

CHAPTER SIX

THE LEVEL OF PERFORMANCE II: THE PRODUCTION OF LEGAL CONCEPTIONS IN HISTORICAL PERSPECTIVE

A. INTRODUCTORY NOTE

I. THE PRODUCTION OF LEGAL CONCEPTIONS

Before I described the systems of cognitive and normative conceptions which pertain to property relationships and their maintenance through time in Minangkabau (Chapter 4), I had asserted that the material presented needed further differentiation, a) in terms of the various authors/producers of concrete and general legal conceptions, and b) in terms of historical development and change. I shall try to give this differentiated account in this chapter. For lack both of space and of adequate data, I cannot, however, present as full a differentiation as would be indicated by the analytical framework outlined in Chapter 1; neither do I want to repeat myself unnecessarily. By way of introduction I shall therefore briefly indicate how the materials of this chapter relate to the data already given and to my analytical framework as outlined in the beginning of this study.

In this chapter, I shall not try to cover wholly the system(s) of property relationships, but shall restrict myself to those topics which, in my view, are central to property relationships in Minangkabau: The general legal conceptions pertaining to the exercise of society's members' autonomy in property affairs and to intestate inheritance, and the conceptual system in which the Minangkabau think and speak about property relationships. Furthermore, I shall not devote equal attention to elements of the plural systems but rather concentrate on the development of *adat/adat* law. As has been shown in the previous chapters, there

has been little room for the clash of the three systems of property relationships in Minangkabau; that is, little room for clashes in a pre-defined legal and judicial context. In the courts' practice, *adat* is more or less the only system used to legitimate decisions in property and inheritance affairs. The same can be said for the popular practice (see Chapter 5). Yet the relations between the systems of property relationships deserve more attention than would seem to be warranted by the limited number of concrete situations in which the systems actually clash. For although the contradictions of the systems are minimized in the legal and juridical context, familiarity with all systems is always there as a cultural and political factor (see Chapter 3). The judges and administrators in the colonial courts who legitimated their judgements in terms of *adat* had been socialized in the system of western law, and they understood the *adat* system through the logic inherent in their own system. The same holds true to a large extent for the Indonesian judges in the contemporary State Courts who have been trained in western law during their study at the university. We shall see that this is an important factor influencing the development of and the changes *within* the *adat* system. The relations between *adat* and Islam also are of great relevance. For with the introduction of the Arabic language and the Islamic legal system, *adat* was to some extent redefined in Islamic legal concepts. The conflict and integration of *adat* and Islam played an important role in local politics, and the issue of inheritance was its main topic. Before I describe and analyse the change which has taken place within the *adat* system, I shall therefore deal with the clash of systems.

But given even these restrictions, a completely differentiated analysis would have to operate at least with a set of three closely interrelated and partly overlapping contexts: personal, processual, and substantive.

On the *personal level*, we would distinguish the authors of legal conceptions according to their differentiated social roles. For Minangkabau this would mean that we would have to distinguish between at least:

1. the common people (with additional sex and age differentiation),
2. the *adat* experts (*panghulu* and *cerdik pandai* in particular),
3. the *adat* functionaries in their capacity as official actors in the processes of reactive and preventive law application (with additional differentiation as to the various institutionalized forms in

the *nagari*),

4. the judicial functionaries in the colonial and national State Courts,
5. the political representatives of the population on supra-*nagari* levels,
6. the authors of literature on *adat* and *adat* law (with additional differentiation between Minangkabau, Indonesian, and foreign writers).

On the *processual level*, we would have to distinguish the social processes in which legal conceptions are produced. For Minangkabau, this would mean that we would have to distinguish:

1. the concrete engagement of persons as parties in property and inheritance affairs,
2. the acting as *adat* functionary in such a process,
3. the social processes of reactive and preventive law application (with additional differentiation between at least the court proceedings, proceedings before the institutions still legitimated through *adat* constitutional law in the *nagari*, and those *nagari*-institutions legitimated by local government laws),
4. the social processes aiming at introducing new legal conceptions outside the processes of law application (legislation, conferences),
5. the publishing of a book on *adat/adat* law, and
6. the interview process.

On the *substantive level*, we must distinguish:

1. between statements which proclaim to give a correct interpretation of legal conceptions and those which aim at a description of existing legal conceptions,
2. between concrete and general conceptions.

