

REPOSITION OF WIDOW'S POSITION (DIVORCE DUE TO DEATH) IN BATAK CUSTOMARY INHERITANCE LAW IN GENDER PERSPECTIVE

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ABSTRACT

This paper examines the repositioning status of widows (divorced deaths) in the Batak customary law with a gender approach. The customary law of Batak's inheritance still tends to refer to the patrilineal kinship system. The kinship system is drawn according to the father's line, where the widow (divorced due to death) is not the heir of her husband, because heirs in Batak society are only man. With the time development and the increasing role of a mother/woman in the household, it is necessary to study more in depth the material position of a mother/woman whose her husband died (widow divorced due to death) in Batak customary law with various approaches, one of the ways is a gender approach. This is important because many modern scholars of customary law have been seeking reform in customary law, especially inheritance to achieve gender equality in accordance with the time development, such as by repositioning the status of widows (divorced due to death) in the inheritance system through the formation of customary law of inheritance national bilateral. Learning of inheritance law of Batak law with gender approach, Batak society can think critically and not rigid in solving the problem of division of inheritance by placing widow (divorced due to death) as heir.

Keywords: Reposition, Widow's Position, Inheritance Law

A. Background

Custom is a habit of a society that is steady (done continuously), maintained by its supporters. Habits are a reflection of the personality of a nation, it is the embodiment of the nation's soul that is constantly evolving evolution from century to century. The development is fast and slow. No matter how rapidly progressing, but it is not revolutionary, it is always based on the basic values that guide those who change, renew or eliminate some of them if they are not functional anymore.¹

Every nation or society has its own culture, therefore every society has its own laws that are different from each other. This difference shows that every society has its own characteristics as the identity of the nation concerned as local wisdom. In this case, customary law is a rule of human habit in social life. So custom is a habit of society and group, from society make it as custom which should be implemented and apply to all of society, so it becomes customary law.²

In the field of inheritance law for example, each region is different, there are those who follow the law of inheritance of BW (civil law) and the law of inheritance of Islam. Customary inheritance law in this case shows a distinctive feature of the flow of Indonesian cultural thought and based on the principles arising from the flow of communal and concrete thoughts of the Indonesian nation. Therefore, customary inheritance law shows principal differences with the BW inheritance law (civil law) and the law of inheritance of Islam.

When we discuss the customary law of inheritance, we cannot be separated from the kinship system, because with the kinship system, we know who is entitled to inheritance, including the wife left by her husband (divorced due to death). Theoretically, the kinship system can be distinguished in three types, namely:

1. Patrilineal system, the kinship system drawn in line with the father, where the position of men more prominent influence than the position of women in inheritance. This system is exposed in Gayo, Alas, Batak, Nias, Lampung, Buru, Seram, Nusa Tenggara, and Papua;
2. The matrilineal system, the kinship system drawn by the maternal line, in which the position of women is more prominent than the influence of men status in inheritance. This system is located in Minangkabau, Enggano, and Timor;
3. Parental or bilateral system, the kinship system is drawn on the two-sided (father-mother) line, where the position of man and woman is not distinguished in inheritance. This system is located in Aceh, East Sumatra, Riau, Java, Kalimantan and Sulawesi.³

Batak society is one of the many customary law communities in Indonesia. The Batak community is a pure patrilineal society, which means any person who in that society draws the line up only through the male liaison only, to a man who is their ancestor

¹DominikusRato, *PengantarHukumAdat*, (Yogyakarta: LaksbangPressindo, Yogyakarta, 2009), page1.

²HilmanHadikusuma, *PengantarIlmuHukumAdat Indonesia*, (Bandung:MandarMaju, 2003), page 1.

³I. Gede Ab. Wiranata, *HukumAdat di Indonesia*, (Bandung: PT. Citra AdityaBakti, 2005), page15-17

of origin⁴. Only men become heirs, because women are outside of the original patrilineal group, after they were married⁵. In addition, a widow is not a heir to her husband in Batak customary law. J.C. Vergouwen in this regard says that:

The right to substitute according to the groove of men is directly manifested through the birth of a boy, it is the fair exercise of the continuity of the men offspring of the father's side.

Gender bias is highly visible in Batak's inheritance system. Whereas the existence of women's emancipation has caused some modern thinkers of customary law who want to make reforms in customary law, especially inheritance for the achievement of gender equality in the inheritance in accordance with the times. Gender and women's emancipation influence, there are demands from the Batak people to renew their customary law, especially inheritance issues and one of them is the issue of inheritance division by placing the widow (divorce due to death) as the heir.

According to Law No. 1 of 1974 on Marriage, Article 38 states: Marriage can be terminated because; (a). Divorce, (b). Death, (c). On the Court's Decision. In the Batak society which is a pure patrilineal society, if the marriage breakup is due to divorce, then a meeting will be held, that is the meeting of *hasirangan* (incarnation). The meeting aims to determine who is at fault and will be discussed about the common property. However, if the breakup of marriage is caused by death, it comes the question of inheritance and maintenance of the child.

The provision is of course felt unfair, because in a marriage the relationship between husband and his wife was already so close, even far beyond the relationship between husband and his blood family. According to feminists, the customary law of Batak is very patriarchal and insensitive to the position and interests of women, so they demand an update in the customary law of Batak.

However, efforts to reform the customary law of Batak's inheritance always face heavy resistance, especially from groups claiming themselves as owners of customary law authority. Therefore, changing customary law is considered dangerous because it means changing the cultural essence of Batak people. Conversely, maintaining customary law even though it is not relevant to the needs of the community is seen as an attempt to maintain customary law. Consequently, not all Batak people are reforming their customary laws, especially those concerning inheritance law.

