

Inheritance Law System: Considering the Pluralism of Customary Law in Indonesia

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Abstract

Customary inheritance law in Indonesia consists of unique and specific patterns that describe the values of traditional Indonesian society that are based on collective and communal culture. There are three types of customary inheritance system: patrilineal, matrilineal, and parental. Every system has a uniqueness that makes it different with others. These differences often cause disputes and problems. The problems are related especially to the status of men and women in relation to patriarchal and matriarchal systems. Settlement of inheritance is done through discussion, approval, or legal remedies. Judges' decisions indicate that there is a renewal on the customary inheritance system in which men and women have equal opportunities to become inheritors of their parents.

Keywords: *adat* law, customary inheritance law, inheritance dispute settlement.

Sistem Hukum Waris: Mengenal Pluralisme Hukum Adat di Indonesia

Abstrak

Hukum waris adat di Indonesia terdiri dari pola unik dan spesifik yang menggambarkan nilai-nilai masyarakat tradisional Indonesia berdasarkan budaya kolektif dan komunal. Terdapat tiga macam sistem waris adat: patrilineal, matrilineal, dan parental. Setiap sistem memiliki perbedaan dan seringkali perbedaan tersebut menimbulkan sengketa dan masalah, terutama terkait dengan status laki-laki dan perempuan dalam hubungan sistem patriaki dan matriaki. Penyelesaian sengketa waris dilakukan melalui diskusi, persetujuan, atau upaya hukum. Putusan hakim mengindikasikan terdapat pembaharuan sistem waris adat di mana laki-laki dan perempuan memiliki kesempatan yang sama untuk menjadi ahli waris orang tua mereka.

Kata kunci: *hukum adat, hukum waris adat, penyelesaian sengketa waris.*

A. Introduction

The 1945 Indonesian Constitution asserts that the state recognizes and respects the unity of indigenous and tribal people along with their traditional rights as long as it prevails and are in line with the development of people and the principles of the Republic of Indonesia. This means that the state recognizes and guarantees the rights of the indigenous people and the norms that govern their lives.

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Customary Law, also known as *Adat* Law in Indonesia, has a very important position in regulating the society. Although the Law is not written, it prevails and becomes the foundation in which people consider and determine their actions. *Adat* Law reflects the collective personality of a society. Therefore, it can be a legal reference since it has embodied a real sense of law within respected society. *Adat* Law can lead to legal obligations for indigenous peoples because it has the elements of reality, which is the fact that the society and its members totally conform to; and psychology, which is a strong belief of the people or members of the community that the Law has legal forces.

In globalization era, it is undeniable that changes of law always take place. It includes changes of *Adat* Law, but the changes that occur do not substantially change the values that have been rooted and become the legal compass. However, both indigenous and tribal people have turned into modern society due to constant growth and development of legal norms in the society. People abides to the law not because of coercion, the law is in accordance with the values that live within the society. Therefore, *Adat* Law fundamentally asserts meaning to the society to determine the national attitude and identity in facing challenges of the globalization era. The *Adat* Law has been a living and prevailing law in Indonesian society from the past until now. The Law has constantly grown and developed as the society changes. It has undergone a process of changes: getting stronger and weaker. Therefore, as it develops, there are issues or materials within the *Adat* Law that are not valid anymore.

Inheritance law is a system for the negotiation of wealth transition from a generation to next generation. In Indonesia, the system of inheritance law that has been valid since the Dutch colonial era (after more than 73 years of Indonesian independence) remains pluralistic. It has not yet been unified as had been mandated by the principle of unity in the Preamble of the 1945 Constitution. This principle mandates that Indonesian law should be a national law that applies to the entire people of Indonesia.¹

Inheritance law is a branch of law that is deeply problematic, given its association with the beliefs, religions, traditions, and culture in general. This kind of law, as well as other areas of family law, is referred to by experts as sensitive and not a neutral law. Due to this fact, it is rather difficult to rush the setting up for the law unification.² There are three systems and practice of inheritance law in Indonesia. These systems are civil-western inheritance law, *adat* inheritance law, and Islamic inheritance law.³ They are also adopted to classify citizens.

The civil-western inheritance law is contained in Book II of *Kitab Undang-Undang Hukum Perdata* (KUHPerdata, the Indonesian Civil Code), Article 830 to Article 1130.

¹ R. Otje Salman and Eddy Damian, *Konsep-Konsep Hukum dalam Pembangunan: Kumpulan Karya Tulis*. Bandung: Pusat Studi Wawasan Nusantara, Hukum, dan Pembangunan, 2002, p. 19.

