WOMAN INHERITANCE, PLURALISM AND GENDER IN INDONESIA

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Abstract

Indonesia’s legal systems for Inheritance comprise Pluralism, Customary Inheritance legal system, Roman-Dutch Inheritance legal system and the Faraid (Islamic Inheritance system). This is an impact from Dutch colonial legal policy and the fact in the pre-colonial era, the numerous ethnic groups and kingdoms on the islands that make-up present-day Indonesia employed customary or adat, based on their difference of social, political systems and religious beliefs which included animism, Hinduism, Buddhism and also when Islam spread through the islands, these societies merged customary laws and Islamic law. Until present-day, Islamic law continued to exist because the majority of people in Indonesia are Muslims, which account for around 87.25% of the total population. For those reasons, since Independence Day through until now, these three Inheritance legal systems in Indonesia could not be unified and in fact the three Inheritance legal systems are still in practice today. Indonesian family Custom law has three genealogist systems there are Patrimonial, Matrimonial and Parental systems that are impact to the family law on marriage, and inheritance custom systems. More than that, people know that Islamic legal system is Patrimonial, although some of them believe that Islamic legal system is Parental... With those backgrounds, How Pluralism inheritance legal system could be solved heritage case in Indonesia and how gender respective in those kinds of inheritance legal system? As a Legal State there is no other factor in which this would be conducted except through a decree of the legislation in written and unwritten law, such as Law No.1/1974 concerning Marriage, Islamic Regulation Compilation (Kompilasi Hukum Islam) implemented instituted on the Instruction of the President of Indonesia (INPRES) No.1/1991 and Ministry of Religious Affairs Decree No.154/1991, the issues of Marriage, inheritance and zakat, wakaf, and donation (infaq) and inheritance Customary Law in every single part of ethnic group. In Indonesia people could choose what decree they want to use on their inheritance case, because of that inheritance legal system still bias gender. The new draft or revision for Islamic Regulation Compilation which effort to make more in line with universal principles of Islam and civil society, such as equality, universal brotherhood, justice, pluralism, gender equality, human rights and democracy in October 2004 had controversy, as Muslim clerics criticized the new provisions as contrary to the principles of Islam. That all the fact that it is not easy to make unification especially for inheritance regulation in Indonesia, because of custom, religion and people miss understood about gender.

Keywords: Law, Inheritance, Woman, Pluralism And Gender
I. Foreword

A. Background

Issues surrounding women under inheritance laws prevailing in Indonesia have always been classic ones such that discussions would evolve around issues whether women and their children, under the inheritance laws in Indonesia (including the Islamic inheritance law), are entitled to distributions of the estate, at what percentage, and whether woman share is different from that of man. There seems to be an unending discussion regarding this matter and that it has become quite a current affair. As we are becoming more globalizes, there have been demands for equality of rights and obligations between different genders. In fact, this has been expressly stipulated in the Convention on the Elimination of Discrimination Against Women (CEDAW) and has been regarded as Human Rights issue.

Indonesia's case of women inheritance can never be disassociated with the fact of the diversity of cultures and national identities that live in this country, such that there are community groups which Adat various kinship systems: Patrilineal/ Patrimonial, Matrilineal/ Matrimonial and Parental, all these have brought in color in the inheritance systems that live in the society. In addition, there is this western system of inheritance initially introduced by the Dutch, thus adding to the diversity; and the one system which is most influential in this predominantly Muslim country is the inheritance system according to the Sharia. The Prophet Muhammad (pbuh) in
fact had predicted that there would always be problems in the implementation of the Sharia inheritance system, such that he once said, as so narrated by Imam Ahmad, Imam Tarmidzi, Imam Hakim from Ibnu Mas'ud r.a. (May God be pleased with them), basically invoking all men to study the faraidh (Sharia inheritance) and teach it to other: "Verily, I am only a mortal person and that this knowledge will be forgotten (lost), and ignorance will prevail, such that two people would fight over a demised estate and that there would be no wise man to judge for the two." (Abdul Jamil in his book “Eradicating Discriminations against Women”, 2000:154)

In line with this tradition of Prophet Muhammad (pbuh), issues around inheritance continues to surface, knowing that it is very much associated with these two factors: (1) death, which will happen to every one; (2) estate, whilst knowing that wealth is nothing but earthly spoils, men would fight for them. (Abdul Jamil, 2000:155)