As the times progressed, and the dynamic nature of customary law, it drives changes a lot. At this time, there are many Batak people who live wander, thus bringing the influence on traditional law. According to Batak customary law in the present, the position between husband and wife is equal and balanced. The husband is the head of the family and the wife is the housewife. They are equally entitled and obliged to take care of their families and children. This can happen because customary law (especially inheritance customary law) is subject to social changes as well as other laws that the judge has always applied.⁶

As stated in Law no. 1 of 1974 on Marriage, in Article 31, states:

1. The right and position of a wife is equal to the rights and position of the husband in the life of the household and the life of the community together in society.
2. Each party is entitled to a legal act.
3. The husband is the head of the household and the wife of the housewife.

Therefore, if the marriage is terminated due to the death of the husband, the widow shall be entitled to continue the domination of marriage property consisting of treasure or joint property (obtained in marriage) and possessions (obtained before or after marriage in the form of gift/giving of relatives or others and or inheritance). In addition, the widow also has right to use a lifetime of her husband's property, as long as the treasure is necessary for her livelihood, provided that the widow must remain in the family ties of her husband's relatives, in the sense that the widow is not married to another.

Based on the various descriptions in the background as mentioned above, the importance of this study is to know how the status of widow (divorce due to death) in the customary law of Batak and how to reposition the position of widow (divorce due to death) in the customary law of Batak in the perspective of gender along with the development of advanced times, and the dynamic nature of custom law.

Based on the background as outlined above, the subject matter will be studied further is about the position of widow (divorce due to death) in the customary law of Batak's inheritance and reposition of the widow's position (divorce) in the Batak customary law in the perspective of gender.

B. Theoretical Framework

Some legal theories that can be used as a basis and guidance in looking at the possibility of realizing codification of inheritance law, including:

⁴Zainuddin Ali, *Pelaksanaan Hukum Waris di Indonesia*, (Jakarta: Sinar Grafika, 2008), page 25.

⁵Eman Suparman, *Hukum Waris Indonesia*, (Bandung: Refika Aditama, 2005), page 44.

⁶Soerojo Wignjodipoero, *Pengantar dan Azas-azas Hukum Adat*, (Jakarta: Gunung Agung, 1989), page 62.

1. The Roscoe Pound Theory, it argues that law is a means of community reform or law as a tool of social engineering. With this theory, Roscoe Pound goes on to explain that law as a social institution can be perfected through human effort done intellectually, and considers it their duty to find the best ways to advance and direct the effort.⁷
2. Lawrence M. Friedman's Theory. Friedman's legal system theory can be used as an analytical tool in an effort to establish a national inheritance law with a bilateral system. Friedman explained that the legal system has three elements, namely the legal structure; substance or legal matter; and legal culture⁸. The use of Friedman's theory, to support Roscoe Pound's theory, particularly emphasizes the functioning of the inheritance legal system as a social control. Because according to Friedman, the legal system as part of the social system becomes social control so that all other systems are more or less secondary or under the legal system.⁹
3. Paul Scholten's theory can also be used as a foundation and guide in view of the possibility of realizing codification of inheritance law. Paul Scholten's theory of legal consciousness is called *Rechtsgefühl* or *Rechtsbewustzijn*. According to Paul Scholten, public legal awareness is the basis of the law of positive law and there is no law that binds citizens except on the basis of legal consciousness¹⁰. As the originator of this theory, Paul Scholten further argues that, legal consciousness is the source of all laws. For in Indonesia the legal awareness has a very important place in the development of legal system and politics, and legal awareness becomes one of the principles of national development.
4. The theory of Carl von Savigny. Carl von Savigny of the historical and cultural school of thought said, "*Das Recht wird nicht gemacht, es ist und wird mit dem Volke*"¹¹. So according to Savigny, the law is not made, but grows and develops with society as living law. Therefore, good law is a law that lives and grows in society, and serves as a guideline for community members in behaving. Savigny's theory was developed in Indonesia by Soepomo by taking customary law as the standard. According to Soepomo, customary law is a living law, because it embodies the real legal feelings of the people and is dynamic and grows in line with the development of society.¹²

The customary inheritance law is customary law containing the lines of provisions concerning the system and principles of inheritance law, of inheritance, inheritance and the manner in which the property is transferred.

Laws that Regulate Discrimination against Women

- a. The mandate of the Convention and Law no. 7 of 1984 has clearly abolished all forms of discrimination, by promoting the principle of equality in law (equality), with the notion also in custom as an unwritten law. Which principle has been accepted worldwide as a universally applicable principle. Not only that, the principle of justice actually inspires the principle of equality, so we will be able to see that discrimination is not a destiny that women cannot oppose.
- b. Convention on the Elimination of All Forms of Discrimination against Women, dated December 18, 1979, ratified by Indonesia with the issuance of Law no. 7 of 1984 on the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. Article 2 states "States Parties to the Convention shall condemn discrimination against women in all its forms and agree to exercise by all appropriate means and without delay, the policy of eliminating discrimination against women, and for that purpose endeavor: (a) to state the principle of equality between men and women in their National Constitution or other appropriate legislation, if not already included in it and to ensure the practical realization of this principle, by law and other appropriate means; (b) make appropriate legislation and other regulations including sanctions where necessary, prohibit all discrimination against women; (c) make appropriate rules for the elimination of discrimination against women by any person, organization or enterprise; (d) make appropriate regulations, including the making of laws, regulations, practices, and discriminatory practices against women".
- c. Law no. 39 of 1999 on Human Rights, Article 51 Paragraph (1) "a wife as long as the marriage bond has the same rights and responsibilities as her husband for all matters pertaining to his marital life, relationships with his children, and the right of ownership and management joint treasure"; paragraph (2) "after the marriage breaks, a woman has the same rights and responsibilities as her ex-husband for all things pleasing to her children, taking into account the best interests of the child"; paragraph (3) "after the marriage breaks, a woman has the same rights and responsibilities as her former husband for all matters of common property without prejudice to the right of the child, in accordance with the provisions of the law".
- d. The mandate of the Convention and Law no. 7 of 1984 has clearly abolished all forms of discrimination, by promoting the principle of equality in law (equality), with the notion also in custom as an unwritten law. Which principle has been accepted worldwide as a universally applicable principle. Not only that, the principle of justice actually inspires the principle of equality, so we will be able to see that discrimination is not a destiny that women cannot oppose.