² *Ibid.*

³ Titik Triwulan Tutik, *Pengantar Hukum Perdata di Indonesia*, Jakarta: Prestasi Pustaka, 2006, p. 281.

Meanwhile, *adat* inheritance law is a distinctive system of inheritance law that is applicable in *adat* law areas, and prevails in each of the *adat* environments. Therefore, it is known by several different names, depending on area or environment of the *adat*. For example, there are *adat* inheritance laws of Minangs, Bataks, Javanese, and so forth.⁴ Islamic inheritance law is a system of inheritance law that used to be called *Faraidh*, and is contained in *fiqh* (Islamic jurisprudence). After the *Kompilasi Hukum Islam* (KHI, Islamic Law Compilation) was made, based on Instruction of the President of the Republic of Indonesia Number 1 of 1991, the Islamic inheritance law is codified in the Book II of KHI Inheritance Law, from Article 171 to Article 214.

There is striking differences among the three legal systems of inheritance law related to the position of women, both in their capacity as heirs and in the number of portions of proprietorship. This is different with Western inheritance Law. Civil-western inheritance law does not differentiate men and women in their capacity as heirs and in the number of portions of proprietorship. This is because civil-western inheritance law only considers heir classification by blood ties.⁵ Islamic inheritance law does not distinguish between the position of women and men as heirs. Widows, daughters, mothers, and sisters are recognized as heirs. Those differences particularly lie in the number of the portions or parts of the proprietorship. Daughters obtain half of the sons' portion, based on Chapter An-Nisaa verse 11 of the Qur'an. In addition to this, KHI regulates the same in Article 176.

The civil-western inheritance law makes no distinction between women's and men's positions and number of portions of the proprietorship but the *Adat* inheritance law does. *Adat* inheritance law, in particular the family system, prioritizes the difference between women's and men's positions as heirs. The *Adat* law recognizes three kinship systems: patrilineal (patriarchal), matrilineal (matriarchal), and bilateral or parental.⁶ Observing the provisions contained in the *adat* inheritance law and the Islamic inheritance law related to the position of women as heirs, and the difference of proprietorship portion between women and men, many problems currently arises related to the position and rights of women as heir.⁷

B. The Provisions of the *Adat* Inheritance Law in Indonesia

The *Adat* Law is law that originates from *adat istiadat* (customs), i.e., social principles. It is stipulated and enforced by the functionaries of laws (rulers/governments) and prevails to regulate legal relationship among Indonesian people.⁸ Soekanto states that the *Adat* Law is a complex unwritten customs, uncodified, and does not have a binding power but it has legal consequences.⁹ From this definition, the primary

⁴ *Ibid.*, p.282.

⁵ Volmar, *Pengantar Studi Hukum Perdata*. Vol. 1, Jakarta: RajaGrafindo Persada, 1996, p. 24.

⁶ Soerjono Soekanto, *Hukum Adat Indonesia*, Jakarta: RajaGrafindo Persada, 2008, p. 284.

⁷ Mukhtar Zamzami, *Perempuan dan Keadilan dalam Hukum Kewarisan Indonesia*, Jakarta: Kencana Prenada Media Group, 2013, p. 6.

⁸ R. Otje Salman S., *Rekonseptualisasi Hukum Adat Kontemporer: Telaah Kritis terhadap Hukum Adat Kontemporer*, Bandung: Alumni, 2002, p. 14.

⁹ Soleman Biasane Taneko, *Dasar-dasar Hukum Adat dan Ilmu Hukum Adat*, Bandung: Alumni, 1981, p. 20.

characteristic of the *Adat Law* is sanction and legal consequences.¹⁰

The regulation of public order by the *Adat Law* indicates that this law contains sanctions imposed when the rules are violated. The *Adat Law* is formed and strengthened by sacred values, namely religious values, as what Soepomo considered as an unwritten law that is enforced by legal functionaries and contained punishment that conforms to religious elements.¹¹

