

## **Distribution of Woman Inheritance In *Batak Toba* Traditions According To The Law**

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### **Abstract**

The customary law society has a tendency to still acknowledge the existence of unwritten law as a law that enforces order and justice in the center of a society, especially in arranging inheritance. Ethnic groups have a plethora of systems in distribution of inheritance, including those that are arranged in various inheritance law. Hence, an interesting issue, “How is the constitutionality in woman’s inheritance distribution in the *Batak Toba* tradition according to the Law?”. The legal option regarding this inheritance matter is necessary in order to develop Indonesia’s national law in the centre of a diverse society. By giving an identical legal sub-system to a different society, and emphasizing a different legal sub-system may widen the distance between law and the feeling of justice within a society. Moreover, it’s crucial to implement the unification and strengthening of order regarding inheritance law in order to conceive legal certainty and the feeling of justice. If legal dispute happens in distribution of inheritance, specifically towards the women of *Batak Toba*, which ends in court, the judge will determine the verdict basing on legal values and justice that lives in a society.

**Keywords:** woman, Batak Toba, customary law, inheritance dispute, inheritance.



## Introduction

*Bhinneka Tunggal Ika* (Unity in Diversity) --Indonesia's national motto. With a myriad of differences in Indonesian society, Indonesia has become a rich country. This richness of diversity needs to be formed in juxtaposition with the ideology and philosophy of the country itself, which is the *Pancasila* and the constitution *UUD 1945*. Living system in Indonesia isn't only constructed basing on the law, it also needs to be aligned with religion, morality, civility, and other social orders. Law with these social orders is compliant with valid values in a nationalistic and patriotic life (Huda, 2018). Law is a reflection of values implemented in a society, which is favorable if it aligns with the living law in a society (Kusumaatmadja, 2002: 13-14).

Indonesia being a legal country, as stated in Article 1 paragraph (3) of UUD 1945, has legal sources originated from the values that live in a society, whether it's written or not, or if it's a higher authority's decision. Unwritten law can be in the form of customary law or local wisdom, where its existence is still acknowledged as a norm and it also possesses a bonding power and penalty (Sinaga and Sabila, 2019: 2). With Indonesia's diversity, implemented customary law is also diverse from one another. With a plethora of tradition, custom, and nature, Indonesia concedes and guarantees cultural society as constructed in Article 18B paragraph (2) UUD 1945. Resulting in the legality of the unified customary law society being ensured in UUD 1945. This is re-emphasized in the provision of Article 28I paragraph (3) UUD 1945.

Moreover, Indonesia is also bound to an international commitment regarding recognition of cultural society rights. On September 13<sup>th</sup> 2007, the government of Indonesia participated in signing the *United Nation Declaration on The Rights of Indigenous People* (UNDRIP) which mandated that cultural societies have equal rights regarding livelihood, education, identity maintenance, and freedom from any form of discrimination (Ministry of National Development Planning/National Development Planning Agency 2013, 2013: 1). Consequently, cultural society is viewed equally as other societies are. Furthermore, it is explained that legal sources are in fact matters that can or should influence the authorities in determining the law. For instance, the belief towards the law; the feeling of justice; the feeling towards either the verdict sourced back from the authority or the civilians; and also theories, opinions, and doctrines from the science of law (Ngutra, 2016: 194-195).

During Indonesia's development, many of its civilians still hold on to unwritten law, to illustrate, civilians obey customary law regulations because basing resolutions on legal customs is considered more beneficial than Indonesia's national law which gives an impression that there are differences which are more inclined to considering someone's social strata. The law that is implemented for the people gives an impression that it's sharp down and blunt up. The people that possess a higher position has a tendency to be treated with privilege, and ordinary or lower classed people has a tendency to be treated unfairly. This unjust phenomenon often occurs in a number of regions in Indonesia (Biroli). Other than

that, many of the people in a cultural society still holds on to the fact that their legal customs are in accordance with the condition of their beliefs.

That phenomenon leads to a tendency where the society, especially the customary law society, still acknowledges the existence of unwritten law as a law that lives in enforcing order and justice specifically in context of distribution of inheritance. There are differences in distribution of inheritance system in various ethnic groups in accordance to customary inheritance law, Islamic inheritance law, and *Kitab Undang-Undang Hukum Perdata (KUH Perdata – Civil Code)*. Authors are highly interested in bringing up the issue of inheritance in *Batak Toba* ethnicity. The authors' interest is sprung by the numerous disputes that has happened in the middle of the society which is submitted to the judiciary.

Hence, authors are bringing up the issue on how distribution of woman's inheritance in *Batak Toba* is according to the Law. This issue is engaging, considering the *Batak Toba* tradition still holds on to their customs strongly, and doesn't recognize the distribution of inheritance towards women. Even though lately, it's proof shown that even with ever-evolving developments, the perspective towards this concept is still limited. This modest writing doesn't possess the means to justify that in the distribution of inheritance according to *Batak Toba's* legal customs and Indonesia's national law towards women there is a contradiction with the human rights, but authors intend to offer a different perspective. In this writing, there will be observations to conclude if the *Batak Toba's* legal customs and Indonesia's national law towards women have indeed align with the human rights and the principles of justice.

