

The Balinese Inheritance Customary Law During Modernity and Gender Equality Era (A Case Study)



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ABSTRACT: The issue focuses on whether Balinese people still adhere to their inheritance customary law during modernity and the gender equality era. The research data consists of the Supreme Court decision No. 29/K/Pdt/2004 of the case as a primary legal material, together with works of literature and research articles of inheritance Bali adat law as secondary legal materials. It will analyze the data regarding substitute heirs' position qualitatively according to Bali inheritance law. The result shows that Bali's inheritance customary law uses a patrilineal system, which places men as the heir. It has existed nowadays as supported by the Plaintiffs and the judges in court decision No. 29K/Pdt/2004. Instead of applying gender equality, Balinese inheritance customary law uses the principle of the balance of life by giving a man as an heir and giving him obligation, likewise, a father who protects and takes care of women. Only if no son can the woman be represented as a substitute heir. Justice for women in Bali is still an exception condition. It is essential to consider the rights given to women because as society develops, the role of women in various aspects of life begins to emerge

KEYWORDS: Balinese, case study, customary law, gender equality, inheritance

I. INTRODUCTION

Indonesia is a diverse country with many different ethnic groups. As a result, Indonesia has dozens or even many different cultural traditions. This diversity of traditional cultures creates different traditional laws, or *adat* law [1], in addition to laws derived from legislation, religious laws, and laws from colonization. One of the diverse laws that apply in Indonesia, especially in civil law, is inheritance law. In terms of inheritance law in Indonesia until now has a pluralistic nature which means that it is still subject to the inheritance law implied in the Civil Code, Islamic inheritance law, and customary inheritance law [2].

Inheritance customary law is the original law of the Indonesian people. It is closely related to the scope of human life and their property after death. The object of inheritance includes both material property with economic value, as well as immaterial property or heirloom property with religious or sacred value. Both properties can be inherited to heirs. Inheritance law includes provisions on who is called the inheritor, what constitutes inherited property, who is called the heir or successor, and when inheritance can occur. Unlike inheritance process according to the Civil Code, inheritance process in customary law may occur when inheritor is still alive. The transfer process is legal despite the inheritor is still alive and carries out the transfer continuously until each descendant can stand in a new family independently [3].

Article 18 paragraph (2) of the Constitution of the Republic of Indonesia 1945 provides that the State recognizes and respects customary law and its traditional rights insofar as they are still alive and following the development of society and the principles of the state. In this case, customary law is no longer recognized by the state if it is no longer by the growth and principles of the Unitary State of the Republic of Indonesia. Meanwhile, the existence of customary law depends on the obedience of its people to continue to follow their customary law. The community's adherence to its customary law is influenced by several factors. One of them is the factor of modernity with the entry of globalization values or values from outside that can reduce the level of community obedience to their own laws.

Bali, one of the provinces in Indonesia, has its uniqueness applicable law, namely Balinese customary law which is interesting to study its existence. The reason is that Bali is very close to modernity with many foreign tourists visiting there and of course bringing their values, including perhaps the value of law. One of Bali's customary laws, namely inheritance law, is quite different from the Civil Code inheritance law, or Western inheritance Law[4], as well as other customary inheritance laws in Indonesia. According to Balinese customary inheritance law, not every descendant then immediately becomes an heir of his parents' estate. Indigenous people in Bali use a kinship system centered on the male line. Consequently, sons are the most prominent, and only sons have absolute power in the family. It hypothesizes that Balinese still abide by their Balinese customary

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law, because it is the original law that they created themselves based on the values that they consider good. Meanwhile, modernity can affect the degree to which indigenous peoples adhere to their own customary laws. The study will focus on whether Balinese indigenous people in the midst of modernity still adhere to their inheritance customary laws. In more detail, the study will discuss whether there are changes in the position of substitute heirs in Balinese customary law today in practices.

II. RESEARCH METHODS

The research uses normative research methods by studying the norm which is implemented in a certain case of Balinese inheritance customary law today in the form of jurisprudence. The research data are secondary legal materials which consists of primary and secondary legal materials. The primary legal material includes the Supreme Court Jurisprudence No. 29/K/Pdt/2004 and the lower court' judgement of the case. The secondary legal materials include the literatures and research articles both print and online, relating with inheritance Bali *adat* law. First, it will analyse qualitatively the jurisprudence regarding with the position of substitute heirs according to inheritance law in Bali.[5]. Second, the research will examine qualitatively, whether in practices, Balinese people and the judges are still upholding Balinese customary law in the midst of modernity, including in the midst of gender justice issues as part of human rights. The qualitative analysis uses interpretation methods of the content of jurisprudence, Bali *adat* law, and gender justice principle. The research will conclude the results of the analysis by using a deduction mindset.

