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<i>Number</i>	Kb 17.016	<i>Date</i>	23 February 2017
		<i>Telephone</i>	+31 71 527 7260
<i>Subject</i>	Invitation	<i>Contact</i>	Jan Michiel Otto

Dear Victor Imanuel W. Nalle,

Referring to previous correspondence from our organizing committee, I am very pleased to officially invite you to present a research paper at the international conference *Adat Law 100 Years On: Towards a New Interpretation?*, organized by the Van Vollenhoven Institute, in cooperation with the KITLV and the Asian Modernities and Traditions (AMT) Research Program.

The conference will take place at the National Museum of Ethnology (Museum Volkenkunde) in Leiden from 22 until 24 May 2017. The Van Vollenhoven Institute will provide you with lunch and drinks, and invites you for a conference dinner on the 22nd of May. The members of the organizing committee Jacqueline Vel and Willem van der Muur will soon send you the conference program and guidelines for writing the conference paper.

The Van Vollenhoven Institute offers to reimburse your international flight and local transport costs up to a maximum of 800 EUR. Please note that only travel costs with valid receipts can be reimbursed. Accommodation costs shall not be reimbursed. You are expected to arrange your own visa, and travel and health insurance. Please do not hesitate to contact the organizing committee in case you have any questions.

I look forward to welcoming you at the conference. In order to be able to attend the full program I advise you to be in Leiden from 21 May until 24 May (late afternoon).

Sincerely,

Jan Michiel Otto
(Director Van Vollenhoven Institute)





Universiteit
Leiden

Changing Adat Inheritance Law

By: *Vitcor Imanuel W. Nalle*

Paper presented at the international adat law conference:

Adat law 100 year on: Towards a new interpretation?

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Changing Adat Inheritance Law

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Abstract

The development of judgments showed that daughters have the right to inherit although it was contrary with the principle of adat inheritance law, especially in patrilineal communities. The judgments use the perspective of human rights to criticize inequality between men and women in adat inheritance law. Furthermore, Supreme Court considered the hegemony of patriarchal perspective on inheritance law reviewed adat inheritance law based on the general principles of law, especially on human rights principle. Consequently, the judges had gradually softening the substance of adat law, especially on inheritance disputes that involved women. However, the 1945 Constitution of the Republic of Indonesia respects the existence of adat law. Article 28I par. 3 states that state respect cultural identities and rights of traditional communities in accordance with the 'development of the times and civilizations'. This study show that definition of criteria 'the development of times and civilizations' is important to prevent adat law from arbitrary interpretation which demonstrates the superior mentality of the state to adat law.

Keywords: adat law, inheritance, gender, development of times and civilizations

Adat Law in Inheritance

There has been no unification of inheritance law in Indonesia. The inheritance law is stipulated in civil law, Islamic law, and adat law. Muslims commonly use Islamic law as a guide in inheritance. Therefore, influence of adat inheritance law can be found in non-Muslim societies, especially in Batakese and eastern Indonesia.

Ordinarily, adat inheritance law has three systems (Barlinti 2013:25). First is the individual inheritance system. System of individual inheritance is distribution based on individual or personal heir to be possessed individually. Each heir is free to use or transfer the property to other parties. Second is the system of collective inheritance. System of collective inheritance is distribution of legacy by transferring undivided legacy to the heirs. Each heir has rights to manage, to use, or to receive the result of the collective legacy. Third is the system of *mayorat*. System of *mayorat* is the transferring of rights to occupy undivided legacy to the eldest child that considered as successor of responsibility in the family.

Inheritance in patrilineal system is based on the male lineage. According to the principle of Batak inheritance law, right to inheritance belongs to son. This principle softened when father gives farms to daughter and her eldest son (Sudiyat 1981:152). Sulistyowati Irianto (2005) showed that Batakese maintained their inheritance system which refers to the patrilineal system notwithstanding they lived in urban areas.

