



## Review Article

# The Contact Point of Customary Law and Islamic Law (Legal History Perspective)

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### Abstract

The period before various legal traditions encounter to Indonesia, the people living in these islands has owned rules that contain the value of values as the original law. The term of original law is also known as the name of "chthonic" law, and is used as the customary law of the community of Indonesia, or the archipelago known at that time. The customary law tradition is very different from other legal traditions; this system has a special character that is very different from the character of other legal traditions. Furthermore, around the seventh century of AD, the influence of religion encounter as well; the first is Hinduism, then the religion of Islam brought by traders from Arabia and India. The term known as custom, with its unwritten form and religious element as the definition proposed by Soepomo (1996), is indeed identical with the term given by experts in the colonial period such as: "*Godsdientige Wetten, Volks instelingen En Gebruiken*" (Regulation of Religious Ordinance, People's Institution and Customs), "*Godsdientige Wetten, Instelingen En Gebruiken* (Religious Regulations, Institutions, and Customs), *Met Hunne Godsdiensten en Gewoonten Samenhangen de Rechts Regelen*" (Rules of law relating to Religion and religion customs habits), in addition there are also called the Islamic Law or Mohameden Law. It shows that at that time Customary Law is equalized as religious law. The point of contact between the two can also be identified from the theories that develop at that time as in the theory of *Receptio in Complexu* (Salmon Keyzer and van Den Berg); *Receptie Theory* (Scouck Hurgronye); *Theory of Receptio a Contrario* (Ha zairin). The relationship between customary law and Islamic law is widely found in the field of family law that is the issue of marriage law and inheritance law. After Independence, legislation products related to Islamic law include Law no 1 of 1974, Law no 50 of 2009, Law no 21 of 2008 regarding Islamic Banking.

**Keywords:** correlation; customary law; Islamic law.

### Introduction

The civil law prevailing in Indonesia until nowadays is still pluralistic, as related to inheritance law, there are customary inheritance law, inheritance law of Islam, and inheritance law according to *Burgerlijk Wetboek* provisions. This condition occurs as a result of the politics of colonial law which creates provisions on the division of the pre-

populated groups in which each has and is subject to different legal systems. Besides, it is also because the diversity of indigenous peoples with their own customary law that has an influence on the creation of legal pluralism in Indonesia. The situation of community with diverse culture makes the plurality of laws is a necessity (von Benda-Beckmann, 2005). On the other hand, however, the

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political commitment to unite the diverse society into a nation-state bond demands a national legal system.

Regarding to the pluralistic of the Indonesian society, Nasikun states as follows:

*Differences of ethnics, differences in religion, customs, and regionalism are often referred to as the characteristics of a pliable Indonesian society, a term originally introduced by Furnivall to describe Indonesian society during the Indies era. Indonesian society, during the Dutch East Indies, according to Furnivall, is a plural society, a society consisting of two or more elements of their own life without any intermingling of one another in a political unity (Muderana, 1982).*

Related to the plurality of customs and religions prevailing in Indonesia, there is a point of both as inheritance law that "Muslims in Java who adopt a parental or bilateral familial system may choose Islamic law or customary law in the distribution of inheritance". In the implementation of inheritance divisions, it is often to find the case that the heirs agree to divide under Islamic Law, but so too often choose Customary Law. In case of disagreement, then the division is not based on Islamic Law, but on customary law inheritance.

Conceptually, in respect of which law applies, customary law or Islamic law, the theory of reception in Complexu provides the following solution. The theory expressed previously by van den Berg states the basis of the enforcement of Islamic law that as long as not otherwise can be proven, according to this doctrine, the indigenous law follows their religion, because if they embrace religion, they must also follow the religious law faithfully. In relation to that, Ali Affandi states that the basis of the enforcement of Islamic law according to the prevailing ideology is that the religious law can apply only if it is accepted by customary law. If it has been admitted to the Customary Law, the religious law is considered as part of the customary law (Artadi, 1987). Before the existence of the Religious Affairs Law (Law no 7 of 1989 jo Law no 3 of 2006 jo Law no 50 of 2009) formerly in Java and Madura, if there are Muslims who intend to settle the case of inheritance, Religious court only gives *fatwa* (decision) for those who have made the choice of the law which is Islamic Law. It creates an awkwardness and it is more strange to the parties, because the party who determines the choice of Islamic law in the case of the inheritance and has received the Religious Court decision, then because of something, there is a party who is not satisfied, then they filed the case of the inheritance to the District Court, then the District Court settles it under customary law (Pohan, 1988). The basis of the provision is the provision of Article 4 paragraph 1 of Government Regulation number 45 of 1957 which states that Religious

Court has the legal competence of inherited case. On the other hand, the District Court has a comet on the basis of Jurisprudence, among others, states that throughout Indonesia, the District Court has the authority to decide the civil cases concerning the inheritance both regarding the petition to be determined by the heirs and the petition to be assigned as the part of the heirs to the inheritance.