B. Component

Inheritance dispute arises when a survivor feels that he has been cheated by the amount of share of the estate distributed to him. Under the Indonesia’s various systems, the share to which a survivor is entitled under a particular system may not be the same as that of others, especially under the kinship system of Patrimonial, where female persons are not entitled to any distributions. Meanwhile, under the Matrimonial system, distributions will be available only to female persons from the mother side, while under the parental system, estates
are to be distributed equally among the descendents of both the father and the mother. In the case of the Islamic Sharia system, both male and female descendents are entitled to distributions but not of equal share such that males receive twice larger than that of females, thus a ratio of 2:1. That is why, some group of people would see that Islam has been unfair toward the women and is too generous to males. Such a view is nevertheless understandable, not to mention that many of them are in fact totally ignorant toward Islam’s system on inheritance, such that they would get caught up with the Islamic terms of Sharia and Fiqh. Even under the Fiqh there are two schools of thought relating to inheritance, namely the Patrimonial concept (Adopted by the Sunnie) and the bilateral /parental concept (Adopted by the Syiah and Prof. Hazairin SH). All these three systems are available to choose from by Indonesians, and as to the Muslims, and depending on their piousness, they should ideally submit to the Sharia system (knowing that Indonesians are 87.25% Muslims). Thus, as to the issue of WOMEN under the INHERITANCE LAWS, PLURALISM AND GENDER IN INDONESIA, I would like to present the following:

1. Pluralism as the source of inheritance law in Indonesia;
2. Gender’s perspective on the inheritance laws in Indonesia.

In order to find out as to why Indonesia’s inheritance laws are still biased against women and pluralism, thus making it difficult for us to unify them.
II. The Substance

A. Pluralism as the source of inheritance law in Indonesia:

Inheritance laws in Indonesia are still pluralistic, since Indonesians are free to choose which of the inheritance laws is to be made applicable to them. Those electing to submit to the customary law (which is non-coded) would find that the customary laws are too diverse in Indonesia while those pious Muslims would elect to submit to the Islamic law on inheritance which, in the case of Indonesia, has been formalized in the Compilation Of Islamic Laws which will govern the distributions of the estate; and those whom are adherents of other religions and would not submit to customary laws, they may submit to the civil code originally introduced by the Dutch colonial. This matter owes partly to the fact that the Dutch colonial rulers once divided Indonesians into three groups, as so expressly stated in Article 131 of the IS (Indische Staatsregeling), these are the: Europeans, Foreign Orientals (Chinese, Arabs and Indians) and the Indigenous; each of which will submit to different set of laws, such that European descents would fall to the Western Law; Foreign Orientals (Chinese, Arabs and Indians) would fall to their respective customary laws and parts of the western Civil Code (i.e. the Burgerlijk Wetboek); while the indigenous people would submit to the Adat (customary) law, while the Islamic laws, in spite of the fact that Islam has existed as of then, would only apply when the indigenous
communities have adopted the Islamic laws as part of their customary system, as so postulated in the 'Receptie' theory of Christian Snouck H, which was then further developed by Van Vollenhoven and Ter Haar (Mohammad Daud Ali, 1993:220). This theory has been in demised since Indonesia proclaimed its independence. However, the results of such division of the society are still felt today where the Customary Law, the Islamic Law and the Western Law still do exist, and in fact it is mentioned in Article II of the Transitional provisions in the State Constitution of 1945 which says that *all bodies of law which were existing prior to Indonesia's proclamation of independence will remain applicable until or unless otherwise superseded by new laws*. With such diversities, coupled with the fact that inheritance is a sensitive issue since there is wealth to be distributed, we are yet to afford ourselves a unified set of law on inheritance, which then leaves the public to choose from among a number of sets of law. Below describes briefly the differences among the three sets of law of inheritance in Indonesia in order to show you how difficult it is to produce a unified law of inheritance in Indonesia.

a. The Adat (Customary) Law of Inheritance

Basically, the customary law can never be disassociated from communal alliance system, marriage system, although not automatically, as so opined by Prof. Hazairin: "Whereas, the customary law of inheritance carries a specific pattern which was born from out of the traditional mind of the relevant community and which is very
much affected by the kinship system that lives in it: be it the Patrimonial, Matrimonial or the parental system.” In other words: different communities which Adat the same kinship system will not necessarily Adat the same type of inheritance law (since each particular community is unique).

For instance:

1. For Batak community; their kinship system is Patrimonial, but their inheritance law is individual;

2. In Lampung and Bali, the communities Adat the Patrimonial system, but their inheritance law is the avuncular one (a.k.a. Male Mayorat).

Indonesia knows three categories of kinship-based communities, namely :

1. Kinship system which favors the father’s descents (Patrimonial), such as that which lives among the Batak, Nias, Sumba, Bali and other tribes.

2. Kinship system, which favors the mother’s descents (Matrimonial), such as that which lives among the Minangkabau people.

3. Kinship system with equal right between the descents of both the mother and the father (thus, parental), such as that which lives among the Javanese, the Sundanese, the Acehnese and the Dayaks. Here, the rights and obligations of family members from the line of the father and that of the mother are equal.
Meanwhile, the inheritance system also recognizes these three categories:


Such that survivors will inherit a collective estate, which is not to be divided among the survivors. Survivors are not to own the estate but rather to receive benefits therefrom. This collective inheritance system lives among the Ambonese, the Minahasen and the Minangkabau peoples.