This is different from inheritance in Java. Based on tradition in Java, the youngest daughter, who cares for the parents, can inherit the parent's house. The parent's house in the Java community has an important value. But now, daughter in Java can inherit parent's house. Kevane and Levine (1994) indicated this trend of equality in Java. Accordingly, discrimination against women in Java is still prevalent in the 1950s, but then decline in the 1990s.

The equal portion of son and daughter in Java occur naturally, while the equality in Batak initially driven through the court decisions for post-independence. The same condition also occurs in Rotinese. Moreover the judgments of the Supreme Court showed the equal portion of the estate. But the judgments are not easy to change society's views on inheritance.

The question is: does the development of the times and civilizations could be the criteria for reviewing the relevance of adat inheritance law? Does the changing adat inheritance law, by the Supreme Court's judgments, contrary to Article 28I of the Constitution which respects cultural identity?

Developments of Judgments

The majority of the Supreme Court judgments that granted equal portion of son and daughter came from a family dispute over inheritance in Batak. Furthermore, there is also a Supreme Court judgment in a dispute over inheritance of Rotinese, namely Supreme Court Judgment in case 1048K/Pdt/2012.

- *Supreme Court Judgment in case 179/K/Sip/1961*

Judgment in case 179/K/Sip/1961 related to cases of inheritance in Tanah Karo. This case involves Langtewas Sitepu and Ngadu Sitepu against Benih Ginting. Both sides claim the estate of the testator Rolak Sitepu. Langtewas Sitepu and Ngadu Sitepu is the biological child of Tindik Sitepu (siblings Rolak Sitepu). Rolak Sitepu did not have a son when he died. Therefore Rumbane boru Sitepu, his daughter, had managed his land. However, Benih Ginting (Rumbane's son) occupied that land after Rumbane boru Sitepu died. Langtewas and Ngadu sued Benih Ginting in Kabanjahe District Court based on argument that Benih's mother (Rumbane) did not have rights to inherit the land from her father.

The court granted the lawsuit, but the Medan High Court overturned the judgment which Langtewas and Ngadu appealed to the Supreme Court. The Supreme Court Judgment in case 179/K/Sip/1961 ruled that the daughter had the right to inherit from her parents according to humanity, justice, and equality between men and women. Equality between men and women, according to the Supreme Court, referred to the living law in Indonesia.

- *Supreme Court Judgment in case 100/K/Sip/1967*

Judgment in case 100/K/Sip/1967 is not just about daughter's right in inheritance but also the widow. This case was about dispute between Tangsi Bukit (son of the heir) against his stepmother (Pengidahen Boru Meliala) and his sister (Muli boru Bukit). Plaintiff argued that son supposed to be the only party that has the right to inherit. Conversely, the estate was sold by Pengidahen boru Meliala. Kabanjahe District Court ruled the lawsuit was unacceptable therefore Tangsi Bukit appealed to the Medan High Court. Medan High Court overturned the previous judgment but only 1/6 part of the property granted to Tangsi Bukit. He is not satisfied then appealed to the Supreme Court. But the Supreme Court ruled the public has been developed towards equality between men and women. Consequently, widow and daughter have rights to inherit from her husband or father. In addition, stipulation of a widow as heir becomes the Jurisprudence of the Supreme Court.

- *Supreme Court Judgment in case 136/K/Sip/1967*

Salmah (daughter) sued Haji Fahri and Siti Dour with the argument that Haji Muhammad Arsyad (father of Salmah and Haji Fahri) had inherited some lands. However, Haji Fahri had occupied the house after the death of their father. Furthermore, District Court and High Court ruled the distribution of the estate based on the principle of *holong ate* which is a gift of a small portion of inheritance to daughters by kindness of her brother. But Haji Fahri then filed a cassation with the argument that Medan High Court misapplied the *holong ate* in the judgment. Salmah as a daughter, according to Haji Fahri in cassation, was not entitled to determine the portion that she received in *holong ate*.

Conversely, Supreme Court judgment in cassation (case 136/K/Sip/1967) specifically expanded *holong ate* part in Batak inheritance. Judgment in case 136/K/Sip/1967 ruled that *holong ate* should consider the progress of women's rights in the land of Batak. The subsequent judgments followed that judgment. Medan High Court Judgment in case 198/PDT/2011/PT-MDN explicitly referred to that judgment in its legal argument and ruled that the position of daughter and widow in Batak inheritance law has undergone a change in practices.