## Method

This study adopts a normative approach with a constructive paradigm—the complexity of the inheritance distribution implemented in the middle of the society with the legal customary system of the *Batak Toba* traditions doesn't acknowledge a circumstance where women receive inheritance. This study practices a normative juridical method (Soekanto and Mamudji, 1985: 15), or according to Wignjosoebroto, a doctrinal observation (Sunggono, 1997: 42) ---a study that uses positivist legist, which states that law is identic with written norms that are made and issued by authorized institutions or governments. Aside from that, this conception is viewed by law as a normative system that acquires an autonomous, private, and independent qualities. Satjipto Rahardjo mentions that this perspective views law as an abstract regulation, its concerns are focused on autonomous institutions, which are ones that are able to be mentioned as independent subjects, regardless of its connection with matters outside of its regulations. The centralization will align with a normative method which is appropriate with the analytic discussion, hence it being called a normative analysis (Sunggono, 1997: 67-68).

## Discussion

Justice is a fundamental matter in a patriotic life. Justice according to Hans Kelsen is a social joy (Kelsen and Herz, 1941: 7-98)--an abstract matter that is craved by every civilian in living a patriotic life. In conceiving justice, law must take part in arranging it. Law in this context is a part of morality and equity, and also the paramount of positive law (Subiharta, 2015: 386). In creating a just and certain law, there needs to be an assertive arrangement regarding Law that can be differentiated between written and unwritten law. Written law regulates a plethora of issues in a society, resulting in the presence of public and private law. Written law system is usually quickly abandoned due to following the needs and evolution of a society. In contradiction, unwritten law is more adaptive in following the needs and evolution of a society. In that case, law must be conceived well. A good law according to Abdul Manan is a law that cooperates with morality, so law possesses spirit, which results in law being able to be enforced to achieve justice, legal certainty, and benefit (Manan, 2003).

Unwritten law, in this context the customary law, requires recognisance. Even though there is found a fraction of legal custom legislation which is issued by former kings and sultans (Rosdalina, 2017: 45), recognition towards cultural society's rights in a civilization, besides oriented by customs and laws, must also be oriented by religion, moral decency, and social orders. Acknowledgement towards customary law society which are ensured by the country makes customary law development ever-evolving.

Therefore, customary law society is a group of people who are bound together by the legal custom order as common citizens of a legal fellowship based on common residency or heredity (Thontowi, 2008: 96). Cultural society as legal subjects and objects, acquires power, namely: society based on equal territory; hereditary; and territory and hereditary, resulting in diverse cultural society from one place to another (Haar, 1939).

## Customary Law Scope

According to Qodri Azizy, that customary law is a law that lives in a society (Azizy, 2002). As well as Soerjono Soekanto who stated that customary law is essentially customs that possess the consequences of law and actions that are habitually repeated in the same form (Soekanto, 1993: 37). Meanwhile, Soepomo stated that customary law is a law that arranges the Indonesian citizens' behavior in relationship to one another, whether it is an entirety, prevalence, custom, and decency that lives in a cultural society or if it is the entirety of a regulation that acknowledges penalty over deviations and the ones appointed by the decision of authorities/traditional elder (Supomo, 1980: 26). Next, C. Van Vollenhollen stated that customary law is legal regulations that is valid for the indigenous and foreign easters, which on one side acquires penalty (which then is called "amercement") and on the other side is codified (which then is called "custom") (Hadikusuma,

1980: 5). Customary law includes law based of verdicts containing legal principles in an environment, where they (judges) resolve the case, and it also roots back to traditional cultures (Soepomo, 1981: 42). Meanwhile, according to the Dutch, customary law belongs to the nationals (Dutch), and Islamic law belongs to the foreign (Jazumi, 2005: 249).

Therefore, the characteristics of customary law according to Djojodigoeno are (Siregar, 2018): (1) static, there always is customary law in a society; (2) dynamic, customary law adapts to the evolution of era; and (3) flexible, the flexibility of customary law is in accordance to the society's wants and needs. Next, according to F.D. Holleman, there are 4 different characteristics of customary law, which are (Pide, 2014): first, religious-magical—legal custom societies have a religious mindset (the belief towards something unseen) (Salman, 2002: 30), and always try to maintain harmony (maintaining the balance between real life and inner life) (Sudiyat, 1952: 34); Second, communal—legal custom societies are beings in a strong sociological bond, and the feeling of togetherness including the whole field of customary law (Muhammad, 1978: 52); Third, concrete—real and clear, every legal relationship in customary law societies is done openly; Fourth, at that very moment—legal relationships is assumed to only happen when the creation of a bond is seen (Muhammad, 1978: 52), such as seen in a buy and sell situation (pay and receive the goods immediately).

