



ISSN 2809-672X (Online)  
**IUS POSITUM (Journal of Law Theory and Law Enforcement)**

<https://journal.jfpublisher.com/index.php/jlte>

Vol. 2 Issue. 2, April 2023

[doi.org/10.56943/jlte.v2i2.326](https://doi.org/10.56943/jlte.v2i2.326)

## **The Existence of Customary Inheritance Law Norm Development in Jurisprudence Supreme Court**

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### **ABSTRACT**

*Customary inheritance law is affected by three kinship systems, which are patrilineal kinship, matrilineal kinship and parental kinship. These three kinship systems have their own characteristics that are typically traditional ones. Traditional customary inheritance law norms in the patrilineal kinship system explain that only male descendants are heirs in the distribution of their parents' inheritance. Meanwhile, women (daughters and widows) are not heirs of their parents/fathers or husbands. On the other hand, the norms of traditional customary inheritance law in Minangkabau with a matrilineal kinship system, which is from the mother or female line, are basically male descendants and female descendants of their mother's property. The father's property is inherited by his sisters and nieces. The norms of inheritance law in the parental kinship system do not distinguish between the position of sons and daughters. Therefore, both sons and daughters have the same rights in the distribution of inheritance from their parents. The development of customary inheritance law norms can be affected by the decisions of judges or the jurisprudence of the Supreme Court. The research method used normative legal research, which refers to legal norms regulated in laws and regulations, literature, expert opinions in order for the researchers to obtain information related to legal issues. Normative legal research is legal research conducted by examining literature or secondary legal materials as basic material to be researched by conducting searches of regulations, jurisprudence or judges' decisions and literature related to the issues discussed.*

**Keywords:** Customary Inheritance Law Norm, Jurisprudence Supreme Court, Law Development

## INTRODUCTION

Customary law has its own characteristics from the minds of traditional communities with forms of kinship, such as patrilineal kinship (male/father lineage), for example in Batak and Bali; matrilineal kinship (female/mother lines), for example in Minangkabau; and parental/bilateral (male and female lineage or no distinction between men and women), for example in Java, Madura, East Sumatra, Aceh, Riau, South Sumatra, all of Kalimantan, Ternate, and Lombok.<sup>1</sup> The same kinship form does not mean that the same system of inheritance applies. Batak and Balinese communities both adhere to the patrilineal kinship system, but the way to maintain the lineage is different. The Batak community recognizes a pure patrilineal kinship system (there must be male descendants in the family), if there are no male descendants, the family will become extinct because there are no descendants, clan successors and no heirs. Meanwhile, the Balinese recognize a switched patrilineal system (if there are no male descendants in the family, it does not matter), because female descendants by being treated with *sentane rajeg*, can change the legal status of female descendants like male descendants, who will later become the successors of descendants in Balinese community.<sup>2</sup>

The customary inheritance law norm is a law that contains provisions on the system and principles of inheritance law, inherited property, heirs, inheritors, and the way the inherited property is transferred from the heir to the inheritor. The meaning of inherited property is the property of the heir who has died, whether the property has been divided or is still in an undivided state and includes inherited property, such as inheritance, marital property, original property, inherited property, and joint property. The heir is the person who passes on his or her inheritance to the inheritors. Inheritor is a term that indicates the person who gets the inheritance from the heir. The method of transmission is the process of passing on the heirs' inheritance from the heir to the inheritors, either before or after death.

Basically, the norms of traditional/original customary inheritance law in Batak customary law (patrilineal) prioritize the male/father lineage and if the marriage does not have male descendants, it can be interpreted as a breaking of descendants.<sup>3</sup> Therefore, in Batak inheritance law with a patrilineal kinship system, only male descendants can be called inheritors and are included in the distribution of the inheritance of their parents/fathers. Meanwhile, Batak women (daughters and widows) are not as a successor to the descendants/family of their parents/father and

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<sup>1</sup> Ellyne Dwi Poespasari, "Dispute Settlement Norm of Estate Distribution on Adat People of Minangkabau (West Sumatra)," *Jurnal Dinamika Hukum* 17, no. 3 (2017): 308–313; Ellyne Dwi Poespasari, *Pemahaman Seputar Hukum Waris Adat Di Indonesia* (Jakarta: Prenadamedia Group, 2018).

<sup>2</sup> Ellyne Dwi Poespasari, "Pengaruh Sistem Kekerabatan Parental Terhadap Hak Waris Perempuan Batak (Study Kasus Pada Perempuan Batak Di Surabaya-Jawa Timur)," *Jurnal Sektrum Hukum Unag Semarang* 10, no. 2 (2013).

