

Judge's Interpretation in Addressing the Updated Dynamic of Balinese Hereditary Common Law

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Abstract. Judge's interpretation in addressing the updated dynamic of Balinese hereditary common law is very dynamic along with the development of justice especially towards the dimension of kapurusa as the legal heir. Originally, kapurusa was only male descendant from the men's side family and male foster child, then it could also include the status of being men, and eventually it also includes women as the legal descendants. Research method A judge interprets based on the development of modern law, progressive law, law of justice based on the philosophy and jurisdiction.

Keywords: Judge's Interpretation, Balinese Hereditary Common Law, Kapurusa

1. Introduction

Hereditary Common Law is a form of local wisdom. From philosophical dimension, local wisdom could be interpreted as empiric and pragmatic indigenous knowledge system. Sunarmi mentioned that local wisdom is a knowledge developed by ancestors in getting around with their surrounding environment [1]. They then made such knowledge as parts of their culture, introduce and pass on from generation to generation. Some forms of traditional knowledge occur through tales, legends, songs, rituals, and also rules or local law. From the dimension of legal unification, the Indonesian nation, until today has not had any hereditary law applied nationally, even though the efforts towards unification have long been carried out. The Provision number 402 lever c sub 2 The Statute of Temporary People's Consultative Assembly of the Republic of Indonesia No. II/MPRS/1960 about the Garis-garis Besar Pola Pembangunan Nasional Semesta Berencana Tahapan Pertama. (Guidelines of Planned National Development Pattern) first edition in 1961-1960 dated on 3 December 1960 stated the need of bills about heritage property based on parental/bilateral principles. The main obstacle of the formation of national hereditary law is because of the plural socio-cultural condition of Indonesian people, as seen in various family system embraced by the people of Indonesia.

Balinese hereditary common law, according Nantri serves as a process of continuation from inheritor to the inheritee about material or immaterial objects where this means that this continuation covers the succession of rights and obligations [2].

In general, within the Balinese hereditary common law, hereditary consists of 4 (four) aspects, Inheritor, Heritage, Inheritee and Heritage. Inheritor is the one that has passed away, and s/he left his/her heritage to other people (inheritee). Inheritee is generally traditionally is

a father, or a man. Such polarization thought is based on the dimension of family system of Patrilineal (kapurusa/purusa) Balinese people. In such system, father as the head of the family, the bread maker and the owner of the family property obtained hereditary. Therefore, its logical consequence, kapurusa system in Balinese people treat sons and daughters differently in terms of inheritance. Such aspect of different treatment is based on the thought that the essence of inheritance in Balinese common law incurs the balance in rights (swadikara) and obligations (swadarma). In Balinese common law in terms of heritage property passed on through the male's line, so that all properties belong to the men, while the women are not owner of the properties. Before married, the daughters belong to and the responsibility of the father, and when they are married, they belong to and the responsibility of their husbands.

Next is the aspect of inheritee, which means the descendant. Furthermore, I Wayan Windia stated that inheritee was actually the responsibility towards parhyangan such as shrines, pawongan means humanity activity based on the Balinese etiquette and pademangan responsibility in its relationship with soil (certificate). The logical consequence, inheritee means Child or descendants who have the right for the inherited property. Before the independence of the Republic of Indonesia, what was meant by Inheritee was those who have blood connection to the Inheritor. Its logical consequences, the definition of Inheritee is always correlated to the blood relation. Therefore, widows cannot be inheritee since they do not have blood relation with their husbands. In Balinese hereditary common law, the requirements as an inheritee is that one should have blood relationship with the inheritor based on the patrilineal line (*kapurusa/purusa*) i.e. biological son (*anak sentana*), or a child whose status is male (*anak sentana rajeg*), or foster child (*anak angkat*), or step child (*anak tiri*). If there is no *anak sentana*, *anak sentana rajeg*, *anak angkat*, and *anak tiri* a possibility to replace the group of inheritee occurs based on Hinduism law. Therefore, a daughter only has the right to indulge her parents' or husbands' legacy. Such aspect and dimension are parallel with the Book of *Manawadharmasastara* determining that inheritee are the descendants which was called as one *pinda* or children who have blood relation stringed straight up and down. Three descendants down from the inheritor and three up to the inheritee is called as one *pinda* as inheritee with priority right is inheritor's descendants withdrawn through the line of the son.

