

## CHAPTER THREE

### THE PLURALISTIC SITUATION

Three bodies of objectified meaning exist in Minangkabau which contain conceptions pertaining to property relationships and their diachronic transfers, and which are conceived as distinct systems. These are *adat/ adat* law, Islamic law, and written law. This "existence" can be tied to three basic points of reference:

1. The national legal system of the Republic of Indonesia - formerly of the colonial system - which recognizes the three bodies as distinct systems of law and which contains rules about the applicability of the systems.
  2. The actual use which is made of these systems in the social processes which deal with property relationships and diachronic transfers.
  3. The "general knowledge" which the Minangkabau have of these systems.
- Before these three points of reference are dealt with, a short description of the systems shall be given.

#### A. THE SYSTEMS

##### I. ADAT/ADAT LAW

###### 1. *Adat*

*Adat* is the symbolic universe by which the peoples of the Indonesian archipelago have constructed their world. To employ the words of an Indonesian *adat*-law scholar: "*Adat* is the whole body of teaching and their observance which governs the way of life of the Indonesian people and which has emerged from the people's conception of man and world" (Koesnoe 1971: 3). *Adat* refers to all domains of social life, and it also

covers the realm of the sacred and supernatural. Although the sacred world has been superseded in most Indonesian societies by one of the established religions - Buddhism, Hinduism, Islam, Christianity - in most societies *adat* still contains elements of the sacred, magical, and mystical sphere (Koesnoe 1971: 7, 15; Surjono Wignjodipuro 1973: 24). In those societies which have not yet, or but recently, been converted to one of the official religions, *adat* still covers both the supernatural and secular social reality.

The etymology of the word "*adat*" is evident to most scholars: *Adat* comes from the Arabic and has been incorporated into most languages spoken in the archipelago (Koesnoe 1971: 3; Van Dijk 1971: 5 f.; Van Vollenhoven 1918: 7). In Arabic, *adat* means "custom"; in Indonesia, however, *adat* does not mean custom but has the meaning indicated above (for "custom" usually *kebiasaan*, Dutch: *gewoonte*, is used). There is, however, another etymological interpretation which should not go unnoticed, as it is much more in accordance with the meaning the word has in the Indonesian languages. According to R.M. Dt. Rajo Panghulu, the leading contemporary Minangkabau *adat* expert, the word *adat* which is used in Indonesia, is a Sanskrit word, and its existence in Indonesia thus antedates the coming of Islam and of the Arabic language. The word is composed of 'a' meaning "not" and "dato" meaning the "material" (*sifat kebendaan*, 1971: 85 and personal communication). *Adat* or *adato* thus would mean "the immaterial". In Dt. Rajo Panghulu's opinion, *adat* in its Sanskrit meaning was the belief system of the Indonesian peoples pertaining to the secular and the sacred, which only later was restricted to the secular as a consequence of the intrusion of the established religions (1971: 86 f.).<sup>1</sup>

*Adat* in Minangkabau is embodied in an innumerable number of proverbs and sayings which have poetic and rhythmic character.<sup>2</sup> There are several different kinds of "sayings", and *adat*-experts still distinguish the *mamang* and *pitua adat* (proverbs), the *kato adat* (the *adat* rules) and the *papatah petitih adat* (the *adat* maxims).<sup>3</sup> Most sayings contain a reference to the workings of Nature from which the relevant rule for human behaviour is derived according to the basic maxim: "*Alam takambang manjadi guru*" - "The growing nature is the teacher" (see I.H. Dt. Rajo Panghulu 1973: 5). To give one example (see Nasroen 1957: 52) the *adat* saying concerning the process of decision making runs:

"*Bulek aie dek pambuluah*  
*Bulek kato dek mupakat*  
*Aie batitisan batuang*  
*Bana batitisan urang.*"

"The water gets round in the bamboo-pipe  
 The words (decision) get round through the *mupakat* (the unanimous decision)  
 The water is led through the bamboo  
 Truth is revealed (bridged) by man."

Within *adat*, some complexes of rules are distinguished from the rest of *adat* sayings and traditions: The two standards, *cupak nan duo*, the four laws, *undang nan ampek*, and the four kinds of *adat* rules, *kato nan ampek*. The actual classification given by Minangkabau experts varies a little, but it mostly comes down to the following (taken from Dt. Sidi Bandaro 1965: 12, similar I.H. Dt. Rajo Panghulu 1973: 114 ff.; R.M. Dt. Rajo Panghulu 1971: 100 ff.).<sup>4</sup>

1. *Cupak usali* - the original standard. (*Cupak* is a measure of bamboo, but also used to denote standards of behaviour.)
2. *Cupak buatan* - the standard which has been made (in cases where the original *cupak* has been changed by decision of the *Karapatan Nagari*).
3. *Undang2 Nagari* - the laws about the constitution of a *nagari* (e.g. that a *nagari* must have four *suku* etc.).
4. *Undang2 dalam nagari* - the laws about the *nagari*-internal life.
5. *Undang2 luhak* - the laws about the Minangkabau empire and the division of Minangkabau into the three *luhak*.
6. *Undang2 nan 20* - the law of 20, which consist of the law of 8, a crude criminal code, and the law of 12, a code of evidence.
7. *Kato pusako* - the rules which are heritage.
8. *Kato mupakat* - the rules which have been made by *mupakat* in the *Nagari* Council.
9. *Kato dahulu* - the "olden" rules.
10. *Kato k(em)udian* - the rules yet to be made.

*Adat* as a whole is generally divided into four kinds of *adat* (Nas-roen 1957: 45; I.H. Dt. Rajo Panghulu 1973: 109; R.M. Dt. Rajo Panghulu 1971: 87):

1. *adat nan sabana adat* - the *adat* which is truly *adat*.
2. *adat nan taadat* - the *adat* which has developed into *adat*.

3. *adat nan diadatkan* - the *adat* which has been made into *adat*.
4. *adat istiadat* - the general (ceremonial) *adat*.

Although different contents are attributed to these four categories, the same four or five core-meanings reappear, which distinguish *adat* according to its sources:

1. the *adat* which consists of the laws of nature (*adat nan sabana adat*).
2. the *adat* which is the old, pure *adat*, given by Dt. Katumanggungan and Dt. Perpatih nan Sabatang. This is either *adat nan taadat* or *adat nan diadatkan* for the various authors. Under this kind of *adat*, the *cupak nan duo*, the *undang nan ampek* and the *kato nan ampek* usually are subsumed.
3. the *adat* which has been made by a decision of the *Nagari Adat Council*, generally labelled *adat nan diadatkan*.
4. the general customs, mostly *adat nan taadat* or *adat istiadat*.