<sup>3</sup> Ellyne Dwi Poespasari, "Kedudukan Anak Luar Kawin Dalam Pewarisan Ditinjau Dari Sistem Hukum Kekerabatan Adat," *Perspektif* 19, no. 3 (2014): 212–222.

not as a successor to the clan, therefore Batak women are not inheritors of their parents/father or husband.

Traditional or original customary inheritance law norms in matrilineal communities that maintain the female/mother lineage. Therefore, customary inheritance law in Minangkabau is closely related to the prevailing kinship system or descent from the mother (matrilineal), that is, those who come from one original mother who are counted from the mother's line, such as brothers and sisters of the mother and her brothers and sisters both male and female, grandmother and her brothers and sisters both male and female, and continued along the female bloodline. Therefore, all these children can only be inheritors of their own mother, both for high inheritance and for low inheritance. If the deceased is a man (her husband), then his children and his wife are not inheritors of his estate, but inheritors are all his nieces and nephews (the children of his sister).<sup>4</sup>

In general, the traditional/indigenous customary law norms of the Javanese community adhere to a parental or bilateral kinship system, which does not distinguish between the position of sons and daughters. Therefore, both sons and daughters have equal rights in the distribution of inheritance from their parents. Based on the existence of traditional/original norms in customary inheritance law, which is affected by these three kinship systems, there are often disputes over inheritance property in the community because the existing kinship system in customary law sometimes distinguishes between the position of men and women. For example, the patrilineal kinship system only gives inheritance rights to sons, while daughters and widows do not receive inheritance rights from their parents/fathers or husbands. The existing kinship system in customary law contains discrimination regarding the social and legal position between men and women. This can be understood because customary law is formed from the experiences and history of each community group. Therefore, patrilineal societies are formed from the history of the dominant position of men in family and community life. As a consequence, men in the family occupy a priority position with more rights than women, and vice versa in matrilineal societies, which are formed dominantly by the position of women who are higher than men in family and community life. Therefore, these conditions will develop throughout Indonesia and the demand for equal rights between men and women continues to develop along with the times.<sup>5</sup>

In Indonesia, regarding customary inheritance rights, the applicable legal provisions of most communities are unwritten law. The unwritten law still contains the traditional values of the customary law community concerned. For example, in the Batak community with a patrilineal kinship system (male lineage), the assessment of women's rights is often differentiated from men's rights. The

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<sup>4</sup> Ellyne Dwi Poespasari, "The Position of Mamak Kepala Waris in High Ancestral Inheritance in Minangkabau Indigenous Community," *Jurnal Dinamika Hukum* 19, no. 1 (2019).

<sup>5</sup> Ellyne Dwi Poespasari, "Dinamika Penguasaan Tanah Oleh Perempuan Pada Masyarakat Batak Toba" (Universitas Gadjah Mada, 2013).

Minangkabau community has a matrilineal system (female lineage), which tends to put women in a higher position than men. The exception is the parental or bilateral kinship system (in Javanese society), which does not differentiate between the position of men and women.

One of the developments in customary inheritance law can be identified in the existence of jurisprudence. Jurisprudence is very important in legal reform through “judge made law”, therefore from “judge made law”, jurisprudence was formed. Jurisprudence aims to establish the same legal standards, through jurisprudence it is expected to create the same legal perception throughout the courts and judges in resolving the same case.<sup>6</sup>

Yahya Harahap stated that the creation of a unified legal framework and unified legal opinion in judicial practice will be the basis for “certainty” of law enforcement because with the existence of legal standards created by jurisprudence, the court decision concerned will become “stare decisis”, which means that the decisions of previous judges will be adhered to by subsequent judges. If the decision has become jurisprudence and the decision has become “stare decisis” and is followed as a legal standard by court decisions regarding the same case, it will avoid decisions that are “disparate” between one another.<sup>7</sup> It can be stated that a valuable jurisprudence as a legal standard has a significant role in establishing legal certainty in people's lives. The legal standards created by jurisprudence are not intended to limit the freedom of judges in deciding an existing case or a particular case. In this regard, Article 24 Paragraph (1) of the 1945 Constitution states that judicial authority is an independent authority to administer justice in order to uphold law and justice. Regarding this issue, it is elaborated in Article 1 of Law No. 48/2009 on judicial authority which states that judicial authority is an independent state power to administer justice in order to uphold law and justice based on Pancasila, and for the implementation of the Indonesian Rule of Law.

The development that occurred in society related to customary inheritance law in Indonesia, that is, the issuance of TAP MPRS Number II on December 3, 1960 which stipulates that all inheritance is for children and widows if the deceased left children and widows so that both children and widows without distinguishing gender, are entitled to the inheritance of their husband/father. This is supported by the issuance of the Decree of the Supreme Court of the Republic of Indonesia Number 179/Sip/1961 which is a permanent jurisprudence in Indonesia which states that the share of widows and children is the same amount without regard to sons or daughters.

