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Dynamics of Reasonableness and Fairness in a Pluralistic Legal System: Perspectives from Adat, Islamic and Civil Inheritance Law

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Abstract

Reasonableness and fairness are keystones of law. They are implemented broadly and important doctrine for civil law. However, the open nature of reasonableness and fairness allow various interpretations, influenced by the legal system, legal tradition, jurisprudence or measured on a case per case basis. Indonesia recognizes more than one kind of a legal system, making it a legal pluralist State. This article aims to describe the dynamics of the reasonableness and fairness principle within a pluralistic legal system. Indonesian inheritance laws use three different legal systems: Adat, Islam, and civil law, each provides distinctive perspectives of reasonableness and fairness. These differences may lead to a clash of interpretation or it may leave a wide room of discretion for the judges. Court judgments are analyzed to examine the implementation of such dynamics in practice. Finally, the outcome of the paper concludes whether the differences shall be embraced or whether there is a need to agree upon what is 'reasonable' and 'fair'.

Keywords: Inheritance Law; Reasonableness and Fairness; Legal Pluralism.

Introduction

Reasonableness and fairness are among the primary principles of law. The implementation goes beyond civil or criminal law matters but is a foundation constituting what is essential in the law. It is a powerful measure deciding whether to nullify a contract, to determine an act as unlawful, even codified among the principles of good governance in administrative law. They are also inseparable elements, as one may not be able to act fairly without acting reasonably in the first place.¹ There is no single definition of 'reasonableness', as the term is meant to be

¹ A.F. Mason, 'Contract, Good Faith and Equitable Standard in Fair Dealing' (2000) 116 *The Law Quarterly Review*. [66].

vague. Every person may decide on their own what is or is not reasonable.² Even in the formal assessment of reasonableness and fairness in the trial of legal disputes, judges are free to interpret and tend to have a wider discretion in interpreting it. Such is the dynamic and open nature of reasonableness and fairness.

Initially, reasonableness and fairness stem, as most legal principles, from values developed in the society.³ Each society may have their own interpretation of reasonableness and fairness. The Western idea of ‘reasonableness and fairness’, for instance, is based on ‘the best interest of others’, to keep ‘the other party in mind’ and to balance conducting an act without hampering the rights of others.⁴ This has been the general view of reasonableness and fairness in a legal relationship, as presented in contract laws around the world. It is based on reasonable reciprocity, where there is a reciprocal value of performance-offer and acceptance, give and take, sell and pay and other relationships.⁵ In addition to legal relationship, reasonableness and fairness dictate how one ought to behave in the society.⁶ An act can be considered as a moral when it is fair and reasonable to others. Indonesia is the fourth most populous country in the world,⁷ consisting of diverse groups of people living in a vast archipelago. The indigenous groups, also referred as the *Adat* law community, have their own cultures, values, and legal system for each *Adat* tribe.⁸ Hence, it is necessary to recognize *Adat* law in Indonesia. On the one hand, *Adat* law and its values are incorporated in certain laws, the most significant is the Basic Agrarian Law (BAL).⁹ On the other hand, Indonesia is also a home for roughly more than 200 million Muslims in the world, amounting to around 80 percent of the population,

² Frederic G. Sourgens, ‘Reason and Reasonableness: The Necessary Diversity of the Common Law’ (2014) 67 Me. L. Rev.[4-5].

³ Jordan Daci, ‘Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?’ (2010) 1 Academicus International Scientific Journal.[110].

⁴ Hutchison and Pretorius (ed), *The Law of Contract in South Africa* (Oxford University Press Southern Africa 2012).[23].

⁵ Frederic G. Sourgens (n 2).[4].

⁶ P. van Warmelo, *An Introduction to the Principles of Roman Law* (Juta and Co Ltd 1976).[151].

⁷ United Nations, ‘World Population Prospects 2019’ (*UN Department of Economic and Social Affairs*, 2019) <<https://population.un.org/wpp/DataQuery>> accessed 5 May 2020.

⁸ J.F. Hollemann (ed), *Van Vollenhoven on Indonesian Adat Law* (Springer 1981).[25].