These legal conceptions, differentiated according to the authors and through the social processes in which they are created, share the same properties by which law is characterized, but they are different social phenomena which should not be confused. In actual description and analysis, it is probably inevitable that data are lumped together across the borders drawn by the distinctions mentioned, but it should be kept in mind that they are lumped together. In this chapter I cannot make as much use of this set of distinctions as I would wish. Much of the relevant material has already been presented in a rather undifferentiated manner in the previous chapters, and I do not wish to repeat myself too

much, but rather concentrate upon the most essential aspects of the system of property relationships. Other restrictions are imposed by the available material, for it often does not make the differentiations we would require. For the analysis of the historical development of the property law in Minangkabau, my main material consists of court-cases and literature in which it is not always clear whether the data are a description of legal conceptions or whether they refer to actual behaviour. The material presented in Chapter 5 can be used in this context, too, although much is concerned with concrete rather than with general legal conceptions.

II. CONCRETE AND GENERAL LEGAL CONCEPTIONS AND THE PROBLEM OF CHANGE

The distinction between concrete and general legal conceptions, already discussed in a rather theoretical manner in Chapter 1, here becomes relevant in practice. Whether concrete decisions embody and restate general legal conceptions is a matter for empirical investigation, and it demands a prior investigation of the doctrine of decision-making, i.e. of those general legal conceptions which pertain to the application and the change of general conceptions in concrete cases. As we shall deal with the change of general legal conceptions in this chapter, I shall give some information here about the doctrines of decision making and change in *adat/adat* law which should be kept in mind when the actual judgements are discussed.

In Minangkabau, different doctrines of decision making operate in *adat* institutions and in the colonial/national courts. The *adat* doctrine of decision by common deliberation (*musyawarah*) leading to a unanimous decision (*sakato*) has already been briefly described (Chapter 2: 92 f.). The decision makers are relatively free in their evaluation of situation-images and in their determination of legal consequences within the framework of rather vague and flexible general substantive legal conceptions; but they are bound by some rather strict procedural general conceptions. As the exercise of their autonomy is the essential element of the doctrine, the concrete result of one decision making process cannot be extrapolated to a similar case later; it is imperative that in the later case the decision makers exercise their autonomy anew and, possibly, with a different concrete result. But the, or rather some, general *adat*

conceptions on which the decision makers base their decision are regularly restated during the process. The formalized and ceremonial speech of the decision making process largely comprises combinations of general *adat* conceptions, which are thus explicitly restated even if their truth is self-evident for all concerned. What cannot be extrapolated is that the concrete result of the decision would always follow from their re-statement.

In the colonial and State Courts, however, a different doctrine of decision making is used, a doctrine of "law-application". The courts' judgements must be legitimated with reference to preexisting law. The doctrine has its origin in western law, where it was designed for the application of the written law. In Indonesia, it has been adapted to the conditions in which the courts have to apply unwritten *adat* law; particularly with the implicit or explicit acceptance of Ter Haar's decision theory, according to which the *adat* law is embedded in "authoritative decisions within and without disputes", made by the *adat* functionaries and the court judges (see Chapter 1: 35). But independently of the question of what the "true" sources of (*adat*) law are, the theory remains one of "law-application", i.e. a theory working with the assumption that law is preexistent, and asking the judge to find that law and apply it to the facts, leaving him little discretion in the process of application. I have commented upon the theoretical implications of this theory earlier in this study (Chapter 1: 37 f.). In practice it meant and means that the process of common deliberation and exercise of autonomy, which is so closely interrelated with the concrete substantive conceptions in *adat*, is not reproduced in the courts. The general substantive *adat* conceptions thereby acquire a much more rigid character and are divorced from the procedural *adat* conceptions. Although the doctrine of decision making is hardly ever made explicit in court judgements, our interviews with the judges in the contemporary State Courts revealed that they adhered to a hybrid form of Ter Haar's decision theory. They did not care too much about the true sources of law; *adat* is *adat*, and only becomes *adat* law through its application in judgements, for *adat* law is *adat* which has sanctions (Van Vollenhoven). The extent to which general *adat* conceptions are explicitly restated in court judgements, varies. As has been mentioned before, the greatest number of cases involve disputes about the *content* of situation-images, whereas disputes about standards of evaluation or general legal consequences are rare. In those cases where the general

adat conceptions are self-evident for all participants in the court process, they are often implied in the parties' reasonings. The judgements generally contain only a brief statement that they follow from, or are in accordance with, the *adat* law of Minangkabau, without the actual general conceptions being restated in detail. However, when general *adat* conceptions are in dispute between the parties, their correct interpretation is usually given explicitly by the judges in the judgement. Generally, the "correct" interpretation is implicitly legitimated by the judges' socio-political status as authorized decision makers and administrators of the law. However, when the judges themselves want to deviate from existing general conceptions, this deviation - the change of legal conceptions - usually is given additional legitimation. And here, in the matter of change, the difference between the *adat* theory and the courts' theory and practice is most marked.