Regarding to Customary Law, Boedi Harsono states that customary law is the part of Indonesia's positive law, namely the law that lives in the form of written (unstatutory law) (Sudiyat, 1983). Furthermore, it is stated that customary law in its development and growth also include elements of foreign elements to meet the needs of today's society in the relationship of the Indonesian nation with the outside world. Customary law has the nature of society which is based on balance and covers the religious atmosphere.

In connection with the notion of Customary Law as a living law, Satjipto Raharjo puts it as follows:

*There is a definition of "living law" with "law in action". Both reject the concept that the law is as it is pronounced in the rules of the law. However, the term "law n action" still stems from the pronounciation of the regulation, only to be seen further how it is in fact with the pronounciation. Whereas as shown by "living law" departs from a wider social life phenomenon than that (Sudiyat, 1983).*

Furthermore, the definition of customary law has the formulation as contained in the Seminar on Customary Law in the National Legal Development in 1975 as the original Indonesian law which is not written in the form of legislation of the Republic of Indonesia, where it has elements of religion (Artadi, 1987).

The formulation implies that as the constituent elements of Customary Law besides habit, it also has elements of religion. Islamic law is applied to the Indonesian people who are Muslim because of the position of Islamic law itself. The provisions of the 1945 Constitution of the Republic of Indonesia have confirmed its affirmation. The third paragraph of the Preamble to the 1945 Constitution states that Indonesia's independence on the blessing of Allah Almighty. In addition, in the first principle of *Pancasila (Five Principles)* listed in the Preamble of the 1945 Constitution and in Article 29 of the 1945 Constitution of the Republic of Indonesia explains the position of religion for its adherents.

Article 29 of the 1945 Constitution of the Republic of Indonesia in paragraph (2) stipulates that "the State guarantees the freedom of each individual to embrace his or her own religion and to worship according to his religion and belief". In the history of legal development in

Indonesia, the position of Islamic law as a law that stands on its own strength has never been in reality for a long time. It is known that since the establishment of Islamic kingdom in some areas of the country and the region of its followers, the Islamic family law according to the level of understanding of the time has been applied. Moreover, in the beginning of the Dutch colonial era, the thing that emphasizes the control of trade and sources of spice material is the VOC era of Islamic family law in the form that has been there and formulated. Even, such things continue into the time of the invaders of trade transformed into colonial government as a whole.

At that time, Islamic law went with a firm stipulation and enactment with the old provisions. Clear religious provisions were formulated with the title of religious or Islamic law, while the old provisions are mentioned with the habit (Thalib, 1982). Both are declared applicable by law and regulation and poured into the Law around 1850 with codification in the Dutch East Indies by the invaders.

Then, it comes the judgment on the policy makers of the colonial government that the power of the Indonesian rebellion struggle was spearheaded by religious beliefs against Almighty Allah who joined the spirit of freedom of lofty desire for a fundamental free life in the soul of the Indonesian nation. Such judgments make it the direction of the colonist to learn more about such circumstances and gradually find a way to weaken them. The undertaking is by gradually removing the basic principles of the implementation of Islamic law in Indonesia. Furthermore, the colonizers managed to remove the Islamic Law from the legal environment of the Dutch East Indies by leaning it on customary law. As a result, something that is detrimental to the nation of Indonesia is with the increase and the existence of religious law contradictions with customs. In this connection, the government of the invaders succeeded in reducing their position which is directly opposed to religious activities and views and has even been reinforced by customs or customary law.

### **The Influence of Religious Law Values on Customary Law**

In order to provide a basic understanding of Customary Law, it must understand the term Customary Law of the three forms based on juridical techniques, based on legislation, and based on the local area terms (Wulansari, 2010).