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<sup>6</sup> Ellyne Dwi Poespasari, Trisadini Prasastinah Usanti, and Soelistyowati, “The Settlement of Adopted Children Status Regarding The Inheritance of Adoption Parents in Toraja Communities,” *YURIS (Journal of Court and Justice)* 2, no. 1 (2023).

<sup>7</sup> M. Yahya Harahap, *Kedudukan Janda, Duda Dan Anak Angkat Dalam Hukum Adat* (Bandung: Citra Aditya Bakti, 1993).

Based on Supreme Court Decision Number 100/K/Sip/1967 on June 14, 1968 (implemented in Java), it is stated that considering the development of society which tends to recognize the equal position between men and women, widows are also determined as inheritors. In addition, the Supreme Court's decision explicitly states the position of widows as inheritors, even though the position of women in customary inheritance law is not as inheritors, but only limited to inheriting their husband's livelihood. This kind of affirmation can be observed from several jurisprudences, such as, first, Supreme Court Decision Number 298 K/Sip/1958 which states that "the widow has the right to inherit the livelihood (joint property) of her husband." The legal rules formulated in the decision state that if there are no children, the widow has the right to take control of all of her husband's livelihood without regard to the size of the amount. The second is Supreme Court Decision No. 320 K/Sip/1958 which states that "according to Tapanuli customary law today, a widow inherits her husband's livelihood."<sup>8</sup>

A significant development in customary inheritance law can be proven by the existence of jurisprudence. The Supreme Court on November 2, 1960 issued Supreme Court Decree Reg. Number 302 K/Sip/1960 which states that a widow is an inheritor of her husband's original property, at least part of the original property must remain in the widow's hands throughout the need for her to live properly until she dies or remarries. The Supreme Court decisions mentioned above, which recognize the position of a widow as an heir to her husband's livelihood, are actually contrary to the values of Batak customary law which adheres to a patrilineal kinship system, which does not recognize the existence of daughters or wives or widows to inherit and there is even no livelihood in marriage because the wife is an immigrant from another clan and by customary law her arrival is based on buying with honest money. Therefore, the jurisprudence is a new innovation that has caused a shift in the old customary law values towards new customary law values, especially that this jurisprudence shifts the position of men (husbands) towards equal rights and degrees with the position of women.

The development of Minangkabau customary inheritance law can be observed in Supreme Court Decision No. 39 K/Sip./1969 on February 12, 1969, which states that a widow of the late Ibrahim, Datuk Mudo, sued for her late husband's inheritance from her father, which is now controlled by her late husband's niece. Supreme Court Decision No. 39 K/Sip/1968 relates to a rice mill case, in which the case between Kalek women (Pisang tribe, Negeri Batipuh Buruh, Padang Panjang) for themselves and as guardians of the mother of their minor children (Zulkarnaini, Zulfahmi, Murni, Ana and Murdatiwarni) as the widow of the late Ibrahim, Datuk Mudo, against Abdul Rahman, Datuk Mudo (the head of the inheritance in his clan) and the women Nursiah and Nursilah, all three from the Koto tribe, Negeri Batipuh Ateh, Padang Panjang. In the Supreme Court Decision

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<sup>8</sup> Sonny D. Judiasih et al., "Pergeseran Norma Hukum Waris Pada Masyarakat Adat Patrilineal," *RechtIdee* 16, no. 1 (2021): 65–87.

at the Cassation level, the case was won by Kalek women as the widow of the late Ibrahim, Datuk Mudo, against the inheritance of a rice mill. Men in Minangkabau have the role of father or husband and *mamak* in customary law.

Before the entry of the National legal system based on Jurisprudence Number 39 K/Sip/1968 dated February 12, 1968 explained that a father or husband was not responsible for his children, considering the form of marriage *semendo bertandang* which the father or husband was only considered as a guest so that the children became the responsibility of the wife and her family. In other words, the children only have a relationship with the mother and the mother's family so that the children become the heirs of the mother rather than the heirs of the father. Therefore, the example of the *kincir padi* case indicates the Minangkabau customary inheritance law. If it cannot be resolved by customary law, it can be resolved through the Court stage until the Supreme Court.

In jurisprudence or judge decisions, the development of customary inheritance law can be seen. This can be seen before the existence of jurisprudence, some regions stated that the position of widows or widowers was not as heirs of the estate of their parents or husband or wife, for example, in patrilineal, matrilineal and parental societies. Therefore, after the aforementioned jurisprudence, the position of widows and widowers was established as heirs.