Adat Law exists and develops since a long time ago and has been rooted in the society. Although it is not written, *Adat Law* has legal consequences against the violators. The indigenous people firmly influence and hold norms and values that exist in the *Adat Law*. In the society, the *Adat Law* serves as a pair of scales of good or bad, right or wrong, and appropriate or inappropriate towards actions or events occurred in the society. The existence of the *Adat Law* is more as a guideline to keep, to uphold, and to guarantee the ethics of politeness, orderliness, morals, and traditional values of the society. This means that the *Adat Law* essentially contains a set of arrangements that is agreed by the community. This set of arrangements stipulates on how a person should act and behaves in the social environment of the society. In the *Adat Law*, the society holds and determines any matter through deliberations and consensus. In principle, any decisions that are related to the interests of the people are discussed by the principles of justice and propriety. To keep the society's trust, an *Adat* leader has to lead the deliberations in a fair and proper way and conforming to the Law. Justice and propriety of the *Adat* community is fair according to the people who know about the *Adat Law* and proper for those who know about the traditional values. Therefore, the existing judicial process of any decision will easily be understood and accepted by the disputing parties and does not provide opportunities for prolonged conflict. The *Adat Law* is also called the original law because it is born in the society, or from the *Adat* community according to the interests to manifest people's feeling. The *Adat Law* is not rigid. As it is called in a *seloka* (poem) *Adat*: "*Adat di atas tumbuh, lumbago di atas tuang, memahat di atas batu, mengukir di atas baris*" (The above *Adat* grows, the back pain is lost, carves on the stone, engrave on the top of the line).¹²

The stages of development of the *Adat Law* in Indonesia currently face challenges and are in dilemma for its survival. As a state that currently undergoes a process of transforming the law into a statutory law system, Indonesia pursues a process of unification of its various unwritten legal systems that exist and prevail in some societies. One of the main concerns in the process is related to the existence of the *Adat Law*, especially for sensitive areas. The existence of the areas of the *Adat Law* living in the form of patterns of legal relationships in Indonesian society is highly

¹⁰ I Dewa Made Suartha, *Hukum Adat dan Sanksi Adat Perspektif Pembaharuan Hukum Pidana*, Malang: Setara Press, 2015, p. 2.

¹¹ R. Otje Salman, *Loc.cit.*, p. 14.

¹² A. Suryaman Mustari Pide, *Hukum Adat Dahulu, Kini, dan Akan Datang*, 2nd edition, Jakarta: Prenadamedia Group, 2015, p. 87.

dependent on the culture and beliefs of their people.¹³

According to Salman,¹⁴ in addition to the form of law of legislation as a written law that is developed and institutionalized in the pattern of societal behavior, there is also a law formed by a judge that bind parties. Thus, for the sake of elaboration of areas of the *Adat* Law that still prevails in Indonesia, it is necessary to conduct research, mainly on court decisions. The choice of court decisions is due to various reasons developed in the discourse of the *Adat* Law. Therefore, the court's decision is important in its function as the establishment or the failure of the *Adat* Law system.

Based on people and their legal alliances' differences, van Vollenhoven established 19 circles of *Adat* Law (*adatrechtskringen*). Subsequently, each circle is subdivided based on the areas (*adatrechtsgouwen*). The details cover¹⁵ Aceh; Tanah Gayo, Alas, Batak, Nias; Minangkabau, Mentawai; South Sumatra; Malay; Bangka and Belitung; Kalimantan (Dayak Land); Minahasa; Gorontalo; Toraja area; South Sulawesi; Ternate Islands; Maluku, Ambon; Papua; The islands of Timor; Bali, Lombok, West Sumbawa; Central Java, East Java, Madura; Swapraja areas of Solo and Yogyakarta; and West Java.

The kinship system of indigenous people regulates heredity as essential in continuing the lineage (clan), either straight or sideline lineages. Generally, offspring have a legal relationship based on blood, for example: between parents and their children. There are also legal consequences related to the offspring that go hand in hand with their ancestor, but the consequences are not all the same throughout regions. Although the legal consequences associated with ancestors throughout regions are not the same, in reality, there is a common point of view to the problem throughout Indonesia, namely that heredity is an essential and absolute element for a clan, a tribe, or a family who wants to sustain their descendants, to continue their legacy.

The structure of indigenous community embraces three kinds of kinship systems as follows.

1. Bilateral kinship system

In addition to both parents, a child also connects with his mother-father relatives bilaterally. In a parental kinship system, both parents and relatives of the mother-father apply the same rules about marriage, the obligation to provide necessities, respect, and inheritance. In this parental kinship system, a child may only acquire a relationship/kinship by means of marriage, directly by his/her own marriage, or indirectly by the marriage of his/her relatives, except the marriage of his/her own mother and father.¹⁶ The parental kinship structure applies to the people of Java, Madura, Kalimantan, and Sulawesi.