Several authors have incorporated another distinction of *adat* into this quadrupartition: the distinction between *adat jahiliah*, the *adat* which is contrary to Islam, and the *adat islamiah*, the *adat* which is in accordance with Islam (cf. Taufik Abdullah 1966: 15): The *adat nan sabana adat* is conceived of by several authors as the Law of God, whereas the *adat istiadat* is conceived of as the *adat* contrary to Islam.<sup>5</sup>

*Adat* is further specified by reference to a particular field of social relations. Thus one speaks of the *adat kawin*, the *adat* of marriage, or the *adat pusako*, the *adat* of heritage. It is also used to indicate a standard of evaluation, both in terms of permissibility and of validity: *menurut adat* - in accordance to *adat*, *salah menurut adat* - wrong according to *adat*; and: *syah menurut adat* - valid according to *adat*, *tidak syah* or *batal menurut adat* - not valid, void according to *adat*. As has already been mentioned, *adat* can also be used in a more restricted way, signifying a particular field of social relations in contradistinction to others, e.g. *pusako* or *buek*.

## 2. *Adat and Adat Law*

*Adat* restricts the constituents' autonomy in various ways and to different degrees. Some *adat* sayings and rules are quite explicit in their prescriptive character and leave little room for interpretation and discretion by the decision makers. However, most sayings are vaguely

phrased, often in an allusive way and have to be interpreted in an actual context: they leave room for the exercise of the constituents' autonomy in the interpretation of the rather general notions embedded in the *adat* sayings. This kind of autonomy is firmly embodied in the *adat* doctrine of decision making through the process of common deliberation, the *musyawarah*, which has already been described in the discussion of the Minangkabau notions of authority. The *adat* rules restricting the autonomy in these processes are more what we would call procedural in character. The decision must be found in a proper process, and certain procedural criteria must be adhered to. If this is done the decision makers are not restricted by substantive criteria. *Adat* is amenable to change (see below Chapter 6: 314 ff.), and the principle of a common decision upholding the harmony between the contending parties and the social relations in the *nagari* in general is higher valued than the idea of an application of rules to a set of facts.<sup>6</sup>

According to the conception of law which I have outlined in the first chapter, there is much general and concrete law in Minangkabau *adat*. It should be noted, however, that my conception does not fully correspond with the concept of "adat law", Dutch: *adatrecht*, Ind.: *hukum adat*. The concept *adatrecht* had first been created by Snouck Hurgronje, who denoted with it "those *adats* which have legal consequences" (1893: 357). The concept was subsequently taken up by Van Vollenhoven, and through his usage the concept received its publicity. In Van Vollenhoven's definition, *adatrecht* meant "the sum of the behavioural rules in force for the natives and foreign orientals, which have sanctions (therefore: law) and which are not codified (therefore: *adat*)" (1918: 14).<sup>7</sup> The discussion about what *adatrecht* is, or rather, what it should mean, has since then been carried on through the subsequent generations of Dutch and Indonesian *adat* law scholars. The most prominent conception became the so-called decision-theory (*beslissingenleer*) of Ter Haar (1930, 1934 a, 1937, 1941) which has already been discussed in the first chapter. In the meantime, Indonesian scholars have developed their own conceptions which are usually variations of Van Vollenhoven's and Ter Haar's definitions.<sup>8</sup>

In contemporary Minangkabau, the notion of *adat* law, *hukum adat*, is known, but its use and its interpretations differ. Most persons who have received a formal legal education, such as judges, lecturers at the universities, and higher administrative officials, use the concept, 'and by

their use they contrast *adat law* from *adat*. The judges, in particular, have insisted on a distinction between *adat* and *adat law*, and emphasized that they applied *adat law*. In their opinion, expertness in *adat law* is firmly connected with a formal legal training, and the Minangkabau *adat* experts, *panghulu* who have written books on Minangkabau *adat*, are experts in *adat* only. Their notion of what constitutes that difference, however, was very vague. It mostly referred to Van Vollenhoven's or Ter Haar's definitions of *adatrecht*: Law was what was applied in their courts. However, in the rationalizations and legitimations of the courts' judgements, we could detect no difference between *adat* and *adat law*. Both terms were used indiscriminately, and the problem of the eventual distinction was never explicitly dealt with.<sup>9</sup> Minangkabau villagers generally do not speak of *adat law*, but of *adat*. The term *adat law*, *hukum adat*, is known, but is, quite correctly, considered a Dutch invention.<sup>10</sup> If the term *hukum adat* is used, no distinction is made from *adat*. But in general, no matter which field of social relations they discuss (thus also in the processes of conflict resolution) only *adat* is employed. The word *hukum* is used, but not in the sense of "law", but rather in the sense of "judgement, verdict". *Hukum* is mainly used in its verbal form *menghukum*, *mahukum*, to judge, to convict. If *adat* is specified or differentiated at all in the *nagari*, people refer to the classifications which I have mentioned. The quadrupartition of *adat*, though it forms part of the standard repertoire out of which first information is offered to the foreigner, is hardly ever used in the processes of decision making. It is rather the *cupak*, *undang*,<sup>2</sup> and *kato* which are referred to. But most people are quite aware of the somewhat obsolete character of these subdivisions in *adat*, as particularly the fields of penal sanctions and of constitutional law have been superseded by colonial government regulations and national law. What I would consider law in *adat* (but also what others consider to be *adat law*) is not conceptually distinguished from *adat* in general by Minangkabau villagers.