III. RESULTS AND DISCUSSION

Two forms of Indonesian law apply together: written law and unwritten law or customary law. In Balinese customary law communities, there is a traditional village government system called *Banjar*, *Subak*, and *Seka*. There are also internal institutions in it that provide written and unwritten. The written rule is called *Sima* [6]. According to Soepomo, customary law is the law that is unwritten and includes rules of life that are obeyed and supported by the people based on the beliefs of the community that these rules have the force of law, even though they are not stipulated by the government in writing [7].

In Balinese kinship law system, there are three main elements of inheritance: (a) subject of inheritance, which discusses who is inheritor and heir, (b) transfer process of the inheritance property, that is, the share of the heirs, (3) object of inheritance, that relates to the property to be inherited [8]. If someone has property, then he can become an heir, both when he is alive and after death. He can leave his property to his children who are called heirs. Heirs can receive property as inherited property. Furthermore, Bali inheritance *adat* law divides inherited property into two groups, (i) heirloom properties (magical-religious value) or called immaterial property, (ii) economic valued property which also called as material properties [9]. Meanwhile, there are three types of heir: (i) *Pratisentana Purusa*, a male child, (ii) *Sentana Rajeg*, a daughter who has the status of a son, (iii) *Sentana Peperasan*, an adopted child [10].

Of the literatures, most Balinese people embrace Hinduism, which influenced their customary law principles, namely Hinduism-based customary law. It also has an impact on inheritance law [11]. Traditional inheritance law based on patrilineal descent is an example of the influence of Hindu principles in Balinese customary law that adheres to the male lineage [12]. In traditional Balinese society, if there is a daughter in the family, the daughter has no title to inherit her parents' property because Bali's people uses patrilineal inheritance system. As a result, to maintain the lineage and heir, the family needs a son. A household without a son has no successor to continue the lineage. Nevertheless, only a few Balinese still do so, having only one son and one daughter to inherit [13]. The Hindu community in Bali has developed then the successor by introducing the substitute heirs in inheritance. It called *Sentana rajeg*, that means, in case no son in descendant, a daughter may replace the position as a son through a specific customary ceremonial. Bellow describes whether the Bali's people today still adhere to their inheritance customary laws principle.

The practice takes a specific case of inheritance land dispute as decided by the Supreme Court with decision No. 29 K/PDT/2004/Dps. In that case, the plaintiffs are the nieces of I Ketut Grundit (deceased), who has married with Ni Luh Suri (deceased). I Ketut Grundit and Ni Luh Suri, in their marriage, have a daughter who is the cousin of the plaintiffs, named Ni Made Sundanti, who has married out. Plaintiffs claim their grandparents' inheritance land, which descended to the Plaintiffs' uncle, I Ketut Grundit (deceased). The inheritance's land is located at Subak Sanglah No. 113 Pasedahan Yeh Oongan, Dauh Puri Kauh Village, West Denpasar Sub-district, Denpasar City, Pipil No. 353, Persil 66, Class II, Area 0.2855 Ha. After the death of the plaintiffs' uncle and aunt, Ni Made Sundanti as Defendant took control of the object of the claim and continued it after her husband's death. Plaintiffs have argued that Defendant, as a daughter of I Ketut Grundit and Ni Made Sundati, has no title to control the object of the claim anymore under the Balinese inheritance law since she has been married and her husband has dead. Defendant, in this case, controlled the disputed object by leasing it. According to Plaintiffs, Defendant did unlawful acts. Plaintiffs claimed against Defendant on the ground that Defendant, as the wife's clan, had no title to control inheritance disputed land, as the object of the claim, and built a house after the death of her husband, and didn't have a son on their marriage. Plaintiffs claimed that according to the inheritance customary law, the successor of the related condition is fall into the plaintiffs as the nephews of I Ketut Grundit (deceased). In the other hand, Defendant argued that during her lifetime until her husband's death, she had been in the house and felt having title to the land and the built it.