- *Supreme Court Judgment in case 1048K / Pdt / 2012 (Jance Faransina Mooy-Ndun against Junus Ndoy et al)*

This case is actually not an inheritance dispute. This case started from the death of Jermias Ndoen in 1951 which had four plots of land in Roti Island. Jance Faransina Mooy-Ndun, Jermias' daughter, then managed these lands because she was an only child. However the problem began when Junus Ndoy in 1989 gave permission to some people to build home in one of the inherited land. Moreover Junus Ndoy in 2010 submitted application to the National Land Agency to measure the land in order to apply for ownership.

Jance then sued Junus Ndoj in Rote Ndao District Court because of tort (Article 1365 of the Civil Law Act). Rote Ndao District Court granted the suit (Rote Ndao District Court's Judgment in case 07/PDT.G/2010/PN.RND). However, the Kupang High Court overturned the judgment of the District Court. Kupang High Court, in its judgment, ruled that Rotinese used patrilineal inheritance system (see Fox 2010:42). Therefore the son as the only one successor of the family name (*fam*) have rights to inherit the land. The testator should use *dendi anak kelambi* institution, if he does not have a son, by adopted a son from his brother.

Jance has filed a cassation and Supreme Court overturned Kupang High Court judgment. Jance in the appellate brief stated that patrilineal inheritance system in Rotinese no longer correspond to the development of society and non-discrimination principle. This argument based on the Jurisprudence of the Supreme Court. In addition, the judgment also used the reference from The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which prohibits discriminatory cultural practices against women. States, based on the Convention, shall take the right to change the pattern of social and cultural behavior of men and women with a view to achieving the elimination of prejudices, customs and all other practices based on the inferiority or superiority of one gender. This judgment is also one of the Landmark Decision in the Annual Report of the Supreme Court in 2012.

Besides the four judgments, there are other judgments related to inheritance disputes and change adat inheritance law to give equal rights of inheritance between men and women.

Judgments about Adat Inheritance Law

No.	Judgments	Arguments
1	Supreme Court Judgment in case 1589 K/Sip/1974	This Judgment referred the Jurisprudence of the Supreme Court. Based on this Judgment, the daughter was an heir. The Supreme Court considered that the Sasak society was patrilineal societies, but in recent times also led to paternal or maternal system.
2	Kabanjahe District Court Judgment in case 23/Pdt.G/2009/PN.Kbj	Argument in this Judgment ruled the law of inheritance in Indonesia recognized the equal portion of estates among heirs, regardless of sex and birth.
3	Medan District Court Judgment in case 397/PDT.G/2012/ PN.Mdn	The Judgment ruled the estate; the house belongs to the heir, divided evenly to all heirs (son and daughter). This Judgment used Supreme Court Judgment in case 179/K/Sip/1961 in its legal considerations.
4	Kupang District Court Judgment in case 210/Pdt.G/2015/PN.Kpg	This Judgment about an inheritance on Rotinese family which divided the estate to the heirs (son and daughter) in equal portion. This Judgment referred to Article 833 of Civil Law Act in its legal considerations.
5	Medan District Court Judgment in case 564/Pdt.G/2015/ PN.Mdn	The Judgment stated that all heirs (son and daughter) have equal portion of three parts of land which is inherited. This Judgment referred Article 832 of Civil Law Act in its legal considerations.
6	Medan District Court Judgment in case 580/Pdt.G/2015/ PN.Mdn	This Judgment granted daughter as an heir of the inherited land which under control by her brother. This Judgment used Supreme Court Judgment in case 179/K/Sip/1961 and the Supreme Court Judgment in case 284/K/Sip/1975 in its legal considerations.
7	Medan High Court Judgment in case 360/PDT/2015/PT-MDN	This Judgment strengthened the Medan District Court Judgment in case 133/Pdt.G/2014/PN.MDN. This Judgment ruled every one of the six heirs receive 1/6 portion of the inheritance.
8	Medan District Court Judgment in case 144/Pdt.G/2016/ PN.Mdn	This ruling gave equal inheritance rights to sons and daughters by referring to Article 28D of the 1945 Constitution, the Supreme Court Decision No. 179/K/Sip/1961, and Article 852 of Civil Law Act.