## II. ISLAMIC LAW

Islamic law, *shari'at*, Ind. and Min.: *sarak*, *syarak*, or *syarat*, is intimately connected with the Islamic religion. It is religious law and regarded as "canon law" by most scholars of Islamic law (see Fyze 1955: 15). *Syarak* literally means "the road to the watering place, the path

to be followed". It consists of the totality of Allah's commandments, each of which is called *ḥukm* (Ind.: *hukum*). Basically, *syarak* is a doctrine of duties which extends to all fields of human behaviour, the sacred and the profane worlds (Fyzee 1955: 15). The religious injunctions of the *syarak* are classified into five different standards of evaluation (see Juynboll 1903: 5 f.; Fyzee 1955: 15):

1. those actions which are strictly forbidden (*ḥarām*)
2. those from which one is advised to abstain (*makrūh*)
3. those where *syarak* is indifferent (*jā'iz*)
4. those which are advised and looked upon positively (*mandūb*)
5. those which are strictly enjoined or prescribed (*farḍ*)

In terms of the conception of law which I have outlined in the first chapter, only the injunctions of nos. 1 and 5 could be regarded as general law, as only they explicitly limit the individuals' autonomy in a definite manner.<sup>11</sup> But besides or rather within the *syarak*, there is the body of the *fiqh*. The *fiqh* is defined as "the knowledge of one's rights and obligations derived from the four sources of law" (Fyzee 1955: 17). *Fiqh* means "intelligence", but under its name the whole Islamic science of jurisprudence has become known. It is generally regarded as the "proper law" or "law in a more narrow sense" by students of Islamic law, and it contains what I call standards of permissibility and validity and the pertinent legal consequences. The "four sources" or "roots" (*'ilm uṣūl*) of law are the Koran, the traditions and practices of the prophet (*ḥadīth* and *sunna*), the principle of analogical deduction (*qiyās*), and the consensus of the learned (*ijmā'*).<sup>12</sup>

Islamic law is the product of a long development process. Islamic scholars divide this process into four main periods, in the third of which, counted from the year 40 until the third century after the *hidjrah* (622 A.C.), the four important schools of Sunnite jurisprudence were formed.<sup>13</sup> In the Indonesian archipelago, most Mohammedans follow the school of Imām Shāfi'ī (150/767 - 204/820). The Shāfi'ites mainly recur to the works of Imām Shāfi'ī and to the two standard works in which the *fiqh* has been elaborated: the *Tuhfah* of Ibn Ḥadjar (died 959/1551) and the *Nihāyah* by ar-Ramlī (died 973/1565) (Juynboll 1903: 38). Another important source of Islamic law have become the collections of *fatwā*. *Fatwā* are explanations of the law in a concrete case, which have been given by a recognized legal expert (Juynboll 1903: 40).

### III. WRITTEN LAW

Written law (*hukum tertulis*) is the sum of the Dutch law which has been received as law in the Colony of the Dutch East Indies, of the laws promulgated for the Colony in Holland, and of the laws made by the colonial and later Indonesian legislative institutions.

Dutch law, like most western legal systems, is a mixture of the late Roman law and the Germanic tribal laws.<sup>14</sup> Most law was codified in the beginning of the 19th century. The Dutch codes were closely modelled on the French codes which were enacted under the reign of Napoleon I. In Dutch legal theory, law is in principle codified, and is applied to concrete sets of facts by the subsumption of the facts under the law. Dutch court decisions do not play the important role they play in Common Law countries, and there is no doctrine that the law is embodied in cases. But court decisions as well as the books written by learned jurists serve as important sources upon which judges draw in the rationalization and legitimation of their judgements. This system was also introduced into the Colony. Legislation-techniques in the Colony also followed the Dutch system, aiming at a complete solution of the problems to be covered in the form of codification of detailed rules, and leaving the judges little room for the exercise of discretion in the application of the law.

Early in this century, Colonial law (*Indisch Recht*) gained in importance when a separate study of it was established at the University of Leiden. In the 1920's a University for Law was established in the Colony's capital, Batavia (now Jakarta).

### B. THE "EXISTENCE" OF THE LEGAL SYSTEMS IN MINANGKABAU

#### I. THE COLONIAL AND NATIONAL LEGAL SYSTEM

The official legal system of the Republic of Indonesia, and formerly the legal system of the Colony of the Dutch East Indies, contains rules about the applicability of the different subsystems and establishes, or recognizes, the administrative institutions which have to apply these subsystems to concrete cases. Most Indonesian societies had already known some sort of legal pluralism after the acceptance of the Islamic religion, but with the Dutch colonialization, the legal pluralism gained in importance. The inhabitants were partly subjected to a new set of

legal rules, and they were also subjected to an administration of justice which was carried out by the new rulers, who were not content to have their own law applied to themselves but also usurped the application of the inhabitants' law. Legal pluralism thus did not just affect domains of social life such as marriage, inheritance, or property. The constitutional systems, and particularly the field of the exercise of socio-political authority were affected to a much greater extent. In the following section, I shall briefly sketch the development of this dual legal pluralism in Minangkabau.

### 1. *Pre-Independence Development*

The Dutch had first come to the west coast of Sumatra in 1600. Then in the first half of the 17th century they had managed to establish some trading posts at major coastal sites. Between 1647 and 1660 they ousted the Achenese merchant governors who had brought the coastal area under their control, probably as a consequence of the weakening of the Minangkabau empire. In the coastal area, in particular in the largest place, Padang, the Dutch introduced some kind of administration, but until the English interregnum (1795-1819), no European had ever set foot into the three *luhak* from the west coast. Raffles, who governed the west coast during the English interregnum for the English East India Company, was the first European to make the journey into Tanah Datar in 1818, where he established a small military post at Simawang. When the west coast had been returned to the Dutch in 1819, they were approached by some *adat*-leaders from Tanah Datar for help against the Padri, and this served as pretext for the introduction of colonial rule in the Padang Highlands. In 1821, the Dutch *resident* of Padang made a treaty with these *adat*-leaders in which "the regions of Pagarruyung, Saruaso, and Sungei Tarab" (all situated in Tanah Datar) as well as "the other regions of the Minangkabau empire" were handed over to the Government of the Dutch East Indies (Westenenk 1918b: 678; Kielstra 1887b: 27 with the full text of the treaty, cf. Dobbin 1977). It is in this treaty that the first regulation concerning the applicability of the laws was made. In fact, legal pluralism was not yet to be introduced. Art. 5 of the treaty said:

"The time-honoured customs and traditions of the land and the relationships between the Native Heads and their subordinates shall be completely safeguarded. In no case shall they be violated, insofar as they are not contrary to the regulations stipulated above" (Kielstra 1887b: 28. The regulations referred to concerned the military presence of the

Dutch in the Highlands and the obligation of the Minangkabau to provide the Dutch with coolies).