¹³ *Ibid.*

¹⁴ R. Otje Salman and Eddy Damian, *Op.cit.*, pp. 149-150.

¹⁵ R. Van Dijk, *Pengantar Hukum Adat Indonesia*, 6th edition, Bandung: Penerbitan Sumur, 1964, p. 11.

¹⁶ R. Van Dijk, *Pengantar Hukum Adat Indonesia*, Bandung: Mandar Maju, 2006, p. 40.

2. Patrilineal kinship system

This kinship system of the child also connects with the father's relatives based on male lineage unilaterally. In a patrilineal community structure, the descendant of the father is considered to have a higher position and will earn more rights. The composition of patrilineal kinship system applies to Batak and Bali communities.

3. Matrilineal kinship system

In this kinship system, a child is connected to the maternal relatives based on female lineage unilaterally. In a matrilineal society, matrilineal lineage is considered to be of prime importance, resulting in a much closer and more pervasive familial association among people through maternal line, which causes more consequences in the case of inheritance. Daughters get more inheritance and are more important compared to the paternal lineage.¹⁷ This system applies to Minangkabau society.

The *Adat* law is a law that develops together with the development of traditional society in Indonesia. It is also an actualization of individual or social community's behavior, being in line with their view and philosophy of life. In social context, *adat* law is a crystallization of living values and becomes a source of guidance for members of the *adat* society. This is in line with the view that law cannot be separated from social and cultural contexts.¹⁸ The *Adat* law has several distinctive characteristics.¹⁹ A strong sense of togetherness, in which, according to *adat* law, individuals have strong bonds in every possible aspect of life with the society itself. Thus, the rights and obligations of every person are compatible with the public interest. The regimes encompass within the *adat* law mostly relate to the living aspects of society. These can be specified as the forms of *adat* society; individuals/persons; families; marriages; succession; land law; debts; and *adat* offenses.

This article focuses on the specification of succession among those specifications of *adat* law, and considers problems that frequently occur in its implementation. *Adat* inheritance Law is legal rules or norms, which regulate or determine inheritance passed on or distributed to the heirs of the next generations either in the form of material or immaterial assets through the means and the transition process.

The *Adat* inheritance Law is geared towards principles arising from communal and concrete schools of thoughts of the Indonesian people. The *Adat* inheritance Law contains rules governing the process of continuing and passing goods, both material and immaterial (*immaterial goederen*), from a generation (*generatie*). The process has started in the time when the parents are still alive. The process does not become "acute" because of the death of parents. Indeed, the death of father or mother is an important event for the process, but actually does not radically affect the process of forwarding and transporting (material/immaterial) property and assets. The process continues until a new generation formed their own families,

¹⁷ Bushar Muhammad, *Pokok-Pokok Hukum Adat*, Jakarta: PT Pradnya Paramita, 2006, p. 5.

¹⁸ Dominikus Rato, *Hukum Perkawinan dan Waris Adat*, Surabaya: Laksbang Yustitia, 2011, p. 9.

¹⁹ Soerjono Soekanto and Jusuf Usman, *Kedudukan Janda dalam Waris Adat*, Jakarta: Ghalia Indonesia, 1986, p. 11.

have their own material by their parents' inheritance as the foundation.

According to R. Soepomo, the *Adat* inheritance Law is a law that contains the rules governing the process of continuing and passing goods, both material and immaterial (*immateriele geoderen*), from a generation of human (*generatie*) from parents to descendants.²⁰ Furthermore, R. Soepomo added that this transitional process of inheritance can begin actually when the owner of property is still alive. The process goes on continuously until the descendants become new, self-contained families. In Javanese language, it is called "*mentas*" and "*mencar*". In turn, the descendants will have a turn to continue the process to the next generation (the next descendants).²¹

The inheritance regulation in the *Adat* Law is a complex rule governing the process of forwarding and passing over goods (material and immaterial properties) of a generation to the next generation.²² The meaning of the 'process' is that the *Adat* inheritance Law is not necessarily related to death. Even if there is no death in the inheritance process, the process can continue. The transfer and passing over of immaterial and immoral properties from one generation to other generation continues. Therefore, the concept of inheritance is not individual.²³ From the aforementioned definition, the following descriptions need to be observed.²⁴

- a. The matter of inheritance in the *Adat* inheritance Law does not become an actual or urgent need to be connected with death since the inheritance may take place even if no one dies. Consequently, the inheritance process can be conducted between parties who are still alive.
- b. The heirs are younger generation.
- c. The rules of inheritance law are imbued with the attitude of familial kinship. This is inferred from the established definition in which the inheritance takes place from generation to generation. This is different from Western inheritance law imbued by individualism as stipulated in Article 1066 of the Civil Code. The article specifies that every heir is entitled to claim the portion of his/her inheritance. In the *Adat* inheritance Law, this only happens in an urgent condition.
- d. If there is a division of the goods, the division in *Adat* inheritance Law is not conducted mathematically based on arithmetic like in the Western law, but it is adjusted to usability.

