

## Adat perkawinan Toraja Sadan dan tempatnya dalam hukum positif masa kini (suatu studi antropologi hukum)

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### Abstrak

#### <b>ABSTRACT</b><br>

The main topic in this dissertation is outlined in the Introduction. It concerns the customs or adat pertaining to marriage, which prevail among a group called Sedan Torajas in South Sulawesi, and the inquiry concerning the position of that adat within the context of positive law in contemporary Indonesia.

A description of the Sa'dan Torajas, i.e. a subsection of an ethnic group inhabiting the central part of the island of Celebes (Sulawesi) and which in the literature is referred to as the Torajas, is rendered in Chapter I, Part I.

A question on the relevancy of studying the position of customary law regulating marriage within the context of contemporary positive law in Indonesia could be raised. In our opinion the topic needs to be discussed after the introduction of Law No. 1, 1974 and of the Government regulation No. 9, 1975 (law regulating marriage and the implementation of that law), because the question arises whether customary law or adat law is still to be applied, or whether it is invalidated on account of the new matrimonial law. Some explanation about the state of the legal regulations pertaining to marriage before the new matrimonial law was introduced is perhaps needed at this point in order to get a better picture of the topics discussed in this dissertation.

Legal policy of the Dutch colonial government was such that with regard to civil matters, society was divided in three groupings, i.e. the Europeans, Foreign Orientals and indigenous Indonesians, the first group being subjected to a civil code modeled after the civil code in the Netherlands. The second group was subject to certain parts of the Dutch civil code, except for the people of Arab origin who were subject to customary law. With regard to the third group the colonial government adopted a non-interference policy to the effect that norms, partly related to religious beliefs -functioning as guide for behavior and referred to in the Literature as adat with legal consequences or more- known as "adat laws" - were sanctioned as laws which the judges should apply when cases were brought to court. In other words "adat law" was part of positive law. Regarding marriage, at a later point new legislation was introduced by the colonial government, specifically for Christian Indonesians. Although strong feelings arose against legal pluralism, the division of the groupings could not be invalidated yet after Indonesia's independence, since national laws governing the affairs of family law and other civil matters have not been enacted. Thus a plurality of regulations existed -When the new matrimonial law was introduced and one of the reasons of the introduction of the law was to bring about unification of matrimonial law. However, when one reads the new matrimonial law, one can see that up to a certain degree the plurality of legal regulations can not be entirely eradicated. It is in such context that the question of the validity of adat law as positive law becomes relevant.

In order to grasp fully what the position is of the Toraja Adat law within the context of positive law, specifically of regulations on marriage, the writer first presents a description about the customs (adat)

around marriage prevailing among the Toraja Sa'dan. The writer is of the opinion that a thorough understanding of the adat on marriage could only be reached when one relates these customs to the cultural background of the group. In view of this, a description of some basic aspects of the culture of the Sa'dan Toraja is offered. In this context the writer would like to stress that culture is used in the sense commonly understood in disciplines dealing with various societies, i.e. a concept which could be succinctly formulated as the way of life of a people, which could be expressed in three kinds of phenomena: (1) in the form of ideas, which are possessed by the adherents of a specific culture as their ideas and concepts and which function as guidelines for their behavior, (2) in the form of activities, and (3) in the form of cultural objects. In order to collect information about the culture of the Toraja Sa'dan people, the writer has done fieldwork in their area of origin known as Tana Toraja in South Sulawesi. During fieldwork the writer has concentrated herself on studying those aspects of the culture which could be established as being prevailing concepts of the Toraja people about the proper way of living and which could be regarded as their guidelines for the life of a Torajanese. The writer could only afford to spend four months on fieldwork, which would not be sufficient for the basis of a study reporting at length patterns of behaviour, patterns of activities, which truly reflect the way of life prevailing among the Toraja people. When one wants to describe such actual patterns, a thorough fieldwork for the duration of at least one year, during which observations are made, is a prerequisite. In view of the limited time allocated for fieldwork, the writer has elected to illustrate in this dissertation on the aspect of the culture known as ideas, or underlying concepts, which function as guidelines for behaviour rather than the actual behaviour patterns.