- a. According to juridical technical, customary law is a translation of Adatrecht as proposed by Snock Hurgronye in the deacon de Atjehers in 1893. He defines customary law as "*Adats die recht gevolgen hebben*", which is customary law as custom which has legal effect.
- b. According to Legislation, there are some rules in it which are as follows:

- 1) Article 11 AB: In the AB (*Algemene Bepalingen van Wetgeving / General Provisions of the Legislation*) it is used the term "*Godsdientige Wetten, Volks instellingen En Gebruiken*" (Religious Regulations, People's Institutions, and Customs)
- 2) Article 75 (3) RR: In the *Regerings Reglement of 1854*, the term "*Godsdientige Wetten, Instellingen En Gebruiken*" (Religious Regulations, Institutions, and Customary Habits)
- 3) Article 128 (4) IS: In the *Indische Staatsregeling* (Dutch Legal Regulations such as the Constitution of the Dutch Indies Government) the term "*Instellingen des Volks*" (People's Institutions)
- 4) Article 78 (2) RR: in this RR, the term "*Godsdientige Wetten en Oude Herkomsten*" (Regulation of Religious Ordinance and Habits of Old or Old Habits is used.
- 5) Article 131 Paragraph (2) sub b IS, the term "*Met Hunne Godsdiensten en Gewoonten Samenhangen de Rechts Regelen*" is used which means Rule of Law relating to Religions and their Habits)
- 6) Stb 1929 no 221 juncto 487 and its development accordingly Article 134 (2) IS: the term *Adat Recht* is used.

#### c. According to Local Regions:

- 1) It only uses Custom to call as Customary Law, whereas the term of custom comes from the Arabic language meaning Habit
- 2) In Gayo, it is known as *Odot (Eudeut)*
- 3) In Central Java and East Java, it is known as *Adat or Ngadat*
- 4) In Minangkabau, it is known as *Lambago* or Institution Custom.
- 5) In Minahasa-Maluku, the term "Habitual Custom" is used
- 6) In Batak (Karo), the term *Basa* (Talk) is used.

Therefore, it appears that before known by the term of customary law as it is now, it is previously known as *Adat Recht*, in the legislation of the Dutch East Indies government with the designation of the Religious Law, People's Institution and also Habits. The term *Adat Recht* itself was only officially used in 1920 for the first time used in the Dutch Law on Higher Education in the Netherlands in Stb 1920 number 105 and in *Academisch Statuut*. Furthermore, based on Stb 1929 number 221 juncto number 487, the term of *Adat recht* among western experts is mentioned by various terms which are as follows:

- a. Nederburg with the term *Wetten Adat*,
- b. Juynboll with the term *Handleiding tot de Kennis van de Mohammedansche wet*
- c. Scheuer uses the term *Het personenrechts voor de inlanders op de Java an Madura* (Setiady, 2008).

It has been proven that in the colonial period, the customary law is already described as a religious law. It indicates the existence of indigenous relations and traditions of other laws. The nature of customary law as a law that is not immune from all forms of change and development of members due to positive attitudes to other legal traditions that arise in society. As in the traditional legal tradition (chthonic) in general, customary law is essentially an open tradition, allowing for the exchange between customary law and other laws. It is particularly evident in the relationship between customary law and Islamic law. Since the arrival of Islam into Indonesia, the relationship between customary law and Islamic law is seen as a means of perfection of the custom itself. In subsequent developments, religious law is seen as part of customary law (Lukito, 2008).

Harmony in the context of justice in general becomes the main objective of both customary law and religious law. As it is known that the first time Islam encountered into Indonesia is not a teaching that *vacuum cultural* because previously Indonesia already has its own culture and civilization. The teachings that are first introduced to the community highlighted the aspect of Sufism or mysticism, not the legal aspect. It is precisely that which seems to support the spread of Islam to the Indonesian people who are previously influenced by the mystical of Hindu and Buddhist. Thus, the newly known teachings of Islam at that time seem to be in harmony with the growing tradition in the midst of society.

The first teachings of Sufism introduced can lead to peace because Sufism embraces the value of humanism. Sumitro (2015) citing the opinion of Prof. S.Fatemi the Islamic historian states as follows:

*"One of the greatest contributions of the muslim thinkers to humanity was the idea of Sufism. Sufism was the antithesis of the arrogance, intolerance, demagogism, by procrisis, and corruption of the medieval society."*

(Which means that Sufism is one of the most valuable contributions of the minds of Islamic thinkers to humanism ... Sufism is the antithesis of the spirit of arrogance, the corrupt soul of the Middle Ages) (Sumitro, 2015), this goal can be achieved by providing a place for various legal traditions, both within and outside the community itself, to coexist harmoniously and this is what makes customary attitudes when confronted with religious law. The reflection of the nature of the relationship of these two traditions as seen in Minangkabau society, that is, the society maintains the value of their religious values while at the same time adheres to customary law. The reflection of it is proven from their belief that *Adat Basandi Syarak, Syarak basandi Kitabullah* or *Law-based custom, Kitabu'llah-based law*; it is also mentioned as *Kuat adat, ta'gadoh hukum, Kuat*

*hukum, ta'gadoh adat*. In such cases, the natives tend to view customs and religious laws as traditions derived from the same root so that both have the same mission of introducing the value of goodness and eradicating badness; although the two legal traditions have some differences in aspects of substantive aspects but both have values of equal importance in society.