2. Method

The research method used in this research is a socio-legal research that emphasizes the making of descriptions of social and legal realities, as well as trying to understand and explain the logic of logical connectedness. This research using a non-doctrinal approach. According to Mayhew in the non-doctrinal approach, that the law is not conceptualized as an autonomous normative phenomenon, but a social institution that is in real terms related to other social variables [3]. This study examines issues related to judges' perceptions in resolving cultural matters in Balinese customs. Judges' perceptions are in the spotlight in this study, because in the hands of judges the law enforcement is oriented to seeing the existing cultural conditions can be realized.

3. Result and Discussion

3.1. The Practice of the Judge in Addressing the Dynamic of Balinese Hereditary Common Law

Balinese hereditary common law embraces patrilineal or kapurusa/purusa line where they determine sons as their inheritee. This is confirmed by ratio decidendi of Decree of Supreme Court of Republic of Indonesia No. 200K/Sip/1955 dated on 3 December 1955 mentioning that, "according to Balinese common law, the ones who have the rights as inheritee are only

male descendants from the men's side family and foster sons. Therefore, Men Sardji as sister is not the inheritee of the late Pan Sarning". Similarly, in the Decree of Supreme Court of Republic of Indonesia No. 3750K/Pdt/1991 dated on 29 June 1993 mentioning that, "by the death of the father, followed by the mother, then the right of this soil passed on and inherited by the inheritee: their three sons mentioned above (Sekehe Tiga)."

The nature of kapurusa/purusa system confirms that inheritee only goes to the descendant from the men's side family and foster son (Decree of Supreme Court of Republic of Indonesia No 200K/Sip/1955 dated on 3 December 1955). It then passes on to the inheritee of sons and daughters (Decree of Supreme Court of Republic of Indonesia No 179/K/1961 dated on 23 October 1961, Decree of Supreme Court of Republic of Indonesia No 4766K/Pdt/1998 dated on 16 November 1999). Further, it goes to those with male status (Decree of Supreme Court of Republic of Indonesia No 707/PK/2011 dated on 3 February 2012). Lastly, the newest update of the Balinese hereditary common law where either Anak Kandung (boys or girls) as well as Anak Angkat (boys or girls) have the right over gunakaya property of their parents, after subtracted by one third as *druwe tengah* (joint property),⁴ swayed (not owned) by the child who is *nguwubang* (taking over the *swadharna* or the responsibility) of their parents (Decree of Supreme Court of Republic of Indonesia No 1331 K/Pdt/2010 jo Decree of Reconsideration No. 60 PK/Pdt/2012 dated on 24 December 2013).

Law is basically made and enforced to manifest justice. The main objective of law is justice. Law enforcement should be oriented to justice. Aristotle stated that justice would only be manifested when the people obey the general rules applied to them. Therefore, justice would be achieved if: *first*, people obey the law applied, that law may not be violated and it must be obeyed and *second*, someone may not take more than their rights, so that justice means equality in rights or *equel*. *Equel* or equality, means that the benchmark of justice is the equality of rights for each and everyone, what is received and felt by a member of society would also be felt by other member of the society.

Plato explained that justice is a virtue containing harmonization and balance that could be understood or explained under rational argumentation [4]. As for such virtue could be divided into 4 (four) i.e. wisdom, courage, and discipline as well as justice [5]. Principally, justice could provide happiness. Meanwhile, the term happiness or convenience is seen differently or even it is against each other, and finally justice is only a matter of compromise [6]. Greek philosophers saw that justice is the constant and continual purpose which gives to everyone his own" [7].

Along with the above confirmation, justice is constant or continual, Derrida also stated that justice is an experience of continuous searching that needs new and fresh interpretation and continuous suspension as the characteristic of "not being able to be determined." Justice is always beyond the law and provoke the law to always approach it. To approach it, it would not be enough by following the sound of the rules, but it needs to perform "*fresh judgement*"[8]. For Derrida, justice plays within the legal and across the legal area. "Deconstruction takes place in the place in the interval that separates the underconstructibility of justice from the deconstructibility". Justice is in the interval between what is legal and illegal [8]. In the context of searching for justice outside formal legal system, the law living within the people (common law) plays a very important role to guide the judges to find the value of efficient justice.