⁹ Budi Harsono, *Hukum Agraria Indonesia. Sejarah Pembentukan Undang- Undang Pokok Agraria, Isi Dan Pelaksanaannya. Jilid 1 Hukum Tanah Nasional* (Djambatan 2003).

making it the largest Muslim population in the world.¹⁰ Though Indonesia does not consider itself an Islamic State,¹¹ it is inevitable that Islamic values strongly influence the nation in many aspects, including the legal system. Indonesia acknowledged Islamic law in private matters, such as inheritance and marital law through the Compilation of Islamic Law which is written in the Presidential Instruction No. 1 of 1991 and enforced through the Ministry of Religion Decree No. 154 of 1991.

Nevertheless, the Indonesian legal system remains a civil law system that is largely influenced by the Dutch. The Indonesian Civil Law Code is adopted from the Dutch *Burgerlijk Wetboek* (Dutch Civil Law Code) of 1847 through the concordance principle.¹² Therefore, formally, Indonesia adheres to the civil law system as their own formal legal system while *Adat* and Islamic law can only be implemented in certain matters. This results in a pluralistic legal system.

The Indonesian inheritance law is one of the fields of law that can accommodate all three legal systems, namely *Adat*, Islamic and Civil law, in its implementation. Each legal system is applied according to the circumstances of the deceased and the heir, e.g. whether they are members of the *Adat* law community, religious belief or even personal preference.¹³ It is important to stress that each legal system provides a distinctive rule in distributing the inheritance. These differences are admittedly rooted in the divergent perspectives of reasonableness and fairness in each legal system. Each legal system has their own measure of reasonableness and fairness related to their views of society and moral according to their own beliefs. The Indonesian inheritance law provides an interesting discourse to the dynamics of reasonableness and fairness in the setting of a pluralistic legal system. How does each legal system view reasonableness and fairness and on which standard? Does

¹⁰ Embassy of the Republic of Indonesia, 'Facts & Figures' (*Embassy of Indonesia*) <<https://www.embassyofindonesia.org/index.php/basic-facts/>> accessed 5 May 2020.

¹¹ Indonesia is a monotheist State based on the first principle of the nation's ideology, Pancasila, enshrined in the Preamble of the 1945 Constitution.

¹² Art 131(2)(a) *Indische Staatsregeling* (Constitution of the Netherland Indies) with exceptions on certain provisions of the Civil Code.

¹³ However, Muslim citizens are to remain comply with Islamic Inheritance Law based on the jurisprudence of the Supreme Court Decision No 172K/SIP/1974.[102].

pluralism encourage the open nature of reasonableness and fairness even more, or does it restrict interpretation within the borders of each legal system? Is it necessary, as a society, to agree upon what is reasonable and fair? This contribution tries to clarify these questions by analyzing the conceptual theory of reasonableness and fairness within Indonesian civil law and the Indonesian inheritance laws. Then, Court judgments relating to reasonableness and fairness in each legal system are examined to observe how the implementation is put in practice. In the end, a conclusion will be made.

Reasonableness and Fairness in Indonesian Civil Inheritance Law

In Indonesian civil law, reasonableness and fairness are inseparable from the provisions relating to the law of obligations under Book III of the Indonesian Civil Code (hereinafter BW – *Burgerlijk Wetboek*). In contract law, it is familiarly recognized to be incorporated within the good faith principle under Article 1338 BW. Furthermore, it is explicitly stipulated in Article 1339 BW as the legal sources of contracts along with customs and the law. This provision puts reasonableness in a high stake that has a binding power without having to be mentioned in a contract. Reasonableness and fairness are also among the standards to determine the validity of contract under Article 1320(4) BW as it is related to the assessment of a lawful cause. This requirement is confirmed by Subekti, concerning the content of an agreement that it should contain values in society – reasonableness being one of them.¹⁴

Beyond the law of obligations, reasonableness and fairness are essentials to determine an unlawful act. Satrio stated that an unlawful act violates the interest of another person in an unreasonable and unfair manner.¹⁵ Article 1365 BW governed the provision on an unlawful act. The criteria for an unlawful act are stipulated as follows: (a) there is a violation of a legal obligation of a party, (b) there is a

¹⁴ Subekti, *Hukum Perjanjian* (Intermasa 1984).[5].