Meanwhile, according to Mohammad Koesnoe, there are 3 characteristics of customary law, namely (Simarmata, 2018: 465-489): (1) concrete; (2) supple (communal)—the feeling of togetherness as the frequently heard term “*senasib sepenanggungan*” (sharing the same fate) in civilization; (3) dynamic—customary law is open and ever-evolves aligning with the demands of civilization. According to Van Vollenhoven, customary law sources are customs related to the people's tradition and noted laws by the kings such as the one in East Java, “*Kitab Hukum Ciwasana*” (The Law Book *Ciwasana*) by Raja Dharmawangsa, “*Kitab Hukum Gadjahmada*” (The Law Book *Gadjahmada*), and with his substitute Kanaka who gave order to create “*Kitab Hukum Adigama*” (The Law Book *Adigama*), and in Bali “*Kitab Hukum Kutaramanawa*” (The Law Book *Kutaramanawa*) (Vollenhoven, 1928: 3). In contrary, according to Djojodigoeno, customary law sources are considered orders or norms that directly emerges as a statement of pure Indonesian's culture as a feeling of justice in a selfless relationship (Djojodigoeno, 1952: 73). Moreover, customary law resources takes form in documents that contains legal provisions that lived at that era (Tongat, et al, 2020), whether they're in the form of charters such as “*papekan Cirebon*” in *Cirebon*; “*awik-awik*” in *Bali*; or regulations or traditional officials' decision such as “*rapang-rapang*” in *Makassar*.

Customary law possesses a material strength, and according to Ter Haar relies on several factors such as (Wignjodipoero, 1995: 23):

- a. The frequency of similar establishments providing stability towards legal regulations that are realized by those establishments;

- b. How far a social situation inside the community concerned experience change;
- c. How far the realized regulation aligns with the valid customary law;
- d. and how far that regulation align with the humanity terms.

Furthermore, the setting of customary law society according to UUD 1945, acquires differences in pre and post amendments (Thontowi, 2008: 5). In pre-amended UUD 1945, the unification of a customary law society is acknowledged automatically without any constitutional terms. On the other hand, in post-amended UUD 1945, the unification of a society doesn't necessarily acknowledge the existence of customary law societies because of a number of the constitutional term as arranged in Article 18B paragraph (2) UUD 1945, which are: (1) as long as they're alive; (2) aligning with the development of a society; (3) in accordance to the *Negara Kesatuan Republik Indonesia* principle; and (4) as arranged in the Law. Therefore, settings regarding customary law societies are constructed in the constitution.

Constitutional rights are implemented towards customary law societies. It is the same as other societies' constitutional rights, as stated in Article 27 paragraph (1), paragraph (2), and paragraph (3) UUD 1945, which is owning the same rights and position in the eyes of law and administration, and is obligated to hold on to that law and administration without any exceptions. In Article 28 UUD 1945, it is stated that people have the right to unite, share their spoken and written thoughts and others which are determined by the law. In Article 29 paragraph (2) UUD 1945, it is stated that people own the rights to embrace their own religions and to pray accordingly.

Indonesia is a legal country. Legal sources (Ngutra, 2016: 195) or also called 'sources of law' is an authorized authority decision. An authorized authority's decision can take form of regulation but can also take the form of provision. Meanwhile, legal sources as a 'place' means valid regulations, among others: law, customs, tract, jurisprudence, or doctrine (Ngutra, 2016: 194). According to Von Savigny, law follows society's *Volkgeist* based on the place of law, because each society's *Volkgeists* are different. Inheritance law are likewise, it's grown and maintained by legal society as cultural resources of each and every legal customary societies (Sinaga and Sabila, 2019: 4-5). There are 2 things that determines the area of limitation of customary law, among others (Soemaman, 2003: 11):

- a. The culture in a society, because basically, cultural deviation is an aspect of culture;
- b. Society, birth, grow, develop, and disappearance of cultural deviation place. Cultural deviation is viewed as a deviation which is valued based on the society's structure.

On the other hand, values that make the foundation of customary law are (Arliman, 2015: 66-67):

- a. Individuals, a part of a society that possess personal functions for the sake of society;
- b. Every individual in a unitary environment makes efforts as a devotion to the whole unity;
- c. In the perspective of custom regarding individuals' interests, it is difficult to express every individual's needs. In custom, order is inside of the universe;
- d. In the perspective of custom, customary provisions don't need to be complimented with terms guaranteeing the validity with the way of coercion.

### **Inheritance Law**

Inheritance Law is a law that arranges the transfer of material and immaterial assets from the owner (parents) to the inheritee (child) and to the descendants (Simamora, 2013: 1). According to B. Ter Haar Bzn, inheritance law is legal regulations that arranges how from every century, the forwarding and switching of inheritance from descendants and to descendants (Haar Bzn, 1994: 202). R. van Dijk stated that inheritance law contains every legal regulation that arranges the transfer of rights, assets from the dying generations (inheritors) to the younger generations (inheritees) (Dijk, 1960: 49). Generally, when the assets are meant to be switched to another person, the inheritors must receive a decision based on the discussion between the inheriter and the family.