⁷Abdurrahman, *Kompilasi Hukum Islam*, Cetakan I, (Jakarta: Akademika Presindo, 1992), page 19.

⁸Lawrence Meir Friedman, *American Law: an Introduction*, Edisi Kedua, Terj. Wishnu Basukidengan judul, *Hukum Amerika: Sebuah Pengantar*, Cetakan I, 2001, (Jakarta: PT Tatanusa, 2001), page 7-8.

⁹Friedman, *ibid.*, page 8.

¹⁰Soerjono Soekanto dan Mustafa Abdullah, *Sosiologi Hukum dalam Masyarakat*, Cetakan I, (Jakarta: , CV Rajawali, 1980), page 338.

¹¹Lili Rasyidi dan Ira Thania Rasyidi, *Dasar-dasar Filsafat dan Teori Hukum*, Cetakan IX, (Bandung: PT Citra Aditya Bakti, 2004), page 65.

¹²Soepomo, *Sistem Hukum di Indonesia Sebelum Perang Dunia II*, Cetakan XV, (Jakarta: PT. Pradnya Paramita, 1997), page 7.

With the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women and the Law of Human Rights should the elders and elders of Batak re-think and examine the principles and discriminatory principles, so that equality between women and men put forward in family, custom, and in all the social life Batak. It is hard and even a dilemma if we make a very revolutionary change, not even a few who reject this idea. However, our pros and cons make it as a treasure to enrich the idea of thought and find an ultimate truth without harming even cornering others. All elements must sit together to talk about it, so that the results achieved satisfy all parties.

C. RESEARCH METHODS

1. Approach Method

Approach method used in this research is normative juridical method, which is law research done by researching or studying problem seen from facet of rule of law, researching library material or secondary data¹³. The author uses normative juridical methods in this study with the intention to inventory the legal material (collect, cluster and clarify) in order to examine the consistency and synchronization of the status of widow (divorce due to death) in the customary law of inheritance Batak.

2. Research Specification

In terms of its objectives, this study tends to be descriptive analytical, ie describing the applicable legislation relating to legal theories and practice of the implementation of positive law¹⁴, which concerns the above issues. Descriptive in this research is intended to provide a detailed, systematic and comprehensive description of all things, related to the position of widow (divorce due to death) in the customary law of Batak and repositioning the position of widow (divorce due to death) in the customary law of Batak in the perspective of gender, while analytical contains the meaning of grouping, connecting, explaining and giving meaning to the subject matter to be analyzed so as to give a clear picture of the problem.

3. Data Source

The type of data used in this study is secondary data, considering this research used normative legal approach. The main data source was secondary data. Secondary data in the field of law (viewed from the point of binding strength) can be distinguished into:

- a. Primary legal materials, namely legal materials comprising legislation, official minutes, court decisions and official state documents.
- b. Secondary law materials, namely legal materials consisting of books or legal journals containing the basic principles (legal principles), the results of legal research, legal dictionary and legal encyclopedia.

4. Data Collection Method

In this study, the secondary data were obtained by library. Library study is a research done by searching for conceptions, theories, opinions or legal findings¹⁵, which are closely related to the subject matter.

5. Data Analysis Method

Data analysis method is an important step in determining a research. Data analysis in a study was used to describe and solve the problems studied based on the data obtained then processed into the principal problems raised against descriptive research.¹⁶

Data analysis method used in this research was descriptive qualitative analysis method, that was how to analyze data by describing and analyzing content material and validity of data obtained from result of library study, so that obtained picture about an event in society, in this case is about position of widow (divorce due to death) in the customary law of Batak and reposition of the position of widow (divorced by death) in the customary law of Batak in the perspective of gender.

D. RESEARCH FINDINGS AND DISCUSSION

1. Position of Widow (Divorce due to death) in Traditional Batak Inheritance Law

a. Position of Widow according to Customary Law

The position of the widow as an heir or not is influenced by the kinship system and marriage form applicable within the society concerned. There is a widow who due to the death of her husband is still not free to determine her behavior, because she still has to be domiciled on the side of her husband's relative. However, there is also a widow who after her husband's death can return to her original relative and freely determine her activities.¹⁷

¹³Soejono dan H. Abdurahman, *Metode Penelitian Hukum*, (Jakarta: Rineka Cipta, 2003), page 56.

¹⁴Moch Nazir, *Metode Penelitian*, (Jakarta: Ghalia Indonesia, 2008), page 84.

¹⁵Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek*, (Jakarta: Rineka Cipta, 2008), page 109.

¹⁶Heribertus Sutopo, *Pengantar Penelitian Kualitatif*, (Surakarta: Puslitbang UNS, 2008), page 8.

¹⁷H. Hilman Hadikusuma, *Hukum Waris Adat*, PT. Citra AdityaBakti Cetakan VII, Bandung, 2003.