The development of jurisprudence or judicial decisions is actually driven by external forces, namely the state through the courts on certain events, but the existence of demands that give birth to legislation and jurisprudence or judicial decisions will still raise several questions about the effectiveness of its application in the lives of community members who still adhere to the existing kinship system. For example, in patrilineal kinship (in Batak and Bali) and matrilineal kinship (in Minangkabau) and in parental/bilateral kinship systems (in Java).

Regarding the existence of several jurisprudences of the Supreme Court, there are developments in the existence of norms in customary inheritance law so that based on the description above, the objectives of this research is to analyze the problem related to the existence of the development of customary inheritance law norms after the jurisprudence of the Supreme Court.

## RESEARCH METHODOLOGY

The method used in this research is normative legal research, which refers to legal norms regulated in laws and regulations, literature, expert opinions so that the researcher can obtain an overview of legal issues. Normative legal research is legal research conducted by examining library materials or secondary legal materials as basic material to be researched by conducting searches of regulations, jurisprudence or judges' decisions and literature related to the issues researched.<sup>9</sup> This method commonly known as doctrinal methos which is generally associated with legal

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<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Cet 13. (Jakarta: Kencana, 2017).



practical and professional work to solve a specific legal problem.<sup>10</sup> There are three main scopes in normative legal research. One of them is focused on the primary legal system. In this case, the legal system is not only the subject of investigation but also the normative framework for analyzing legal issues.<sup>11</sup>

## RESULT AND DISCUSSION

### Customary Inheritance Law Norms in Indonesia

Iman Sudiyat stated that customary inheritance law includes rules and decisions relating to the process of conveying or passing and transferring or shifting material and non-material assets from generation to generation.<sup>12</sup> Meanwhile, Bushar Muhammad stated that inheritance law is a series of regulations governing the succession and transfer of inheritance or inheritance property from one generation to another, both regarding material and immaterial objects. The intended inheritance law includes issues, actions regarding the transfer of property while a person is still alive. The institution used in this case is the grant institution.<sup>13</sup>

The customary inheritance law of a community group is affected by the form of kinship of the community itself, each kinship or family has its own customary inheritance law system. The kinship system in Indonesia is theoretically divided into three types, such as patrilineal system, matrilineal system, and parental or bilateral system. This descent system affects and also distinguishes the issue of inheritance law.

Hilman Hadikusuma referred to it as the kinship system. In addition, he also stated that the descent system in Indonesia has been applicable since a long time ago before the entry of Hinduism, Islam and Christianity. The different descent systems appear to have an influence on the customary law inheritance system.<sup>14</sup> The kinship system can theoretically be divided into three types such as following below:

1. Patrilineal system is a system of kinship or descent that is started from the paternal line, in which the position of men is more prominent than the position of women in inheritance (Gayo, Alas, Batak, Nias, Lampung, Buru, Seram, Nusa Tenggara and Irian Jaya);
2. The matrilineal system is a system of kinship or descent derived according to the mother's line, in which the position of women is more

<sup>10</sup> Theresia Anita Christiani, "Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object," in *3rd Global Conference on Business and Social Science* (Kuala Lumpur: Procedia-Social and Behavioral Sciences, 2015), 201–207.

<sup>11</sup> Tunggal Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Origins and Approaches," *ACLJ: Audito Comparative Law Journal* 4, no. 1 (2023): 1–9.

<sup>12</sup> Aprilianti and Kasmawati, *Hukum Adat Di Indonesia*, ed. M. Dr. Fakhri (Bandar Lampung: Pusaka Media, 2022).

<sup>13</sup> Dr. H. Erwin Owan Hermansyah Soetoto, Zulkifli Ismail, and Melanie Pita Lestari, *Buku Ajar Hukum Adat* (Malang: Madza Media, 2021).

<sup>14</sup> Sigit Sapto Nugroho, *Hukum Waris Adat Di Indonesia* (Solo: Pustaka Iltizam, 2016).

prominent than the position of men in inheritance (Minangkabau, Enggano and Timor); and

3. The parental or bilateral system is a system of kinship or descent derived through the parental line, or according to the two-sided line (father-mother) in which the position of men and women is not differentiated in inheritance (Aceh, East Sumatra, Riau, Java, Kalimantan, and Sulawesi).<sup>15</sup>

Soerojo Wignjodipuro stated the same statement as above, then he added that if a society that in its daily life recognizes patrilineal or matrilineal descent only, it will be called unilateral, while those that recognize descent from both sides are called bilateral.<sup>16</sup> The norms of customary inheritance law in patrilineal societies (Batak and Bali), traditional/original norms are influenced by the form of honest marriage (giving honest goods or money made by the relatives of the prospective husband to the relatives of the prospective wife as a substitute for releasing the woman out of the customary citizenship of her father's legal community, moving and entering into her husband's community). This is applied after the marriage, hoping to get male offspring who will later become the successor to the descendants or successor to the lineage of their parents and relatives because the Batak tribe is a society with a patrilineal type (pure) and genealogical in nature, where kinship relations among its members are absolutely drawn according to male lineage or paternal lineage. Therefore, only the descendants of sons as heirs are taken into account in the distribution of their parents' inheritance. Female descendants are not the successors of their parents (father) and heirs of their parents (father). According to the Batak people, daughters are only prepared to become other people's children who will strengthen the descendants of other people or other clans.