The war against the Padri, which was only ended in 1837, prevented the Dutch from a fast establishment of a proper administration. But for the areas under Dutch control, a preliminary administrative system was erected in 1823.<sup>15</sup> Following the pattern also used on Java, the Minangkabau region was divided into 2 *hoofdafdelingen* and 4 *regentschappen*. The *regentschappen* were subdivided into districts. These districts were called *laras* and were based upon actual, or what were erroneously assumed to be, *nagari*-federations. They were placed under the control of a Minangkabau administrative official, the *Tuanku Laras* (*Lareh*). The *nagari* were placed under a village-mayor, *Kepala Nagari*. These officials were paid by the Dutch administration. In the first phase they were appointed by the Dutch administrative officials, later elected by the population. In 1864 election became obligatory (Westenenk 1918b: 830, 832). In 1825, the first court (*landraad*) in the Padang Highlands was established at Fort van der Capellen (Batu Sangkar) (Westenenk 1918b: 680 ff.). In 1833, it was decreed (by *Missieve* 9.1.1833) that courts (*landraden*) were to be constituted in all major centers of Minangkabau, and "that the law should be applied in accordance with the existing customs in each district".

The jurisdiction of these first colonial courts was restricted. All disputes between natives were in principle to be decided by the *nagari*-government. Only appeal to the Dutch courts was allowed (Westenenk 1918b: 686). This state of things was solemnly confirmed by the Governor of the West Coast in the so-called *plakaat panjang*, "the long declaration", of 25.10.1833:

"The Government shall refrain from all interference into the domestic affairs of the natives, and all problems concerning debts, torts, marriage, divorce, and inheritance must be decided by the *adat*-functionaries according to *adat*". (Kroesen 1873: 95 ff. with the full text of the *plakaat panjang*; Kielstra 1889: 332; Westenenk 1918b: 688).

The promises of the *plakaat panjang* were quickly forgotten. In 1837 the Dutch had taken Bonjol, the last stronghold of the Padri-forces. The court structure was renewed, but without any significant changes. But already in 1825, the Dutch had begun levying a market tax (Kielstra 1887b: 125), and in 1847 the *cultuur-stelsel*, the system of forced cultivation of cash crops, in Minangkabau mainly coffee, was introduced (cf. Kahn 1976: 81), the latter made compulsory in 1862. The villagers were forced to plant a number of coffee trees and sell the products to

the storehouses run by the Dutch. The *Tuangku Lareh*, village mayors, and the *panghulu* officially recognized by the Dutch (the *panghulu rodi*) were responsible for the implementation of this policy.

In 1875, the West Coast received a new judicial structure which brought some fundamental changes (see der Kinderen 1875). The *Reglement op het Rechtswezen van Sumatra's Westkust* (coming into force on 1.11. 1875) completely abolished the jurisdiction of the village government, and the penal law was made subject to a (Dutch) Penal Code. The West Coast now had the typical dual court structure with different chains of courts for Europeans and Natives.<sup>16</sup> Only the lowest court for the natives, the *distriktsgerecht* or *Rapat Tuangku Laras*, was staffed with natives. It was presided over by the *Tuangku Laras*, with some of the *nagari panghulu* as assessors. These courts were to apply *adat* law but had to follow Dutch procedural law. Appeal lay in the *Inlandsche Rechtbank* (later to be styled *landraad*) which was presided over by a Dutch administrative official with at least two *Tuangku Laras* as his assessors.<sup>17</sup>

The application of *adat* through *adat* officials, which had been abolished in 1875, flourished also without official recognition. The *Karapatan Adat* continued to exercise their jurisdiction according to *adat*. The official courts condoned this. Guyt, himself a judge in the *Landraden*, states that the governmental courts highly valued the decisions of the *panghulu* (1934: 133). In the 1930's, it had even become regular court practice that intra-lineage (*kaum*) disputes were not accepted by the courts unless the parties had obtained a decision of the *Karapatan Adat Nagari* beforehand (Guyt 1934: 134 and the judgements published in T 133: 264, T 135: 299, T 138: 471).

In 1935, some kind of "village justice" was officially resuscitated by the colonial government.<sup>18</sup> An ordinance amending the *Rechtsreglement voor de Buitengewesten*, R.B.G., was enacted, in which it was stated that: "Legal actions, of which the judges of smaller communities should take cognizance according to *adat* law, are subject to such cognizance".<sup>19</sup> The newly recognized *adat* institutions were given the status of a mediating body (*hakim perdamaian*). The natives were not prevented from bringing their suits before the Dutch courts. However, the *distriktsgerechten* had to inform themselves as to whether the "village judge" had already given a ruling in the case, and if so, were obliged to take cognizance of this ruling. They were also entitled to remit the case to the village judge and could regard the suit as lapsed (*vervallen*) if the plaintiff

refused to do so.

Islamic institutions of dispute-settlement were not recognized as judicial institutions in West Sumatra.<sup>20</sup> However, in those *nagari* where such institutions had been established during the Padri-war and, as in CKL, had been more or less integrated into the *adat* system, they continued to exercise jurisdiction, particularly in marriage affairs, also without official recognition (see AB 39: 212 ff.).

The law which was to be applied in this dual court system had been systematized for the whole colony in 1848. The basic principle was that different law was to be applied to the different population groups. These groups were mainly based upon racial origin. At first, two groups were recognized, Europeans and Natives, but the *Regeringsreglement* (R.R.) of 1854, the constitution of the colony, recognized three population groups: Europeans and persons treated like Europeans (mainly Christians), Natives, and Foreign Orientals.<sup>21</sup> These provisions remained unchanged until 1920, when the R.R. was amended, and then to 1925, when the *Indische Staatsregeling* (I.S.), the new constitution, was enacted. Art. 163 I.S. defined who belonged to which population group, and art. 131 regulated which law was to be applied to which population group.<sup>22</sup> According to art. 131 (6) I.S., all private law in force for the native population on 1.1.1920 continued to be in force. This meant, that according to art. 75 R.R. the law which was applicable to the natives consisted of their unwritten *adat* law and those European regulations which had been made applicable to the native group by decree of the Governor General. The application of *adat* law was restricted by the rule that it was not to be applied when it offended the (western) principles of equity and justice (see Gautama and Hornick 1972: 10, Hooker 1975: 278). Before 1920, only very little Dutch law had been made applicable to the native group.<sup>23</sup> The members of the native category had also some opportunities to become subject to European law, but these were infrequently used by the Indonesians. The fields of property and inheritance law were excluded from these possibilities in any case.<sup>24</sup>

The *adat* law of property and inheritance thus was in principle untouched by these provisions. However, several laws and regulations had been enacted which had some impact on property relationships and land law in particular: The *Domeinverklaring* for Sumatra (S. 1874: 94 f.) by which all "waste land" was declared to be the domain (*domein*) of the

State, and the "Prohibition on Land Alienation" (*Verbod van vervreemding van erfelijk individueel gebruiksrecht* of 1875) which prohibited sales of 'native land' to non-natives (Gautama and Hornick 1972: 75 ff., 83). These laws will be discussed later in Chapter 4.