The widow's position within the customary law of the heritage property, starting from the principle that women as foreigners have no right to inherit¹⁸. This happens when the conditions of inheritance are a family bond based on blood or heredity, but there is the fact that, in a marriage, the birth and soul relationship between husband and wife is so close, even far beyond the relationship between the husband and his own sibling. Therefore, in the formulation of the inheritance of widow rights must be considered, they are:

1. Widow is entitled to life guarantee of her life, from result of *gono-gini*(common property) or from result of goods of husband.
2. The widow is entitled to take possession of her husband's property, to withdraw the income of the goods, especially if having children, the property remains a unity under the care of the widow and not divided.
3. The widow is entitled to hold her husband's goods, as long as they are needed by her, for her necessities.
4. The widow is entitled to share or demand for the child's share, in the event of a division with the child, such as the pregnant widow or the child asking for part of the business capital.¹⁹

It is worth noting that there must be two conditions, in order for the widow to obtain a position as an heir:

1. Widows must have long lived together and follow the joy of family
2. Widow, after the death of husband does not show attitude or tends to sever relationship with husband's family, also do not marry again with other man.²⁰

In Indonesia, there are 3 (three) forms of kinship system, which in some way influence the position of widow.

1. Widows in Patrilineal System

Patrilineal society in Batak tied to patrilineal system that is absolutely genealogical, that is draw a lineage from the father. The main feature of this patrilineal society is marriage with *Jujurt. Jujur*, it gave to the woman is as a symbol of the family's decision to decide the family relationship with his relatives and entered into her husband's relative.

2. Widows in Matrilineal System

The matrilineal lineage system is the one that calculates the kinship relationship through women only, and it results in each individual entering into his mother's relative.

3. Widows in Parental System

Javanese society is a society that has a parental / bilateral kinship system, that is, each individual draws his or her lineage upwards through the father and mother line simultaneously. According to Javanese customary law, heirs can be classified in the following order:

- a. Heir of the testator.
- b. Parent heir.
- c. Hereditary brothers / descendants.
- d. Parents of the parents of the testator.²¹

In this order is not including widows, although in fact, they are heirs as well. This is a continuation of the bilateral inheritance system which places the same position between men and women so as to give the same position to widows to inherit the property of their deceased relatives.²²

b. The Position of Widow (Divorced by Death) in the Traditional Batak Inheritance Law

Marriage is a very important event in the life of the community, because marriage is not only about men and women who will be the bride, but also the parents of both sides, brothers and even distant relatives. With the marriage, will form a new family which is a unity of life consisting of father, mother, children who then led by the father as the head of the family and mother as the head of the household.

¹⁸ImanSudiyat, *HukumAdatSketsaAsas*, Liberty Cetakan VII, Yogyakarta, 1981.

¹⁹Muhammad Busar, *Pokok-PokokHukumAdat*, PradnyaParamita Cetakan III, Jakarta, 1985.

²⁰*Ibid.*, page., 45

²¹Hadikusuma, *op.cit.*

²²M. YahyaHarahap, *KedudukanJanda, DudadanAnakAngkatDalamHukumAdat*, Citra AdityaBakti Cetakan 1, Jakarta, 1993.

In domestic life, husband and wife bear a noble obligation to uphold the norms that become the basic joint of the society. Among the spouses have equal rights and position, both in the domestic life and social life together in the community. However, the extent to which the balance between the rights and positions of husband and wife, still influenced by the kinship system and marriage form adopted by the husband and wife.

1. Position Related with Kinship System and Marriage Form

In a patrilineal society in Batak every person who is born always draws a lineage through a man/father. The born of boy always draws a lineage through his father, so that the born children have a legal relationship with father and father's family. The consequence of this principle of offspring, then resulted in the position of boys become important, because boys are the hereditary descendants. It can be said that boy will be forever in one line with his father and his father's family. Therefore, in the Batak community with patrilineal system, the residence is the father side.

It is same with the wife, where her residence depends on her husband (patri-local). This happens as a result of the marriage form that applies to this society, namely "*jujur* marriage". In this marriage there is *jujur* goods given by the men to the women, which serves to replace the magical emptiness that occurs within the family of origin of women. This *jujur* item is important in maintaining the magical balance that exists within the family of female origin. With such an *jujur* marriage, the consequence that the wife escaped the rights and responsibilities of the family of origin and entered into the rights and duties and responsibilities of her husband's family.

If the marriage breaks up, then it depends on the cause of the breakup of the marriage. If the marriage breakup is due to a divorce, "*hasirangan* meeting" will be held before, the purpose of the meeting is to determine who is wrong and to talk about sharing the common property. If it turns out that the meeting decides that the husband is guilty, then the wife will get a larger share of the joint property, and vice versa if it turns out the wife is at fault, then the husband will get a greater share than his wife.

If the marriage breakup is caused by death, then there arise the issue of inheritance and maintenance of the child. If the deceased is a husband, then it is appropriate if the mother (widow by death) who continues the maintenance of children who are underage and control of the wealth of the child obtained as inheritance from his father who has died.

In this case, the widow is only given the right to dominate and enjoy the property (not owning), and later on, the property will belong to her son or to the family of her late husband if he remarries or has no offspring. So it is clear that according to the customary law of the Batak community, it does not allow widows to inherit their husband's property. This is reinforced by the opinion of SulistyowatiIrianto who said:

1. Cultural values and concepts concerning women and men in Batak society that reflect the unequal power relations between men and women, place women in a weak position, especially in the case of inheritance.
2. The absence of territorial factors in the city does not result in the diminution of cultural values that affect the weakness of women's position in inheritance.
3. The migration of Batak people to the city actually reinforces the existence of customary rules of inheritance in certain respects. Values about heritage possessions that girls may not have in their homeland, adopted in such a way that the property of marriage (matrimonial property) is considered not entitled to be owned by girls in certain Batak communities in the city.
4. With regard to the widow, the customary inheritance which does not place the widow as an heir, is still preserved in the city, in which the widow along with her husband has collected the property during her married life.
5. The impact of patriarchal control over women in the city has led to an increasingly sharp social and economic stratification by gender.²³

2. Widow's Position in Relation to the Principles of Inheritance and the Inheritance System

In customary law of inheritance, to determine the heirs are based on the principle of inheritance, where the applicable principles are different among the other one society. The principle consists of general principles and special principles. The principle of general inheritance is the principle whereby to be an heir must have a blood relation with the heir, in other words that the heir must be the heir of the heir. In addition to the general principle, it is also known the special principle that to be an heir not only has blood relations, but also must be a clan with the heir.