In general, the relationship between the two legal traditions can be traced from the legal history of the influence of value or religious law on customary law. From legal history, it can be seen that the customary law system is the oldest legal system in Indonesian society. This legal system comes together with the belief system of society, religion, and plays a very significant role in social control. The history of customary law has been formed since pre-Hindu era in the Malaio Polynesian (Malay Polynesian) era. At this time, the public is more controlled by mystical objects, which is then interpreted as the religious magical nature, as evidenced by the painting on the walls of the cave. It shows the pattern of public confidence in the object being painted. The undeveloped religious thoughts in the pre-hindu because the community to seek its own value through objects that can be concrete objects, such as the characterization of spirits from the unseen nature through symbols of animals.

It is considered that the peak of the influence of Hinduism in the Customary Law is in the Majapahit kingdom when ruled by Hayam Wuruk (Hadikusuma, 1978). At this time, there has been a modern regulation called *Adigama* (some referring to the religious code). Regarding this book, Adigama Djokosoetono argues that Majapahit religious law is a book of legislation modern which can be used as the foundation of national law. Apart from the book of religious legislation, the Hindu system still plays an important role in some areas, especially in Bali, and even grows the notion that people who are not followers of Hinduism are still referred to as migrants even though they have long lived in the area (Budiwati, 1992). The period of Hindu gradual declines continuously because it is triggered by the coming of Islam into the Java region.

Based on historical speculation, Islam has been believed to enter Indonesia around the VII century AD brought by Arab and Indian traders. At that time, Islam has not been influential in customary law because there has been a belief system of the established society that is Hindu religion, and new looks its influence on a century XII, as an alternative system of problem solving in daily social relations.

As it is known that Indonesia is not a religious country, but as a country that has the largest Muslim followers in the world. Therefore, many customary law materials are influenced by Islamic law. Islam is able to influence the customary law's configuration for two reasons:

- a. Islam encounters through the coastal areas of Sumatra which is a strategic place to touch the traditions of the world's great traditions. That is why coastal communities tend to fuse in every social tradition that develops in the region so as not to make it difficult for preachers to spread their religion. The preachers are able to eliminate the social stratification that has encircled society during the entry into force of the Hindu system.
- b. Islam is able to accommodate all other belief systems that develop in coastal communities. This is because the mission carrier of Islam is first performed by the missionaries of Islam by mystical *sufi* who many agree on the coherence between Islamic orthodoxy and other belief systems (Soemadiningrat, 2002).

With these two factors, in the twentieth century, two kingdoms in Aceh namely Perlak (*Peureulak*) and Pasai were established. Originally, these two kingdoms apply the system of Islamic rule according to the Arabic tradition of *Quraish* and then after being integrated into the territory of the kingdom of Aceh Darussalam, it actually has run the system of Islamic government. Furthermore, Islam began to spread to other areas such as in Java which gradually urges the existence of Hinduism.

The kingdom of Aceh Darussalam with the system of Islamic government really shows the point of tangency between the value of Islamic values and the Customary Law System. It because at that time form of the smallest form of territory ie *Gdeong* (village consisting of several houses and each has a place of worship known as *Meunasah*) has been known, headed by a *Keucik* or *Geucik* assisted by spiritual advisors (*Qadhi*), *Teungku Meunasah* and elders of Kampong (*Ureung Tuha*). The Gampog community is known as *Mukim* and is headed by a *Imeum Mukim* who served as the ritual leader (*Imam*) in the mosque. The unity of the mukim is the *Nanggroe (country)* headed by *Ullebalang*. If the influence of Islam in the case of the government system occurra during the Kingdom of Aceh Darussalam, then in the case of daily handling, it occurs during the Iskandar Muda period.