The norms of customary inheritance law in the matrilineal system, for example in Minangkabau. Basically, the kinship structure of indigenous peoples who maintain the maternal line (matrilineal) who are entitled to be successors of offspring and as heirs are daughters and sons of their mother's property, while sons are not as successors of offspring. The position of daughters as successors and heirs in a matrilineal arrangement is different from that of sons as successors and heirs in a patrilineal kinship arrangement. In the patrilineal arrangement, the position of sons, as Ter Haar stated *vaderrechtelijke ordening*, which is based on the father's legal system, which means that everything is controlled by fatherhood, while in the matrilineal arrangement, the position of daughters as successors and heirs is *moederrechtelijke groepering*, which means that everything is controlled by the maternal group. Therefore, it is not only the female heirs who control and manage

<sup>15</sup> Kenji Itao, "Emergence of Kinship Structures and Descent Systems: Multi-Level Evolutionary Simulation and Empirical Data Analysis," in *Proc Biol Sci*, 2022.

<sup>16</sup> Nugroho, *Hukum Waris Adat Di Indonesia*.



the inheritance, but are accompanied by the mother's brothers or called *Mamak Kepala Waris*.<sup>17</sup>

The inheritance system in matrilineal societies, especially in Minangkabau, is a collective inheritance system. This system is affected by a way of thinking in indigenous societies called communal thinking or togetherness. This communal way of thinking emphasizes a sense of togetherness in strong bonds, in common cause, in ideals and in agreement covering all aspects of life. In the communal inheritance system related to customary inheritance law in Minangkabau, it is better if the inheritance is left intact and not divided, inherited together by a group of heirs and the results are enjoyed together and then used as heirloom property. In Minangkabau society, it is called *Harato Pusako* (heirloom property).

In Minangkabau, which adheres to the system of collective inheritance (women) of heirlooms, all daughters who have blood relations are heirs of the inheritance of their descendants who are not divided into ownership, but are controlled and regulated by the *mamak* head of the inheritance regarding their usage rights. The heirs of the daughters may use, cultivate and enjoy heirloom property such as heirloom rice fields, *Gadang* houses together under the supervision of the *mamak kepala waris*.

In Minangkabau society, property is divided into two, first, high heirloom property is obtained by iron *tembilang*; and second, low heirloom property is obtained by gold *tembilang*. Low heirloom treasure, if it falls once and then rises, then it becomes a high heirloom. These high heirlooms cannot be sold, eaten (*sando*), mortgaged and cannot be transferred to other people. Minangkabau society is also known as *harta surang*, which is the entire property obtained jointly by the husband and wife during the marriage period, except for all the husband's inherited property and all the wife's inherited property that existed before the marriage was held. In fact, *harta surang* is the same as property that is inherited by the wife and children.

Customary inheritance law in Minangkabau is just mastering, compared to the inheritance law prescribed in Islam, because inheritance law according to Islam has certain parts such as getting a share of one-half, one-third, one-fourth, and so on. Therefore, the part can be controlled according to his property rights, may be sold, donated and so forth with can not be hindered by others. However, in Minangkabau customary law, a person or a clan inheriting from his grandmother or from his *mamak* according to custom only controls or uses the heirloom property, but is not allowed to sell or grant property to anyone, unless agreed upon by all families in the clan. Only the produce of the heirloom property is allowed. Only the proceeds can be sold and granted to whomever they want. In Minangkabau, the proceeds of the heirloom property are sufficient for a man to support his wife and children while he is still alive; with the proceeds of the heirloom property he can

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<sup>17</sup> Bravo Nangka, "Penyelesaian Sengketa Berdasarkan Hukum Waris Adat Berdasarkan Sistem Kekerabatan," *Lex Privatum* 7, no. 3 (2019): 145–155.

redeem, buy, and build a house for his wife and his children. However, when he dies, all the inheritance returns to his female relatives.