For instance: among the Minangkabau people, they recognize the term “Harta Pusako tinggi” which means priceless legacy; and in Ambon region, they use the term “Tanah Dati” a collective land tenure and in Minahasa, the people there use the term “Tanah Kalakeran”, also a collective land tenure.

2. The Majorette System (Primogeniture)

A system in a community whereby an estate / legacy is not to be distributed but rather to be kept and safeguarded by the first born child. This first-born child will therefore carry the obligation to maintain his younger siblings through until they become independent. For instance: a male primogeniture system lives in Lampung (where he is called the ‘anak punyimbang’), in Bali and also in West Papua (Irian Jaya), in which estates are to be kept by the first born male; while female primogeniture system lives in the region of ‘Tanah semendo’ in South Sumatra, where
estates are kept by first born female, which is known as "tunggu tubing."

3. Individual System

Under this system, estate is to be distributed among the individual survivors. This system lives among families with parental kinship system (the Javanese, Sundanese, and others).

As for the customary (Adat) inheritance system, compared with such other varieties of kinship and inheritance systems, it basically also carries its own uniqueness such that there is no certain limit to estate distribution as otherwise known as legitime portie in the Indonesian Civil Code (KUHPerdt), but it recognizes the marital properties of the wife and the husband, and equality of right to estates, peaceful coexistence and certain privileges of certain survivors, and even Adopted children are entitled to distributions. In addition, an estate is not to be immediately distributed and there is no time limit as to when the estate must be distributed, since all is to be deliberated among members of the family or otherwise as decided by Tribal Chief (Ketua or Kepala Adat/Ninik Mamak).

b. The Islamic Law on Inheritance

Discussions on the Islamic law on inheritance can never be disassociated with Islam's source of law, because the law, which is known as faraidh forms part of a greater Islamic law, the Sharia.
Pursuant to the Qur’anic Chapter “Women,” verse 59, Islam has three sources of law, such that God has commanded that every individual must abide by the commands of God, the commands of the Prophet and the commands of the leaders among us. The commands of God are those verses that we can find in the Qur’an, and the commands of the Prophet are laid down in the books of traditions/hadist, while the commands of the leaders among us are those contained the book of laws which were written out of the work of reasons and of the interpretation of the Qur’an Hadist based on the strength of their respective reasoning. In the implementation of the above, Prophet Muhammad (pbuh) once tested one of his companions, named Mu’ad bin Jabal, as he was assigned to serve as governor in Yemen. Based on the act of the Prophet whom substantiated the policy of Mu’ad bin Jabal, and in accordance with Verse 59 of the Chapter “Women” as stated above, it is therefore concluded that the Islamic sources of law are: (1) the commands of God as laid down in the Qur’an; (2) the commands of the Prophet (the traditions); (3) the commands given by the leaders of the society (resulted from work of reasoning). In line with the mechanism as modeled by Prophet Muhammad (pbuh) in his dialog with Mu’ad bin Jabal as described above, the above sequencing of the law sources reflect the hierarchy of precedence of said law sources of Islam. The laws as laid down by God in the Qur’an are for the faithful Muslims
to abide by. Then, Muslims will also be required to abide by the Hadist, as the second source of law. Hadist comprise such sayings, actions, actions or omissions by the Prophet as narrated in the books of Hadist, considered as authentic interpretation of the Qur'an. If both the sources of law above are silent regarding a certain matter, then Muslims will resort to the work of reasoning, known as ijtihad, of the learned people, in order to resolve certain legal matters to which the two sources of laws above are silent. This work of reasoning shall be opted in order to prevent the silence of law in connection with certain legal matters.

Islamic inheritance is in fact regulated qathri/verbatim (clearly and detailed) in the Qur'an's verses: 7, 11, 12 and 176, as well as in some of the Hadist. However, the two major branches of Islam also influence the interpretation of the Qur'an, namely the Sunna in which there are four schools of thought, and the Syiah. These two are practiced in a number of countries. According to Fyzee, as quoted by Abdullah Siddik, some 90% of Muslims worldwide follow the path of the Sunni and the remaining 10% follow that of Syiah. It is from these two branches of Islam that controversies usually surface in connection with issues on inheritance. Most people are of the opinion that the source of Islamic law on inheritance should come from those books written by the Mazahib thinkers, otherwise they must be rejected, even out of interpretation of the Qur'an. As a matter of fact the books written by the
Mazahib thinkers were resulted from the same works of reasoning based on the two major sources (the Qur'an and the Hadist). The outcome of such works of reasoning cannot contradict the commands of the major sources (Abdul Jamil, 2000:158).