In Batak society which is a clan society, adheres to both principles. To perform inheritance, a person must have a blood relation with the heir and must be a clan with the heir. So in this society, the inheritance is a boy. This is because boys are descendants or defending father's clan and father's family.

In relation to that, if the deceased is a husband, it is clear that the widow cannot appear as the heir to inherit the property of her late husband, because the widow has no blood relation and not one clan with her deceased husband but a clan with her family of origin. But by doing *jujur* marriage, she has gone out of his family clan. So it can be said that the widow is not the heir of her deceased husband.

²³Irianto, *op. Cit.*, page.,2.

In addition to the principle of inheritance, it must be considered also about the inheritance system. In customary law there are three systems of inheritance, namely:

- a. An individual inheritance system, a customary legal system of inheritance in which, inheritance is distributed to relatives and may be owned individually with property rights. This inheritance system applies to parental society, western law (Civil Code), as well as in Islamic inheritance law.
- b. The collective inheritance system, a customary legal system of inheritance which does not permit heirs to have personal possessions: they are only allowed to use, commercialize, or process and enjoy the proceeds (eg, *tanahdati* in Ambon which is administered by heads of *dati*, or *ganggambauntuik* in Minangkabau). In this system, in general there are treasures derived from ancestral treasures called heritage treasures.
- c. The major inheritance system, a customary legal system of inheritance in which the property is not divided and is controlled only by the eldest. Against this property is only attached to the status of use rights as well as the right to process and collect the results. Mastery by the eldest son is followed by the right and duty of taking care of and preserving her siblings (male and female) until they can stand on their own. For example in the area of Lampung, known as *pepaduan* custom, all the treasures fall on the eldest son of a boy who is called a child was balanced. The same thing happened in Irian Jaya (Papua) with its major son. In the Semendo area of South Sumatra, the treasure property is controlled by a girl called *tunggutubang* (treasure keeper) but is accompanied by a *payungjuritai* as a female lady.²⁴

Among the three systems of inheritance in reality there is a mixture²⁵. Batak community embraces the system of individual inheritance, where in this system treasure relics will be divided to the heirs in accordance with their respective parts. But of course only boys are entitled to get a share of the treasure. If it turns out that the family does not have sons, then the inheritance falls to the brother of the heir, which in Batak is known as "*manean*" or "*tean-sejanan*", this brother is called "*paneanean*" or "*manean*". If the brother of the heir does not exist, the inheritance falls to the family near the heir, drawn along the line of the father.

Thus, it is clear that if the widow's position is associated with the inheritance system and inheritance principle, then it can be said that the widow cannot inherit her husband's property, because the widow is not the heir of her deceased husband.

3. Position of Widow of Husband's Heritage in the Principle of Justice

A widow in a patrilineal society in Batak, after the death of her husband, has the right to enjoy all the livelihoods and other property brought by the husband and wife into the marriage, as long as the widow does not remarry and remains in the family of her deceased husband. But usually, if a widow has a married son, this son should take care of his mom.

If there is a division of inheritance and her son is not likely to take care of his mother, then some of her husband's property must be abandoned and handed over to the widow for the provision of her life. If the widow dies, then the property is subdivided by the heirs or if previously has been determined to be controlled by the widow, then the heirs can only control that part, if the widow has died, the heirs have no right to disturb the widow's right.

The right to enjoy is limited only to things that are necessary and appropriate for the widow's life. But to sell goods belonging to the deceased her husband, she must get approval from close family/other heirs. According to Batak custom law, widow is not heir to her husband's property, but widow only serves as:

- a. Superintendent or keeper of the property, replacing the position of the deceased husband in order to safeguard the interests of the heirs.
- b. As long as the widow is alive, it is entitled to control and enjoy the property and be entitled to the results and profits arising from the business.
- c. The nature of such supervision and enjoyment shall not reduce or separate or sell the property. Sales can only be made if it has been approved by other heirs.²⁶

However, to keep in mind that the oversight and pleasure will disappear by itself, if the widow has left the family of her deceased husband or the widow remarries with another man outside the relatives of her deceased husband.

4. Sections of Widows in Traditional Batak Inheritance in the Principle of Justice

The widow in the Batak area in the form of marriage with *jujur* after the death of her husband remained domiciled in the place of her husband's relatives, she still deserve to enjoy the wealth left by her husband, even though she is not inherited from her husband. In the Batak land, widows are not inherited from their husbands, but they have been entitled to life for their husbands in the limits of their livelihood. This matter can be seen from several Court Decisions as follows:

²⁴Hadikusuma, *op.cit.*, p.,212-213.

²⁵Hadikusuma, *ibid.*

²⁶SoekantodanUsman, *op.cit.*

According to the South Tapanuli District Court Decision dated December 12, 1953 No.81 / 1953 / SHP.Ps, it is said that according to customary law in the Batak area a widow woman cannot inherit the land of her husband. Then the High Court of Medan Decision dated April 23, 1957 No.50 / 1954 said, according to Batak custom law a widow cannot inherit the land of her husband, but can demand to keep enjoying the land of her husband, as long as the treasure is needed for his livelihood.