In general, several provisions codified in the Civil Law Code, the Islamic Law, and the *Adat* Law govern Inheritance in Indonesia. This reveals that the pluralism exists in Indonesian law system that stipulates inheritance. Law of inheritance is divided into several parts that are related to social structure within each traditional society. This is because the *Adat* inheritance Law in Indonesia is diverse. It can be patriarchal,

²⁰ Soepomo, *Bab-Bab tentang Hukum Adat*, Jakarta: Pradnya Paramita, 1980, p. 81.

²¹ *Ibid.*

²² Djaren Saragih, *Pengantar Hukum Adat Indonesia*, 3rd edition, Bandung: Tarsito, 1996, p. 147.

²³ *Ibid.*

²⁴ *Ibid.*

matriarchal, and parental.

If we observe the nature of the *Adat* inheritance Law, it appears that the nature is communal based on the traditional mind of Indonesian people. Therefore, the *Adat* inheritance Law is different with the Islamic and the Western inheritance Laws. This fact can be seen as follows.

1. The <i>Adat</i> Inheritance Law	2. Western Inheritance Law
<ul style="list-style-type: none"> a. The <i>Adat</i> inheritance Law does not recognize "<i>legitieme portie</i>", but it establishes the basis of equality of rights. This contains the right to be treated equally by parents in the process of continuing and passing on family property. b. The <i>Adat</i> inheritance Law, to ensure equality of rights, also lays the foundation of harmony in the process of implementing the division of property in harmony with attention to the special circumstances of each heir. c. Inheritance should not be forced to be shared among the heirs. 	<ul style="list-style-type: none"> a. Western Inheritance Law recognizes the right of each heir to a certain portion of inherited property according to the provisions of the law ("<i>wettelijk erfdeel</i>" or "<i>legitieme portie</i>", Articles 913 to 929). b. It determines the absolute right of the respective heirs to demand the distribution of inheritance at any time (Article 1066 of the Civil Code).

The difference between the *Adat* inheritance Law and the Islamic inheritance Law can be seen in the following description.

1. <i>Adat</i> Inheritance Law	2. Islamic Inheritance law
<ul style="list-style-type: none"> a. In <i>Adat</i> Inheritance Law, the property may be indivisible or its distribution shall be delayed for a considerable period or only divided partly. b. It is the right of the parents to choose to inherit their property to an adopted child. c. There is an inheritance replacement system. 	<ul style="list-style-type: none"> a. In Islamic Inheritance law, every heir may demand the portion of the inheritance at any time. b. There is no provision on parents inheriting their properties to adopted children. c. There is no provision on inheritance replacement system. d. Parts of the heirs have been determined; the division of the inheritance is based on the terms.

<p>d. The division is a joint action, conducted in harmony and friendly atmosphere with due regard to the special circumstances of each heir.</p> <p>e. Daughters, especially in Java Island, when there is no son, can close the right of inheritance of their grandparents as well as their uncles/aunts.</p> <p>f. The goods shall not constitute a unit of inheritance but shall be retained by the nature/variety, origin and legal standing of the respective items contained.</p>	<p>e. It ensures that daughters have a definite part of their parents' inheritance.</p> <p>f. The goods are a unit of inheritance</p>
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It can be seen that *Adat* inheritance Law is closely related to the familial character of the legal community and its influences the inheritance for and within the community. In addition, the *Adat* inheritance Law is not only influenced by societal changes, for instance, due to the strengthening of the “*somah*” relationship (based on nuclear family only) and the weakening of clan and kinship relations, but also from similar foreign legal regulations. The judges of Religious Courts always apply *in concreto* although the effect is relatively small.