Thus the main sources of information, which enable the writer to describe Toraja culture, are fieldwork, during which depth interviews took place, library research and judicial verdicts, relevant to the understanding of matters underlying the system and the customs of Toraja marriage. During her stay in Tana Toraja, with the aid of persons who have thorough knowledge of the culture and the people, the writer was able to identify knowledgeable persons there, and various depth interviews were conducted with them. In the section dealing with the general background of the Sa'dan Toraja people it was brought forward, that there are about 312,436 people residing in the regency of Tana Toraja in South Sulawesi. The majority of them are adherents of the tribal religion referred to by the people as aluk to dolo, and basic institutions, such as marriage can not be understood when it is not related to tribal religion the beginning of this century Sa'dan Toraja people had relatively lived in isolated environment. Except for contacts with ethnic groups contiguous to their area, such as the Baginese, long lasting contacts with the outside world started with the Dutch colonial government, which in 1906 sent an army to this region; Afterwards long lasting contact with Christian missionaries followed suit.

According to traditional belief of the Sa'dan Toraja people, society proper consists of several stratified layers and the concept of this stratified society should also be related to marriage if one wants to understand the system in the right way. In Chapter II stratification according to traditional concepts is elaborated. Marriage as many other areas in Indonesia can not be separated from kinship system and in Chapter III a description of the kinship system is offered. In the Sa'dan Toraja kinship system a person belongs to the kinship group of his mother's family as well as to the kinship group his father belongs to. Furthermore, there is no obligation on the part of a wife to follow her husband and to live among his relatives. In Chapter IV a description is given about the most important aspects of aluk to dolo, the tribal religion including ceremonial life, marriage is also

closely related to this belief system as it is indicated in that chapter.

Thus the First Part of this dissertation covers information about the cultural background of the Sa'dan Toraja people, specifically the background of customs around marriage. The Second Part, beginning with the 5th, Chapter, covers information about legal matters, which are relevant for understanding positive law and its relationship to customary law.

Chapter V contains information about matrimonial customary law prevailing among Sa'dan Toraja people. As an example of living law among Sa'dan Toraja people an important institution is discussed, namely the kapa'. In most districts belonging to the regency of Tana Toraja kapa' is meant as an agreement pronounced by husband and wife during marriage ceremony, whereby each partner recognizes the obligation to pay a fine when he or she will be found guilty of being the cause of the dissolution of their marriage. The value of the fine is expressed in a certain number of buffaloes, and the parties decide the number according to their status. For persons from the top layer, i.e. puang (persons believed to have an ancestor descended from heaven), the fine is settled for the value of 24 buffaloes, each with a horn of 30 centimeter length. Usually a kapa' is documented in a contract during the performance of every carriage, and in some village offices one can read a copy of the text of such a kapa'. Should disharmony arise among husband and wife to the point that they are thinking of a divorce, a decision on determining the guilty will be made by the council of elders (Hadat). The person who is found guilty has to pay the fine. The value stipulated in the kapa' is used as a guideline by the Hadat. The actual decision may deviate from the fixed value, since and economic condition of the guilty person will be considered as the realistic criteria.

After the description about Sa'dan Toraja customs on marriage, attention is given in Chapter VI to the matrimonial Law (Law No. 1, 1974), the regulation concerning its implementation and all other matters which in the writer's opinion are relevant for answering the question regarding the applicability of customary law, specifically Sa'dan Toraja matrimonial customary law. After studying the afore-mentioned law and regulation, it appears that one can draw the conclusion, that for many affairs legal norms known as customary law in the literature, and referred to as living law in the Law to. 14, 1970, are still valid as positive law. Article 66 of Law No. 1, 1974 and the General Explanation of the Law, specifically point 2 and point 5, are the support for such conclusion. Furthermore, an instruction of the Supreme Court, mainly issued for reiterating points of guidance for the implementation of Law No. 1, 1974 (bearing the official number II.A/Pem/0807/75), strengthens the conclusion the writer has put forward. Accordingly, norms, which for a long time has been referred to as customary law or customs with legal consequences, are still important, and the discipline concerned with studying these rules should be sustained and further developed. Within such context the writer has cited a conceptual framework developed by Leopold Pospisil for studying law cross-culturally, as one example which could be drawn upon in studying customary law or adat law, or which could function as a proposition for innovative approaches in making research on adat norms and on adat institutions. Pospisil has acquired experience in studying legal system among preliterate societies, such as the Kapauku in Irian Jaya, as well as in modern context,

One question which logically would come up is that on the fate of adat law in the process of the renewal of the Law, i.e. the shaping of the National Law. In chapter VII the writer has cited the line of thinking about that question as it has come up in a meeting of 45 scholars in the field of law, who convened at Yogyakarta (1975) for the discussion on "Adat Law and the Development of National Law." We have quoted what has been said in that meeting, in order to give a picture of the opinion of lawyers active in various professions, such as those working in the ministry of Justice, in universities, in bodies providing legal aid and those

functioning as judges and attorneys. The participants rightly suggested, that institutions of adat law should not be neglected in

formulating legislation within the prospective National Law dealing with kinship matters in particular and the family in general; and that a great deal of caution should be considered with regard to the unification of law regulating affairs of "spiritual" matters, to which kinship and marriage in many cases belong.

