

DEVELOPMENT OF BALINESE WOMEN'S RIGHTS ABOVE MARITAL PROPERTY IN THE EVENT OF DIVORCE

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ABSTRACT

Before the enactment of Marriage Law in Indonesia (1974), the judiciary in Bali tend to make discriminative decision above women related to marital property dispute (gunakaya). In the event of divorce, the given wife was given the rights over one third of the marital property if the cause of divorce was the husband. Conversely, if the wife found guilty, wife was not entitled to marital property at all. All marital property will be the right of husband. Along with the development of Balinese society that is constantly changing, the legal principle adopted by the judiciary before the enactment of the Marriage Law abandoned. However, Balinese society change and there are many Balinese women work in public area and have her own income. This paper attempt to analyze the development of Balinese women right above marital property (gunakaya) in the event of divorce. Method use in this paper is normative legal research by providing appropriate legal material. The result of the study show that there are significant development in Bali Adat Law related women right above marital property in the event of divorce, and in adjudicating disputes of marital property, Court no longer considered as discriminative institution

Keywords: women's rights, marital property, gender equity, Balinese customary law.

Introduction

Indonesia has established the unification of law in the marriage and divorce field, namely since the establishment of the Law of the Republic of Indonesia Number 1 Year 1974 on Marriage (hereinafter is called the Marriage Law), which implementation became effective on October, 1st 1975. However, this law unification is unique since it still enables the enactment of religious laws or customary law. One of the provisions of the Marriage law that allows the establishment of customary law is the provision of Article 37, which is "When the marriage broke up because of divorce, the marital property shall be governed by their respective laws ". The official explanation of this law states that the definition of "respective laws" in Article 37 above are religious law, customary law and other laws. With this arrangement, the applicable laws pertaining to marital property in the event of divorce is pluralistic, since Indonesia applies wide variety of customary laws. In Bali, the indigenous peoples (ethnic of Balinese Hindu), strongly hold the applicability of customary law in family life (marriage, divorce, inheritance).

The above provisions result in problems for Balinese divorced women, since her rights upon the property acquired during the marriage, by law handed to Balinese customary law regulation that is very patriarchal and unfavorable for women. According to Balinese customary law, women are not heirs in the family so that Balinese women who have married shall not be entitled to carry a certain part of the estate of their parents (Korn, 1972, p. 15). In such conditions, women's contribution in the establishment of marital property becomes low. As a result, women's control of the marital property is also weaker; both during the marriage and after the broke up of the marriage because of divorce

Today, in the development of Balinese society that is constantly changing, many Balinese women who work in the public sector, which are allows them to contribute to the formation of family possessions (Sudantra, 2002, p. 82). Therefore, it is important to study the Balinese women's rights to property when the marriage broke up because of divorce.

Arrangements of Marriage Property Law in Indonesia

In the Marriage Law, the issue of marital property is stipulated in Chapter VII. Under Article 35, the property of marriage includes two categories, namely: (1) the marital property, i.e. all property acquired by the spouses during the marriage took place; (2) the premarital property of each spouse and property derived by respective spouses as a grant or inheritance. Balinese customary law is also familiar with the classification of assets, namely the marital property called *pagunakaya/gunakaya*; premarital property of each husband and wife are called *tetadatan*, which can be a premarital property (*sekaya*), grants (*jiwadana*) or inheritance (*tetamian*) (Dyatmikawati, 2016, p.14).

Viewed from the control of property categorization during the marriage took place, the groups of such properties have a different character. According to the Marriage Law, marital property is within the possession of the husband and wife together. Article 36 paragraph (1) states that: "Regarding to marital property, the husband or wife can act on the agreement of both parties". Regarding the premarital property respectively, Article 36 paragraph (2) specifies that "... the husband and wife have the full right to perform legal acts concerning their property". From a gender perspective, the regulation concerning the control of marital property during the marriage lasted already reflect gender equality, because the husband and wife have a balanced position in control of the property (Sudantra, 2002, p. 83). However, there is still a juridical problem in the setting of the property because the law does not set it in detailed, especially with regard to the arrangements of the property when the marriage broke up because of divorce.