Thus, if the primary source of law has sufficiently provided, clearly and in detail, then man shall not look for other sources of law. Take for instance, the Qur'an's Chapter "Women" verse 11 says that the share of a male shall be twice that of female. Now that this command is to be taken as is by all Muslims as so stated by the Qur'an and the Hadist. This was how HAR Gibb, as quoted by Ichtijanto, came to the term submission to legal authority. This theory says that if a Muslim has professed that Islam is his religion that he will have to submit to the Islamic law (Ichtijanto S.A,1990: 23-27). Thus, when God and His Prophet have laid down a law, Muslims cannot but have to submit themselves to such law – which is called the Sharia.

It is therefore clear that the Islamic law on inheritance is contained in the Qur'an and Hadist. It provides among others that the share of a male shall be twice that of a female; that an only female child will inherit ½ of the estate; and if there are two or more, their share is 2/3 (Chapter "Women" verses 11, 12). These are the command of God. As such, no man may alter them. Things are different for the third source of law, i.e. the ijtihad (outcome of works of reasoning). Ijtihad is the result of
works of reasoning, which are conducted diligently based on the interpretation of the Qur'an and the Hadist. The resulted laws are called zhanni which is non divine. But the laws, which are stated qathi/verbatim in the Qur'an and the Hadist, are not for Muslims to questioned. It is the results from this ijtihad, which were then compiled in volumes, which were then known as the Figh.

The inheritance laws as laid down in Chapter 4, verses 7, 11, 12 and 176 basically say that both male and female persons are entitled to distributions, although not necessarily of equal share. In addition, Islam places the children and the parents close to the estate owner, that their existence can forfeit the entitlement of others (relatives), such that siblings of the deceased will be entitled to the estate only if the deceased is not survived by children, known by the term mafi kalalah (extinct). Islamic inheritance law also recognizes the term substitute heir or mawali, as it is also known in customary (Adat) inheritance system and the Indonesian Civil Code. However, Adopted children are not entitled to distributions of the estate.

c. Inheritance Under The Western Civil Code (the Indonesian Civil Code)

In principle, the western civil code system on inheritance does not differentiate between male and female as to the portion of their entitlement, as per Chapter XII Articles 830-1130; and that under Article 832 the heirs
include all kin relatives, under both legal and extra marital bond, and the husband or the wife whom live longest, each of whom is to receive equal portion of the distributions. This system also recognizes substitute heirs, namely parents and their children, then their kinship relatives both upward and downward without limit. In cases where the first group does not exist, Article 855 provides that the parent which lives the longest will inherit half of the estate if the deceased is survived by a female or a male sibling; and one-third if the deceased is survived by two female or two male siblings; and a quarter of the estate if the deceased is survived by more than two female or male siblings; and then the remaining portion is to be distributed next kinship relatives. Then, if the deceased is not survived by first group survivors nor parents, then the entire estate is to be distributed his siblings both male and female. The right of unwedlock children is provided in Article 863, such that if any such wedlock child is to inherit alongside other marital child and the husband or the wife who lives the longest, then such un wedlock child is entitled to receive a third of the share of the legitimate child. However, if any such wedlock child is to inherit not jointly with any legitimate child, nor the husband/the wife, then such un wedlock child will inherit $\frac{1}{2}$ of the share of the legitimate child. Article 913 of the Indonesian Civil Code also mentions the term legitimate portion (legitime partie), i.e. portion of the estate, which must be distributed among the straight-line kinship
survivors permitted by law. As for downward straight-line kinship survivors, if the deceased is survived only by one legitimate child, then such child shall inherit ½ of portion otherwise available to him; if there are two children, then each will be entitled to receive two-third of the portion otherwise receivable; and if the deceased is survived by three children or more, then each will be entitled to receive three-quarter of the portion otherwise receivable. This mechanism also applies to the children’s and the children’s children of any degree, such that his legitimate portion is ½ of the portion otherwise receivable. Thus, as for an unwedlock child whom has been acknowledged as legitimate child, his legitimate portion is ½ of the portion for first category survivors, be it male or female child.

The narrative could go on and on, but from the above brief illustration we could see that the Western System on Inheritance very much protect the rights of all the heirs both male and female of any degree such that even an unwedlock child will, when legalized, have the same right as that of biological child, male or female, or as otherwise provided by laws. The Indonesian Civil Code is however silent concerning the right of an adopted child to distribution of an estate.

C. Inheritance in Indonesia from gender Perspective

1. Women under the customary (Adat) inheritance system
If we look further into the principles at play under the customary (Adat) inheritance system, with all its diversities, we would easily see that the system is biased against certain gender, such that when an estate is entrusted to first born son, he will never make distribution to his female siblings except in the case of Tanah semendo in South Sumatra where the estate is entrusted to the first born female.