In parental or bilateral societies in Java, the original customary inheritance law norms, in which the position of men and women (daughters and widows) is not differentiated in terms of the distribution of inheritance from their parents. Basically, the heirs are the people in the next generation who are closest to the testator or called the main inheritors, that is, children who grew up in the testator's family and the first to inherit are biological children. In Javanese society, if the heir has no children at all, nor has adopted children, then the property will be inherited in order to (1) the parents, father or mother of the heir; (2) if there is no heir, then it will be passed on to the siblings of the heir or their descendants; and if they are not there, then the grandfather or grandmother of the heir; and (3) if the grandfather or grandmother of the heir is also absent, then it will be given to uncles or aunts both from the father's line and from the mother's line of the heir. If there are none at this level, it will be inherited by other family members.<sup>18</sup>

The position of a widow or widower in customary law is not an heir of the estate of a deceased husband or wife, but they are entitled to receive a share of the husband's or wife's estate together with other heirs or withhold the distribution of the estate for future living expenses. However, the law that states that widows are not heirs of their husbands only existed before independence. Meanwhile, after independence, widows are the heirs of their husbands.

Initially, widows were not heirs to their deceased husbands, but they had the right to live off their husbands' inherited family assets, even though the parental kinship system placed equal and reciprocal status between husband and wife to inherit from each other in their position as widows or widowers. The extent of the widow's or widower's inheritance rights is limited to joint property only. However, it does not cover the personal property of each of the husband and wife. Assets obtained by husband and wife before marriage or obtained as inheritance or grants either before or after marriage, are considered as inherited assets. Therefore, this property is not included in the category of widow's or widower's inheritance.

Generally, widows do not get a share of their husband's estate as heirs, but have the right to draw income from the estate, if necessary for life, for maintenance can also be given a lump sum from the husband's estate, especially provided from joint property. If the joint property is sufficient for maintenance, then the heirs can demand that the original property of the testator be transferred to them. If the joint property is insufficient for her maintenance, then the husband's original property can be used for that purpose. The estate may be divided, if the widow's estate is considered sufficient for her livelihood or her maintenance has been guaranteed by several heirs. If a widow remarries, she leaves the first husband's household and enters a new household.

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<sup>18</sup> Anggita Vela, "Pembagian Waris Pada Masyarakat Jawa Ditinjau Dari Hukum Islam Dan Dampaknya," *As-Salam* 4, no. 2 (2015): 67–91, <https://core.ac.uk/download/pdf/287246711.pdf>.

### **The Development of Customary Inheritance Law Norms after Supreme Court Jurisprudence**

According to Prof. Koesnoe, customary law has four characteristics such as following below:

1. The traditional nature of customary law is guided by the will of the great ancestors used and the will of the gods who are considered sacred. This assumption is contested in legends or stories passed down from generation to generation, both written and unwritten.
2. It has a sacred character, which means that the provisions of customary law have a sacred character because elements derived from the field of belief have an important role in the provisions of customary law.
3. It is flexible in that the provisions of customary law as law originate in the life of the community concerned. Therefore, customary law can quickly adapt to the conditions of the community environment without changing its systems and institutions.
4. It is dynamic because customary law can develop along with the times.<sup>19</sup>

Developments in customary law are not always carried out by eliminating the rules in the old customary law and replacing new rules, but by allowing old customary activities to form something new while maintaining existing or basic principles. For example, in the Batak and Balinese communities, in the past, when a customary marriage was performed, the male relatives had to pay honest money to the female relatives and the honest money payment was in accordance with the high and low position of the bride. However, the customary law communities (Batak and Bali) are not static groups, but are dynamic customary law communities, at this time of modernization the customary law communities are able to adjust, so that the Batak and Balinese communities can adjust to honest payments that are no longer adjusted to the high and low position of the bride. Although the Batak and Balinese communities no longer pay attention to the payment of honest money that is no longer adjusted to the high and low position of the woman, the payment of honest money to female relatives still exists. This adoption model makes customary law survive in the midst of the times and customary law is basically able to adapt to the modern order of society.

There are two theoretical models in the development of customary law in Indonesia such following below:

1. The development of new customary law does not contain the old customary law or it can be called the development of customary law through judicial decisions, for example customary inheritance law;

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<sup>19</sup> Soetoto, Ismail, and Lestari, *Buku Ajar Hukum Adat*.

2. The interactive model is the development of new customary law that still contains the old customary law, for example customary law that develops in the community.<sup>20</sup>

There are two theoretical models in the development of customary law, then in this case the theory is closer to the second theory, that is, the development of new customary law still contains old customary law (which develops in the community), but without leaving the first theory, that is, the development of customary law, new customary law does not contain old customary law (this development can be called the development of customary law through judicial decisions). Therefore, if customary law develops within the community it can follow the second model of theory and if it develops through court decisions it can follow the first model.