Adat has its own theory of change. In principle, *adat* (or certain manifestations of *adat* (see above Chapter 3: 115 f.), "do not rot through the rain and do not crack in the sun" (*indak lapuek dek hujan - indak lakang dek paneh*). Even if the *adat* rules are old, they never lose their actuality: "If a *kain* (cloth) is used, it gets worn - if *adat* is used, it remains new" (*kain dipakai usang - adat dipakai baru*). Yet *adat* can change and be changed: "Every time there is a great flood, the shape of the bathing place changes" (*sakali aie gadang, sakali tapian baralieh*). *Adat* must be adapted to changing circumstances. An *adat* saying states (Nasroen 1957: 39 f.; R.M. Dt. Rajo Panghulu 1971: 93 f.):

<i>Usang Usang dipabaharui</i>	What is worn must be renewed
<i>Lapuek-lapuek dikajangi</i>	What is rotten, must be cleaned
<i>Nan elok dipakai</i>	What is good, must be used
<i>Nan buruek dibuang</i>	What is bad, must be thrown away
<i>Kok singkek mintak diuleh</i>	What is (too) short, should be lengthened
<i>Panjang mintak dikarek</i>	What is (too) long, must be shortened
<i>Nan umpang mintak disisit</i>	What is too spacious, must be made smaller

Change in *adat* and of *adat* general conceptions can occur in two ways: There is the *adat nan teradat*, the *adat* which changes with time and place and adapts itself to changing circumstances as a reflexion of changing behaviour patterns. No formal social process of changing *adat* conceptions is necessary in this case (see Chapter 3: 116). But *adat* conceptions of more important and legal character can be changed only by

decisions of the *adat* council. Through the *musyawarah* of the *nagari* leaders it becomes *adat nan diadatkan*, "*adat* which is made into *adat*", or *kato mupakat*, "the rule made by *mupakat*". An instance of such change is the abolition of the rule of *nagari* - endogamy, which was decided in many *nagari* after Independence in the 1950's. So far as we have been able to find out, there have been no such decisions in the field of property and inheritance law.

The courts treat the change of legal conceptions differently, but the way in which they have done so has not been uniform during the last 100 years. The idea seems to have once prevailed among Dutch lawyers and judges that, if a given situation could not be dealt with in terms of already existing *adat* conceptions, the lacuna had to be filled with Dutch law and not with a development of *adat*. It only seldom happened that judges were concerned with the question of whether a hypothesized new rule or legally relevant action could be subsumed under a category of *adat* which, according to *adat* theory, is amenable to change and adaptation to changed circumstances.¹ In the late periods of Dutch colonial judicial administration, and also after Independence, the judges generally contented themselves with the knowledge that *adat can* change. An additional legitimation for stating changed *adat* conceptions flowed from their theory about *adat* law and their position as judges: *Adat* law is the law of the people, reflecting their customary behaviour patterns and their feelings of just and right behaviour. When the behaviour patterns and the feelings of justice change, *adat* changes with them. The judges leave no doubt that they are the ones entitled to ascertain this change, and that they are charged with the task to state whether *social change* only has occurred or whether this social change has brought about *change of the law*, too (compare Lex 1962). Social change not in accordance with the judge's conception of how the law should be, must, in their view, be denied the force of legal change. It sometimes happened and continues to happen that the judges draw upon the expert evidence of *adat* experts in the *nagari* in order to determine change, but in recent times they do no more than refer to the unsubstantiated "fact, that it is already customary ..." or "that it is a well known truth of contemporary Minangkabau society ..." (cf. p. 330 f.). Reference may be made to higher ranking law, too, as e.g. to the Constitution of the Republic of Indonesia and the *Panca Sila*, the five basic principles of the state ideology, in order to change *adat* conceptions. Such legitimations of change have played an important role in the change

of inheritance conceptions in other areas of Indonesia.² As we shall see later in this chapter, however, the most decisive changes of the Minangkabau *adat* conceptions of property relationships and diachronic transfers have been changed in a rather laconic way.