## 2. Post-Independence Development

Since the independence of the Colony of the Dutch East Indies in 1945/49, the pluralistic situation has not basically changed. The regulations of arts. 163 and 131 I.S. are generally held to continue to be in force,<sup>25</sup> and they are still applied in contemporary Minangkabau State Courts.<sup>26</sup> Some laws have been enacted by the Indonesian legislature which have important consequences for the fields of property relationships: The Basic Agrarian Law of 1960 and the Marriage Law of 1974. They will be discussed in the next chapter.

The dual court was abolished during the Japanese interregnum, and after Independence this unitary court system was retained. The ordinary jurisdiction was conferred upon the *Pengadilan Negeri* (PN) as courts of first instance, the *Pengadilan Tinggi* (PT) as courts of appeal, and the *Mahkamah Agung* (MA), the Supreme Court, as court of revision.<sup>27</sup>

The village justice in its officially recognized form survived the Japanese interregnum and the Dutch military actions. In post-Independence Indonesia, it is generally held that the regulations introduced in 1935 are still valid and that the village institutions are still permitted to act as *hakim perdamaian*. In West Sumatra, the structure of the administrative bodies which function in village justice has been changed by several regulations.<sup>28</sup> The first systematic reorganization of the local government system in West Sumatra was introduced in 1968 by a decree of the Governor. The *nagari* government was to consist of a village mayor, *Wali Negeri* (WN), a *nagari* council, *Kerapatan Negeri* (KN), and a village parliament, *Dewan Perwakilan Rakyat Negeri* (DPRN), the membership to which was elective (SK 015/GSB/1968). The KN was to assist the WN and to function as court of mediation in *adat* and religious matters. The regulations on the KN were implemented by a decree of 1970 (SK 149/GSB/1970): The KN consists of three sections, an *Adat* Section, a Religious Section, and a General Section. For each section, a jury (*Dewan Juri*) is to be established. The juries shall take decisions "which are to mediate between the parties and which should be accepted by both parties" (*keputusan perdamaian yang disepakati oleh pihak2 yang berperkara*). The members of the *Adat* Section shall be the members of the

*Karapatan Adat Nagari* (KAN), the members of the Religious Section the members of the Council of Religious Experts (*Majelis Ulama Negeri*) or those persons who are recognized as religious experts (*Alim Ulama*).<sup>29</sup>

In most *nagari*, the *Karapatan Adat Nagari*, the *adat* councils according to *adat* constitutional law, exist side by side with the officially established *nagari*-institutions. The KAN are not officially recognized by Indonesian national or provincial law, but their existence is known and indirectly acknowledged by the provision that the members of the KN should be recruited from the KAN.<sup>30</sup>

During our stay in Minangkabau, a new local government regulation was introduced (SK 155 and 156/GSB/1974), which abolished the DPRN and restructured the KN, without, however, basically changing its jurisdictional powers. The re-establishment of a religious section of the KN has already been mentioned.

Post-Independence saw a growing recognition of Islamic institutions. Besides, Religious Courts were set up in several parts of Sumatra after Independence, mainly by and in cooperation with the Ministry of Religious Affairs.<sup>31</sup> The Ministry has a department (*Perwakilan*) in each province, and Religious Administrative Offices (*Kantor Urusan Agama*, KUA) were set up on *Kecamatan* level. The KUA in many parts of Indonesia assumed jurisdictional powers, until in 1957 Religious Courts were officially established outside Java and Madura (see Lev 1972a: 76): The Government Instruction (PP 45 of 1957) established Religious Courts, *Pengadilan Agama* or *Mahkamah Syariah*, in the places where PN already existed. The Religious Courts' jurisdiction is only vaguely circumscribed. It comprises disputes between married persons of the Islamic religion as well as matters of marriage, divorce, remarriage, and disputes concerning inheritance and gifts, but only "if these subjects are, according to the living law (*hukum hidup*) to be decided according to Islamic law. If other than Islamic law is in force in these matters, the Religious Courts may not assume jurisdiction" (art. 2 and 4). The decisions of the Religious Courts can only be executed after they have been reviewed and confirmed by a State Court (art. 3-5).

The administrative structure of the Religious Department reaches down to the *nagari* level. There is an Officer for the Registration of Marriage, Divorce, and Remarriage (*Pembantu Pegawai Pencatat Nikah*, *Thalak*, *Rujuk*, P3NTR) in each *nagari*, who is chosen by the village mayor and whose appointment must be confirmed by the KUA. Since 1969, the P3NTR has an advisory committee, the *Corops Penasehatan Nikah*, *Thalak*, *Rujuk*, (CPNTR),

the members of which are appointed by the village mayor.

## II. THE ACTUAL USE MADE OF THE SYSTEMS

The second form of actualization of the three systems in Minangkabau is the actual use made of the systems in property and inheritance affairs. The substantive rules of the systems will be described in the next chapter, and the actualization of the systems in the social processes which are concerned with property and inheritance affairs will be treated in Chapters 5 and 6. But in order to convey an impression of the systems' respective importance, first a general overview will be given here.

### 1. *The Legal Systems Used by the Courts*

#### a. The State Courts

The State Courts either apply *adat* law or written law but not Islamic law. That Islamic law is not applied is to be emphasized, as the foreigner is often told the contrary in introductory interviews. Most people whom we interviewed still vividly remembered the two conferences which had been held in 1952 and 1968 on the subjects of land and inheritance law. In the resolutions issued by the conferences' participants it had been stated that Islamic law should be applied to the inheritance of self-acquired property (see Prins 1953, Naim (ed.) 1968). The Judges' Organization had participated in the 1968-conference and had agreed with these resolutions. In some of our first interviews with judges and administrative officials we were offered the statement that Islamic law was indeed applied in the State Courts. But our check of the court records of the PN in Bukit Tinggi, Batu Sangkar, and Payakumbuh for the period of 1968 - 1974 revealed, that Islamic law was not applied in one single case. Once we had become better acquainted with the judges, they, too, emphatically denied that Islamic law was, or should be, applied in their courts in property or inheritance matters.