¹⁵ J. Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Undang-Undang* (Pertama, Citra Aditya Bakti 2001).[177].

violation of rights of others, (c) there is a violation on the rules of decency, and (d) there is a violation of reasonableness, prudentialism and duty of care in interacting with others or when dealing with the possessions of other people.¹⁶ This further proves the stance of the Civil Law Code in weighing reasonableness and fairness pertaining to the elements of a lawful act.

In civil inheritance law, reasonableness and fairness implicitly adopted similar philosophies. The inheritance is distributed without considering the gender of the heir nor their roles in the family or community.¹⁷ Rather, it is conducted according to the degree of closeness of the heir with the deceased or through a testament.¹⁸ It is fair to say that this is due to the similar approach taken in the law of obligations and the unlawful act provisions, that the key point in acting reasonable is to put the interests and rights of other people in mind while carrying our own personal interests. Thus, the provisions on inheritance are laid out more specifically, addressing each familial situation to prevent the violation of rights of others while at the same time upholding independence in the right to inherit.¹⁹

Reasonableness and Fairness in *Adat* Inheritance Law

Adat law, briefly defined as a ‘living law’ formed through ancient wisdom, acquired its validity from *Adat* rulers.²⁰ They conclude what is considered as ‘reasonable and fair’.²¹ *Adat* law began as a system of behavioral norms for every legal act and legal relationship.²² Nonetheless, if the Civil Law Code turns to individualism and legitimate interest of the parties as a point of consideration in

¹⁶ Rosa Agustina, *Perbuatan Melawan Hukum* (Program Pascasarjana Universitas Indonesia 2003).[50].

¹⁷ Surini Ahlan Sjarif and Nurul Elmiyah, *Hukum Kewarisan Perdata Barat: Pewarisan Menurut Undang-Undang* (Kencana and Badan Penerbit FHUI 2010).[9].

¹⁸ Article 832 BW.

¹⁹ Abdul kadir Muhammad, *Hukum Perdata Indonesia* (Citra Aditya Bakti 2010).[195-196].

²⁰ On the role of *Adat* rulers, see Keebet von Benda Beckmann, ‘Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra’ (1981) 13 *Journal of Legal Pluralism*. [131].

²¹ Soerjono Soekanto, *Masa Depan Hukum Adat Di Indonesia* (Seminar Penelaahan Pembaharuan Hukum BPHN 1982).[144-148].

²² *ibid.*

acting reasonably and fairly, then *Adat* law completely relies on what has been agreed by the rulers, which tends to prioritize the interests of the whole community. Indeed, one of the natures of *Adat* law community is the communal nature, where community interest tends to trump an individual interest.²³ This communal nature of *Adat* law influenced how they view reasonableness and fairness, what can be considered reasonable for an individual, may not be so for the community. Generally, what is best for the community, is believed to be the most reasonable.²⁴

The communal nature of *Adat* law shapes individual roles in the community.²⁵ The community thrived by preserving these roles and keeping their tradition, as demonstrated in the *Adat* law of inheritance. There are different approaches for each tribe: the Minangkabau tribe pass the inheritance to female lineage of the family (matrilineal), the Batak tribe to male lineage (patrilineal) and the Javanese divides them equally (parental).²⁶ Each considered their means reasonable and fair, assuming different roles of men and women in the tribes.²⁷ Inheritance is divided assuming these roles that are set forth for generations in the community. The matrilineal tribe considered it fair to prioritize female lineage in dividing inheritance as women are essential members of the community. Likewise, the patrilineal tribe believed that prioritizing male lineage are reasonable as the men of the tribes are the honorable member with more contribution to the community.²⁸

Inevitably, the religious-magical nature of *Adat* law²⁹ also contribute to their view in defining reasonableness and fairness. When it comes to basic values, especially ones related to the protection of the *Adat* region environment,

²³ Husen Alting, *Dinamika Hukum Dalam Pengakuan Dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah* (LaksBang PRESSindo 2010).[30].

²⁴ *ibid.*

²⁵ On the separation of individual and communal rights in respect to *Adat* Land Law, see Budi Harsono (n 9).[183].

²⁶ Sri Hajati,[*et.,al*], *Hukum Waris Adat, Islam & Burgerlijk Wetboek* (Airlangga University Press 2014).[7-20].

²⁷ *ibid.*

²⁸ Tapi Omas Ihromi, 'Inheritance and Equal Rights for Toba Batak Daughters' (1994) 28 *Law and Society Review*. [527]; in Sulistyowati Irianto, *Perempuan Di Antara Berbagai Pilihan Hukum* (Yayasan Pustaka Obor Indonesia 2003).[5].