If the widow in the patrilineal system is not the heir of the husband, but she is the bridge or inheritance bridge of the father to his sons, then so is the husband actually not the heir of his dead wife, because according to the nature of mind in this kinship system wife belongs husband, let alone treasure and livelihood that during the marriage is a unity that is not separate and not fragmented its position.²⁷

From the property of her husband, the wife does not get a share as an inheritance, but the right to withdraw income from the treasure for life, if necessary. For that living, the wife (widow) can also be given a decent share of her husband's property, which is often the case when her children are all grown and independent (not in the same home anymore). The widow is entitled to earn a living forever, so for that purpose sometimes the treasures left to her are not divided, as well as the goods of her husband's origin.

2. Reposition of Widow's Position (Divorced by Death) in the Batak Customary Inheritance Law in Gender Perspective

a. Gender Definition

Gender issues are not a new issue in social, legal, religious, or other studies. Nevertheless, the study of gender is still actual and interesting, since there are still many people, especially in Indonesia who have not understood this issue and there are still many disparities in the application of gender so as to bring about the occurrence of gender injustice. The importance of gender is given in this discussion to assist in clearly defining the boundaries meant by that understanding, to obtain a common point of view.

Gender is often identified with kind of sex (sexual), whereas gender is different from sex. Gender is often also understood as a gift from God or the divine nature, whereas gender is not solely so. Etymologically the word 'gender' comes from English meaning 'the state of being male or female'²⁸. The word 'gender' can be interpreted as 'a visible difference between men and women in terms of values and behavior.'²⁹

In terminology, 'gender' can be defined as cultural expectations of men and women³⁰. Another definition of gender is put forward by Elaine Showalter. According to him, 'gender' is the differentiation of men and women seen from socio-cultural constructions³¹. Gender can also serve as a concept of analysis that can be used to explain something³². More emphatically mentioned in the Women's Studies Encyclopedia that gender is a cultural concept used to distinguish the role, behavior, mentality, and emotional characteristics between men and women who develop in society.³³

From some of these definitions, it can be understood that gender is a trait that is used as a basis for identifying differences between men and women in terms of social and cultural conditions, values and behaviors, mentality, and emotions, as well as other non-biological factors. Gender is different from sex, although etymologically means the same as sex, 'the state of being male or female'³⁴. In general, sex is used to identify the differences between men and women in terms of biological anatomy, while gender concentrates more on social, cultural, and other non-biological aspects. If the study of sex is more emphasis on the development of biological aspects and chemical composition in the body of a man and a woman, then gender studies emphasize the development of aspects of one's masculinity and femininity.

The history of gender differences between a man and a woman takes place through a very long process and is formed by several causes, such as socio-cultural conditions, religious conditions, and state conditions. With this long process, the final gender difference is often regarded as God's natural or as if biologically irreversible provision. This is precisely what caused the beginning of gender inequality in the midst of society.

Gender has an important position in one's life and can determine the life experience that it will take. Gender can determine one's access to education, the world of work, and other public sectors. Gender can also determine the health, life expectancy, and freedom of movement of a person. Clearly, gender will determine the sexuality, relationships, and ability of a person to make decisions and act autonomously. Finally, it is the gender that determines what a person will become.

²⁷Hadikusuma, *op.cit.*, p.212-213.

²⁸John M. Echols, dan Hassan Shadily, *KamusInggris Indonesia*, Gramedia Cet. XII, Jakarta, 1983, page., 265.

²⁹Victoria Neufeldt (ed.), *Webster's New World Dictionary*, Webster's New World Cleveland, New York, 1984, page., 561.

³⁰Hilary M. Lips, *Sex and Gender: An Introduction*, Myfield Publishing Company, London, 1993, page., 4.

³¹Elaine Showalter (ed.), *Speaking of Gender*, Routledge, New York and London, 1989, page., 3.

³²Nasaruddin Umar, *ArgumenKesetaraanJender: Perspektif Al-Qur'an*, Paramadina. Cet. I, Jakarta, 1999, page., 34.

³³SitiMusdahMulia, *Islam MenggugatPoligami*, GradediaPustakaUtama. Cet. I, Jakarta, 2004, page., 4

³⁴Echols, dan Shadily, *op.cit.*, page., 517.

b. Position of Widow (Divorced Died) in the Law of Traditional Batak Inheritance in Gender Perspective

A number of studies on women and law in Indonesia conclude how marginal the position of women is. This proves that gender inequality in male and female relations in Indonesia is still very strong. As seen in Batak customary inheritance law system which adheres to the patrilineal system, where women do not get inherited property and are economically dependent on men.

As it is known that gender issues are often discussed and discussed by observers of gender issues in various meetings, discussions, seminars and others both at the local level, as well as at the national level even at the international level. Mansour Fakhri, suggests that gender is a socially male and female relationship. The social relationships between men and women in the interaction of everyday life, formed and transformed by society itself, therefore, are dynamic, meaning they can change from time to time, and may also differ from one place to another in line with culture of each society.³⁵

Social relations between men and women can be seen in various fields of life, among others, in the political, social, economic, cultural and legal fields (whether written or unwritten law ie customary law). The social relationships between men and women in these various areas of life generally show a subordinated relationship which means that the status of women is lower than that of men.

These subordinated relationships are experienced by women worldwide because subordinated relationships are not only experienced by developing societies such as Indonesian society, but also experienced by developed countries like the United States and others. Such circumstance is due to the influence of patriarchal ideology of ideology which places power on the hands of men and is present throughout the world. This situation has begun to get opposition from feminists, because feminists have always been in oppressed situations and circumstances. Therefore, feminists struggle to claim equal status with men in various spheres of life in order to avoid the sub-ordinated circumstances.