In a community with collective system, we cannot expect to see distributions to individuals. Thus only in a community where the individual system is practiced that an estate is distributed evenly to all the survivors, male and female. The jurisprudences of the Supreme Court of Republic of Indonesia however indicate that, even when individual system is practiced, there is no guarantee that females would receive equal distributions as that of the males, knowing that there is some certain kinship system, which affects that. Take for instance the Tapanuli community, which Adats the Patrimonial system, under which they distribute estate to individuals but only those from the male line, for reason that women (both maiden and married one) when jujur married had voluntarily become part of the family of their husbands and therefore will have no right to a distribution. In addition, there are regions in which the community distribute an estate equally to individuals, such as that of the Javanese and Sundanese people, whom Adat the parental system. There
are jurisprudence of the Supreme Court which differentiate the share of a male from his female siblings, which appears to be influenced by the Islamic inheritance system. All the above shows that in some regions, the inheritance system is biased against women. However, in the Minangkabau community, collective estate distributions will only go to the female line of the mother, such that no distributions is made to the nucleus family (known as somah, i.e. the wife/husband and their children), as the result of the samendo marriage that they had Adopted.

However, there have been new developments that the community now tends to favor more the nucleus family members (in the case of the Minangkabau community, after the war of the Padre, such that nucleus family members receive distributions from the collective estate, while legacy property will remain as a collective property and entrusted to the female line of the mother). Other new change in the customary (Adat) inheritance system is in the equal distributions of estate to both male and female children, as evident in the Decision of the Supreme Court of Republic of Indonesia No. 179.K/Sip/1961, dated 23 October 1961, which held that "for the sake of humanity and general principle of equitability and the basic principle of equality between genders, all has been (new) developments that prevail all across Indonesia ..."
In addition, the customary (Adat) inheritance system also recognizes the term 'hak *gonogini* (marital property), such that half of the joint property of the husband and wife is to be distributed to the one whom lives the longest.

2. **Women under the Islamic law on inheritance system**

As I have suggested in above background, there are people whom would opine that women rank lowest under Islam’s system of inheritance. They presented evidences that there is injustice in the distribution of rights between men and women, such that a woman will be entitled to a leftover share (*ashabah*) only if she has brothers, and so forth.

History however shows that the rise of Islam brought in message which is in the defense of women, among others in the area of inheritance, knowing that pre-Islamic society had Adopted inheritance system which is based on clan, with Patrimonial, Matrimonial, bilateral or parental elements. Before the advent of Islam, especially in Arabia, the society adopted the Patrimonial inheritance system such that estate distributions would only go to the males from the father’s line; while women, including their children, be they male or female, would not be entitled to such distributions.

After the advent of Islam in Arabia, in the third or fourth year of the migration (*hegira/ hijriah*), God revealed verses, which contained laws on inheritance, which truly
changed the status of women and their descents both male and female. Under which, they were entitled to inherit from the estate left by their parents, relatives and husbands, as per the Chapter “Women” verse 7 of the Qur’an. This verse says that a woman and her children are entitled to distributions from an estate. However, said verse 7 was still silent regarding the amount of woman’s share. Said verse 7 was the first law on inheritance revealed by God. The circumstances (the asbab al-nuzul) having relevance to the revelation was such that one Ummu Kahlan, the wife to Aws bin Shamit al-Anshari, once came to Prophet Muhammad (pbbuh) basically reporting that her husband has died and that he is survived by three daughters to whom she admitted that she was unable to provide. It turned out two male relatives named Suwaidun and Arfathah, whom shared the same grandfather with the deceased, had taken all the estate of her deceased husband away. In response to that report, Prophet Muhammad (pbbuh) then summoned both Suwaidun and Arfathah at which they admitted that they have collected the estate left by the deceased Aws bin Shamit, based on reason that the three daughters of the deceased were unable to participate in wars, unable to ride horse and unable to carry spoils of war. It is with this circumstance that God revealed verse 7 of the Chapter “Women” to Prophet Muhammad (pbbuh) (Abdul Jamil, 2000:163).
Thus, it is clear that, Islam has placed women among the heirs thus entitled to distributions from an estate. Under Islam's inheritance system, heirs are not restricted to the descents of the male line, but also the descents from the female line. In this regard, I am in agreement with the opinion of Prof. Hazairin when he summed up that the Islam's inheritance system is of bilateral one, such that those entitled to distributions are not restricted to the male line only but also those from the female line. This opinion of Hazairin agrees with the ideas Adopted by the Syiah (in spite of the fact that Hazairin himself is not a Syiah) which is bilateral in character, knowing that those entitled to distributions were not only the descents of Ali bin Abi Thalib (male line) but also the descents of Fatimah bint Muhammad (female line). These two opinions are however different from the ideas Adopted by the Sunni side which says that only the descents from the male line (thus, Patrimonial) whom are entitled to distributions, which known by the term ashabah. The ashabah pertains to, under Patrimonial system, a group of kinship individuals whom are entitled to estate distributions after the share of the dzul fara‘id is secured. Here, the male descents from the male line are favored. (M.Daud Ali, 1997:52). Thus, it is clear that the teaching of Islam on inheritance is laid down in the Chapter “Women” verses 7, 11, 12 and 176. When certain group would place the male descents from the male side as the true heirs that is only a
matter of opinion. Thus, as we were taught, when contradiction arises among members of the society, we should go back to the Qur'an and Hadist. God in Chapter “Women” verse 59, gives this command that: “If ye differ in anything among yourselves, refer it to God and His Messenger.” This revelation gives a confirmation that the truth shall be that as stated in the Qur'an and in the Hadist. (Abdul Jamil, 2000, 164)