B. THE CLASH OF THE SYSTEMS OF PROPERTY RELATIONSHIPS

I. *ADAT* AND WESTERN LAW

The first situation in which *adat* and western/written law collided in the field of property relationships was in the introduction of the *pusako-eigendomsakte* (ownership deed) in 1853 (see Chapter 4: 209). From the few available sources it is not possible to assess whether Sarolea's statement, "that everyone agreed that through the registration such *pusako*-land became subject to Dutch formal law only" (AB 27: 275) holds true for all stages of Minangkabau legal history. It may have been correct in his time, around 1928, 75 years after the introduction of the regulation. Right after its introduction, however, two cases involving *pusako-eigendom* caused quite a stir in the colonial administration.³

The Case of Puti Priaman - LR Padang, 9.6.1856

Puti Priaman, the woman whose inheritance was in dispute, had had two daughters, Puti Dewi and Puti Maley. Puti Dewi already had died but her daughter, Puti Dihan, and her granddaughter, Puti Banghong Reno, were still alive. Shortly before her death, Puti Priaman had gone to a notary public in Padang and made a testament. She had bequeathed all her property, including some *pusako-eigendom*, to her granddaughter Puti Banghong Reno. In her testament she had also appointed an executor. It was this executor who filed the suit before the court. He complained that he could not execute the testament. He had sold a part of the deceased's estate, but the *panghulu* council had not recognized this transaction as valid and even refused to accept him as executor of the testament. For all this, the executor asserted, Puti Maley was responsible.

Puti Maley, the disinherited daughter, claimed that she was the sole heiress of her mother's property. As the "executor" was trying to violate her inheritance rights, she had applied to the *panghulu* council for an investigation of the matter, and the *rapat* had acknowledged her exclusive

rights.

The LR held that "according to *adat*, Puti Maley was the only heir to her mother's estate, and that her mother's testament was void". The court ordered that the name of Puti Maley was to be entered as the name of the new owner and universal heiress in the register ("... *dat volgens de hadat poesakka tot eenige en universeel erfgename in de nalatenschap van Puti Priaman ...*").

The Case of Si Djidjah - LR Padang, 15.7.1859

Si Djidjah, a woman, complained before the court that her brother had donated a piece of land with a house on it, to his son. But this property had been the property of their common brother, who was dead, and therefore was their common inheritance. As she, Si Djidjah, was the legal heiress to that property, her living brother had had no right to donate it to his son.

The court held that, according to the Malayan law of inheritance, the heritage was received by brother, sister, brother's children (?), sister's children, maternal aunt and maternal uncle. Such inherited property could only be sold, pawned, or otherwise alienated for the benefit of the so-called *waris*, the blood relatives (*stamverwanten*). As the property in dispute was inherited property, the plaintiff's brother was not entitled to donate it to his son, and the donation therefore was void.

These judgements caused quite a stir in the Dutch administration. The Governor of Sumatra's west coast had quite a different opinion on these matters, and he applied to the Governor General of the Colony to have the judgements annulled. In his letter to the Government he explicated his legal view:⁴

"... that the land was not subject to the Malayan institutions of inheritance, but that the transformation into ownership had occurred in accordance with European law, to which the native authorities, who had witnessed the conversion, had given their consent.
... on this legal basis, a member of the native population group of Sumatra's west coast is completely entitled to dispose of such immovable property as he wishes, and his rights are transferred to the subsequent possessors, whoever they may be. The Malayan rules of inheritance have to be applied only in the case of intestate inheritance."

In his view, the judgement of the LR was wrong for the reason that the property was *eigendom*; Puti Priaman therefore had the right to dispose of it by testament. To avoid further problems, the Governor suggested a change in the regulation: From now on, all property for which an *eigendoms-*

akte has been made, should be subject to European law; the native heads should be cautioned of these consequences at the time the *eigendoms-akte* was established.