In the field of customary law, especially in inheritance law, Hazairin has been initiated to form a national law of bilateral national heritage³⁶. Similarly, there was an idea incustom law seminar in Yogyakarta in 1975 to form a parental national law, but until now the idea has not been applied. Therefore, in Indonesia still applies customary law of inheritance which is diverse in accordance with family system adopted by the people in Indonesia.

In the patrilineal kinship system adopted by the Batak community it is clear that men are placed in a higher position. Men are domiciled as heirs, as surname, as hereditary descendants, as members of indigenous peoples and also have a role in family decision making as well as the wider community. In societies that adopt a patrilineal kinship system women have very low positions, not as heirs, not as progenitors, not as the successor of surnames because in true marriage (in general) women follow husbands and also do not belong to indigenous peoples.

Observing that issues, it is clear that there has been legal injustice and gender inequity to women because women are always positioned in weak and subordinated positions so that discrimination against women continues. As a solution it is necessary to reposition the position of women in the field of customary law, including in the context of this study is to reposition the position of widow (divorce due to death) in the customary law of Batak. The way is to follow up what was ever initiated by Hazairin, which is by forming the national customary law of bilateral heritage.

c. Repositioning the Widow's Position (divorce due to death) through the Establishment of Traditional Law of National Inheritance Based on Bilateral System

The establishment of national inheritance law based on the bilateral system is an effort to create a uniform legal system of inheritance for all people whose legal principles are extracted from the principles of inheritance law of the three prevailing inheritance legal systems, namely customary inheritance law, Islamic inheritance law, and the law of Inheritance of the Civil Code.³⁷ The Islamic inheritance law introduced by Hazairin, is strong enough in the development of Islamic inheritance law in Indonesia which was marked by the birth of the Compilation of Islamic Law (KHI) in 1991. His influence was also felt in the field of development of customary law of inheritance, especially through jurisprudence.³⁸

³⁵ Mansour Fakhri, *Analisis Gender & Transformasi Sosial*, Pustaka Pelajar, Yogyakarta, 1996, page.,8.

³⁶ According to Hazairin, the legal system of bilateral inheritance is a system of inheritance that does not distinguish between male and female lineages. Both have the same power (right) to obtain the inheritance of both his parents and his relatives. see: Abdul Ghofur Anshori, *Hukum Kewarisan Islam di Indonesia, Eksistensi dan Adaptabilitas*, Ekonisia Cetakan I, Yogyakarta, 2005, page.,93.

³⁷ H. S. L. Tobing, "Pengaturan Hukum Waris dalam Sistem Hukum Perdata Nasional", *Majalah BPHN*, Nomer. 1, Tahun 1989, page.,27.

³⁸ Purwoto, S. Gandasubrata, "Perkembangan Hukum Waris Menurut Yurisprudensi", dalam Simposium Hukum Waris Nasional yang diselenggarakan oleh BPHN pada 10-12 Pebruari 1983, Jakarta, page.,112.

The reasons for the establishment of inheritance law with the bilateral system are, among others, due to the tendency of unilateral (patrilineal and matrilineal) family union system changes that lead to parental kinship. The change in trends affects the inheritance of one-way community inheritance into changes towards bilateral inheritance. The reasons for gender equality, democratization and human rights have influenced the change, both in terms of community kinship system and changes in the legal system of inheritance, in addition to educational, religious, and family economic factors, it can even be said that in the field of legal discovery, the Supreme Court's jurisprudence of the tendency to resolve community inheritance disputes strongly leads to the bilateral system.

If we examine the reality in the field of the three legal systems of inheritance that exist within the community groups, there has been a deviation in the practice of the distribution of inheritance, both in the law of inheritance according to the Civil Code, Islam, and custom. That is why Rahmadi Usman concludes that Muslims today seem to be no longer carrying out the Islamic inheritance law as it should. The same deviation also occurs in the law of inheritance according to the Civil Code and custom, because inheritance is not divided equally between the parts of the male heir with the female heir, but rather based on certain considerations of the testator. As a result, there is an heir to get a share of inheritance because with consideration for capital, there is due to education, or there are assisted in paying debt through inheritance. Such modes of distribution are allegedly committed with the consciousness of the testator even though they are not based on the applicable law of inheritance.³⁹

The codification of the bilateral inheritance law is in line with the parental familial system commonly adopted by the community. Therefore, in Article 12 Sub-Article F of the Planning Board of LPHN dated 28 May 1962 stated that the national inheritance law system is regulated bilaterally and the legal system of inheritance is in line with the development of parental national law which is parental. Similarly, the decision of the result of National Law Seminar I of 1963 by BPHN stated that, the law of inheritance for all people is arranged bilaterally-individually, with the possibility of variation in bilateral system for the Islamic groups who need it.⁴⁰

In addition, there were also several national seminars which later resulted in academic manuscripts of legislation inheritance laws and the formulation of national inheritance principles, among them the result of a national seminar in 1987 and the results of the National Legal Law Symposium in the Development Era by BPHN on 1- 2 November 1989. Finally in 1995, the Head of the National Legal Development Board formed a team of drafting Academic Regulations on Legal Laws of Inheritance, which then gave birth to the Draft Law of National Inheritance Law of 1995.⁴¹

The legal system of bilateral inheritance is a legal system of inheritance that does not base its legal provisions on unilateral or clan-based kinship systems, but based on a parental-affiliated society. The bilateral inheritance law system places the mother's relative line just as strongly as the father's line of connecting the heirs with the heirs, thus giving the same position between father and mother as heirs to his children, both male and female.