C. The Definition of *Adat* Law of Succession

1. Definition by Soepomo²⁵

Soepomo elaborates that the *Adat* law on succession contains provisions regulating the continuation process of properties, assets, and immaterial belongings of a generation of people towards their descendants. In a family succession, the entitlement process of succession shall be initiated even before the death of the inheritor, to prevent the possibility of serious impacts that might occur upon the death, despite the fact that the death itself is one of the important events in the succession process.

2. Definition by Soerojo Wignyodipuro:²⁶

According to Wignyodipuro's definition, the *Adat* law on succession covers the legal norms related to personal assets: whether they are material or immaterial; and which assets the descendants can inherit. These legal norms also regulate the moment, methods, and the process of the transfer of the rights and obligations over such assets. In fact, the transfer process itself can be started before the death of the

²⁵ Soepomo, *Loc.cit.*

²⁶ Soerojo Wignjodipoero, *Kedudukan serta Perkembangan Hukum Adat setelah Kemerdekaan*, Jakarta: Gunung Agung, 1983, p. 109.

original owner of assets. The transfer process continues until each of the owner's descendants is able to build a new independent family. In the future, these families continue the same process to the next generation.

3. The Subject of *Adat* Law on Succession

In order to determine subjects or those who are governed by the *adat* law, it is necessary to review the system of kinship in the local society. The kinship system in Indonesia is divided into three kinds: namely, the patriarchal, the matriarchal and the bilateral. Upon the death of a person, the successor shall be determined by the aforementioned three systems of society. However, not all descendants can legally inherit a person's wealth.

1. Inheritor

The term inheritor used to indicate that the dead person had an amount of wealth which could be transferred to his successors or descendants.

In the patriarchal system, men have a rather more important status than women: the line of descent always follows men: for instance, in *Batak* society. Legally born children acquire their legal status from their father and their father's family. In this kinship system, the father acquires a title as the inheritor who owns the right to transfer their belongings upon their death to their descendants.

In the matriarchal system (for instance, the *Minangkabau*) the line of descent follows the women: children born in these families only have legal ties with their mother and the mother's family. Upon the death of every mother, children have the right to be successors. However, upon the death of fathers, those who have rights as successors concerning certain sacred heirlooms are the brothers and sisters, as well as the nieces, of the mother.

In the parental society, children who are legally born always have legal ties from the line of descent from both their father and mother. For instance, in Java there are no differences between men and women. Thus, whether upon the death of a father or a mother, children acquire rights as successors.

2. Successor

The term successor is used to indicate persons entitled to wealth or an heirloom from the inheritor. In the *adat* law on succession, determining the successor is also based on the kinship system.

A pure patrilineal society, such as *Batak*, differentiates between the status of sons and daughters, influenced by the kinship system, where the line of descent is from men or fathers. Thus, in *Batak* society the successors are all men. Boys have the responsibility for continuing the clan. As for women, after marriage their rights and obligations are transferred to the responsibility of their husbands' family. Daughters cannot become successors. However, they can receive their parents' given wealth or heirlooms prior to their marriages.

In the matrilineal society of the *Minangkabau*, daughters can become

successors upon the death of their mother, by the influence of the kinship system, in which the line of descent is via women. The succession rights are granted in relation to all wealth, whether ordinary assets or heirlooms that are owned collectively. In recent practice, upon the death of every father, every son and daughter can acquire the right to inherit their father's assets from work, marriage or other ordinary wealth, while the brothers and sisters of the fathers or their descendants inherit heirlooms. Parental society in Java is viewed as an ideal model of *adat* society. There is no differentiation between sons and daughters. Thus, upon the death of a parent, every child is a successor.

3. The transfer of wealth or inheritance²⁷

The laws of succession enacted in Indonesia are compound and plural. They consist of various legal systems, which have grown and developed separately, and which have their own history. In general, the legal system in Indonesia until presently is made up of *adat* law, *Islamic* law, and western-civil law as composed in the Civil Law Code. Each system has different sense and significance towards the output of the succession itself. This means that there is as yet no uniformity in regard to the definitions and meanings of the law of succession in Indonesia.

4. System of Succession in *Adat* Law

The *adat* law on succession represents a distinctive and unique pattern of law that reflects the way of thinking and traditional spirit, based on a collective or communal culture. Prioritizing family, togetherness, mutual assistance, and being deliberative and consensus-oriented in dividing inheritance are cultural codes that tinge the system. The *adat* law on succession shows Indonesian's traditional way of thoughts arising from prevailing principles upon their communal society, it also derives from the concrete way of thinking they have.²⁸

In the *adat* law on succession, there are three succession systems, namely: an individual succession system, a collective succession system, and the *mayorat* system,²⁹ In the individual succession system, the successors inherit separately from one another. The distinctive characteristic of this system lies in the allotted inheritance. With the private ownership of each successor, each successor takes charge of the inheritance for their free use in daily life, and is not influenced by other family members. However, unfortunately, on the other side, this may lead to conflicts over inheritance and can cause breaches between family members. The successors might end up avariciously dominate the inheritance. This system is currently applied in Batak, Java, and Sulawesi.