Justice law based on Pancasila (*the five pillar*) according to Teguh Prasetyo is the formula of justice applied within the Indonesian people i.e justice that emphasizes on the balance between rights and obligation i.e. the right to savor the development result with their obligation to devote. Furthermore, it confirms that with such formula of justice, the development of law

and legal system based on Pancasila aims to protect each and every citizen of Indonesia, the ideas and the objectives of the nation, the people of Indonesia and individual freedom, dignity and property, the implementation of development (the law that functions to support throughout the development of modernization).

In the context of hereditary common law in general and Balinese hereditary common law in specific, justice seems to be in the context of inheritor, inheritee and the inheritance. The dimension of inheritee, as the scope of this research, there occur the dynamic of the shifting based on the theory of justice i.e. in the context of patrilineal (*kapurusa/purusa*) system where only a child who is male gets to be the inheritee has shifted to parental system dynamic where either Biological Children (sons or daughters) as well as Foster Children (Boys or girls) have the right over their parents' *gunakarya* property, after subtracted by one third as the *druwe tengah* (joint property), swayed (not owned) by *nuwubang* child (continuing *swadharma* or the responsibility) of their parents. Similarly, towards the inheritance where the Child with *kapurusa* status has the right over a part of the inheritance properties, while the ones with *predana/ninggal kedaton* status has the right over a part or half of the inherited property received by the child with *kupurusa* status.

Parallel to the principles/value of hereditary common law on "the lap" of common law, then it is normal, harmonious, and aligned if the hereditary common law was born, grow, and develop in the atmosphere of common law and the people of its common law. Therefore, hereditary common law has a special characteristic emerging in traditional nature of Indonesian nation. The common hereditary law style is magical religious (*magisch-religious*), communal, concrete, and straight (*kontante handeling*). What is said to be fair in the process of inheritance is influenced by thoughts and life of the local people. Similarly, what is felt as fair and unfair, normal or abnormal, good or bad, are influenced by thoughts and the surroundings, by religion and everyone's surroundings. With the sense of justice, it does not mean in the hereditary common law divides the ownership or the usage of the same amount of inheritance property, but the one that is aligned and balanced with the interest and its even distribution.

The relation between the existence of the development of justice value in the people of hereditary common law is addressed to the national state formal legal system. Such aspect and element remind the argumentation by van Vollenhoven in 1905 that quite hampered the intention of colonial officers to conquer indigenous people to the law established according to the justice principles of the Dutch's law. Even though the bills of Idenburg was eventually accepted by the parliament, yet Idenburg amendments has confirmed the policy that has been compromised, i.e. that unwritten people's (which at that time had been popularized under the name of common law) might only be replaced by European law if in their daily lives, indigenous people truly needed such law. Under the proposition by Savignian, van Vollenhoven confirmed the needs of indigenous people were truly different from the legal needs of European people and therefore the application of one-sided European law would cause the collapse of indigenous order [9].

Savigny explain that legal codification always brought negative effects, i.e. hamper the development of law [10]. History kept go on, yet the law had been determined, therefore, it was relatively hard to stop the history at certain times. Moreover, to formulate the law based on the national spirits (*volksgeist/inner order*), it takes an investigation on what is actually the spirit of nationalism, which beliefs of the nation that could be made as the basic of adequate legal order. If this was neglected, there would emerge a danger of huge gap between nationalism and the law contained within the state's legal order. In the construction of Indonesian legal order, Pancasila animates each legal order either in written or unwritten that is applied to assure the manifestation of substantive justice for all Indonesian people.

As explained previously that Balinese hereditary common law has experienced shifting dynamic from patrilineal system (*kapurusa/purusa*) where only Boys that get to become inheritee to parental system dynamic where either Biological Children (boys or girls) and Foster Children (boys or girls) have the rights over their parents' *gunakarya* property, after subtracted by one third as *druwe tengah* (joint property), swayed (not owned) by the child who is *nguwubang* (taking over the *swadharna* or responsibility) of their parents. Similarly, for the inheritance property where only *kapurusa* child who has the right over a part of the inheritance property, while the one with the status of *predana/ninggal kedaton* only limited to the right over a part or half of the inheritance property received by the child with *kapurusa* status.