Most courts explicitly legitimate their judgements by reference to *adat* or *adat* law. Written law only enters the judgements in rare instances. The only substantial exception is formed by the bulk of cases in which banks try to recover loans from their debtors. In the period under review, this kind of case constituted about 14% of all contested

civil cases (71 of 507). In practically all other cases, *adat* (law) was applied as the system of substantive law. In disputes about property and commercial transactions in the towns, the courts sometimes recur to single principles of Dutch law like the principle of *bona fide* acquisition. But the law in these cases also is, for the rest, *adat* law (for a more detailed overview of the case load see Chapter 5: 307).

It must be remembered, however, that the law of procedure and evidence is a modified version of Dutch procedural law. This is of considerable influence on the concretization of *adat* law in the state courts.<sup>32</sup>

#### b. The Religious Courts

In principle, the Religious Courts apply Islamic Law. The actual exercise of their jurisdiction in Minangkabau is reduced to marriage problems. The greatest percentage of their case load (78%, N=1.237) is formed by applications demanding the declaration of validity of a previously unregistered marriage (*pengesahan nikah*). Property or inheritance questions are hardly ever brought before the religious courts. In the 6 years of 1969-1974, for which we examined the case load of the *Pengadilan Agama* in Bukit Tinggi, only 8 cases concerning property (or 0.64% of the total case load) came before the court. Of these 8 cases, only two were actually decided: One uncontested case of inheritance and one property dispute between a married couple. The other six cases were withdrawn, and in two cases the court did not assume jurisdiction on the grounds that the matter in dispute was subject to *adat* law and should therefore be heard by a State Court.<sup>33</sup> One of these cases will be reported in Chapter 5: 267 ff.).

#### 2. *The Use Made of the Systems in the Nagari-Institutions of Decision Making*

It is difficult to give an answer for Minangkabau as a whole to the question of the degree to which the three systems are used to legitimate decisions in property and inheritance matters by the *nagari*'s institutions. Although I think it probable that the situation in most *nagari* will be similar to the one in CKL, I shall restrict my statements to *nagari* CKL.

Property matters are in principle dealt with only by the *adat* institutions and the *adat* section of the *Kerapatan Negeri*. These institutions use *adat* to legitimate their decisions. The P3NTR did not handle property problems, and neither did the religious section of the KN; in fact, the

latter had not decided any case at all and its existence was very much on paper only. Marriage affairs are dealt with by the P3NTR, the KUA, and the *Pengadilan Agama*, but disputes over the division of marital property are handled by the *adat* institutions. In some cases in CKL, disputes concerning property were also dealt with by the *sidang*-councils (see Chapter 2: 80). The *sidang*, however, were regarded as *adat* institutions in definite contrast to the P3NTR or the religious section of the KN.

### 3. *The Use Made of the Systems Outside the Formal Institutions of Decision Making*

Here again, it is difficult to give a precise and statistically supported statement. As a general rule, *adat* is used by the population to rationalize and legitimate all kinds of property relationships. One exception, which will be discussed in detail later in this study, is, that the inheritance of a father's self-acquired property by his children is sometimes rationalized as being in accordance with Islamic law. Religious experts are also occasionally approached for advice with respect to the division of self-acquired property of a deceased in accordance with Islamic law. In CKL, such cases seem to have been extremely rare, and no concrete instance was reported to us.

## III. THE ACTUALIZATION OF THE SYSTEMS IN THE KNOWLEDGE OF THE MINANGKABAU

The third point of reference for the "existence" of the three systems lies in the knowledge of the Minangkabau that these systems exist; a knowledge held by more or less all adult Minangkabau, independently of the degree to which these systems are applied in social processes that deal with property affairs, and independently of the degree to which the Minangkabau have internalized the formal characteristics and the substantive content of the systems. The situation may be compared with that of the common German, who *knows* that in his society religion, law, ethics, and morals exist as different and distinct systems which contain standards for his behaviour, but who can neither define the distinction between the systems nor claims to have adequate knowledge of their contents. For he knows that in his society this knowledge is the realm of lawyers and theologians, of experts who have undergone a special training. Yet he knows "something" of the systems' substantive rules and has his

own ideas about them. The situation of "the Minangkabau" is quite similar, and it shall briefly be described in what follows.

### 1. *The Knowledge of Written Law*

Minangkabau do not know much written law. This law has been made in Holland or in the national or provincial capital, it is laid down in statutes, and has been elaborated by learned men. Written law is taught only at the Legal Faculties of the Universities, in West Sumatra at Universitas Andalas in Padang. The courses include lectures on Dutch civil law, the students thus becoming acquainted with the principles of Dutch property and inheritance law. Some more written law is taught at the APDN, the *Camat* Training School, but there no courses in western property or inheritance law are given. The judges in the State Courts - the State Courts are, with a few exceptions, all staffed with Minangkabau judges - for the greatest part are University graduates (according to the law, judges *must* be law graduates) or have at least followed the training in the School for Judges and Public Prosecutors, where the basic principles of western law are also taught.

But these sources of knowledge are not open and accessible to the common villager, and they interest him little. The written law which reaches the villagers consists mainly of government regulations relating to administrative matters. Thus there is no actual knowledge of the western written law of property and inheritance, although the most relevant provisions of the Basic Agrarian Law and the new Marriage Law are known to many. But most villagers hold some vague notions of what western law is, like: That Dutch family law does not recognize matrilineal descent; that it is patriarchal; that the children follow the father; and that they inherit from their father, whereas the *mamak* does not play a role in western law. It is also known that according to western law a person is quite free to dispose of his property as he wants to, and that his relatives cannot interfere in his property relationships.

Information about written law reaches the villagers mainly through the channels provided by the State administration. National or provincial regulations flow from the provincial administration to the *Bupati's* office, from the *Bupati's* office to the *Camat's* office. The *Wali Negeri* receive information and instruction from the *Camat*. A separate channel is provided by the Department of Information which keeps information officers down at the *Kecamatan* level. If new regulations are to be ex-

plained or propagated, the information officer calls a meeting of the WN of his *Kecamatan*.