The collective succession system is a system in which the successors inherit collectively, without the possibility of dividing the inheritance. The main feature of this system is the undivided and whole transfer of the inheritance from the inheritor

²⁷ Soerojo Wignyodipoero, *Pengantar dan Asas-Asas Hukum Adat*, Jakarta: Gunung Agung, 1983, p. 162.

²⁸ Soepomo, *Op.cit.*, p. 83.

²⁹ Soerjono Soekanto, *Hukum Adat Indonesia*, *Op.cit.*, p. 260.

to the successors. Each successor has the right to acquire shares of the inheritance. The benefit of this system is clear when the inheritance is used to sustain the wealth of one family.

Upon inheritance the *mayorat* system places rights, as a whole or in part, on a sole successor. The system is divided into two kinds: the *mayorat* system for men and the *mayorat* system for women.

As mentioned earlier, the three kinship systems in *adat* society are patriarchal, matriarchal and parental. The formation of the *adat* law on succession cannot be separated from these three systems, and has a very strong connection with the characteristic of the society in concern. There are three forms of law on succession in Indonesia: the patriarchal in *Batak*, *Manado*, and *Ambon*; the matriarchal in West Sumatera; and the bilateral in Java.

The patriarchal system prioritises men, placing them in a higher position, as the successor who will continue the name of the family, as the descendant, as the member of the *adat* society, and as having the most important role in decision-making within the family or the society. In this system, women have a rather low position: they do not have rights as successor, or as a descendant. Upon a legal marriage, women shall follow their husbands and leave their original society.

In contrast, women have a high position in the matriarchal system: they have the right to be a successor and a descendant.

In the parental system of kinship, the positions of men and women are equal as regards the matter of succession. Every man and woman have the right to become a successor.

E. Comparison of The Status and Position of Men and Women in *Adat* Inheritance Law Based on Jurisprudence in Indonesia

Breakthroughs in *adat* law can occur because of the will of the society, particularly through the actions of the courts. This can be seen, for instance, in the change in the position of daughters in the *Batak Toba* society: currently they can be regarded as successors, but originally, they could not. This is emphasised in the Decision of Indonesian Supreme Court Number 179 K/Sip/1961, dated 23 October 1961, which stated that it is not only based on humanity and common justice, but it is also based on the equality of rights between men and women. The Indonesian Supreme Court hereby, in several decisions, taking demeanor and regarded as living law in every corner of Indonesia, that daughters and sons from an inheritor, have equal rights upon wealth, and that every daughter shall be regarded as a successor along with every son, as well as have the same shares.

The spirit for enacting the pure *adat* law on succession consequently changed because there are incoherency between existing circumstances and the need of change in the rapid development of the civilization. Hence, on 1 November 1961, the aforementioned fundamental breakthrough was established. This is commonly known as “the New *Adat* Law on Succession”. It is elaborated clearly in the

consideration of the Decision of the Supreme Court as follows.

1. Sons and daughters have an equal position in regard to their parents' inheritance.
2. They shall have the same shares.
3. They are entitled to the same amount of shares, based on humanity and common justice.
3. And also based on the awareness of the living law in every corner of Indonesia.

Subsequently, the new law of succession was born. Its core is that it gives rights to every daughter to become a successor, and gives them the same shares as are given to sons. In the enactment of common public jurisdiction, the new *adat* law was groundbreaking and has been used to settle disputes concerning the allotment of inheritance from 1961 up until now. The judges in the public jurisdiction have enacted these provisions as a conception of *nusantara*, without prejudice to the kinship system of both parties, regardless of whether they are from Batak, Java, Minang, or elsewhere.