²⁹ M. B. Hooker, *Adat Law in Modern Indonesia* (Oxford University Press 1978).[10].

reasonableness and fairness could be applied rigidly based on *Adat* values and tradition. For instance, one may not deem himself reasonable in the eyes of *Adat* law only by paying a compensation for an environmental destruction,³⁰ but a traditional ceremony or sanction must also be applied.³¹

Reasonableness and Fairness in Islamic Inheritance Law

Islamic law recognizes the reasonableness and fairness principle in the aspect of practicing religion. The Quran, as one of the main sources of Islamic law,³² says in this respect: “And they have been commanded no more than this: To worship Allah, offering Him sincere devotion, being true (in faith); to establish regular prayer; and to practice regular charity; and that is the Religion Right and Straight” (soera 98:5). The Quran generally prohibits unfair and deceitful commercial negotiations: with respect to keeping contractual obligations,³³ the Quran commands Muslims to “fulfill (all) obligations” (soera 5:1). In Islamic family law, reasonableness is being considered in measuring maintenance funds in a divorce. It is stated in the Quran: “For [a] divorced woman maintenance (should be provided) on a reasonable scale. This is a duty on the righteous” (soera 2:236). The same view is held by the decision of the Supreme Court Decision regarding the obligation of a husband to provide for the children prior to a divorce.³⁴ This demonstrates that Islamic law tends to put reasonableness and fairness not only as a norm to regulate behavior but further as a moral obligation as a Muslim.

Reasonableness and fairness are among principles of Islamic inheritance law as well.³⁵ On this matter, it is weighed based on the rights and duties that one carries in society. Men are expected as providers for their family, therefore they

³⁰ R. Lestarini, [*et.,al*] ‘The Implementation Strategy of Customary Law Aspect in Protecting Local Environment’ (2018) 52 E3S Web of Conferences.[2-5].

³¹ *ibid.*

³² Khaled Abou El Fadl, [*et.,al*], *Routledge Handbook of Islamic Law* (Routledge 2019).[23].

³³ Choi S, ‘Towards A Better Understanding of Good Faith Concept in Islamic Contract Law’ (2018) 7 International Journal of Engineering & Technology.[247-253].

³⁴ Supreme Court Decision No. 280K/AG/2004 dated 10 November 2004.

³⁵ Sri Hajati, [*et.,al*] (n 27).[135].

earn the right to receive more inheritance than women.³⁶ This is similar to how the *Adat* law community divides based on community roles, though in this regard, the Islamic inheritance law puts more emphasis on traditional gender roles. The Islamic inheritance law also has a similarity with the civil inheritance law, mainly in the bilateral lineage system and sharing inheritance based on the degree of proximity.³⁷ Nevertheless, unlike the others, the Islamic inheritance law is sourced from religious teachings and faith.

The Implementation through Court Judgments

Indonesia included reasonableness as a criteria to determine an unlawful act through the case of *Masudiati v I Gusti Lanang Rejeg*;³⁸ this case is about a false promise of marriage made by I Gusti Lanang Rejeg to Masudiati in exchange of the couple living together. Even though there was no written law on the promise of marriage, the Supreme Court deemed it was an unlawful act under the grounds of reasonableness as I Gusti Lanang Rejeg violated the interest of Masudiati in conducting his own interest to live together. This follows the interpretation of reasonableness as considering the other party's interest in conducting our own. While in the breach of a contract dispute, a particular case in West Java concerning a claim of breach of contract made by a son to his mother,³⁹ was rejected by the judges under the grounds of 'reasonableness' under Article 1339 BW based on decency and morale, since Indonesian society regards the role of parents very highly, especially mothers. This case follows Subekti in applying reasonableness by certain morale developed in the society.

In cases relating to *Adat* law, reasonableness and fairness can be applied differently. The Supreme Court highlighted this difference in a case concerning a rent agreement with *Adat* land as an object and the parties are a part of the *Adat*

³⁶ Line Nyhagen Predelli, 'Interpreting Gender in Islam: A Case Study of Immigrant Muslim Women in Oslo, Norway' (2004) 18 *Gender and Society*. [473-493].