The Governor's proposals were not well received in the capital, as they were incompatible with the colonial policy.⁵ His legal opinion, however, was fully shared by the highest legal official of the Colony, the *Procureur Generaal* of the Supreme Court:

"There can be no doubt that, since the parties have been established as owners by European officials, and since ownership is a purely European institution, the consequences attached to it have to be governed by European legislation. The *Landraad* Padang has not so much erred in its application of the law of ownership concerning immovable property, but rather in its application of the Malayan law of inheritance, to which it conceded such a wide range of applicability, that any other transfer of ownership, based upon inheritance rights (except intestate inheritance) would be void."⁶

The remark of the *Procureur Generaal* is exactly to the point: The Minangkabau inheritance law (the law of diachronic transfers) would recognize as valid only intestate transfers of property relationships. If it were upheld, the synchronic dimension of Dutch property relationships would be almost completely superseded by the diachronic conception of *adat*: The individual autonomy granted to the individual *eigendom* holder in Dutch law, manifest in the capacity to bequeath or donate the *eigendom*, would not be able to unfold. Whereas the *Procureur Generaal* and the Governor wanted the Dutch synchronic dimension of property relationships to prevail, the *Landraad* Padang upheld the dominant diachronic one of the Minangkabau *adat*.

A good 100 years later, in the new combination of *adat* and western law of the Basic Agrarian Law of 1960, the roles of the temporal dimensions are reversed. Although the law is professed to be based upon *adat* law, the specific property relationships and legal statuses of property are modelled on western law. The *hak milik* status of property objects, the most complete form of individual rights in land, which is translated as ownership (Gautama and Harsono 1972: 39), has no time-limit. Synchrony and diachrony are, as in western law, distinguished by reference to the individual's lifetime. During his lifetime, he has the full autonomy of the ownership/*eigendom* holder: he can transfer his right to another party, he can donate it, he can dispose of it by testament. Only in the case of death will the *hak milik* be inherited by the legal heirs (Gautama and Harsono 1972: 39, 61 f.). *Adat* only determines those legal heirs. Theore-

tically, it is possible to have property held by a matrilineal group registered as *hak milik*/ownership under the new law. But in Minangkabau hardly any property has been registered so far (see Chapter 5: 281). For in general in West Sumatra, *hak milik* property is, for inheritance purposes, treated as *harato pancaharian* and is "inherited by the children". Once registered as *hak milik*, the legal status of the property does not change with or after inheritance, i.e. it would not become *harato pusako*, but be treated as *hak milik/harato pancaharian* in perpetuity. It is obvious that a conversion of *adat* rights into *hak milik* rights would be the doom for the *adat pusako*, and this is fully realized by the villagers and lineage elders.⁷ In spite of frequent exhortations by the Government, nobody has had his or her *kaum*'s land registered, for one "is afraid that the land will become *hak milik* and then be inherited by the children", as several informants in CKL put it.

II. ADAT AND ISLAMIC LAW

Since their Islamization, the Minangkabau have always been confronted with an alternative system of property relationships. The relation between *adat* and Islam in Minangkabau has changed considerably during the course of history between what might be called phases of adaptation, open conflict, and skilful ideological integration.⁸ Matters of property and inheritance were an important topic in that relationship, and those Minangkabau who were or are engaged in propagating strict adherence to the Islamic religion, have always demanded that the Islamic rules of inheritance law should be applied. The development of the relationship between *adat* and Islam will briefly be sketched:

In the period following the Islamization of the Minangkabau population, Islam was mainly adopted as religion, and to a large extent it suppressed the *adat* conceptions relating to the supernatural and sacred world. In secular matters, the *adat* rules remained more or less intact. What was accepted from Islam was adapted to the system of the *adat pusako*. The number of *adat* functionaries was increased to include a religious functionary, the *Malim* or *Chatib Adat*, but these functionaries were *suku* functionaries, and their office was *turun temurun dari niniek ka mamak, dari mamak ka kamanakan* like all other offices. Religious prescriptions concerning marriage and burial were incorporated, not to the exclusion of, but rather as an addition to, the existing *adat* rules. The system of