In the arrangement regarding inheritance according to customary law, adopted family nature must be known. Family natures adopted in Indonesia are divided into (Simamora, 2013: 2):

1. Patrilineal decent, a nature which adopts the father's hereditary line.
2. Matrilineal decent, a nature which adopts the mother's hereditary line.
3. Parental decent, a nature which adopts both parents' hereditary line.
4. Altenerend decent, a nature which adopts either the mother or father's hereditary line according to the form of marriage.
5. Unilateral decent, a nature which adopts only one hereditary line (patrilineal or matrilineal).

According to Kuntjaningrat, there are 4 main principle decents in Indonesia, which are (Kuncoroningrat, 1992: 135):

1. Patrilineal decent, which counts the kinship through the men only, resulting in every individual in the father's kinship group to be included in the kinship limit, meanwhile the mother's kinship group falls outside of that area of limitation;
2. Matrilineal decent, which counts the kinship through the women only, resulting in every individual in the mother's kinship group to be included in the kinship limit, meanwhile the father's kinship group falls outside of that area of limitation;

3. Bilineal decent (doble decent), which counts the kinship through the men for certain rights and obligations and women for certain rights and obligations resulting in the father's kinship group to be included in the kinship limit, meanwhile the mother's kinship group falls outside of that area of limitation, and vice versa;
4. Bilateral decent, which counts the hereditary relationship through both parents.

Inheritance law system in Indonesia cannot be separated from the family/kinship system as Hazairin stated, which is that customary inheritance law possesses a separate pattern from the society's traditional nature of mind in the form of kinship with patrilineal, matrilineal, parental, or bilateral hereditary system (Hazairin, 1982: 9). With that, there are 3 systems of customary inheritance law in Indonesia (Hazairin, 1982: 11):

1. Patrilineal inheritance law system, which causes unification of big families, such as clans, where every person relates themselves only to the father. A pure patrilineal system such as in *Tanah Batak* is likewise. Whereas when every person relates themselves to either the mother or father, are put in a switch-over patrilineal system such as in *Lampung* and *Renjang*.

Societies with patrilineal kinship system (Jayus, 2019: 235-253), are mostly found in *Bataknese*, *Balinese*, *Ambonese*, *Papuanese*, *Tanah Gayonese*, and *Timornese*. The form of marriage with those patrilineal systems called 'honest marriage' where the women is given a trade by the husband's family with a number of items or cash that is usually called *tuhor*, *tukon*, or *tukor*, which means "ganti" (Indonesian) or "purchase" (English). With that, there is a purchase that results in a change of status from the future wife's family clan member when to become the husband's clan.

In *Batak Karo*, only the sons can be the inheritees, because daughters are considered outside of the patrilineal group (Meliala, 1978: 54). That reason was what based the inheritance law patrilineal system. Moreover, other reasons which implies that daughters are looked down on especially in *Bataknese* societies are (Meliala, 1978: 54):

- a. Wedding gold known as "tukor" which proves that women are 'sold';
- b. Levirate which proves that women are inherited by the passed husband's sibling;
- c. Daughters don't receive inheritance;
- d. The words of men showing that women are deceitful creatures and so on.

Besides that, factors that affect patrilineal law system where only sons have the inheritance rights from both parents are (Suparman, 1985: 53-54):

- a. The family tree is based on sons, daughters aren't considered able to continue the tree (family hereditary);



- b. In a household, the wife is not the head, the children use the father's family name, and the wife is classified as family;
- c. In custom, women cannot represent their parents because they are a part of the husband's family;
- d. In custom, *kalimbubu* (men) are considered family members as the parents.

In this patrilineal marriage custom, married women are considered out of the family and a part of the husband's family. Resulting in only sons are rightful to inherit assets. Meanwhile, the inheritees in patrilineal customary inheritance law system consists of (Suparman, 1985: 53-54): *one*, sons, with equal amount of inheritance amongst all the sons. But, if the inheriter doesn't have a son, the inheritees are only the wife and the daughter, after he's passed, that inheritance goes back to the "*pengulihen*". *Two*, adopted children, in the *Batak Karo* customs, have the same position with biological children as inheritees, but can only receive inheritance in the form of marriage assets. As for heirlooms (Lubis, 2007: 139), adopted child doesn't own the rights to receive that inheritance. *Three*, father and mother. Father, mother, and siblings can inherit if there are no children who can inherit. *Four*, closest families, appear as inheritees if there are no children, father, mother, and siblings who can inherit. *Five*, customary unity as inheritees if there are none of the mentioned.

- 2. Matrilineal inheritance law system, results in unification of big families, such as clans, ethnicities, where everyone always relate themselves to the mother and because of that are a part of the mother's ethnicity clan.
- 3. Parental/bilateral inheritance law system, that may result in unification of big families, such as tribe, cluster, where everyone relates themselves hereditarily to both the mother and father.