According to Daniel Lev (2013:28), changes of the inheritance portion of daughter in the adat inheritance law by court's judgment (in particular the Supreme Court) in the 1950s and 1960s related to the paradigm of post-independence judges. The unstable political situation and the lack of a well-established legal system then made the judges considered themselves had important role as a creator of law. Judges often said that the old rules are no longer law and the judge did not hesitate to create new rules through a judgment. Therefore, Lev (2013:29) doubted sociological analysis in the court's judgments.

Lev analysis of the thinking of judges which position themselves as the creators of the new law when dealing with adat law related to Wignjosoebroto analysis about the effect on the legal expert nationalists in 1950-1959 eras. According to Wignjosoebroto (2014:188), the Indonesian law experts are in a dilemma in the position of adat law in the national legal system. On the one hand, state should maintain adat as a national pride or national identity. But on the other hand, adat law may become an obstacle to economic progress and social welfare due to weak growth in the aspect of legal certainty.

The judge in the Supreme Court's judgment interpreted the development times in relation to equality before the law. Construction inequality of son and daughter in the adat inheritance law become incompatible with the values of equality which had become a universal value. But on the other side of the issue of the division of inheritance to son and daughter - with regard to the land or estate - was not only about equality or inequality. In the context of the Batak family, inherit land to the son interpreted as a symbol of sustainability clan along with his property. It can be interpreted as surrender of land inherited to another clan if daughter inherits the land. When a daughter marries, she will be part of the clan of her husband. Furthermore, Batakness according to Aritonang (2000:420) encouraged their daughters to have a husband with a high social status so their daughters should not have to ask for an inheritance.

Although the Supreme Court's judgment in 1961 followed by subsequent judgments, but inheritance by reference to adat law is still commonly used, even in urban areas. Some informants who are interviewed in this study said their family use the adat inheritance law. According to those who still practice adat inheritance law, justice in division of inheritance to the son and daughter related with the context of the social structures in their communities. For example is division of inheritance land. Although the inheritance is not evenly distributed with daughter, but the land inherited to son still has a social function. The social function is also used for daughter that becomes part of another clan. When the daughter and her husband had a financial problem, the son who received the estate should help by giving the rights to daughter to manage the estate.

The development of civilizations can be used as the basis to give equal portion of inheritance for daughter and son. Notwithstanding the change, in clan's view, should not deconstruct the relationship between clan and the land that inherited to the son. The inherited land is not an ordinary asset that can be divided into individuals in the family on the basis of the equal rights. The inherited land is the clan's asset which has a collective function.

Interest not to deconstruct the sustainability of the clan is the implication of view within the communities (in general) that puts children - especially son - as a bridge for families and adat communities in the future. According to Lukito (2006:148), son in adat communities is not only a continuation of the existence of the family but also cultural identity. Cultural identity in this context is the clan and Indonesian constitution actually ensures respect for cultural identity.

Respect for Cultural Identity

Respect for cultural identity in the Indonesian constitution (Constitution of 1945) stipulated in Article 28 (3). Article 28 (3) states that 'cultural identity and traditional rights be respected in line with the times and civilization.' The previous section of this paper has discussed the interest to sustain clan as cultural identity. Cultural identity, when referring to the Article 28 (3) of the 1945 Constitution, was respected by the state but by taking into account the times and civilization.

The 1945 Constitution does not describe explicitly the definition of 'cultural identity' and criteria 'in line with the times and civilizations'. Placement of 'cultural identity' in section (3) which is coupled with the 'traditional rights' make meaning of 'cultural identity' became inseparable with 'traditional rights'. The 'traditional rights' in Constitution is different from the term 'adat law' in

Article 18B paragraph (2) although some studies use both terms interchangeably (Abdurrahman 2015:16).