Hart used the term of primary rules for rules of social behavior and secondary rules for meta-rules.<sup>21</sup> Stig Stromholm with regard to the rules of behavior he makes a distinction between the primary rules that contain behavioral orders and secondary rules that determine what sanctions should be imposed if the behavioral orders in the primary rules are violated. According to R.J. Jue there are two kinds or types of rules, namely rules of behavior and rules of authority. Behavioral rules are a type of rule that prescribes (stipulates) how people should behave. The characteristics of the rules of behavior are that these rules lay or impose obligations. On the one hand, obligations to carry out a certain behavior or hand over a bicycle, pay the purchase price, pay taxes, on the other hand there are obligations to stay away from or not to do certain behaviors such as stealing.

In Article 5 Paragraph (1) of Law No. 48/2009 on Judicial Power states that “judges and constitutional judges are obliged to examine, follow and understand the legal values and sense of justice that live in society.” Therefore, judges are expected to be able to explore new positive laws. Judges must have high intellectual acumen regarding the existing law in society which is unwritten law (customary law), but is obeyed and respected in society. Meanwhile, in Article 10 Paragraph (1) of Law No. 48/2009 on Judicial Power states that the court is prohibited from refusing to examine, hear and decide a case submitted on the pretext that the legal basis is absent or unclear, but is obliged to examine and hear it. The legal system that applies to most Indonesian people is unwritten customary law, this is evidenced that most Indonesian people still adhere to and are subject to customary law even though in certain fields of customary law the community considers that customary law is only a benchmark for behavior in the customary law community itself.

Based on Ter Haar’s opinion, it gave birth to a *beslissingen leer* theory (decision theory), so that customary law can be interpreted as all decisions of legal

<sup>20</sup> Bono Budi Priambodo, “Positioning Adat Law in the Indonesia’s Legal System: Historical Discourse and Current Development on Customary Law,” *Udayana Journal of Law and Culture* 2, no. 2 (2018): 140–164.

<sup>21</sup> Bernard Arief Sidharta, *Refleksi Tentang Struktur Ilmu Hukum* (Bandung: Mandar Maju, 2009).

officials, both village judges, village density, judges, religious officials and village officials who have obligations and are obeyed immediately by the customary law community. These decisions have spiritual values, community values that live in a customary law community.

The decision taken by the judge in resolving a problem that occurs is called jurisprudence. Therefore, before the judge makes his decision in resolving the problem, the judge must be guided by written law, if the written law does not find a solution, then the judge can look for a solution in unwritten law or in this case it is also called customary law.

The norms of customary inheritance law in the kinship system after the jurisprudence of the Supreme Court, namely the application of the Jurisprudence of the Supreme Court of the Republic of Indonesia No. 179/SIP/1961 which states that the Supreme Court considers customary law as a living law throughout Indonesia, that between sons and daughters are entitled to their parents' inheritance with equal distribution. The jurisprudence cannot apply as a generally binding rule of law, but jurisprudence is only binding on the litigants or furthermore can be followed by other judges in the same case. However, as a legal discovery from judges called jurisprudence, it is quite valuable as a factor in the formation of national law because jurisprudence is one of the sources of law in Indonesia so that it can be used as a reference in the equality of inheritance rights of the Batak customary tribe.

Jurisprudence functions to create new law by changing the old law on the basis of the consideration that the old law is no longer in accordance with the society where the law applies. It is hoped that the developments that have been made by these judicial decisions can elevate the rights of daughters equally as heirs. Related to the Judge's Decision for livelihood property, that is, the Supreme Court Decision on April 23, 1957, No. 50K/Sip/1954, which states that customary law in the Batak area, a female widow cannot inherit the lands left by her husband, but can demand that she continue to enjoy the lands of her husband, as long as the property is needed for her livelihood. Decision of the Supreme Court on October 25, 1958, No. 54K/Sip/1958, which states that Batak customary law in all property arising in marriage belongs to the husband, but the wife has the right to use for life from her husband's property, as long as the property is for her livelihood.

Decision of the Supreme Court dated January 17, 1959, No. 320K/Sip/1958, which states that based on customary law in the Tapanuli region in the current era, the wife can inherit the livelihood of the deceased husband. In relation to the Judge's Decision for widow inheritance, the Padang Sidempuan Landraad Decision on January 4, 1937 was upheld by the Padang Court of Justice on August 12, 1937, which stated that a widow is the heir of her deceased husband provided that the condition is met that the husband died without leaving a child and other heirs.

Regarding the application of customary inheritance law norms or rules after the Supreme Court's jurisprudence on the matrilineal kinship system in Minangkabau, there have been developments in inheritance law in Minangkabau.