Another important channel of information is the organization of the "Karapatan Adat League of the Minangkabau World" (*Lembaga Kerapatan Adat Alam Minangkabau*, LKAAM). The LKAAM is a government sponsored organization of *adat*-functionaries which functions on *Kecamatan*, *Kabupaten*, and Provincial levels. It serves as a forum in which government plans and policy are explained to the *adat*-elders by the representatives of the Government, with the aim of securing the *adat*-elders' cooperation for the implementation of these plans.<sup>34</sup>

The information thus flows through the various channels to the village government, either to the *Wali Negeri* or to the Head of the *Karapatan Adat*. In meetings it is then transmitted to the *Ninieks Mamak*, the lineage elders, whose task it is to pass it on to their *kamanakan*.

## 2. The Knowledge of Islamic Law

The principles of Islamic law are known to a much greater extent. "Real" knowledge of the law, the *fiqh*, and of its interpretation and application, however, is firmly ascribed to the status of *alim ulama*, of the religious expert.

Principles of Islamic law, as part of the religion, are taught at all levels of the educational system. In the *nagari*, children of the age of 8 to 10 years follow a yearly course of religious instruction which is held in the mosque or *surau*. They are taught rudiments of the Arabic language and are instructed in the Koran. At the end of this year, the *Khatam-al-Koran* ceremony is held: The children are led in a procession through the village, accompanied by relatives and neighbours. On the return to the mosque, each child recites one verse of the Koran. This ceremony is followed by a feast, which usually takes two days, during which friends, relatives and neighbours come to congratulate the parents and matri-relatives of the children and to eat with their hosts. There is some religious instruction in government schools, and systematic teaching takes place in the Islamic schools at primary and secondary school level.<sup>35</sup> Religious instruction - for all villagers - is regularly carried out at night in the mosques and *surau*. The Islamic functionaries recognized as *alim ulama* who act as teachers there, often are persons who have learned religion from a recognized teacher, and have had no formal education in religious matters.

Even if the exact knowledge of Islamic law and its interpretation is a matter for the experts, the general principles of Islamic law are well known to all Minangkabau. Islamic law plays its most important role in the field of marriage and divorce, and the basic rules are regularly restated in the relevant procedures. In inheritance matters it is well known that the Islamic rules of inheritance differ radically from the *adat* rules. Everyone knows that according to Islam "the children inherit from their father", and that male heirs get a bigger share than female heirs. Most people know that the actual distributory rules of Islamic law as laid down in the Koran are much more complicated, but these details are considered a matter for the experts (which is understandable in view of the complexity of these rules).

### 3. *The Knowledge of Adat*

#### a. The Knowledge of *Adat* in the *Nagari*

Most of *adat* is known to the population, but there are also several fields of *adat* which are considered the special knowledge of experts.

*Adat* is learnt during the process of socialization. Children listen to their elders, observe their behaviour, learn the language and the many *adat* sayings in which *adat* rules and maxims are embodied. The basic principles of *adat* are taught at a very early age. Children are systematically educated in feelings of shame, of propriety, and of lineage solidarity. Much of *adat* is learnt by observation and imitation, but there is also (or used to be at least) some formal instruction. When boys move to sleep in the *surau*, they are taught by older men, if possible by their *mamak*. Children are allowed to attend most ceremonies and formal occasions, at which *adat* is restated in ceremonial language by the *adat*-functionaries. In some *nagari* (such as Padang Parab, where we attended two *panghulu* installations) children are even allowed to attend the most formal meetings of the *panghulu* installation. *Adat* is also contained in most of the stories and epics told to the children, and there are some stories, like *Raneak Dilabueh* (see Dt. Panduko Alam 1954, Johns 1958) which contain more or less the whole of the principles of *adat* morality and law.

Rethorical skill is highly valued in Minangkabau. Knowledge of *adat* not only means the ability to remember *adat* rules and proverbs once learnt, but great emphasis is laid upon the capacity to reproduce *adat* in the proper verbal behaviour. Each proper Minangkabau must be able to

*berunding*, to talk in a highly flowery and polite phraseology, which is full of allusions. For it is one basic principle of *adat* (under which the curious anthropologist will often suffer) that one may not speak straightforwardly: "*Indak bulieh taruih tarang*" - "you may not express yourself directly and clearly", was a phrase which we repeatedly heard during our stay as a characterization of the proper way to speak in *adat*. To *berunding* is generally learnt by observation and imitation. For other forms of verbal behaviour, however, special knowledge is required. The *pasambahan* is a form of formalized speaking which is employed at all ceremonies. It also consists of allusive and flowery phraseology which involves a constant restatement of *adat* proverbs and rules, in which the intentions of the speaker have to be expressed. The *pidato* are *adat* recitals, which are held during the major ceremonies, for which there are different kinds of *pidato*. Those *pidato* held during *panghulu* installations mainly consist of a recital (spoken or sung) of the *tambo* of the Alam Minangkabau, the Minangkabau *adat* and its historical (*tambo*) development. The *pidato* are performed by younger *adat* functionaries, in CKL by the *anak mudo*. The *pasambahan* and the *pidato* must be learnt from someone who is "*pandai*", an expert, and this involves a formal teacher - pupil relationship. Nowadays, there are several "standard-versions" of the most frequently used *pasambahan* and *pidato* which have been published by Minangkabau *adat*-experts.