The entitlement of women under Islam’s inheritance system is however not the same as that of the men, although both have the same right to become legitimate heirs. The unequal share of distribution between man and woman is basically attributable to the differences in the role and responsibility, known generally with the principle of ‘balanced equitability,” although some people would argue that such an idea is no longer relevant. This ideal teaches us that there had to be balance between rights and obligations, between the right that a person is entitled to and the obligations that he must serve. Thus, as to between men and women, the amount of their respective rights is balanced with the amount of their respective obligations. A man for instance has such amount of right, which is fairly balanced with the obligations he has to bear within the family and the general public. Thus, the share to which an heir is entitled has been fairly balanced with the duty he or she has to fulfill in the family (M Daud Ali, 1993:128)
In the case of Indonesia, there is this Presidential Instruction No. 1 of 1991 which calls of the Compilation Of Islamic Laws as a guide in resolving issues on Marriages, Inheritance and Wakaf (Islamic endowment) before the Religious Court. Then, as of then, the Compilation Of Islamic Laws has, within the wider legal system prevailing in Indonesia, become one of the sources of law for Muslims in Indonesia. Thus, in this treatise, the ideas of the Compilation Of Islamic Laws regarding women inheritance are also described.

The Compilation Of Islamic Laws, under the Presidential Instruction No. 1 of 1991, is the results of works of reasoning (the *ijtihad*) of groups of Indonesia’s intellectuals, which were the laid down in three volumes, namely: Volume I on Marriage Law; Book II on Inheritance and Book III on Wakaf.

The distributions of estate, as per Article 176 – Article 191 of the Compilation Of Islamic Laws, is basically the same as that revealed in the Qur’an’s Chapter “Women” verses 7, 11, 12 and 176 and the guidance in the Traditions of Prophet Muhammad (pbuh). Thus, a woman has the right to be heirs like the men, uncles and grandparents. Included under the term ‘woman’ are: mother, daughter, female siblings and grandmother. In the paragraph b it says that marital relations include: widow or widower.
Article 174, paragraph (1) of the Compilation Of Islamic Laws fails to mention grand children, be it male or female. However, references to children both male and female and the children’s children and so forth should have represented it. This idea is expressed in Article 158 paragraph (1) to the effect that “an heir who dies prior to the death of the principal will be substituted by his children, unless otherwise they are qualified under Article 173.” This Article 185 simply explains that in Article 174. The term grandchildren as contemplated in Article 185 does not differentiate between male and female grandchildren, nor it points to which line they came from, the male’s line or the female’s line.

The wordings of Articles 174 and 185 above simply illustrate that the Compilation Of Islamic Laws does not recognize the term ashabah or the male line from the male, which would otherwise eliminate the right of the women (as per that of Sunni / Ahlussunnah wal jama’ah).

One thing that we need to know about the Compilation Of Islamic Laws is that it mentions the distributions of an estate based on the agreement among the legitimate heirs, as per Article 183, to the effect that heirs may deliberate and agree on a scheme for the distribution of an estate, after each has understood of his share. The provision in this Article simply provides room for the survivors of the deceased for them to be generous to other survivors. Provided however that he shall first know
of his share under Islam and only after that can he surrender portion of his share to be distributed to others as mutually agreed.

From above illustration, we may sum up that Indonesia's Muslim intellectuals, through the Compilation Of Islamic Laws, have been able to achieve some compromise between the Islamic teachings as evident in the Qur'an and in the Hadist, with such circumstances which are prevailing in Indonesia, such that its Articles demonstrate some flexes in the implementation of the Sharia, and even it accommodates some element of the customary (Adat) ideas, such as the marital properties of the married couple.

Revision to the Compilation Of Islamic Laws which basically try to make it more accommodative to the universal principles of Islam and civil society, such as equality, universal brotherhood, justice, pluralism, gender equality, human rights and democracy in October 2004 had given rise to controversy, as Muslim clerics criticized the new provisions as contrary to the tenets of Islam.

These facts demonstrate that there have truly been efforts to accommodate the principle of gender equality in the laws governing marriages and inheritance in Indonesia, although the outcome has not been optimum, partly because many of members of the society as well as those who sit in parliament buildings, regulators in
Indonesia, have not quite grabbed the concept of gender equality.