Parental/bilateral kinship system are societies with both parents' family and hereditary line with equal statuses. This marriage system is called '*free marriage*' where everyone is allowed to marry anyone as long as it doesn't deviate the decency and religion norms. The position of husband on one side and the wife on the other has no differences whatsoever as how the patrilineal and matrilineal system households are. For children in parental/bilateral system, there are no differences between sons and daughters, and grandsons and granddaughters from the father's side or the mother's side. Meanwhile, the husband and wife's sister are classified as "*siwa*" or "*uwa*", and brothers from each mother and father is classified into genders, being "*uncle*" for men and "*aunt*" for women (National Legal Development Agency, Ministry of Law and Human Rights, 2011).

This law system gives equal rights between men and women whether towards wives or husbands and daughters in the men's family side or the women's family side. This means that both sons and daughters receive the

equal amount of inheritance from their parents, even widows in their developments are included as inheritees. The transfer of assets process started since before the parents are even born. This distribution of inheritance system is individual—inheritance can be distributed individually. Inheritance law system are commonly found in *Jawa, Kalimantan, Riau, Lombok*, and so on.

There are 3 kinds of cultural inheritance system outside of patrilineal kinship system, namely (Barlinti, 2013: 25): one, individual inheritance system is mainly used in societies with parental/bilateral kinship system. This system is implemented in *Jawa* (Yunus, 1988: 439-440). Individual inheritance system arranges the distribution of inheritance by putting all men and/or women inheritees to receive distribution to take over or possess inheritance according to each person's portion. Those inheritances are allowed to be endeavored, enjoyed, or transferred to another person. Two, collective inheritance system. This system puts inheritance as a non-distributable unity between the power and possession. The usage for the interests of the inheritees are arranged together with the inheriters. Three, majority system which is similar to collective inheritance system. The transfer of rights of the inheritance are given to the oldest child who will continue to be the inheriter in the family. Majority system is affected by the used kinship system, between the patrilineal or matrilineal system.

### **Western Inheritance Law System**

Indonesian national law regarding inheritance law isn't constructed assertively in the *KUH Perdata* (Civil Code Book). A. Pitlo stated that inheritance law is a group of regulations which arranges law regarding wealth because of the death of a person, which is the transfer of assets left by the passed and the result of their relationship or them and a third party's relationship (Pitlo, 2004: 84). Wirjono Prodjodikoro stated that inheritance according to *KUH Perdata* shows a number of elements: *one, erflater* who in their death leaves assets. This element results in how and how far the relationship of the inheriters and inheritees. *Two, erfgenaam*, who have the rights to receive those inheritance. This element results in how and how far should there be a family bond between the inheriters and inheritees. *Three, nalatenschnap*, which is the form of assets left and transferred. These 3 elements result in how and how far the form of assets are transferred, affected by the characteristics of the family environment where inheriters and inheritees are both stable (Ramulyo, 2004: 85).

With that being said, the requirements to receive inheritance are (National Legal Development Agency, Ministry of Law and Human Rights, 2011): first, requirements relating to the inheriter. For a transfer of inheritance to happen, inheriters must have passed (Article 830 *KUH Perdata*). Second, requirements regarding the inheritees. People who are qualified to inherit are the ones who are born or are still alive when the inheriters have passed. Babies in all mothers' wounds are considered to have a relationship with the inheriters [Article 1

paragraph (2) *KUH Perdata*]. Other than that, are also constructed reasons according to the law about unqualified inheritees (Usman, 1993: 58):

- a. According to Article 838 *KUH Perdata*:
  1. Those who have been accused and punished for murder or the attempt of murder on the inheriter.
  2. Those with a judge's verdict have been accused for wrongly complained to the inheriter on doing crime with a minimum of 5 years prison time.
  3. Those who with violence prevented the inheriters to create or pull out the inheritance letter.
  4. Those who have embezzled, damaged, or forged the inheriters' inheritance letter.
- b. According to Article 912 *KUH Perdata*:
  1. Those who have been sentenced for killing the inheriters
  2. Those who have embezzled, destroyed, or forged the inheritance letter of the inheriters.
  3. Those who with violence prevented the inheriters to pull out or change the inheritance letter.

Meanwhile, in Inheritance Law, there are 2 ways to receive inheritance, which are (Usman, 1993: 58):

- a. By *ab intestate* (inheritees according to the law), arranged in Article 832 *KUH Perdata*: the people who are allowed to receive inheritance are families by blood, either legal or outside of marriage or the longest living husband and wife.
- b. By *testamentair* (inheriters pointed out in a letter=testament), arranged in Article 899 *KUH Perdata*. In this context, the owner of assets make letter where the inheritees are appointed in the testament (Perangin, 1997: 4).

According to Wirjono Prodjodikoro, there are 3 fundamental elements relating to the inheritance, which are (Prodjodikoro, 1976: 14):

1. There being an inheriter who on their passing leaving assets;
2. There being inheritees allowed to receive assets left behind;
3. There being assets, which are "*in crocreto*" assets left and transferred to switch inheritees.