The formulation of Article 28 (3) of the 1945 is similar to the formulation of Article 6 (2) of Law Number 39 of 1999 on Human Rights (Human Rights Act). Article 6 (2) stipulates 'The cultural identity of indigenous community, including adat land rights are protected, in tune with the times.' Furthermore, elucidation of Article 6 (2) provides the limitation of criteria 'in line with the times' which the cultural identity should not inconsistent with the principles of rule of law on justice and welfare. Therefore, respect to cultural identity is limited by the rule of law principles.

Accordance of cultural identity in traditional societies with rule of law principles is a requirement if a cultural identity would be respected by the state. On the other hand, adat inheritance law as a cultural identity is hard to be harmonized with the rule of law principles. In fact, several court judgments in the adat inheritance tend to regard adat inheritance law must conform to the universal principles of law. This perspective is like thinking of the colonial countries that apply the theory of evolutionism by requiring traditional law not contrary to law and Western values such as justice and equality (Snyder 1981). According to Lev (1971:105), the thinking of legal pluralism can not be avoided because the Indonesian independence movement articulated in terms of liberty, equality, and self-determination. Such ideas seem to be transformed as well in view of the judges of Indonesia's post-independence when there is a dispute in inheritance.

The judges argue that society has changed and assume that the value in the adat inheritance – which tends to understate the female part – is no longer accepted by the public. Whereas the principle of equality in inheritance – as a universal principle – seems still difficult to be accepted by the community who still run the adat inheritance law. Court judgments that change the inheritance for daughter – for those who've run inheritance based on adat inheritance law – understood as a state intervention that happened in a fair share of the estate. However, these interventions can also remodel the system of kinship in the community if then change drastically adat inheritance law. For instance Medan High Court Judgment in case 360/PDT/2015/PT-MDN which not only granted daughters as heirs, but also granted the money received by the daughter from her parents (*pauseang* and *indahan arian*) as part of the estate which should be distributed to the heirs.

In the context of the Batak community, cultural identity has no significant changes in spite of being part of a dynamic urban community. According to Bruner (1961:520) '...the urban Batak not only lack alternative models of change but find in their adat the sole basis of moral order in society'. The urban Batak communities maintain their cultural identity by maintain adat inheritance law, even when they migrate out of the region of Sumatra (Borualogo and van de Vijver 2016).

The condition is not same in other ethnic groups, such as Rotinese in urban areas. Supreme Court Judgment in case 1048K/Pdt/2012 related with inheritance disputes which used adat inheritance law and the parties lived in Roti Island. However, most arguments of the plaintiff and defendant in inheritance dispute (in the period 2012-2016), which involved Rotinese in Kupang District Court, did not use the adat inheritance law. This condition may be different if the disputes occurred in Roti Island, especially if related to productive land, because the inheritance land related with ancestors in a clan (Fox 2006: 239).

Furthermore, informants were interviewed in this study also showed the different interpretation of inheritance in Bataknese and Rotinese in urban areas. There are families who interpreted the estate of parents, though not derived from their ancestor, as the land of the ancestors. Consequently, the inheritance in the clan – even in urban areas – a few years later would put the inherited land as ancestral land of the clan. However, there is also a different interpretation which considers the most important part in adat law is not respect to ancestors land but respect to the ancestors. The interpretation difference showed the importance of interpretation about criteria 'in line with the times and civilizations' to have respect from the state.

Conclusion

Supreme Court judgments, particularly since the Supreme Court Judgments in case 179/K/Sip/1961, have become an instrument to change adat inheritance law. Changes to adat inheritance law are effective when there is a dispute of inheritance in the judiciary. Supreme Court Judgment in case 179/K/Sip/1961 about disputes in Karo, but later became a reference in inheritance disputes in Rotinese and Bataknese. Although the Supreme Court Judgment in 1961 is followed by subsequent

judgments, but adat inheritance law is still commonly used, even in urban areas. The judgments which are based to the Supreme Court Judgment in case 179/K/Sip/1961 – for those who've run inheritance based on adat inheritance law – understood as state's intervention. However, fair division of inheritance – in the context of land's inheritance – can have an impact on the kinship system because the ancestral land should be controlled by the clan.