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After examining the evidence and referring to the existed-customary law, namely the patrilineal system, the panel of judges decided to grant Plaintiffs as the successor of the inheritance-disputed-land. The Supreme Court's consideration in case No.29 K/PDT/2004/Dps stated that because the respondent's marriage had no sons, according to Balinese inheritance law, the heirs fall on the male line of the respondent's family. In this case, the plaintiff, who is the nieces of the respondent's father. Customary inheritance law, especially Balinese custom, under the Hinduism influence has introduced the existence of substitute heirs. However, in the life of traditional Balinese society, the replacement heir will be used if the family has no heirs. Based on the adat law, the defendant's husband has the right of the inherited property of his wife 'family. Nevertheless, the right lapses with his death, and the wife's male lineal family become entitled to the inheritance. The original court, through case no.188/Pdt.G.2002/PN Denpasar, has considered that the plaintiffs were the heirs of I Ketut Grundit (deceased). The object in dispute was entitled to be inherited by the plaintiffs and stated that the land under the name of I Made Redeg and his children was invalid and had no binding force. The decision also declared the bail seizure on the object of the claim. Before the Supreme Court decided the case through Case No.29 K/PDT/2004, the Defendant appealed to the Bali High Court, but Bali High Court had the same consideration as the original court that the defendant was not legitimate heir and had no right to control the object of the claim. Furthermore, the appellate court continued stating that the plaintiffs were legitimate heirs following Bali customary law.

By studying the case, Bali people and the judges in practices still adhere patrilineal system of inheritance. Due to this situation, women do not have a bargaining position within the family and social environment. As a result, it is difficult for women to obtain justice [14]. The judges declared that Defendant, a woman's clan who claimed they built the land, had no title. The judge seems not to provide a sense of justice to Defendant as a woman. The plaintiff and the judge were able to defend the Bali inheritance customary law and were unwilling to vary or change the law, for example, by using the gender justice principle.

One of the basic principles of traditional customary law is that the law is binding on the community. This binding nature makes customary law in Bali, especially inheritance law, an ever-present and sensitive issue. The patrilineal system strongly binds Balinese customary law communities in terms of spiritual ancestors and community customs. Case No.29 K/PDT/2004/Dps shows that spiritual binding, and The arrival of foreign tourists with their values as well as gender equality's principle has no effect to shake their attitude to upholding customary law.

The Balinese customary law community thus still believes that *adat* law will maintain community's harmony and peace. The existence of *awig-awig* until now shows that Balinese indigenous people are strong in obeying their customary laws amid external value influences. *Awig-Awig* is a guideline for traditional villages in running the traditional village government [15]. Balinese traditional people makes *Awig-Awig* both writtenly and unwrittenly, in accordance with each village's customs. One of the *Awig-Awig* provides *Sukerta Tata Pawongan* chapter that regulates family law [16], includes *Sarga* chapter and *Indik pariwisata* that regards to marriage institution, *Indik nyapian* which regards to divorce, *Indik Sentana* that regards to offspring, and *Indik inheritance* which regards to inheritance. Talking about Balinese customary inheritance law, inheritance is not only related to how in marriage must have children as recipients of inheritance, but also the issue of how to have sons, as successors of descendants as well as recipients of inheritance. The son will be the successor to the rights and obligations of his parents, to be the foundation of hope in maintaining the yard house and the place of worship (*sangah* or *pemerajan* and other sacred buildings). *Sangah* or *pemerajan*, in addition to this heirloom object, is very important for the Balinese indigenous people and is one of the ancestral heritages that must be maintained only by male blood descendants. Hereby, the patrilineal system places men as the main holders of power, rights, as well as the burden of responsibility in managing the family, property, especially sacred property, and customs, not women.

Even if Girls in Bali are not heirs, they can have the right to enjoy and utilize the land if they are not married. Otherwise, when a girl gets married, she loses this right [17]. Based on gender justice principle, these provisions looks unfair and disadvantages women. Gender justice according to the principles of Balinese inheritance law thus does not mean 'equality' of shares, but rather 'division' of roles. The concept of justice in Balinese customary law prioritizes the balance of life, between *swadikara* rights and *swadharma* obligations, where a man shoulder it. This balancing concept also continues in *niskala* [18]. From the principle of customary law, which is full of sacred values, reflecting on the case at hand, it appears that Balinese indigenous people are very respectful, obedient, and dare not violate the sacred laws in their customary law, despite the concept of gender justice. The judge in the case also chose to respect the sacred Balinese customary law rather than change the inherited law in the name of gender justice.

Manawa Dharma Sastra's book describes Hinduism inheritance law and patriarchal culture in detail. Both law and culture prioritize sons as heirs who inherit their parents' property, duties, and obligations after they die [19]. Indeed, *sentana rajeg* institution shows that there is a change from the concept of *sentana* as an heir. In *sentana rajeg*, daughters can become substitute heirs if the family has no sons. Daughter gets an increase in position to become a *sentana* child and has a title as heir. This supports the principle of gender justice in the sense that there are equal rights between men and women [20]. The woman's status is changed to a status like a man's [21], while her husband will have a position like a woman's.