The new provisions were made as neutral as possible, to be applied in all *adat* surroundings. They do not question one's religion or the origin of the dispute, whether it happens in a village or in urban areas. The jurisprudence sets the *adat* law free from territorial boundaries, the kinship system, and religion. The values usually directing the jurisprudence had being reformed as several common principal,³⁰ namely: The principal of rights and position; The principal of properness and justice; The principal of humanity; The principal of consciousness of the living law. The settlement of succession disputes in *adat* law is based on four key factors:³¹

- a. The prevailing legal system in the surroundings;
- b. Reality of the law, considering changes in the law, the impacts of the law upon the society, and changes in assessment;
- c. The sense of justice on the part of judges, and their knowledge as members of the society;
- d. Judges have to investigate prior decisions, whether at the same judicial level or not: for example, investigations conducted by the judges in the High or Supreme Court.

It is to be hoped that a standard procedure or provisions concerning inheritance divisions and the equality of positions for both sons and daughters can be produced for dispute settlement under the *adat* law on succession.

Before the emergence of the new provisions, the Interim People's Representatives Body made decision Number II, dated 03 December 1960, which was followed by the National Law Construction League, currently called BPHN, in a decision made on 28 May 1962.

Concerning the law of kinship particularly, it was decided that the main principles in the Indonesian Law of Kinship are as follows.

1. In Indonesia as a whole, the most prevailing kinship is the parental system which

³⁰ Mukhtar Zamzami, *Op.cit.*, p. 194.

³¹ Tamakiran, *Asas-Asas Hukum Waris Menurut Tiga Sistem Hukum*, Bandung: Bandung Pionir Jaya, 1987, p. 73.

governs under Indonesian Acts, this principle prevails since it can adjust with other kinship systems within the *adat* law.

2. The law of succession for the whole population is to be governed in a bilateral individual manner, with the possibility of a variation for Muslims if needed.
3. The priority and exchanging system in succession law is the same for the whole of Indonesia, in principle, with small changes for the Islamic law on succession.
4. *Adat* law and jurisprudence specifically elaborating the law of kinship admitted as a complementary source in Indonesian law.

Concerning the development of the *adat* law on succession, there is an opinion which states that currently there is an equal position between men and women since Indonesian Law Number 1 of 1974 on Marriage (Marriage Law) come to an existence, as a unification in the regime of law of marriages. This Law is also governing law principles on family, and wealth of the marriages in parental-individual demeanor. There is a strong connection between the equality of gender and the law of succession, mainly in practice. By this development, it is shown that there is coherency between the *adat* law on succession, as un-codified law developed by jurisprudence, with the provisions in the Marriage Law aforementioned. Efforts to make real the equality of rights and the equal position of men and women in the regime of law of succession have been made by the courts.³² From the examples of the aforementioned jurisprudence, it is evident that the court's decisions are passed either by the District Court or by the Religious Courts. The jurisprudence of the District Courts means that the parties wish to settle disputes based on *Adat* Law, regardless of what the judge will decide.

The above facts show that on the one hand, the people want the *Adat* Law norms to remain steady. However, they are open to changes as long as the changes are desired and in accordance with the society. The Article 49 of the Law Number 3 of 2006 states that the Religious Courts are authorized to examine, decide, and resolve cases at the first level among Muslims in the areas of marriage, inheritance, will, grants, endowment, *zakat*, *infaq*, *shadaqah*; and *sharia* economics.

The term "inheritance" means the determination of the heir, the wealth, the portion of heirs, and the distribution of the wealth. The court also decides a petition that regulates the determinations. For Muslim heirs, the primary legal basis that becomes the reference is the Law Number 3 of 2006 to the Amendment of Law Number 7 of 1989 on Religious Court. The General Elucidation of the Law states that prior to litigation, the parties may consider choosing what law to be used in the distribution of inheritance. Explicitly, it is Islamic Law that should be a legal choice for Muslims. However, this provision does not bind because the Religious Judicature Law does not explicitly regulate the issue of inheritance distribution for Muslim or non-Muslim heirs.

³² Purwoto Gandasubrata, *Renungan Hukum*, Jakarta: Ikatan Hakim Indonesia, 1998, p. 584.

F. Conclusion

Up until now, the *Adat* inheritance Law in Indonesia is still pluralistic. Efforts to unify the *Adat* inheritance Law have been made through the mechanism of court decisions that put heirs, either men or women, equally. The unification efforts, however, are difficult to realize given the sensitive nature of the *Adat* inheritance Law.

Through the mechanism of judicial decisions, the legal status of men and women in the *Adat* Law system in Indonesia has reflected a reform. Therefore, their positions as heirs are equal. This is in line with the principle of inheritance law based on a parental or bilateral principle that establishes fair and equitable sharing between men and women.

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