Unlike Aceh, the influence of Islam in Java tends to lead to activities related to social action. It happens because the way of spread of Islam in Java using cultural methods and not through government systems such as in Aceh. With such a cultural approach through the act of communicative action, the melting of the preachers in the internal activities of society occurs so that Islamic preachers do not have difficulty communicating with the community. Another thing that facilitates the communication of the Islamic preachers with the community in spreading Islam through the guardians and known with the *walisongo* in which all is *Sunan* titled. The *Sunan* impose Islamic law in daily social

relations, as in trade follow the pattern by the Prophet Muhammad SAW. However, there is also a model spread using a mystical approach, namely the spread of religion through the deeds that are originally considered taboo in the Islamic tradition. The spread of such a way is ultimately internalized in the life of society and gives rise to what is called *Syncretism* or *Abangan Islam*.

Based on the history of the point of contact between customary law and Islamic law, Soepomo (1996), a leader of customary law states that customary law comprises mostly customary law and a small part of Islamic law, including law based on judge decision which contains principle of law principle in the environment in which he decided the case (Soepomo, 1996). Furthermore, the form of point of contact between customary law and Islamic law which got the biggest influence is in the Law of Marriage. It is because of the way the spread of Islam is done through marriage institutions.

Scientifically, the discussion about the point of contact between customary law and Islamic law is supported by the theory of underlying theory. Among the theories of proficiency explain the virtue of customary law over Islam but also on the contrary, some of them show that Islamic law is more important than customary law. Here are the theories of intersection between the two legal systems.

#### ***Theory of Receptio in Complexu***

The theory introduced by CF Winter san Salomom Keyzer circa 1823 -1868 then followed by LWCvan den Berg in 1845-1927 which was an advisor for the language of Eastern language and Islamic Law in Indonesia between the years 1878 - 1887 . This theory suggests that Muslims in Java have accepted the introduction of Islamic law in an integral way that is binding on the people concerned. It can also be mentioned that Islamic law binds a native Muslim. As long as it is not proven otherwise, the law is applicable to the *Bumi Putera* group is not formed by the original law (*inheem volksrecht*). This theory is stated also in article 75 paragraph (3) RR, meaning the colonial government adopts this theory because it is considered as a theory that shows a major influence on the colonial government.

Article 75 (3) The RR determines the following:

Except for those who have declared their entry into force (*toepasselijk verklaring*) or in the case of a native Indonesia and a Foreign Orient have voluntarily submitted (*virtueel*) to European civil law, by judges for indigenous people, the use of religious law, institutional institutions and customs (*godsdientiege wetten, volksinstellingen en gebruiken*) indigenous groups, to the extent not inconsistent with the generally recognized principles of propriety and justice (*bilijkheid en rechvaardigheid*) (Soemadiningrat, 2002).

The thing that can be explained is that customary law has shifted its position and prioritizes the validity of religious

law. However, this statement has been criticized by Piepers as the basis for the implementation of the law to Indonesians or indigenous people is custom (*gronndtoon van het recht is de adat*), a form of Islamic law as long as it has been perceived, is an exception.

### **Theory of Receptie**

The theory proposed by Snouck Hurgronje which van Vollenhoven then followed is a theory that criticizes *reception in complexu*. This *receptie* theory prioritizes customary law because in essence it is mentioned that the law that lives and applies to the people of Indonesia apart from the religion that they believe in is Customary Law. While Islamic law perverts into and applies as long as desired by customary law. In more explicit explanation, it is stated that between the two, according to this theory, are as two different entities, but also facing each other meaning that between customary law and Islamic law, sometimes conflict occurs except for Islamic law that has been perceived into customary law.

Criticism of the reception in complex theory has succeeded in making a strict statement that the law applicable to indigenous groups is customary law (set out in article 131 IS and article 134 IS).

Strict provisions indicate the relevance of customary law and Islamic law as contained in article 134 paragraph (2) IS which provides for civil disputes that may arise between Muslims, and if their customary law also requires its settlement, the settlement of the dispute shall be held by the judge religion, as long as the regulation does not specify otherwise. Theory of Receptie is continued by Ter Haar by proposing the following recommendations:

- The Law of Inheritance of Islam has not been fully accepted by the people, so the law of inheritance of Islam cannot be used as the legal basis in its implementation;
- The absolute revocation of the authority of *Raad* Religion, in adjudicating cases related to inheritance law, is transferred to *Landraad*;
- The bureaucratic structure of *Raad* Religion is subordinated or under the supervision of *Landraad*
- The verdict issued by *Raad* Religion should get the first executive *verklaring* from the head of the *landraad* so that the verdict can be executed (Soemadiningrat, 2002).