The codification system of bilateral inheritance law will have to be differentiated, namely the unity of the law by formulating provisions that are general and applicable to all classes. But on the one hand, there remains a provision that the legal formulation is special and will apply only to certain groups in society. So it resembles the codification of the Number Act. 1 Year 1974 about Marriage. In addition, the codification of inheritance law is differentiated in line with the position and position of the Indonesian nation consisting of various tribes, religions, and beliefs, as well as the prevailing kinship system but within the framework of national insight.

Thus, the codification of inheritance law by differentiation serves as a means of renewal in society. Such codification function is the embodiment of the Roscoe Pound theory, in which law is positioned as "a tool of social engineering". It is also a manifestation of Friedman's Theory of the development of the legal system. Thus it can be concluded that the codification of inheritance law based on bilateral system in the context of repositioning the status of widow (divorced due to death) in customary law of Batak is very important to be realized.

In the context of this study, at least when viewed from the legal reason of the inheritance of Batak custom is that the customary law of Batak which adheres to paternal fatherhood system, tends toward the parental system by observing the examples that occur, for example in Batak society, there gradually the principle patrilineal that is almost abandoned to the bilateral family life of its nature, which from day to day increase strongly offset the influence of father, especially for the Batak people who live in overseas. As a result, in the field of inheritance law there is a change (tendency) towards the bilateral system so that the women share in the property because it is judged in terms of responsibility and safety (protection) as a family member that is no different from men.

Similarly, for a wife whose husband died (divorce due to death), then it is considered very appropriate if the mother who continues the maintenance of his children until the adult child, because it is considered the mother would be better to take care of the interests of his own son than anyone else. In continuing this maintenance, of course the mother (widow), requires a lot of

³⁹Rahmadi Usman, *Perkembangan Hukum Perdata dalam Dimensi Sejarah dan Politik Hukum di Indonesia*, Pustaka Sinar Harapan, Jakarta, 2003, page.,9.

⁴⁰Rumonda Nasution, *Harta Kekayaan Suami Isteri dan Kewarisannya*, BPHN, Jakarta, 1992, page.,65-75.

⁴¹Nasution, *ibid*.

money. Therefore, it is appropriate that the mother (widow) who takes care of and controls the wealth of the child acquired as the inheritance of his deceased father, during the minor.

From these legal facts, it can be concluded that the law of Batak customary inheritance has progressed towards the bilateral inheritance law system. In addition, it has become a reality that the area of inheritance law prevailing in society is subject to change triggered by various factors. It was argued by Bushar Muhammad that: "For sociological reasons in society, bringing and influencing the state and tendency of Indonesian society towards the bilateral system. The situation is influenced by educational factors; overseas/migration in a broad sense; life factor based on household family system; economic factors; industrialization, technology, living in big cities; and others".⁴²

The triggering factors of change from the kinship system that were based on the clan gradually became more open, and ultimately affected the basic joints of society and the familial system that prevailed toward the parental society. This sociological change is marked by the assumption that widows are no longer inherited goods (levirate) in patrilineal society, besides that there has been a lot of marriage between national tribes.⁴³

Establishment of national inheritance law based on bilateral system related to legislation step through codification and unification of inheritance law. In reference it is said that the codification and unification of the law, not only to achieve legal certainty, legal uniformity and simplification of law. But also as a legal political guidance for the government in facing the task of maintaining national law.⁴⁴

E. Conclusion

Based on the above discussion, the authors can conclude several things as follows:

- a. Position of widow in customary law of Batak customary law according to Batak society norm does not give opportunity to widow to inherit her husband treasures. Although the Batak community embraces the individual inheritance system, where in this system the property will be divided to the heirs according to their respective sections, but only men are entitled to a share of the property. Thus, it is clear that if the widow's position is associated with the inheritance system and inheritance principle, then it can be said that the widow cannot inherit her husband's property, because the widow is not the heir of her deceased husband.
- b. How to reposition the position of widow (divorce due to death) in customary law of Batak in order to have equal status with other heirs (gender perspective and principle of justice), that is by forming national inheritance law of bilateral nature. The establishment of national inheritance law based on the bilateral system is an effort to create a uniform legal system of inheritance for all people whose legal principles are extracted from the principles of inheritance law of the three prevailing inheritance legal systems, namely customary inheritance law, Islamic inheritance law, and the law of Inheritance of the Civil Code.

F. Suggestions

The implication of the results of this writing is on equal status of widow (divorce due to death) in customary law of inheritance of Batak in order to have equal position with other heirs. Based on this, the author tries to give suggestions as follows:

- a. It should be a way of repositioning the status of widows (divorced due to death) in the national customary law of a bilateral nature, in order to pay attention to the plurality of Indonesian society, both in terms of religion, customs and kinship system, and pluralism of the inheritance law system itself, since inheritance law is laws that are closely related to these factors.
- b. Establishment of national inheritance law based on bilateral system needs to follow codification of Numbers Law. 1 of 1974, which is done by differentiation or the unity of law by formulating provisions that are general and applicable to all classes, but on the one hand there remains a provision that the legal formulation is special and will apply only to certain groups in society.

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⁴²Muhammad Bushar, *Susunan Hukum Kekeluargaan Indonesia Menuju ke Sistem Bilateral-Parental (Pandangan Sosilogis-Yuridis)*, PT Pradnya Paraminta Cetakan 1, Jakarta, 2006, page.,28.

⁴³Bushar, *ibid*.

⁴⁴R. Subekti, "Beberapa Pemikiran Mengenai Sistem Hukum Nasional yang akan Datang", *Majalah BPHN*, 1992, page.,102.

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