Other than that, in civil inheritance law, principles that are valid are (Ramulyo, 2004: 95-96):

- a. Only regarding rights and obligations in the field of law, assets are able to be inherited;
- b. There being *saisine* for inheritees, with the inheritees automatically because law receive rights over every item and every rights also every obligation from someone who has passed;
- c. Death principle, which is inheritance because of death;
- d. Individual principle, which is inheritees individually and not as a group;

- e. Bilateral principle, which is somebody inheriting from the father's and mother's side
- f. Grading principle, which are inheritees whose degree is close with the inheriters closing inheritees with a higher degree.

Civil inheritance law is also known as there being alternate inheritees or alternate place as constructed in Article 854-857 *KUH Perdata* also connected with Article 860 and Article 866 *KUH Perdata*. The switch gives rights towards person who acts as a replacement in degree and every rights of the person replaced (Article 841 *KUH Perdata*). Replacement in a valid downward straight line goes on without a limit [Article 842 paragraph (1) *KUH Perdata*].

### **Islamic Inheritance Law System**

Towards Islamic inheritees, the division of inheritance law obeys the Islamic law that orients towards Islamic law compilation and that aligns with the Second Paragraph of *Penjelasan Umum* Law No. 3/2006 which states that the resolution of dispute or case on distribution of inheritance to the Muslims are absolute authority of the Religious Court and is resolved based on Islamic law. So, Muslims are not allowed to resolve inheritance case in the District Court or by Inheritance law. Meanwhile, non-Muslims are allowed to bow down to the customary law or civil law. Resolution for the Islamic law dispute is done through the Religious Court as arranged in the Law Number 3 of 2006 concerning Amendments and Law Number 7 of 1989 concerning the Religious Courts. Dispute resolutions according to the customary law and the civil law are done through District Court.

Inheritees according to Presidential Instruction No. 1/1991, are people who when the inheritor passes, is still related by blood or marriage with the inheritor, a *Muslim*, and aren't blocked by the law to be an inheritee [Article 171 letter c Compilation of Islamic Law (*KHI*)]. Muslims generally use Islamic law as a guide in inheritance, but a number of people also uses customary law as a guide. But, in the context of inheritance that uses customary law are also mostly used in non-Muslims in the *Batak, Java, Borneo, Sulawesi*, and other ethnicities. For Inheritance law according to the Islamic law, each one of the inheritees receive an even amount of inheritance. But, inheritance in Islamic inheritance law are distributed according to the testament. According to Article 194 paragraph (1) *KHI*, people who are minimum 21 years old, healthy, and without any coercion are allowed to give a portion of their assets towards other people or institution. Meanwhile according to Article 194 paragraph (3) *KHI*, the possession of the assets is only able to be done after the testator have passed. Testament is an act of giving an item or benefit towards other people or legal institution, which is valid after the testator have passed (Elucidation of Article 49 letter c of Law Number 3 of 2006). If there is a testament, only allowed a third of the inheritance at most except if all the inheritors agree [Article 195 paragraph (2) *KHI*].

## Bataknese Inheritance Law

Bataknese have an ancestral land in Sumatera Utara, which consists of a number of sub-ethnicities, which are: *Batak Toba*, *Batak Simalungun*, *Batak Mandailing*, *Batak Karo*, and *Batak Pakpak* where each and every one of its traditions are different (Sugiyarto). With their own differences, the law manages their traditions is customary law, which is a group of regulations that arranges generation to generation customs, including the inheritance customary law (Simamora, 2013: 2). The validity of inheritance law in Indonesia is still dualism and pluralism. This is caused by the history of civil law in Indonesia. Before Indonesia claimed its independence, constitutional law politics in the *Hindia Belanda* era, as arranged in Article 131 and Article 163 *Indische Staatregeling* (IS), are considered to there being classification of law and classification of citizens. Then, European Civil Law (*Burgerlijk Wetboek*) was valid in Indonesia based on *Staatsblad* Number 23 Year 1847 for European Class, Customary Law for *Bumiputra* Class (pure Indonesians), and Customary Law for every Foreign Eastern Class (National Legal Development Agency, Ministry of Law and Human Rights, 2011). In its development, *KUH Perdata* is valid for Foreign Eastern Class and is made possible for *Bumiputra* Class to do voluntary submission towards the *KUH Perdata* and customary law, including the inheritance law. In the development of Islamic law, there is pluralism in the valid inheritance law system, namely: western inheritance law, customary inheritance law, and Islamic inheritance law, which until is considered positive law (National Legal Development Agency, Ministry of Law and Human Rights, 2011).

Inheritance law that is in use since then until now (customary inheritance law, Islamic inheritance law, even western inheritance law) are positive laws which are enforced by the court. Each inheritance law validity are based on the society that implements it. *Batak Toba's* kinship system is the patrilineal system, which is hereditary line pulled from the father's heredity resulting in the father's family name used by the descent children. As for the distribution of the parents' rights, in the *Batak Toba* customary law, only men receive inheritance, women only receive inheritance in the form of voluntary giving from the parents or brother (Nadapdap, 2019: 3).