### **Theory of Receptio a Contrario**

Hazairin is the figure of this theory that the new customary law applies as long as it is not contrary to Islamic law. It is inferred from his criticism of the *receptie* theory which states that this theory is the work of anti-Islam, the Dutch government's creation theory to hamper the progress of Islam in Indonesia. The next statement is that Customary Law cannot be confused with Islamic Law so that both must

be separated. Customary law arises solely from the interests of community life and is exercised on the adherence of the members of that society and if any disputes are exercised by the custom authorities as rulers and judges at the district court. Whereas if a dispute within the Islamic legal system is settled in a better religious court if it is under the supervision of the Supreme Court without any interference by the state court in the execution of the verdict of the religious court.

### **Theory of Syncretism**

The arrival of Islam to Indonesia has an effect on the development of customary law because of the accommodative nature of Islam towards other system systems outside the religious domain. The essence of this theory is that the value of Islamic values that enter not only the eyes of the pure teachings but has received a modification of other factors that are Hindu mysticism. The theorist of this theory is MB Hooker, as a customary law expert; he is more concerned with the concept of custom system developed from the conceptualization of Dutch scholars, in which in defining customary law, it is emphasized on *kinship relations* and territorial factor. In addition, it is stated that the law as a distinctive view that lives in society is conceptualized according to the common idea that the customary law is normative, contains the obligation articulated from the society based on the value of the widely accepted values. The existence of obligations in customary law is distinctive related to the culture of the special cave (particular). It further mentions that between customary law system and Islamic legal system, both have equal force in certain society. It is exemplified in the law of inheritance law in Minangkabau, for the division of inheritance treasures apply to customary law while for livelihood (*suarang property*) apply Islamic law which is the part of male inheritance is two parts of women.

### **Theory of Penetration Pasifique, Tolerante et Konstruktive**

Related to the relationship between customary law and Islamic law, according to this theory, it is that the influence of Islam seen in his life as a certain belief and embodied in Islam based on the culture of Indonesian society, so known as Indonesian Islam. Hence, this theory is more to the discussion of cultural anthropology because Islam enters into Indonesia peacefully (pasifique), tolerant, and constructive, and rooted in the awareness of the Indonesian.

### **Pattern of Law under the 1945 Constitution of the State of the Republic of Indonesia**

The law is always evolving along with the development of people's lives, including the Indonesian Law. Indonesia is a legal state; it is the explanation of the 1945 Constitution. If it is related to the Elucidation of article 29 (1) of the 1945 Constitution which stipulates "*the State based on the Almighty God*", then the intended state of law is not like the

concept of a legal state in the West that has alienated religion from the "jurisdiction" (secular) (Yaswiran, 2006). In Indonesia, the problem of law is not only mere human affairs, but also the affairs of God; the concept of a state law that is intended by the 1945 Constitution is a state that is not separate from the religion (Yaswiran, 2006). The laws in force in Indonesia consist of the law of written and not written. The unwritten law is meant to be a law that is not enacted and is not codified by government agencies and is not applicable for the people of Indonesia, each region has different traditions or customs. Noteworthy it is not all that is not written is Customary Law. Yaswiran (2006) mention that it also includes unwritten law because it is not codified and not enacted; the meaning is the convention, jurisprudence, and Islamic Law (Yaswiran, 2006). Since 1991 through the President Instruction, the Compilation of Islamic Law was born, although not as a product of legislation in the form of Law, but since the existence of the President Instruction, it becomes the juridical basis for civil or family law cases of Muslims in Indonesia.

According to Soepomo (1996), Customary Law is a non-statutory law, mostly customary law and a small part is Islamic law. It also explains that customary law also includes a decision of a judge ruling containing the principles of law within the environment in which the judge decides the case. Customary law is deeply entrenched in traditional culture and is a living law because it embodies a real legal feeling of the people which continues to grow and develop like life itself.

It is natural that customary law originating from the custom of this society is then influenced by religious law (Islam) as the religion of the people of Indonesia. Furthermore, Wignjodipoero (1994) argues that customary law is dynamic, easily accepting the influence of other legal systems. The statement is described as follows: that customary law is not a static but dynamic law. Every customary law rule arises, develops and then disappears with the emergence of a new customary law. The new rules will develop, and then disappear with the emergence of new customary laws, in line with the dynamics and changes in the sense of community justice that once gave birth to such a regulation, and so forth (Wignjodipoero, 1994).

It is this rationale that comes to the conclusion as after seeing the reality that occurs in an ever-changing and unavoidable society. The coming of Islamic law to Indonesia strongly plays role in this change. Islamic law in addition to grow peacefully and give awareness to the people to embrace it, it also teaches about sanctions in the afterlife for those who violate and reward for those who obey it.