A more intensive knowledge of *adat* is expected from the *adat* functionaries and lineage elders. The *adat* functionaries, the *panghulu* and *juaro hindu* in particular, must "know" the *adat*. They must know how to use *adat* in the processes of decision making. They must be skilled in the verbal behaviour which is employed in these processes. They further must know the *undang*, the *kato*, and the *cupak* of the Minangkabau *adat* and the *nagari*'s own *adat*. This knowledge has to be learnt from a teacher, who should be a *mamak* or the *panghulu* or some other person of one's *suku* who has a reputation for his *adat*-knowledge. Young *panghulu* who have not yet had the opportunity to learn enough continue their *adat*-education after their installation.<sup>36</sup>

This intensive knowledge of *adat* is one of the prescribed status attributes of the *adat* functionary. But villagers are quite aware of the fact, that not all *panghulu* are equally knowledgeable, and that in contemporary Minangkabau "*panghulu* are not what they used to be". Particular skill and knowledge as well as obvious inabilities are freely discussed and commented upon. Intensive knowledge of *adat* is not only

recognized in *adat* functionaries. It can also be achieved by persons who do not hold any office. Their abilities will always become evident as they are displayed at the numerous public occasions and ceremonies. Persons who acquire the reputation of great knowledge and who are neither *adat* nor Islamic functionaries, are called *Caradiek Pandai* (Ind.: *Cerdik Pandai*), the "intellectuals", who may play an important role in *nagari* political life.<sup>37</sup>

An important part of expert *adat* knowledge is the *adat* of one's *nagari*; in particular its history, its constitution, the political and genealogical relationships between the *buah gadang* and the status of their *panghulu*. Such knowledge is of great relevance in the frequent disputes over *kaum* or *buah gadang* property, especially when one *kaum* or *buah gadang* has become extinct and the question of its inheritance has to be settled. This kind of knowledge is highly valued and kept secret. It means prestige and power and has also some economic consequences. For if such knowledge is required to solve a dispute, the expert will be approached with customary (or modern) gifts.

For the common villagers and the experts themselves, the differentiation of *adat* knowledge is accepted as a matter of fact. In discussions about the *adat* of CKL and its development, we were frequently referred to those "who know", even when we had reason to assume that the person asked would perfectly know himself. The experts, too, held that "knowledge must be in different levels" (*ilmu mesti bertingkat2*). There are some fields of knowledge which are ascribed to the *panghulu* or *juaro* status: Only a *panghulu* "can" know about the development of his *suku* (*buak gadang* etc.) and the development of the original lineage property belonging to the *buah gadang* of his *suku*. Others "cannot" know this. This knowledge is transmitted to selected persons only, generally to the prospective successor, and only when the expert feels his end coming.<sup>38</sup>

On a lower level, the *buah gadang* or *kaum* genealogy, and the location of the property are also transmitted from *mamak* (group head) to his *kamanakan* (his prospective successor). This knowledge is part of the group's heritage, which may only be transmitted within the group. Minangkabau *adat* says: "*warih dijawek*" - "it has been received as heritage". Reference to this kind of acquisition of knowledge is a valid basis for evidence in *adat*.<sup>39</sup>

In contemporary Minangkabau, the value attributed to *adat* knowledge has decreased, and so has the number of persons who are *adat* experts. The younger generations are attracted by the new knowledge offered by the schools which opens the way for new and attractive careers outside the *nagari*. The *panghulu* have lost much of their traditional authority, and their position is less respected and desired than before Independence, when the *adat* functionaries were used as the main tool of Dutch colonial policy. In the *nagari*, there are only a few younger people who really want to learn *adat*, and the *panghulu* in CKL had only a very few pupils. The youths in the towns seem to display no interest in *adat* at all.

The *adat* elders and the *adat* pressure groups are greatly concerned with this situation. At present, *adat* is not taught at schools, and people realize that in the field of the formal educational system, *adat* has lost all ground to religious and modern knowledge. At the LKAAM-meeting in 1974, a special committee on *adat*-development had been formed, which made some proposals for the improvement of the situation. According to these, *adat* is to be introduced in the curriculum of primary schools. In addition, the LKAAM intends to organize courses and lectures in *adat* in the towns and *nagari*. Lectures which had been organized by *Bundo Kanduang*, the Women's *Adat* League, were held already shortly after the LKAAM-meeting of 1974. Finally, plans have been made to found a People's University (*universitas masyarakat*) in which lectures in *adat* shall be given. This university will be open to everyone interested in Minangkabau culture (see K.v.Benda-Beckmann 1975: 73).

Besides the predominant oral tradition of *adat*, it must be noted that since the beginning of this century a substantial number of books and brochures has been published by Minangkabau, generally by *panghulu*. The start was made by Dt. Sangguno Dirajo (1919, 1920, 1924, for an early review see Ter Haar 1934b) and the publicity campaign for Minangkabau *adat* was furthered by Dt. Sutan Maharajo who edited several journals in which *adat* was explained and discussed. Both writers reacted against the publishing activity of the Islamic pressure groups (see Taufik Abdullah 1971, 1972). Most of this expert literature consists of an exposition of the *tambo* and Minangkabau *adat*, stressing its compatibility with Islam and the state ideology of the Republic, often in the form of a serious attempt at reinterpretation of *adat* in the terms of religion and ideology, often as a lip-service only. The ideas contained in these books and the systematization of *adat* and history are to a growing extent

disseminated to the *nagari*, and we have met or heard of several *panghulu* who returned to these books when they themselves were interviewed as experts.<sup>40</sup>

b. Knowledge of *Adat* in the Courts

As has been mentioned, the judges consider themselves experts in law, not in *adat*. In the curriculum of the Legal Faculties, courses on *adat* law are taught, but these courses are on "*adat* law in general" and are mainly based upon the writings of Dutch (Van Vollenhoven, Ter Haar) or Indonesian scholars (Supomo). There are no courses on Minangkabau *adat* law in particular. Most judges, however, are Minangkabau and have undergone some socialization in *adat*, and some of the elder judges are themselves *panghulu*.

However, the crucial questions which decide about 80% of the court cases, are not problems of substantive *adat* (*adat* law) rules (in the sense of legal consequences) but rather problems of evidence and *nagari*-specific *adat*: The constitution of the *nagari*, the genealogical relationships between *buah gadang*, the genealogical position of the parties, etc. These facts generally are not known to the judges, and in practically each case expert-evidence given by *panghulu* of the *nagari* is required. As the research of K.v.Benda-Beckmann has shown, much confusion arises from the fact that the standard terminology for property holding groups used in the courts - the *kaum* under the *mamak kepala waris* - is insufficient to understand the actual relationships in a dispute, and frequently does not correspond to the terminology used by the parties.<sup>41</sup>

With the exception of several judges who are generally acknowledged to be knowledgeable, the villagers do not consider judges to be experts in *adat*. Court judgements are freely criticized as not being in accordance with *adat*. However, it is generally only the outcome of the dispute, the concrete decision, which is evaluated by the villagers against their own understanding of *adat*. The legal reasoning of the judges and their elaboration of *adat* law usually do not come to the notice of the villagers.