The patrilineal system is used by a majority of ethnicities in Indonesia, for example *Batak*, *Timor*, *Rote*, *Gayo*, and *Bali*, the inheriting process is done based on the men's hereditary line. According to the *Batak Toba* customary inheritance law, the rights over a father's inheritance are only owned by sons, meanwhile daughters and the firstborns' descent can only receive agriculture or farming land supplies from their father (Sudiyat, 1952: 152). In Java customary inheritance law with a bilateral or parental kinship, the youngest daughter takes care of the parents and can inherit their house. Parents' house in *Java* customs can be inherited to the daughters.

*Batak Toba* people are those who follows the patrilineal family system. Even though the *Batak Toba* people follow the Patrilineal system, the daughters also

receive those rights which is called with the gift from father and that gift is not a form of distribution of assets. A gift from a father to his daughter in the form of land has a purpose to be worked on to support the daughter's household. But, that land gift cannot be transferred or sold to other people, except if inherited to the sons or given back to the brothers. If there are no sons who can inherit, the inheritance falls for brother's sons. This inheritance system is still implemented up until this day in the ancestral land, *Tapanuli Utara*. Generally, *Bataknese* men who are wandering far possess inheritance rights over the father or grandfather's inherited assets. In conclusion, the distribution of assets in *Batak Toba* still acquires the *Batak Toba* customary inheritance law with the patrilineal family characteristics, but several regions have changes towards the implementation following the development of era.

### **Resolution of Distribution of Inheritance Law**

One of the country's way and role in protecting cultural community is through the active role of the country in protecting their identities and collective rights to maintain unity in diversity of the cultures in Indonesia (Rozi, 2017). The first step the country needs to do is to actualize the goal by giving acknowledgement and respect guarantee for cultural societies' traditional rights and identity in constitution, as constructed in Article 18B paragraph (2) and Article 28I paragraph (3) *UUD 1945*. The two norms in that constitution gives meaning that the country manages to present a space to coexistences of rights towards diverse ethnicity groups, cultures, and religions which could be the foundation towards human development, democracy, and civilization of the *Negara Kesatuan Republik Indonesia* (Constitutional Court Decision Number 1/PUU-XIX/2021 dated June 29, 2021, under Legal Considerations Paragraph [3.11.1]).

According to the Constitutional Court, Article 18B paragraph (2) and Article 28I paragraph (3) *UUD 1945* have given acknowledgement and respect guarantee towards the identities and rights of a cultural society and the legal plurality and legal framework concept. But, the legal plurality concept in Indonesia requires there to be collaborative and harmonious relationship between Indonesia's national law sub-system. Regarding the resolution of distribution of inheritance law, Indonesia still follows the plural law system. The diversity of inheritance law [Islamic inheritance law, western civil inheritance law (*KUH Perdata*), and customary inheritance law] is more visual because customary inheritance law in reality is not singular, but diverse with the traditions of each and every region. In this kind of situation, ideas emerge to unify law in realizing a national law system regarding inheritance. But the inheritance law unification arranged needs to guarantee the absorption of all aspirations, values and interests of a society by showing the background, culture, religion, and law interests' difference in a society.

Inheritance law unification in Indonesia if not implemented carefully could emerge conflict in a society because people who inherit bows down to different inheritance law. Because of that, in practice, if there isn't any inheritance dispute,

society would be given the rights to choose the inheritance law to be applied (*choice of law*) in a deal of constructing Indonesian national law in the middle of a pluralistic society, because by giving equal legal sub-system choices to a diverse society and merely negating legal other sub-system might widen the distance between law and the feeling of justice that lives in a society (Constitutional Court Decision Number 1/PUU-XIX/2021, dated June 29, 2021, under Legal Considerations Paragraph [3.12]).

In line with the plurality of inheritance law in Indonesia, the Constitutional court, in their line of practice, does not put customary law in an inferior position. Even though historically, since the validity of Emergency Law Number 1 of 1951 concerning Temporary Measures to Organize Unitary Powers and Procedures for Civil Courts (*LN 1951/9; TLN No. 81*), which juridically erases the existence of *pribumi*/customary court and *swapraja* court, customary law is still valid and their values are still accommodated in court verdicts so access to justice towards cultural societies are open. In this context, customary law is a sub-system from Indonesia's national law system. As in the court system in Indonesia, customary law has become one of the legal sources in resolving a case and it's compulsory to dig living customary law in the center of a society.

Normatively, the freedom of judges is constructed in Article 5 paragraph (1) Law Number 48 of 2009 concerning Judicial Power (State Gazette of the Republic of Indonesia of 2009 Number 157, Supplement to the State Gazette of the Republic of Indonesia Number 5076) which stated, Judges and Constitutional judges are obligated to dig, follow, and understand law values and the feeling of justice that lives in a society. But according to the *a quo* terms, if in practice turns out that the valid customary law is not in accordance to the society's law interest, a judge could drop a different verdict from the valid one, so there indirectly emerges containing new laws which reflects the feeling of justice, benefit, and certainty of law. In this context, there are not paradoxal relation between the enforceability of customary law with the articles in *KUH Perdata* which arranges inheritance. Morely if all parties agree to use the *KUH Perdata* fully, that situation is allowed (Constitutional Court Decision Number 1/PUU-XIX/2021, dated June 29, 2021, under Legal Considerations Paragraph [3.13]).