property relationships was more or less kept intact and the rules of the *adat pusako* pertaining to property were not changed. However, social and legal relationships were expressed to an increasing degree in terms of the Arabic language and in legal terms of Islamic law like *hak*, *milik*, *warih*, *hibah*, *wasiyyat*. This probably gave *adat* a more systematic character (as there are no data on pre-Islamic *adat*, this is, of course, speculation, cf. Taufik Abdullah 1966: 9 f.); but a comparison of the *adat* expressed in Islamic terms and the meaning these terms have in Islamic law quickly reveals that the older *adat* conceptions were not supplanted by new Islamic institutions. The *warith* in Islamic law are the Koranic heirs and the agnates - in Minangkabau the *warih* are the matrilineal relatives. The *hibah* in Islamic law is a contract which becomes effective during the giver's lifetime, and the individual is not restricted as to the amount of his property which he can give away. In Minangkabau, the *hibah* was revocable and became effective only after the giver's death, and the giver was severely restricted with respect to the amount of his gift. The process of adapting Islamic legal concepts to *adat* institutions has by no means ended. In the discussion of the "*hibah* of *pusako*", for instance, we have seen that this conception apparently did not even exist in the beginning of this century, and that the underlying institution of gifts from *bako* to its *anak pisang* was formerly expressed in older *adat* concepts. Some contemporary experts have taken to classifying the *adat*-heirs in terms of the classification of heirs used by the Ithna Ashari school of Islamic jurisprudence:

1. The *waris nasab*: in Islamic law they are the blood relatives, consisting of the Koranic heirs who are blood relatives (*dhu fard*) and the agnatic blood relations (the *dhu qarabat*). In its adapted form the term denotes the matrilineal blood relatives in Minangkabau, the *waris batali darah*.
2. The *waris sabab*, the persons who are heirs for a special reason: in Islamic law they are the spouses (the *zawajyyat*) and the persons who are heirs by virtue of a special legal relationship (the *walā*), in Minangkabau they are the *kamanakan* who are descendants of strangers and former slaves.⁹

In the beginning of the 19th century, open conflict broke out between Islamic pressure groups and *adat* leaders. The economic and political objectives of the Padri to a great extent were expressed in terms of Islamic law (see Dobbin 1977), for which supremacy was demanded:

"*Syarak mangato - adat mamakai*" - "Islamic law orders, *adat* carries out". The relationship between *adat* and Islam was expressed as "*adat basandi syarak - syarak basandi kitab 'ullah*" - "*adat* is based upon Islamic law, Islamic law is based on the Koran" (cf. Kroesen 1874: 15; Taufik Abdullah 1966, 1972: 200; Dobbin 1977). *Adat* was classified with respect to its conformity with Islamic law into the *adat jahiliah* the "*adat* stemming from the pagan times", and the *adat islamiah*, the "*adat* in accordance with Islam". Although the Padri were finally defeated by the Dutch, the consequences of their reign should not be underemphasized. It has already been mentioned that in several *nagari*, amongst them CKL, new forms of socio-political organization were established which survived the defeat of the movement.¹⁰ Unfortunately, there is no information about the influence which the Padri movement had upon the system of property relationships in Minangkabau in general. Apparently, even the Padri realized that the system of the *harato pusako* "could not" be abolished (HAMKA 1968: 33).

In the aftermath of the Padri-war, *adat* regained much of its lost ground being actively supported by the Dutch colonial administration which used the *adat* system as the basis for its local government administration.¹¹ The relationship between *adat* and Islam again became one of mutual tolerance: "*Adat basandi syarak - syarak basandi adat*" - "*adat* is based upon Islamic law, Islamic law is based upon *adat*". The spiritual reformation also seems to have lost most of its impact. Travellers' reports from the second half of the 19th century tell of cockfights in the open market, of "immodest" dressing of women, and of alcohol consumption by Minangkabau officials (cf. Bickmore 1869; Von Rosenberg 1878: 82 ff.; Carthaus 1891: 63).

But around the turn of the century, Islam had another renaissance in Minangkabau. One of Minangkabau's most famous Islamic scholars, Syeh Achmad Chatib, started a new orthodox religious movement, and although he never returned from his pilgrimage to Mekkah in his mother-country, he exerted a great influence on the following generation of Islamic leaders, most of whom had been his pupils.¹² For Syeh Achmad Chatib, the matrilineal system was *haram* (forbidden) and the *adat pusako* with its matrilineal inheritance rules was *sjubhāt*, stemming from the pagan times of the *adat jahiliah*, and therefore was *halal* for Minangkabau Muslims (cf. Prins 1954: 145; HAMKA 1968: 33; Anas 1968: 107). Syeh Achmad Chatib was unsuccessful insofar as he could not convince his pupils and followers that the *pusako*-system should or could be abolished. Most of them

