Dzawil Furudh*: heirs who have certain parts as mentioned in the Qur'an or the sunnah of the apostle. The amounts of the distribution consisted of 2/3, 1/2, 1/3, 1/4, 1/6, and 1/8. The heirs include in the *dzawil furudh* are a husband, a wife, a father, and a mother.
- b. The heirs of *Ashabah*: heirs whose share of the inheritance is not determined, but they will receive the entire inheritance if there is no *dzawil furudh* at all. If there are *dzawil furudh*, they get the rest of the inheritance, but if there is no left at all, then they do not get any share.
- c. The heirs of *Dzawil Arham*: heirs who do not belong to the *dzawil furudh* and *ashabah groups*, but still have a relationship with the family with the corpse.

In the Islamic inheritance law, the principle of distribution is that sons receive a larger share than daughters. This principle refers to article 176 of the Compilation of Islamic Law:¹⁴

¹³ Sirman Dahwal, *Hukum Kewarisan Indonesia Yang Dicitakan*, (Bandung: CV. Mandar Maju, 2020), pp. 145-147

¹⁴ *Islamic Law Compilation*, Article 176.

“If there is only one daughter, she gets half of the share, if there are two or more daughters, each of them gets a two-thirds share, and if the daughter is with the son, the share of the son is two to one with the daughter”

3. Comparison of the Division of Inheritance according to the Traditional Inheritance Legal System of the Community with the Islamic Inheritance Legal System

a. The Similarity of the Inheritance Legal System of the Community and the Islamic Inheritance Legal System in the Distribution of Inheritance

1. The Similarity in the Definition of Inheritance

When discussing the definition of inheritance, both Islamic inheritance law and the customary inheritance law of the community, both inheritance systems discuss:

- a. Transfer of inheritance from someone who dies to someone who is still alive.
- b. People who are entitled to receive the inheritance.
- c. People who are not entitled to receive the inheritance.
- d. The share of each heir.

- e. How to settle the distribution of the inheritance.

2) The Similarity in the Principles of Inheritance

The principle of inheritance of Islamic law and the principle of inheritance of the customary law of the community have something in common, namely, they both adhere to the individual principle. The individual principle in Islamic inheritance law and adat inheritance law means that inheritance can be divided between heirs to be owned individually. Therefore, each heir is entitled to their respective share which he gets without being bound to the other heirs.

3. The Similarity in Order of Heirs

Both Islamic inheritance law and the customary inheritance law of the community place children (both daughters and sons), and their descendants as the main heirs. In the Islamic inheritance law, the position of daughters occupies the position of heirs of *dzawil furud* (people who get a certain share as determined by the Qur'an), on the

condition that they are not together with sons. If the daughter is together with the son, it will be the heir of the *ashabah*. Whereas in the customary inheritance law of the community, both daughters and sons and their descendants, occupy the main group as the inheritance receivers. As long as this main group is still alive, the next group is prevented from getting the inheritance.

4. The Similarity in Inheritance

In Islamic inheritance law and customary inheritance law, both are about the heir's property/assets which will be passed on to the heirs, both prenuptial property and joint property (marital property).

b. The Differences between the Customary Inheritance Legal System of the Community and the Islamic Inheritance Legal System in the Distribution of Inheritance

1. The Differences in the Definition of Inheritance

In the Islamic inheritance legal system, something can be called inheritance if it happens after the person who owns the property dies. This means that a

person's property cannot be transferred to another person and is called an inheritance as long as the person who owns the property is still alive. Whereas in the customary inheritance law of the community there is an inheritance called Low Heirloom Property in which the process of transferring assets is not tied to the death of the heir, but can be started while the heir is still alive.

2. The Differences in the Principles of Inheritance

In the Islamic inheritance law, there is a principle of *ijbari*. It is the transfer of property from a person who dies (heir) to his heirs. Whereas in the customary inheritance law of the people, an heir has the right to give property to his heirs while the heir is still alive. Then in Islamic inheritance law, the bilateral principle is also known, Meanwhile, the customary inheritance law of the community does not adhere to the principle of *ijbari* because the indigenous people in Mukomuko adhere to a matrilineal kinship system.

In addition, in the Islamic inheritance law, there is also known as the principle of death. This principle means inheritance exists when someone dies. Inheritance exists due to someone's death. Whereas in the customary inheritance law system of the community, the factor of the death of the heir and the surviving heirs who are a condition for Islamic inheritance, is not important.