³⁷ Sri Hajati, [*et., al*] (n 27). [113].

³⁸ Supreme Court Decision No. 3191K/Pdt/1984 dated 8 February 1986.

³⁹ Garut District Court Decision No. 01/Pdt.G/2017/PN.GRT dated 6 January 2017. [43].

community.⁴⁰ Considering the nature of the case, the Court acknowledged the open dynamic of *Adat* law based on reasonableness and fairness. The Court established that the rationale of the *Adat* law of reasonableness and fairness prevails over the Civil Law Code. The judgment proves that the Court differentiated the ‘reasonableness and fairness’ as a principle embodied in the Civil Law Code and as a source of *Adat* law. However, this approach is not applied in the case of *Adat* inheritance. Since the Supreme Court judgement in 1961 concerning inheritance division in a patrilineal *Adat* tribe of Karo,⁴¹ the Court deemed based on reasonableness and fairness that gender equality is a living right in Indonesia. In other words, it should also be applied in North Sumatera (where the tribe is located), replacing the previous point of view of *Adat* law. Therefore, in this case, the reasonableness and fairness in the form of gender equality in the modern society prevailed, or rather has altered the standards of reasonableness of *Adat* law. This jurisprudence is then continuously applied, and it became a landmark decision that daughters still have the right of inheritance even in patrilineal *Adat* society. In the proceeding judgment in 2017,⁴² the Court stipulated, in its consideration of ‘reasonableness and fairness’ that inheritance should be divided equally regardless of genders. From the differing approach within *Adat* law, it is visible that reasonableness and fairness in *Adat* law allows a broader interpretation, whether on a case by case basis or for the judges to develop law.

Within the legal realms of Islamic law, such developments are not as easily enforceable. This is due to a more rigid nature of Islamic law as it is based on non-negotiable faith principles. Unlike *Adat* law that is largely unwritten, the application of Islamic law in Indonesia is more formal, guided through the Indonesian Islamic Law Compilation, the legal guidance of the implementation of Islamic law in Indonesia. The development of Islamic law requires a specific process towards the changes in meaning and implication of Quran and sunnah as the sources of Islamic

⁴⁰ Supreme Court of Indonesia Judgment no. 1685K/Sip/1978 dated 28 February 1981.[173].

⁴¹ Supreme Court Decision No. 179 K/SIP/1961 dated 23 Oktober 1961.

⁴² Supreme Court Decision No. 147 K/Pdt/2017 dated 18 April 2017.

law. Therefore, the judges in interpreting reasonableness and fairness within Islamic law regime based solely on the main sources of Islamic law. In this judgment, the Court found that it is an obligation for the husband as a Muslim to provide for his family on the basis of reasonableness and fairness referring to his obligation as a father according to the Islamic teaching.⁴³ This is due to the strict interpretation of the Quran as it is believed to be the holy Word of God. Consequently, it leaves a narrow room for the judges in interpreting reasonableness and fairness within the Islamic law.

From this example of cases, it can be observed that the Indonesian pluralistic system leaves a room for a wide interpretation of reasonableness and fairness. It enriches the understanding of reasonableness and fairness and how societal values played a role in interpreting it. The interpretation does come with a limit, especially when it is related to faith and universal values of decency in society. It is further encouraged with the non-binding nature of cases in Indonesia although past cases are used as sources are developed by the judges.⁴⁴ No matter how varied the perceptions are, one thing is for certain: there is always a place for reasonableness and fairness in every legal system.

Conclusion

Each of the *Adat*, Islamic and civil law system have varying views on reasonableness and fairness based on their own values. The *Adat* law uses the standard of community roles, the Islamic law sourced it from their faith and civil law puts emphasis on respecting the interest of others. Legal pluralism does encourage the open nature of reasonableness and fairness even more, but in certain cases, it also restricts interpretation based on the standard of the legal system applied. Judges may choose to embrace the dynamics by interpreting it in a wider discretion, but they can also choose to narrow it down to safeguard such standards. Lastly, there is no necessity to agree on what is reasonable and fair, as often, it is due to the openness of it that reasonableness and fairness can be realistically achieved.

⁴³ Supreme Court Decision No. 280K/AG/2004 dated 10 November 2004.

⁴⁴ H. Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum* (Cipta Aditya Bakti 2004).[21-22].

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