probably realized that its abolition could not be achieved, and they re-defined the *harato pusako* in a way such as to eliminate the conflict with Islamic law: The local Minangkabau Islamic leaders treated the *harato pusako* as "*harta musabalah*" (Anas 1968: 107). This concept, which according to Prins (1954: 145) is only employed by Minangkabau Islamic scholars, gives the *harato pusako* the legal status of 'property in the dead hand', a kind of *wakaf*, which cannot be divided or inherited and to which consequently the Islamic inheritance rules need not apply (HAMKA 1968: 33; Anas 1968: 107). The concept seems to be related to the concept of *mushā*, "undivided share", which can be validly dedicated as *wakaf* (Fyzee 1955: 247). But the frontal attack was, since then, directed against the inheritance of the *harato pancaharian* by the *kamanakan*. It has continuously been demanded by Islamic leaders that the *harato pancaharian* should be inherited according to *hukum faraidh*, and the problem of *pancaharian*-inheritance has been, and still is, one of the major issues in Minangkabau local politics.¹³ In 1952 and 1968 two conferences which dealt with the problem of *pancaharian*-inheritance were held in Bukit Tinggi and Padang, in which local politicians, leading Islamic personalities and *adat* leaders participated.¹⁴ The 1952-conference had been organized by a "Deliberation Committee of the Religious Experts, *Adat* Elders, and Intellectuals" (*Badan Permusyawaratan Alim Ulama, Ninik Mamak dan Cerdik Pandai*). The committee was to work out a plan concerning how the *fatwa*, the legal opinion of the Islamic Teachers, that *hara pancaharian* should be inherited according to the *fiqh*, could be carried out. It was given the task to define what should be understood under "*harta pancaharian*" and to propose how the rules of the *fiqh* could be attached to it. The proposals of the committee were the following:

1. The *harta pancaharian* are those property objects which
 - a. stem from the *pusako* in accordance with *syarak*,
 - b. which one has received by Islamic testamentary dispositions, with the exception of *harato pusako*,
 - c. which one has received by way of *hibah*,
 - d. which one has acquired by one's own work,
 - e. which are the fruit (*hasil*) of the *harato pusako*, and which have been added to the *harato pancaharian* with the consent of the *kamanakan*.
2. The committee had come to the conclusion that the *kamanakan* should be allowed to inherit 1/3 of their *mamak*'s *pancaharian* through testamentary dispositions. The other 2/3 should be distributed among the heirs

according to the rules of the *fiqh*. The *harato pusako* should continue to be administered in accordance with *adat*.

In the case of *pancaharian* of kinds a - d, the committee advised each Minangkabau to make a testament for the benefit of his *kamanakan*. For *pancaharian* of kind e, a testament for the benefit of the *kamanakan* was proposed as obligatory (cf. Prins 1953: 324).

The conference which was held in Padang in 1968 built upon these proposals, but finally came up with somewhat different and less ambiguous¹⁵ conclusions. It was stated:

1. The valid law for the inheritance of *harta pancaharian* is the *hukum faraidh*, whereas for *harta pusaka* the *hukum adat* shall apply.
2. All judges of West-Sumatra and Riau (the I.K.A.H.I., the Judges' Organization had been a participant in the Conference) are called upon to take this decision to heart (*memperhatikan*) (Naim (ed.) 1968: 241).

About the inheritance law it was said in detail:

1. The *harta pusako* in Minangkabau are a legal property complex which is administered (*diurus*) and represented (*diwakili*) by the *mamak kepala waris* inside and outside the institutions of dispute settlement (*peradilan*). The *anak kamanakan* and the *mamak kepala waris*, who are both part of this property complex, are both not the owners (*pemilik*) of it.
2. a. The *harta pancaharian* are inherited by the heirs according to *hukum faraidh*.
 b. By *harta pancaharian* is meant: one half of the property which a person (or rather: a couple) has acquired during his/her marriage, and his/her "brought property", *harta bawaannya*.
 c. A person may make a testament for the benefit of his *kemanakan* or other persons, but only to the extent of maximally 1/3 of his *harta pancaharian* (Naim (ed.) 1968: 243).

These decisions have been widely publicized throughout Minangkabau, and the foreigner is often told that following the decisions of the Conference the *harta pancaharian* are inherited in accordance with *hukum faraidh*. On the level of ideological combat between *adat* and Islam, Islam has finally become a full partner in the "inheritance market", which has been "cartelized" (Berger 1973: 147). *Adat* controls the *pusako*, Islam the *pancaharian*.