3. Differences in Inheritance System

The Islamic inheritance law only recognizes an individual-bilateral inheritance system. Meanwhile, in the customary inheritance law of the community, in addition to the individual inheritance system, there are also collective and mayoral systems¹⁵. The majority inheritance system is a single inheritance right. The characteristic of the majority inheritance rights is that the inheritance is inherited in its

¹⁵ Tolib Setiady, *Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan)*, (Bandung: Alfabeta, 2009), p. 286

entirety or mostly only by one heir (a son or daughter)¹⁶.

4. Difference in Order of Heirs

In the Islamic inheritance law, if a person dies, then those who are most entitled to get the inheritance are *dzawil furud* (people who get a certain share as determined by the Qur'an). Whereas in the customary inheritance law of the community, the rights and position of daughters are more prominent than the sons so the daughters are more entitled to a larger share of the inheritance.

5. Differences in Types of Inheritance

In the Islamic inheritance law, inheritance is property left by the person who died. Whereas in the customary inheritance law of the community, inheritance is not just property. For example, the High Inheritance Property is the common right of all people.

c. The Tangent Point between the Customary Inheritance Legal System of the Community and the Islamic Inheritance Legal System in the distribution of Inheritance

The tangent point between Islamic inheritance law and the customary inheritance law of the people lies in the view that there is a "privilege" between boys and girls. In the customary law of the community with the matrilineal system, daughters are prioritized in receiving the inheritance. In contrast, Islamic inheritance law is patrilineal.¹⁷

In Islamic inheritance law, the principle of distribution is that sons receive a larger share than daughters. The inheritance obtained by the son is bigger, with the intention that it will be used as well as possible for his family in the future. A son has dependents on his wife and children, so he can use the inheritance to meet the needs of his family. This system is different from customary law which is individual-collective. The inheritance system according to Islamic law is also individual, but individual-bilateral. The inheritance system according to Islamic law does not recognize the absolute nature of carrying out the distribution of inheritance or leaving an inheritance in an

¹⁶ *Ibid*

¹⁷ Mohammad Yasir Fauzi, *Op.Cit*, p. 69

undivided state, but it is carried out by way of deliberation.¹⁸

The most appropriate inheritance system for Muslims to follow is Islamic inheritance law because it always puts forward the principle of balanced justice for its people. The principle of justice in the Islamic inheritance law implies that there must be a balance between the rights acquired and the inheritance with the obligations or burdens of life that must be borne/fulfilled among the heirs. Therefore, the meaning of justice in the Islamic inheritance law is not measured by the similarity of levels between inheritance experts but is determined based on the size of the burden or responsibility assigned to them, in terms of the general condition of human life.

D. CLOSING

1. Conclusion

In the customary law of the community with the matrilineal system, daughters are prioritized in receiving inheritance while the Islamic inheritance law is patrilineal. The customary inheritance law system of the community is individual-collective. The inheritance

system according to Islamic law is individual-bilateral. Unlike the indigenous people's inheritance system, which is matrilineal, the inheritance system according to Islamic law prioritizes the principle of balanced justice for its people. This inheritance legal system regulates inheritance and the law regarding the property as well as possible and fairly by stipulating the right to transfer ownership of a person after death to his heirs, from all relatives and lineages, without distinguishing between men and women and the amount of the inheritance distribution (much or little).

2. Suggestion

The indigenous people in Mukomuko regency who has a philosophy *Adat Bersendi Syarak, Syarak Bersendi Kitabullah* which means the custom is based on syarak (Islam) and syarak is based on the Book of Allah) based on the Qur'an and Hadith of the Prophet of Muhammad SAW, *Qias* (Qiyas), *Jima* (ijma), and *Syarak Berkato Adat Memakai* (according to syarak, the customs apply), should practice Islamic Law in the distribution of the inheritance system. The best custom is custom that adapts to religion, not the other way around, because the

¹⁸ Djaja S. Meliala, *Hukum waris Menurut Kitab Undang-Undang Hukum Perdata*, (Bandung: Nuansa Aulia, 2018), p. 3

distribution of inheritance according to Islamic law is considered fairer, and balanced so that each heir gets a clear, systematic, and fair measure because this law puts forward the principle of balanced Justice.

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