The Consequences of Divorce toward the Status of Marital Property

Article 37 of the Marriage Law does not regulate the consequences of divorce on each premarital property of husband and wife. However with the systematic interpretation - by referring to the provisions of Article 36 - it may drawn a legal logic that, in case of divorce the personal wealth, gifts and inheritance will remain in the possession (rights) of each husband and wife. Unlike the marital property, which according to Article 37, in case of divorce, marital property governed by the respective law. Therefore, to know the consequences of divorce on the position of the marital property, analyze above it must related to the applicable laws couple when the marriage took place. In the case that the couple is the Balinese, the applicable law is the customary law of Bali, the original law of Balinese inspired by Hinduism (Suwitra Pradnya, 2017, p.4).

Under customary law of Bali, within the consequences of divorce, the marriage relationship between husband and wife is terminated; husband remains in the environment of his own family, while his wife returned home to her birth parents with the status of "single" (*mulih deha*). The wife no longer has legal relations (rights and obligations) with her husband's family, including their children. It is a consequence of patrilineal kinship system (*purusa*) adopted the Balinese where children were born of a legitimate marriage has a legal domicile in the family of their father. If any, wife may bring back to her parents' house the property or possession she brought into the marriage (*tetatdan/jiwadana*). It is in accordance with the logic of the Marriage Law.

Regarding the right of the wife to marital property, since the Dutch colonial era until the 1960s, the justice agencies in Bali gave discriminatory court rulings. Until 1951, the judiciary and adjudicates cases among the people of Bali were the *Raad van Kertha* (*Raad Kertha*), a judicial body established by the colonial rulers to administer justice for the people of the indigenous groups. This judiciary adjudicated based on the Balinese customary law (Sudantira, 2016, pp. 168-169). One of the law codes used by the judges of the *Raad van Kertha* as substantive law to adjudicate disputes of divorce was a law code of *Poerwa Agama*, compiled and enacted during the kingdom or colonial era. Article 101 of *Poerwa Agama* -which was written in Balinese specified: "Djanmane belas makoerenan sapadroewene jogja pah tiga; jan saking moeani mamelasin, polih kalih doeman, iloeh polih adoeman. Jan saking iloeh mamelasin, tan wenang polih doeman; maka sami jogja kadroewe antoek sane moeani, asapoenika tingkah djanmane palas makoerenan", which means: in the event, where husband liable of the divorce, then the property shall be divided into three: the husband is entitled to two parts, the wife is entitled one section; conversely, if the wife that 1 to divorce then she is not entitled to the property, all the properties shall be entitled to the husband (Djlintik, 1918, p. 99). The legal principles regulated in Article 101 of *Poerwa Agama* is the basis for the judges of *Raad Kertha* to give decisions in cases of divorce, as can be seen in the Decision of *Raad Kertha* Karangasem of 1938 and the verdict of *Raad Kertha* Denpasar in 1939 that stated if the wife found guilty then she unjustified to demand a share of common/marital property (*druwe gabro/gunakaya*); and the Verdict of the *Raad Kertha* Karangasem in 1941, Verdict of the *Raad Kertha* 1942 in Gianyar, the verdict of the *Raad Kertha* of Klungkung in 1951 that all determined the wife was entitled to a third of the marital property, if it turned out that the guilty one was the husband. The principle of law was adopted by the judiciary after the *Raad Kertha* was dismissed (1951), as evidenced by the finding in the Singaraja District Court in 1960 which ruled that the wife was given part of common property because the husband was found guilty (Panetje, 1986, p.152-155).

Along with the changing of times, the attitude of the Court began to shift, it is known from court decisions that already have jurisprudence after the enactment of the Marriage Law. In adjudicating the dispute over marital property, as long as it is proven that such property is the marital property (*gunakaya*), judges tend to give a balanced position (equal rights) to the husband and wife. Judges no longer consider which party is at fault in a divorce. Some of the Court's Decision that prove these statements, can be seen below (Sukranatha, 2002, p. 12):

1. Denpasar District Court's Decision No. 56/Pdt.6/1985/PN.Dps. decided that the marital property is divided in half between (former) husband and (former) wife. This decision was strengthened by High Court of Denpasar No. 93/Pdt/1986/PT.Dps.;
2. Denpasar District Court's Decision No. 53/PDT/G/1990/PN. Dps stated that the marital property acquired during the marriage, each portion to (former) wife, and partly for the (former) husband. This decision was strengthened by the High Court of Denpasar through Decision No 33/Pdt/1991/PT.Dps.;
3. Denpasar District Court's Decision, dated December 16, 1991 Number 71/Pdt/G/1991/PN/dps. decided that (former) husband and (former) wife were entitled to each half of the possessions of *gunakaya*. This decision was strengthened by the High Court of Denpasar with Decision No. 65/Pdt/1992/PT.Dps.