3. **Woman Inheritance under the Western Civil Code (the Indonesian Civil Code)**

The Indonesian Civil Code contains provisions on inheritance, which were initially made to apply to European descendants. Under this system, both male and female heirs receive equal amount of the distributions, and there is a legitimate portion (*legitime portie* in Dutch) which is allotted to the deceased's survivors which are composed of the children and the wife / husband whom lives the longest and their descents both upward and downward. In addition, an estate may be distributed to individuals from time to time deemed necessary. One may be quick to agree that this system is most fair because each of the survivors, be it male or female, receive the same amount of distribution from an estate, regardless of the circumstances of any individual heir. Thus, so long as there is no unified law on inheritance, Indonesians are free to choose this Western Civil Code to govern the distribution of their estate to the deceased's survivors.

4. **Conclusion**

In consideration of the above, we may draw up the following summary:

1) Indonesia's laws on inheritance are still pluralistic, for the following reasons:
a. The society are still practicing the customary (Adat) inheritance system, the Islamic inheritance system and the Western-Style Civil Code. This situation is the result of the policy then Adopted by the Dutch colonial rulers in addition to the fact that Indonesians came in various sub-nations and tribes and the fact that they are predominantly Muslims.

b. The customary (Adat) inheritance system in Indonesia is very complex one such that it is difficult to form a uniform code, knowing that the people Adat the various kinship systems: the Patrimonial, Matrimonial and parental/bilateral systems; its marriage system is honest one, *semendo* and free to choose from; and that its inheritance systems comprise the collective, primogeniture (*mayorat*) and individual systems, because of which no uniformed system can be achieved.

c. In addition, Islam's inheritance system, which has become a substantive law in Indonesia, is basically based on God's revelation in the Qur'an, the *Hadist* and the *Ijtihad* (works of reasoning of intellectuals). As to the teachings of the Qur'an and *Hadist*, Muslims are not to question them since they were revealed by God or otherwise directed by the Prophet not to mention that the teachings are *qathi/verbatim* of which there is no room for arguing. The mathematical calculations of the distributions of
an estate are in fact stated by God in the Qur’an and by the Prophet in Hadist. Muslims are not to question them, but to implement them.

However, in the case of Indonesia, we have had the Compilation Of Islamic Laws, which resulted from the works of reasoning of Indonesian intellectuals, which governs marriage, inheritance and wakaf (Islamic endowment) of Muslims with some adjustments to the circumstances of the Indonesian Muslims. Currently, the Compilation Of Islamic Laws has served as a guide for the judges of the Islamic courts in Indonesia. Thus, the provisions of the Compilation Of Islamic Laws provide more choices in addition to the Qur’an and the Hadist for the Muslims of Indonesia.

d. The inheritance principles offered by the Western Civil Code have been the choice of law particularly for non-Muslim Indonesians.

e. Some comparisons relating to these three systems on inheritance can be described in below table:

<table>
<thead>
<tr>
<th>Inheritance Under the Customary Law</th>
<th>Inheritance Under the Islamic Law</th>
<th>Inheritance Under the Western Style Civil Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Inheritance is on equality of right, onul coexistence, considering any privileges of each</td>
<td>-Inheritance is based on the divine directions given by the verses of the Qur’an and the</td>
<td>Inheritance is conducted in accordance with the provisions in the Civil Code.</td>
</tr>
<tr>
<td>Rightful Inheritors.</td>
<td>Hadist.</td>
<td></td>
</tr>
<tr>
<td>---------------------</td>
<td>------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>2. No such term as</td>
<td>- As regards 'legitimate party', Islam provides that a will shall not</td>
<td>- The term 'legitimate party' is recognized, as per 'Wettelijk erfdeel/legiteme portie,' as in Articles 913-929.</td>
</tr>
<tr>
<td>'legitimate party'</td>
<td>exceed 1/3 of the total estate, so as to protect inheritors' rights.</td>
<td></td>
</tr>
<tr>
<td>is recognized</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. It is not</td>
<td>- Inheritance is an individual right (one essential tenets in the</td>
<td>- Inheritance is an absolute right, such that a legitimate inheritor may from time to time demand distribution of the estate, as per Article 1066 of the Indonesian Civil Code.</td>
</tr>
<tr>
<td>compulsory that</td>
<td>Sharia regarding inheritance)</td>
<td></td>
</tr>
<tr>
<td>estates shall be</td>
<td></td>
<td></td>
</tr>
<tr>
<td>distributed among</td>
<td></td>
<td></td>
</tr>
<tr>
<td>all the inheritors.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Estate may</td>
<td>- Estate must be distributed entirely and at once after</td>
<td>- Estate may be distributed any time.</td>
</tr>
<tr>
<td>remain not</td>
<td></td>
<td></td>
</tr>
<tr>
<td>distributed for a</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Long period of time / or only parts are distributed.</td>
<td>Offsetting the debts of the principal.</td>
<td>5. Estate may not be one unified object; but to consider the characteristics / category, origins of an asset, because there is this recognized term of marital properties to which the husband/wife whom lived longest is entitled.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>6. Estate to be distributed is not always clean</td>
<td>-Estate to be distributed must be free from all debts or encumbrances.</td>
<td>7. An Adopted child inherits the estate of his</td>
</tr>
</tbody>
</table>