If the court examine inheritance dispute in a community that still use the adat inheritance law, the judge should know the meaning of the various institutions in the adat inheritance law comprehensively. In addition, judges need to interpret clearly the criteria of "in line with the times and civilizations" when change the adat inheritance law by their judgment. A clear understanding of these criteria should be made so that adat inheritance law changes do not have implications for the heterogeneous cultural identity of the Indonesian people. In addition, a clear understanding is needed so that there will be no arbitrary interpretation of adat inheritance law which then demonstrates the superior mentality of the state to adat law.

Reference List

Abdurrahman. (2015) *Laporan Pengkajian Hukum tentang Mekanisme Pengakuan Masyarakat Hukum Adat*, Jakarta: BPHN.

Aritonang, J.S. (2000) *The Encounter of the Batak People with Rheinische Mission-Gesellschaft in the Field of Education (1861-1940) a Historical-Theological Inquiry* (Doctoral dissertation).

Barlinti, Y.S. (2013) 'Inheritance Legal System in Indonesia: a Legal Justice for People', *Indonesia Law Review*, year 3, volume 1, January-April, pp. 23-41.

Borualogo, I & van de Vijver, F. (2016) 'Values and Migration Motives in Three Ethnic Groups of Indonesia', in C. Roland-Levy, P. Denoux, B. Voyer, P. Boski & W.K. Gabrenya Jr. (ed), *Unity, Diversity and Culture: Research and Scholarship selected from the 22nd Congress of the Internasional Association for Cross-Cultural Psychology*, International Association for Cross-Cultural Psychology.

Bruner, E.M. (1961) 'Urbanization and Ethnic Identity in North Sumatra', *American Anthropologist*, vol. 63, no. 3, pp. 508-521.

Fox, J.J. (2006) 'Contending for Ritual Control of Land and Polity: Comparisons from the Timor Area of Eastern Indonesia', in Thomas Reuter (ed), *Sharing the Earth, Dividing the Land: Land and Territory in the Austronesian World*. Canberra: ANU Press.

Fox, J.J. (2010) 'A Rotinese Dynastic Genealogy: Structure and Event', in: Beidelman, T. O. (ed), *The translation of culture: Essays to Evans-Pritchard*. Milton Park, Abingdon, Oxon; New York, NY: Routledge.

Irianto, S. (2005) *Perempuan di antara Berbagai Pilihan Hukum: Studi Mengenai Strategi Perempuan Batak Toba untuk Mendapatkan Akses kepada Harta Waris melalui Proses Penyelesaian Sengketa*, Jakarta: Yayasan Obor Indonesia.

Kevane, M. and Levine, D.I. (1994) 'Changing Status of Daughters in Indonesia', *Quarterly Journal of Economic*, vol. 109, no. 3, pp. 531-563.

Lev, D.S. (1971) 'The Lady and the Banyan Tree: Civil Law Change in Indonesia', in: Indian Law Institute (ed), *An Introduction to the Study of Comparative Law*. Bombay: Tripathi.

Lev, D.S. (2013) *Hukum dan Politik di Indonesia*, Jakarta: Pustaka LP3ES Indonesia.

Lukito, R. (2006) 'The Enigma of National Law in Indonesia: The Supreme Court's Decisions on Gender-Neutral Inheritance'. *Journal of Legal Pluralism*, no. 52, pp. 147-167.

Snyder, F.G. (1981) 'Colonialism and legal form: The creation of customary law in Senegal'. *The Journal of Legal Pluralism and Unofficial Law*, vol. 13, no. 19, pp.49-90.

Sudiyat, I. (1981) *Hukum Adat Sketsa Asas*, Yogyakarta: Liberty.

Wignjosebroto, S. (2014) *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia*. Jakarta: HuMa; VVI-Leiden; KITLV-Jakarta; Episteme Institute.