When we say, that norms known as adat norms are partly still valid as positive law - pertaining to matters not regulated yet in Law No. 1, 1974 and Its implementation - regulation, and to matters already regulated but not effective yet, - we do not mean to say that the valid norms are those already identified as adat law many decades ago. In Law No. 14, 1970 (the law regulating the basic principles of judicial power in Indonesia), it is stipulated in Article 27(9), that, as he functions to secure justice, the judge has the obligation to "dig up", to trace and to understand legal values prevalent in society. Furthermore, it is mentioned in the Official Explanation accompanying that law, that the judge is the formulator and the researcher of living legal values prevailing among the people. For that purpose, it is stated, that the judge should go down into society in order to discern, to feel what concepts of equity and justice exist.

Accordingly, the judge will be in the position to extend aid to the people. As an illustration of the role of a judge in bringing about equity and justice, the writer has referred to the example of the development in case law regarding the right of a woman to inheritance in a patrilineal family structure. The Decision of the Supreme Court of November 9, 1961, contains the right of a woman to inheritance from her~ parents in Karo-Batak society. One should compare this, for example, with the decision of the Judicial Court in Padang of September 9, 1937, denying a woman to have the right to inherit from her parents according to the adat law of Nias, which has a patrilineal structure. In many cases of conflicts about inheritance, solution has been perhaps provided through informal channels. Traditional adat law might still be applied, denying daughters to be considered as rightful heirs, but for those who want to seek justice and who bring their case to court, the afore-mentioned legal precedence is now the prevailing guide for courts. Changes have- thus taken place regarding the recognition of the right of daughters in patrilineal family structures. The change has not been channeled through the introduction of regulations, but through the judicial court.

Another matter, which in the course of time has undergone development through legal practice (and not through legislation) is that concerning adoption. Couples wishing to adopt a child with the same legal rights as a biological child, can now appeal to courts. Regulation on the salary of civil servants opens the possibility for providing full child allowance to one adopted child, whose status must be confirmed by a Court's decision. (See Government Regulation No. 7, 1977, Artikel 16 (2) and (3), in conjunction with Government Regulation No. 12, 1967, Article 9 (2) b).

Finally, the writer has presented some thoughts on the potentiality of a law as means for change in the existing pattern of behaviour within the realm of kinship and family. She is of the opinion, that change can be expected to take place only when certain requirements are met and when certain conditions exist, and such a development proceeds in a gradual way. To clarify this point examples are presented of marriage and of family patterns. Patterns of marrying off a daughter at a relatively young age were expected to change after the introduction of the new Matrimonial Law. (See Article 7: the minimal age at first marriage is 19 years for the groom and 16 years for the bride. There was no comparable stipulation valid for all ethnic and religious groups in Indonesia prior to this law.) Another example is the small family pattern, which is expected to replace the large family pattern. It is hoped, that the implementation of the matrimonial law will support the Government in the implementation of its population policy.

The writer is of the opinion that those objectives can only be realized when the following conditions can be met:

a. Prior to the introduction of the new law, members of the society, or the majority of them, have already accepted values which are in harmony with the value embedded in the new law, and which are being promoted by the new law.

b. When conditions as they are spelled out in point a have not been established yet, social-economic policy of the government should be directed in such a way so that the introduction of the new law be accompanied by a social economic-cultural policy guiding people towards the acceptance of the values promoted through the new law. In view of these points, the writer would like to state her stands that in its implementation, the new Matrimonial Law should be regarded as an opportunity for guiding people to accept the law. It thus could be utilized as a means of adult education. Through the implementation of that law, people, specifically those who are underprivileged in terms of educational opportunity and in terms of social-economic condition, could be given guidance and means to enable them internalizing the ideal values which are so attractively formulated and reflected in the Law and its Official Explanation. Various institutions, government as well as private, such as women's organizations, could play an important role in this process, and mass media can be used to amplify the valuable common concern of the people.