Analysis of Gibb (1950) stating that, if Muslims have accepted Islam as a religion as well as accepted Islamic law

authority on him. Sociologically, people who have been Muslims also accept Islamic law to obey (Gibb, 1950).

The most prominent legal aspect of the relationship between customary law and Islamic law is within the scope of family law namely marriage and inheritance. On the other hand, the people want to maintain the customary law position but on the other hand the sense of compliance with Islamic law stands out. For example, in heirs in Minangkabau. The Minang people are very strong in holding custom but also are bedient to their religion. On the influence of Islam, the philosophy of custom was born that is *Adat basandi syarak, syarak basandi Kitabullah, Syarak mangato, custom use* (custom to syarak, Kitabullah-based *Syarak*, what set by syarak applied in custom); Matrilineal-like society Minangkabau can accept system influence bilateral parental applied in Islamic law.

If it is analyzed with known and accepted theory such as *receptio in complexu* theory of van den Berg, the question arises is whether or not the Islamic family law is fully applicable to Muslims in Indonesia or whether Islamic law applies only if it is accepted in customary law so that in the end it is no longer based on Islamic law but derived from customary law, as van Vollenhoven and Snouck Hurgronje suggest. The problems related to the law of inheritance to the National Law until now is never finished even though every year seminars or symposium held; therefore it remains pluralistic. The thing that then arises is the problem in practice because the practitioners are faced with the problem of finding the contact point of customary law with Islamic law in the field of inheritance. The facts show that the influence of religion in this case the inheritance law of Islam is still strong in certain legal society (*rechtskring*), so it requires special thinking.

The thought of Indonesian law in law circles is still influenced by the legal mindset that lives and develop abroad, especially the western countries of the Netherlands. In the Netherlands, the mindset of the fact that many of the laws of the past are still being treated, besides the thing that makes the strong influence of our mindset is that the science of law that is preserved is still the law of inheritance from the colonial period. It is time after Indonesia's independence over half a century should be insightful of Indonesian Law on the basis of the 1945 Constitution of the State of the Republic of Indonesia and its explanation.

It is the 1945 Constitution of the Republic of Indonesia as a constitutional basis. The absolute basic element without which our rule of law is impossible. The first category is the Basic Law, *droit constitutionelle* (French term); the second category is the Act as the implementer of the Constitution; while the third category is the unity of the Government as a rule that implements the Act.

Furthermore, in relation to the policy on Customary Law, it can be explained below. Customary Law as a living law used in society and has its own characteristics; during the Dutch East Indies rule the existence of the law is still recognized and applied simultaneously with European law. After independence, especially after the reformation period, the existence of customary law still obtains recognition although there are some that feel the urgency of written law in the form of legislation.

As a sovereign state, it certainly must have a legal system with characteristics of Indonesia which is certainly not the same as other countries. It is because customary law as one of the elements forming a national legal system is a set of values, norms, and sanctions recognized and obeyed by the community concerned. As an example, it can be shown from Minangkabau society. It has its own legal system and principles as well as philosophy. The principle and philosophy embraced by the Minangkabau community is different from the principle and philosophy by other people such as Batak, Aceh or Bali. Customary Law is in line with the passage of time and development that occur in the community.

In the framework of the development of the National Law, it is impossible to avoid the use of conceptual concepts and principles derived from western law that has been generally accepted. Mochtar Kusumaatmadja and B. Arief Sidharta argue that it is done so that this nation is ostracized from the international association with other nations in the world, especially in the field of economy and trade (Sumitro, 2015). However, it must be kept in mind that it must maintain the concept and the principle of traditional law in the field of law closely related to sociocultural life that is still strongly held and used by traditional societies (Sumitro, 2015). Regarding with that, if customary law is willing to be used as a source of law, it must fulfill the following conditions:

- a. Material requirement. The existence of a habit or behavior that is fixed or repeated, which is a series of the same actions, which lasted some time. The existence of a long-lasting action should be shown; there must be what is called *long et inveterate consuetude*.
- b. Intellectual requirement. That habit must give rise to a *necessistasis opinion* (see that it should be so). The habit should be done because of the belief that it is objectively worth doing and in doing so believes in a legal obligation.
- c. The existence of legal consequences where customary law is violated (Mertokusumo, 2000).