### **Supreme Court Jurisprudence Verdict**

Customary law in most ethnicities in Indonesia follows a patriarchal concept which puts men as the head of the family first, because they are considered to have a public role of continuing the hereditary so that only men are able to receive inheritance. Meanwhile, women are viewed to have a role in the domestic household are, because they are viewed as not essential to receive inheritance or to receive half of the portion of the men's or a smaller portion. Regarding this, over the equity of rights between men and women and humanitarian principle and justice, women have inheritance rights. This issue has been restated several times by the Supreme Court and with their consistence since 1961 regarding the equal

rights for men and women on inheritance, this law character has become a jurisprudence in the Supreme Court (Jurisprudence, Directory of Decisions of the Supreme Court of the Republic of Indonesia, 2018).

The Supreme Court decision regarding equal rights between men and women on inheritance, among others (Jurisprudence, Directory of Decisions of the Supreme Court of the Republic of Indonesia, 2018):

1. Supreme Court Decision Number 179 K/SIP/1961, on 23<sup>rd</sup> of October 1961 in the Langtewas issue against *Benih Ginting* regarding inheritance dispute on the patrilineal *Karo* customs. The Supreme Court decided that women should be considered to inherit.
2. Supreme Court Decision on the inheritance dispute in the *Batak Mandailing* customary law system which follows the patrilinealism concept. The Supreme Court through Decision Number 415 K/SIP/1970 on 16<sup>th</sup> of June 1971 on the Usman case facing Marah Iman Nasution. Customary law in *Tapanuli* is now developing towards giving equal rights for men and women.
3. Supreme Court Decision Number 1048K/Pdt/2012 on 26<sup>th</sup> of September 2012. This issue regarding distribution of inheritance of the Rote Ndao Nusa Tenggara Timur custom. This verdict is then put into one of the Supreme Court's landmark decision in the 2012 Annual Report. In their consideration, The Supreme Court stipulates that, the *Rote Ndao* customary law is not in line with the recognition of men and women's rights so it is no longer able to be maintained.
4. Supreme Court decision on the issue regarding inheritance that follows the patrilineal concept in *Bali*, Decision Number 4766 K/Pdt/1998, on 16<sup>th</sup> of November 1999, The Supreme Court has back again highlighted the rule of law that: Women in *Bali* are allowed to receive inheritance even though the inheritance system in *Bali* follows the men majority inheritance system.
5. Supreme Court Decision Number 147 K/Pdt/2017, on 18<sup>th</sup> of April 2017. The Supreme Court resolved the issue on Chinese inheritance customs. On their consideration, the Supreme Court decided that: in the context of gender equality, women and men's rights are equal in the eyes of law, so the Chinese unwritten law must be able to adapt with the era development.
6. Supreme Court Decision Number 573 K/Pdt/2017, on 19<sup>th</sup> of June 2017 on resolution of inheritance distribution in the *Batak* customs and Supreme Court Decision Number 1130 K/Pdt/2017, on 10<sup>th</sup> of July 2017 regarding inheritance distribution in the *Manggarai Nusa Tenggara Timur* customs.

Other than that, to lift the equality of justice between men and women, also to strengthen it with regulations which is the Regulation of the Supreme Court Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases Against the Law, promulgated on August 4, 2017, State Gazette of the Republic of Indonesia of 2017 Number 1084.

In conclusion, based on the Constitutional Court Decision and the Supreme Court Decision Jurisprudence regarding the completion of inheritance distribution



law, if there was to happen an inheritance dispute, the society will be given rights to choose which inheritance law will be used (*choice of law*) in an agreement of all parties. In context of disputes that ends in court, judges will choose the law that reflects the feeling of justice, benefit, and law certainty.

### Conclusion

1. To avoid the potential dispute regarding inheritance, everyone could prepare by making a testament and/or donation when he/she was still alive. Because testaments made by people to inherit who are still alive and transferred after they have passed;
2. There needs to be an inheritance law unification to avoid inheritance dispute which happens continuously by absorbing all aspirations, values, and interests of the society by paying attention to the different cultural, religious, and legal needs background in a society;
3. There needs to be a strengthening on the regulations to give legal certainty and the feeling of justice;
4. If there is a legal dispute on distribution of inheritance specifically in *Batak Toba* ethnicity towards daughters that ends in court, judges who are going to decide the verdict has to base their law according to legal values and the feeling of justice alive in a society, so that the rights and justice principle towards the daughters in *Batak Toba* could be upheld high;
5. Inheritance issues have numerously been resolved by the Supreme Court since 1961 regarding equal rights between men and women in inheritance, also to already become a jurisprudence in the Supreme Court;
6. According to Constitutional Court Decision Number 1/PUU-XIX/2021, on 29<sup>th</sup> of June 2021, if there wasn't any dispute of inheritance, the society will be given a choice of law on what inheritance law will be used with the agreement of all parties. But, if the dispute ends in court, the judges will decide the verdict.\*\*\*

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