The shift of the legal principles adopted by this jurisprudence affect the attitude of indigenous people in Bali. This was reflected in the legal principles adopted and set forth in *awig awig desa pakraman*, the regulations made by the traditional law community unit of *desa pakraman* to be used as guidelines by the people in conducting relationship with one another, relationship with the natural environment, and relationship with the Almighty God (Sudantira, Sukerti, Dewi, 2015, p.19). Today, in general principle of customary law of *awig awig desa pakraman*, have embraced the same principles to the legal principles adopted by jurisprudence. The example of adoption can be seen in the *Awig-awig Desa Adat Tumbak Bayuh* in Mengwi, Badung Regency (1992), which in Article 78 specifies that "Tatacara palas marabian...pagunakaya polih pahan pada; pabekel, tetatadan kakuasa niri-niri; nanging warisan kakuasa antuk purusa" (Divorce procedures: marital property shall be divided equally; pre-marital possessions shall be controlled respectively; whereas inheritance is controlled by the husband). In the latest development, the traditional village assemblies of the Province of Bali, the *Majelis Desa Pakraman* (MDP) has adopted the legal principle that is gender responsive in its decision. *Pasamuhan Agung III MDP Bali* (congress) in 2010 it was decided that in case of divorce, "... each party is entitled to the division of *gunakaya* (marital property in marriage) with the principles of the General Guidelines (shared equally)" (Sumarta 2011, p. 47)

Conclusion

Significant developments have occurred in the customary law in Bali regarding the women's rights to property in case of divorce. In the past, the regulation on the women's rights to marital property (*Gunakaya*) was discriminatory, but now it has changed, and

reflect equality and gender justice. This is reflected in the decision of justice agencies and indigenous peoples' attitudes in Bali set forth in the customs regulations (*awig awig desa pakraman*) and custom panel decisions of the Province of Bali (the *Majelis Desa Pakraman*).

References

- Desa Adat Tumbak Bayuh (1992). *Awig-awig Desa Adat Tumbak Bayuh*, Koleksi pribadi.
- Djlantik, I Goeti Poetoe (1918). *Wetboek Poerwa Agama*. Batavia: Landerukkerik.
- Dyatmikawati, Putu (2016). Inheritance Rights Of Women Based On Customary Law In Bali. *International Journal of Business, Economics and Law, Vol. 11, Issue 4 (Dec)*, 13-16
- Korn, VE (1972), *Hukum Adat Waris di Bali*, diterjemahkan dan diberi catatan-catatan oleh I Gde Wajan Pangkat, Fakultas Hukum & Pengetahuan masyarakat Universitas Udayana.
- Panetje, Gde (1986). *Aneka Catatan tentang Hukum Adat Bali*. Denpasar, Bali: CV Kayumas.
- Republik Indonesia (1974). *Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan*. LNRI Th. 1974 No. 1; TLNRI No.3050.
- Sukranatha, A.A. Ketut (1992). Kedudukan Perempuan Bali Terhadap Harta Bersama Dalam Hal Terjadi Perceraian (Analisis Perkembangan Yurisprudensi). <http://download.portalgaruda.org/article.php?article=13353&val=929>. Diakses: 9 Februari 2017.
- Sudantra, I Ketut (2002). Wanita Bali dan Harta Benda Perkawinan: Suatu Perspektif Normatif, *Jurnal Studi Gender Srikandi*, Vol, 2 No. 2, 79-87.
- Sudantra, I Ketut (2016). *Pengakuan Peradilan Adat dalam Politik Hukum Kekuasaan Kehakiman*. Swasta Nulus - Bali Shanti - Puslit Hukum Adat LPPM Universitas Udayana.
- Sudantra, Sukerti, Dewi (2015). Identifikasi Lingkup Isi dan Batas-batas Otonomi Desa Pakraman dalam Hubungannya dengan Kekuasaan Negara. *Jurnal Magister Hukum Udayana*, vpl 4 No. 1, 13-27.
- Sumarta, I Ketut (2011), *Himpunan Hasil-hasil Pesamuan Agung III Majelis Desa Pakraman Bali*, Denpasar, Bali: Majelis Utama Desa Pakraman (MDP) Bali.
- Suwitra Pradnya, Ida Bhegawan Istri (2017). *Purusha dan Pradhana dalam Agama Hindu dan Hukum Adat Bali*. Tabanan, Bali: Pustaka Ekspresi..

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