*Woman Inheritance..... (Wahyuni Retnowulanidari)*
<table>
<thead>
<tr>
<th>Adopted parents.</th>
<th>parents not from his Adopted parents. However, under the KHI, Adopted children are entitled to a distribution based on a will, a.k.a. ‘Wasiat Wajibah.’</th>
<th>right of an Adopted child; as for oriental (Chinese) community, to follow their customs (pursuant to provisions of the Indonesian Civil Code on Adation).</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. There is a recognized term of “substitute inheritor.”</td>
<td>-There is a recognized term of “substitute inheritor” / known as Mawali.</td>
<td>-There is this parallel term: plaatsvervulling.</td>
</tr>
<tr>
<td>9. Daughters without male siblings may eliminate the right of other parties such as grand parents &amp; siblings of parents.</td>
<td>-In Islam, a female inheritor can never eliminate the right of other inheritors; and in the absence of a male inheritor, her share is ½ of the estate.</td>
<td>-The shares of male and female inheritors are equal; and so long as there is a male inheritor, the rights of others are eliminated.</td>
</tr>
</tbody>
</table>
10. If a dispute arises, the matter is to be brought before the elders which will decide based on: amicable deliberation and equality of right, fear of God and self control, deliberation, justice and love.

- Disputes are to be resolved before the Sharia Court, pursuant to the KHI.
- Disputes are to be resolved before the relevant District Court, pursuant to the Indonesian Civil Code.

2) Gender Perspective of the Three inheritance systems practiced in Indonesia is as follows:

   a. **The customary (Adat) inheritance system** is still biased toward women because under the Patrimonial system, women are not entitled to distributions of the estate; while on the other hand, under the Matrimonial kinship system, legacies are not to be passed to males. Meanwhile, under the parental/bilateral system, which is much influenced by Sharia, there is no equality of shares between that of the males and that of the females.

   b. **Islam’s inheritance system** basically protects the rights of women as heirs, because persons whom are entitled to distributions are not only from
the male's line but also persons from female's line. The difference in the amount of share of distributions between that allotted to male and that allotted to female is attributable to the difference of role and responsibility among genders. However, the general public is quick to agree that fairness means equality of distributions of the estate such that Islamic inheritance system will always be viewed as biased against women, knowing that the Qur'an and the Hadist have stated qathi/verbatim the share which is to be allotted to male and the lesser share to the females.

c. The principles of the Compilation Of Islamic Laws (KHI) regarding women in inheritance are basically similar to that of the Sharia. In fact, the Compilation Of Islamic Laws expressly recognizes a substitute to an heir, such that sons do not eliminate the right of a female grand child of a son or of a daughter. In addition, the Compilation Of Islamic Laws also provides rooms for the distribution of an estate based on an agreed scheme but provided that each of them has known of their actual share under Sharia. Thus, in spite of the fact that the Compilation Of Islamic Laws is in line with the Sharia principle in the distribution of estate between males and females, which is viewed by some as sign of injustice (gender biased), but this product of
Indonesia’s Muslim intellectuals has provided rooms for agreeing on other scheme provided that each of them has known of their actual share under Sharia. Thus, the Compilation Of Islamic Laws is more flexible on inheritance because it permits the distribution of equal share to both male and female heirs provided that all parties agree this to and that each of them has known of their actual share under Sharia.

d. The Civil Code’s provisions on inheritance are considered not biased on gender, because the share of a male survivor is the same as that of female survivor and in fact an wedlock children have the right to distributions regardless of their gender. This equitability of right also applies to substitute heirs down the line.

III. Recommendations

In order to realize a unified system of law on inheritance in Indonesia, which is not biased toward gender, we need to see some change of visions among Indonesians as regards the true essence of gender itself so as to prevent misunderstanding. Because in fact, many of us, from the remotest corners of Indonesia up to those whom sit in the Parliament buildings have no sufficient understanding as to the true meaning of gender equality. This situation presents one huge obstacle in the efforts of achieving the above, de jure and, not to mention, de facto. Therefore, I am of the opinion that first
of all we need to renew our visions regarding this matter and this shall be done gradually and continuously, i.e. by formally including this matter in the school curriculum from elementary level up to colleges and universities, as well as informally through public-service advertorials in medias on matters of gender education in families. These should be implemented as early as possible.

With such renewed visions, we would be able to conceive a unified system on inheritance, which is not biased toward gender. This is nothing impossible nor is it easy to implement. In fact similar efforts have been made such as in the drafting of a compendium of Islamic laws which is more accommodating to gender equality. Moreover, there are jurisprudences of the Supreme Court on customary (Adat) inheritance system which have developed toward equality of distributions of estate to both male and female heirs.

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