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The status of a daughter as *sentana* starts by the marriage of the biological daughter with a man who will make the *sentana* through a traditional ceremony process, namely *nyentana* marriage or *nyeburin* marriage. The procession or implementation of this marriage based on Namawa Dharmasastra / *Manu Dharmasastra IX Sloka 127* [22], by stating:

"*Apotro Nena vidhina*

Sutam kurvita putrikam

Yad apatyam

Bhavedasyam

Tan mama syat svadhakaram."

It means that if the parent has no son, they may make their daughter as the son's position based on the ceremony of appointing a daughter who is conveyed to her husband to perform the *penyeburan* ceremony. *Putrikam* ceremony, as well as *sanggah* ceremony (a sacred place in the family), are similar ceremonies that give a daughter the same authority as a man to inherit property. The outgoing marriage between a son (*nyentana*) and a *sentana rajeg* makes a son leave his lineage from his biological family, including his position as a family's heir. The son's rights and obligations with his biological family then transfer to his new family (his wife's family), and he assumes having all rights and responsibilities in the Balinese customary law community in his new family. Based on this description, *sentana rajeg* appears to give equal rights between daughters and sons, because daughters will take over the position of sons and have rights to inheritance. However, with *nyeburin* marriage, it is the husband who will take over as the holder of the rights and responsibilities of the new family, including the property of the new family. Here the principle remains patrilineal since the ceremony makes the daughter's legal heir from the female parent falls straight down and still uses the patrilineal legal basis [23]. Inheritance in Balinese customary law, in other words, is not only about the position of women and men and not only about the status of *purusa* or prime [24], but much more important, namely concerning *sekala* or reality and also the most important and firmly held by the Balinese people, namely *niskala* (belief).

There are properties other than inherited land, *sanggah*, *pemerajan*, sacred objects, and others, namely after-marriage property. This property can be excluded from inheritance anywhere or even to daughters. It includes *druwe gabro* (property obtained during marriage), *tetatanan* (inherited property or *Gono gini*), *Jiwadana* (property given to sons and daughters before marriage) and *akaskaya* (property obtained by each husband and wife from work). However, the case was not about those kinds of properties.

Adjusted to the definition of indigenous people themselves, the Balinese indigenous law community nowadays is still holding and obeying their *adat* law and beliefs from generation to generation. Regarding the judges' consideration, it is appropriate in this case to consider customary law, especially inheritance held by the Balinese customary law community, which adheres to the patrilineal system. It means that the line of descent is in the male child. Since Balinese and the judges are still holding and obeying *adat* law, based on Article 18B paragraph (2) of The Republic of Indonesia Constitution 1945, the State will recognize and respect it. Even, the State respects to their gender equality not by means of the same position, but of the distribution position to get a balance of life, where a man responsible on it.

The development of indigenous peoples today does not deny that the Balinese customary inheritance law has shifted. However, as the community develops, some of them use the individual system of inheritance, although the patrilineal system in customary inheritance law still exists [25]. This individual system is implemented based on the mutual agreement between descendants. In other words, they are using both systems, namely the patrilineal system that mostly implemented, and individual system eventhough rarely impkemented, to prevent future disputes between *semitones* (siblings).

IV. CONCLUSIONS

It comes to conclude that the position of heirs according to Balinese customary law are: (1) *Sentana*, Male Child, (2) *sentana rajeg*, a daughter to be a substitute heir for her father, (3) in putung situation, grandfather and if his siblings have died before the testator. *Sentana* and *sentana rajeg* get the same distribution of inheritance. This customary law provision has been existing now adays, as supported by the Supreme Court decision No. 29K/Pdt/2004/Dps. The case shows that gender equality in the Balinese customary law community does not mean 'equality' of shares, but rather 'division' of roles. It means the balance of life, by which the man is a balance between *swadikara* rights and *swadharma* obligations where a man shoulder it. By giving a man as an heir the law at the same time giving obligation to the man to has a position likewise a father, who maintain, protect, and tak care woman. Only, if there is no son, the heir can be represented by a substitute heir, in this case, by daughter. Justice for woman in Bali is still an exception condition. Considering the gender equality rights, as a part of human rights, it is important to consider the rights given to girls because as society develops, the role of girls in various aspects of life begins to emerge.

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