For example, Supreme Court Decision No. 39 K/Sip/1968 related to the rice mill case, where the case between the Kalek woman (Pisang tribe, Negeri Batipuh Buruh, Padang Panjang) for herself and as the guardian of the mother of her minor children (Zulkarnaini, Zulfahmi, Murni, Ana and Murdatiwarni) as the widow of the late Ibrahim, Datuk Mudo, against Abdul Rahman, Datuk Mudo (the head of the inheritance in his clan) and the women Nursiah and Nursilah, all three from the Koto tribe, Negeri Batipuh Ateh, Padang Panjang. In the Supreme Court Decision at the Cassation level, the case was won by the woman Kalek as the widow of the late Ibrahim Datuk Mudo against the inheritance of a *kincir padi*. Men in Minangkabau have the role of father or husband and mamak in customary law.

In Jurisprudence Number 39 K/Sip/1968 on February 12, 1968, that a father or husband is not responsible for his children considering the form of marriage *semendo bertandang*, where the father or husband is only considered as a guest so that the children become the responsibility of the wife and her wife's family in other words the child only has a relationship with the mother and her mother's family so that the children become the heirs of the mother not the heirs of the father. Therefore, the example of the *kincir padi* case indicates that Minangkabau customary inheritance law, if it cannot be resolved by customary law, can be resolved through the Court stage to the Supreme Court.

In the decision of the Supreme Court of Republic Indonesia Number 90 K/Sip/1952, on November 30, 1955, if a testator (erflater) only leaves widows and a sibling (older sister), then the sister is the only heir to the original property, but since it is obligatory for the widows to maintain and arrange the entire estate, including the burial of the deceased, the widows must be given provisions, which include the proceeds of 1/3 of the estate.

The Decision of the Indonesian Supreme Court Number 130 K/Sip/1957 on Customary Law in the Bandung area, in the case of Doctor Raden Mas Soehirman Erwinn and Drs. R.M.E. Soeratman Erwin against R.M.G. Husni Erwin; Doctor Raden Mas Soehirman Erwinn died, which he left a wife and three children (male). The Supreme Court's consideration stated that the three children of the deceased were "inheritors", while the widow was "not an inheritor", but entitled to inheritance property. Therefore, all four persons are entitled to the deceased's estate.

Supreme Court Decision No. 3293 K/PDT/1986, the property in question is joint property, so the widow has the right to control and enjoy it to ensure her life until she (the widow) dies or remarries. Meanwhile, inherited property is inherited by biological children. Supreme Court Decision on June 14, 1968 No. 100 K/SIP/1967, the Supreme Court confirmed the reasoning of the High Court Decision which stipulated that in the event of the abandonment of a husband by leaving a widow, a son and a daughter, the widow is entitled to half of the joint property while the rest is divided between the widow and her children.

In the development of several jurisprudence that states that the widow or widower is the heir of her husband. The Supreme Court Decision on February 25,



1959 with Number 387 K/Sip/1958 which states that according to the customary law prevailing in Central Java, a widow gets half of the joint property. In addition, the Supreme Court decision on October 29, 1958 with Number 298 K/Sip/1958 states that according to the customary law prevailing in Java if in a marriage no child is born, then the widow can remain in control of the joint property until she dies or marries.

## CONCLUSION

Customary inheritance law is influenced by three kinship systems, such as patrilineal kinship, matrilineal kinship and parental kinship. The three kinship systems have their own characteristics that are traditional in nature. The patrilineal kinship system is a descent system that is derived according to the father or male line. The norm of customary inheritance law in the patrilineal kinship system is that the position of men is superior to that of women. Therefore, men are the heirs of their parents or father, while women are not heirs of either their parents, father or husband. This is the case with customary inheritance law in the Batak, Bali, Nias, Lampung and other communities. Meanwhile, the matrilineal system is a system of descent drawn according to the mother or female line, the position of women is preferred over men. In principle, the heirs are male descendants and female descendants of the mother's property while the husband's or father's property is inherited by his sisters and nieces. In the matrilineal system applied in Minangkabau society. The norms of inheritance law in the parental system do not distinguish between the position of sons and daughters. Therefore, both boys and girls get the same rights in the distribution of inheritance from their parents. The development of customary inheritance law norms can be influenced by the three kinship systems with the support of judge decisions or Supreme Court Jurisprudence.

The development of customary inheritance law norms after the Supreme Court Jurisprudence which explains that the development of these norms can be seen from jurisprudence or judge decisions. Therefore, jurisprudence or judges' decisions are very important in legal reform through "judge made law", so that the existence of jurisprudence can make the development of customary inheritance law norms. The development of jurisprudence or judge decisions is actually driven by external forces, that is, the state through the courts on certain events, but the demands that created to legislation and jurisprudence will still have several questions about the effectiveness of its application in the lives of people who still adhere to the existing kinship system. For example, in patrilineal kinship (in Batak and Bali) and matrilineal kinship (in Minangkabau) and in parental or bilateral kinship systems (in Java and others).

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