Legal reinterpretation of Balinese hereditary common law about the position of inheritee that changes some standard on the provisions previously applied, reflects the dynamics of its development. Such dynamics problem should be understood and followed by the judges of the district court in either Bali or in other area than Bali where there are Balinese people or Balinese community and wish their hereditary law if there happened to be a dispute may be overcome by Balinese hereditary common law. As a base of the judges' obligation, i.e. reinforcing the law and justice based on the development of value and the sense of justice living and developing within the people.

Actually, the shifting from Patrilineal (*Kapurusa/Purusa*) in Balinese hereditary common law is not the only dynamics occurring in Indonesia. In the Decree of Supreme Court of Republic of Indonesia No. 3123 K/Pdt/1984 dated on 21 April 1986 the Supreme Court stipulated that the prosecutors (daughters) and defendants (sons) are the legal inheritee of the Late Amag-Seniah and together they have the rights over the disputed rice field inherited from their late father. This decision was based on the consideration that in Sasak Custom in Lombok, the people have changed and developed rapidly, many positions and profession have been filled by Sasak women. Because of the obsolete traditional Hereditary Common Law and it no longer fit with the needs of modern era, so that it does not match with the justice within the society. Based on the research by the Faculty of Law of Mataram University in 1979, it was revealed that in fact within the indigenous people of Sasak in Lombok Tmur there had been a shifting in value of Hereditary Common Law about the position of daughter, which before they were not inheritee and they did not have any right for the inheritance property, yet only had the right over the moving objects; jewelry (*pesangu*), today it has developed to the point where they acknowledge daughters as inheritee who have the right over the properties inherited by their parents equals to their brothers.

Related to the existence of the decree of Pasamuan Agung Majelis Utama Desa Pakraman (MUDP) that contains a breakthrough of Balinese hereditary common law updates, then it is appropriate to question if it would directly become a pattern of static behaviour within the society so that it applies to become hereditary common law in reality (*in concreto*) to be made as a guideline, handbook, and build a legal revitalization of Balinese hereditary common law in the form of *awig-awig* of Pakraman village. Therefore, it needs a socialization and internalization among the people of Balinese people about the values contained within the decree of MUDP. Its logical consequence, the decree of MUDP would be made as the guideline and benchmarks by the judge in adjudicate hereditary case in Balinese hereditary common law so that, it enables the judge to perform legal findings to explore the legal values appreciated in lives.

Aspect and dimension of the decision oriented to the patrilineal system (*kapurusa/urusa*) shifted into other parental system are based on the Decree of Supreme Court No 1331 K/Pdt/2010 where legitimacy was given that at one time either girls or boys could together be *kupurasa* (so that they have the right to receive inheritance) through a process of marriage

pada gelahang. The Judge was truly aware of the development of Balinese hereditary common law in providing the way out and alternative solution to its people. In terms of the celebration of marriage of *pada gelahang* by a certain spouse based on the fact that this couple was impossible to choose one out of two existing forms of marriage, i.e. common marriage and *nyentana* marriage. If they chose common marriage, the family from the woman's side must object, since this family would be left by their only daughter. If they chose *nyentana* marriage, the man's family side must disagree, since this family would lose the only son they had. In such condition, they chose to execute *pada gelahang* marriage, a form of alternative marriage other than the two forms of tradition marriage known by the Balinese common law.

However, factually, the issue that emerges related to the *awig-awig* of Pakraman village regulating and acknowledging such marriage there is a doubt around *prajuru* or Village officers of Pakraman village to acknowledge the form of the marriage of *pada gelahang*. Over such doubt, it affects the completion of marriage administration in Pakraman village. To prove that the couple had a marriage of *pada gelahang*, the marriage certificate followed by the agreement of the families known as *mawarang* agreement, confirming the responsibility or *swadharma* that must be carried out by the couple and their descendants after the marriage was carried out, either towards the family or towards the people or Pakraman village.

4. Conclusion

The judge is very dynamic in interpreting the dynamic of update of inheritee of Balinese hereditary common law *kapurusa*. Previously, *kapurusa* is only male descendants of the family from the man's side and foster son, then it shifted to those with male status, and lastly shifted to women as the inheritee. The judge's interpretation was carried out based on the development of modern law, progressive law, justice law under the philosophical and jurisdiction based on the Decree of *Pesamuan Agung MUDP Bali*.

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