It is known that Indonesia is a pluralist country, Fadjar (2004) states that plurality owned by the Indonesian nation is a reality in the Indonesian community that cannot be avoided and denied (Fadjar, 2004). Such a condition is

wisdom and blessing that is owned by the Indonesian nation if it is able to manage in the integration that produces strength. On the contrary, if it is badly managed, it could create disintegration disaster. The prominent characteristic of Indonesian Customary Law is ethical or moral factor covering all aspects of law, both civil and criminal. Here are some examples of the points of customary law in Islam in Banten, Bogor, and East Java:

The case in Banten reveals that they can not separate which Islamic law that is customary law because "*the elders of custom and also the clerics*" declare, this is the customary law and this is Islamic law. Similarly, the cases experienced by indigenous people of Banten and also Bogor, they came to the clergy to ask for clues to solve their problems. Sayuti Thalib mentions this with the *reception a contrario* that the prevailing customary law does not conflict with Islamic law. Another example is the case of inheritance in East Java based on Customary Law is similar to Islamic Law with some variations. Such implementation is justified by Islamic law through legal institutions such as *al-Istihsan* (for maintaining a sense of justice in Indonesia), there is a grant institution after being divided according to the *Syafi'iyah Faraid Law*, institution of *tasaluh* (*al- istislah*) with *mandatory will* (Sumitro, 2015).

The legal issues that arise in relation to the adoption of two legal systems are common in the field of family law that is the problem of marriage and inheritance. Formerly, the base of article 4 paragraph (1) Government Regulation number 45 of 1957 mentions that the Religious Court has competence in the case of inheritance. On the other hand, the District Court has competence on the basis of Jurisprudence; it is mentioned that throughout Indonesia, the District Court has the authority to decide the civil cases concerning the inheritance of the petition to determine who is the heir as well as the petition to assign part of the heirs of the inheritance. The jurisprudence is:

- a. The Decision of the Supreme Court dated 24 September 1960 number 109K / Sip / 1960, throughout Indonesia on inheritance essentially applies customary law, which in the area of influence of strong Islamic religion, contains little element of Islamic law;
- b. The decision of the Supreme Court dated December 13, 1979 number 11 K / AG / 1979, Lawsuit of inheritance containing disputed property excluding the authority of the religious court, but including the authority of the general court.

Furthermore, the followings are identified legislation products of Islamic Law in various fields which are as follows:

- a. Field of Marriage: Law number 1 of 1974



- b. Religious Courts:
  - 1) Through the Law no 14 of 1970
  - 2) Through Law No. 7 of 1989
  - 3) Through Law No. 35 of 1999 on the amendment to Law no 14 of 1970 on the provisions of the Basic Provisions of Judicial Power
  - 4) Through Law No. 4 of 2004 on the provisions of the Basic Provisions of Judicial Power
  - 5) Through Law no 3 of 2006 on the amendment to Law No. 7 of 1989 on Religious Courts
  - 6) Through Law No. 48 of 2009 on Judicial Power
  - 7) Through Law no 50 of 2009 on the second amendment to Law No. 7 of 1989 on Religious Courts
- c. Field of *Hajj*: Law no 17 of 1999 and Law no 13 of 2008
- d. *Zakat* Management Field: Law No. 38 of 1999
- e. *Wakaf*: Law No. 41 of 2004
- f. Field of State *Sharia* Securities: Law no 19 of 2008
- g. *Sharia* Banking: Law No. 21 of 2008

Before the Law on Religious Courts, Law No. 7 of 1989 is established, and subsequently revised by Law no 3 of 2006. It is refined by Law no 50 of 2009 as a positive law; the case of inheritance is the choice of law means that the party has the choice of determining which law that should be used to solve the case. As time passes by, with the formation of Law on Religious Courts Law No. 50 of 2009 on the second amendment of Law No. 7 of 1989 on Religious Courts, procedurally the process of it is clear. For the Moslems, the case of inheritance is based on the competence of the Religious Courts, while except Muslims; the competence is based on the District Court.

## Conclusion

The existence of contact point of customary law and Islamic law is due to the nature of customary law as a non-immune law of all forms of change and development giving effect to positive attitude to other legal traditions that exist in society. Such as in chthonic law tradition in general, customary law is basically an open tradition that allows for the mutual filling of customary law with Islamic law. Since the arrival of Islamic law to Indonesia, the contact point between customary law and Islamic law is seen as a means of perfection of customary law itself. At the time of Islamic law preach with no incessant conflict or opposition between the two, there is even development of Islamic law which is seen as part of customary law, peace, and harmony in the context of justice in general become the main objective of both Islamic law and customary law. Indonesian

community generally sees the customary law and Islamic law complement each other.

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