It has already been mentioned, that the judges did not "take to their heart" the decisions of the conference but continued to apply *adat* law in their judgements. But the proposals and decisions of the two conferences are nevertheless important. For they constitute a clear attempt to break through, on the conceptual level, the system of the *adat pusako*; aiming at the elimination of the retrospective-diachronic element in the *pancaharian* concept. The *harta pancaharian* should not be "self-acquired" property objects only, but also property which - contrary to the semantic implication of the concept - had been received by *hibah* and testament. This would guarantee that *harta pancaharian*, even if already subjected to a case of diachronic transfer, remains *harta pancaharian* and can again be inherited according to *hukum faraidh* instead of becoming *harta pusako rendah* in line with *adat*. The consequence that *all* property inherited according to Islamic law (not just the goods inherited through testament or received by *hibah*) would remain *harta pancaharian* and thus inheritable in perpetuity according to Islamic law, has not yet explicitly been demanded, but it is the logical next step.

In the legal and judicial context, the threats to *adat pusako* from outside, from written and Islamic law, have been rather ineffective. But it must not be forgotten that these two systems have provided alternative frames of reference toward which the "agents of objectification" could orient themselves in their efforts to create new conceptions within *adat*. The description and analysis in the following section of the changes which have occurred within the *adat* system, will show that quite similar ideas have developed within *adat*.

C. THE DEVELOPMENT OF THE ADAT SYSTEM: LEGAL CONSEQUENCES

In contemporary Minangkabau, the individual is free to dispose of his or her *harato pancaharian*. If explicit disposition is not made, the property is inherited by his or her children. According to our field data, this statement covers both practice and law. There are only a few disputes over *harato pancaharian* inheritance. Of the disputes we heard of in CKL, only one case concerned a conflict between a "son" with his father's brother over *pancaharian*-pawnings, and in one case the legal status of rice-fields (*pancaharian* or *pusako*) was disputed. The former case was decided by the *Kerapatan Negeri* (case 5 of 1973); the latter could not

be solved in the *nagari* and was finally decided by the State Court (see Chapter 5: 266 ff.). The inheritance of *harato pancaharian* in CKL is not problematic.

Pancaharian inheritances also only play a minor role in the State Courts. Of the 492 cases concerning property, which were brought to the courts in Bukit Tinggi, Batu Sangkar, and Payakumbuh in the period 1968 - 1974, only 42 or 8.4% concerned diachronic transfers of *harato pancaharian* (inheritance, *hibah*, *wasiyat*, distribution among the *pancaharian* heirs). In 25 of these cases, the contending parties were "the children and the *kamanakan*", and in 8 cases the *pancaharian* inheritance was disputed between children of the same father (in 9 cases the exact relationships between the parties could not be determined). It must be noted that in all 25 cases in which the children and *kamanakan* disputed their father's/*mamak*'s inheritance, the legal status of the property objects was in dispute, the inheritance being claimed as *harato pancaharian* by the children and as *harato pusako* by the *kamanakan*. Once the legal status of property as *harato pancaharian* has been unequivocally established, no more conflicts arise.

This situation is in definite contrast with nearly all reports given by the Dutch scholars in the 19th and 20th centuries, and to the information referring to past practices given by contemporary Minangkabau. The tenor of all reports is that the *harato pancaharian* are inherited by the *kaum*, the *familie*, the *kamanakan*. The change which has taken place in *adat* has frequently been predicted (see Van Vollenhoven 1918: 271; Joustra 1923: 127) and its first manifestations have been eagerly noted by foreigners as signs of the "inevitable break-down" of the matrilineal inheritance system and of the Minangkabau social system in general (Schrieke 1955: 118 f.; Maretin 1961: 193). Yet these statements often are superficial and not always supported by ethnographic facts. In the following I shall retrace in some detail the development which has taken place in the Minangkabau system of property relationships. I shall distinguish between intestate inheritance and diachronic transfers made during the lifetime of the property holder(s), as quite different sets of conceptions are involved.

I. THE RECOGNITION OF AUTONOMY IN PROPERTY AFFAIRS IN HISTORICAL PERSPECTIVE

1. *The Individual's Autonomy over Harato Pancaharian*

The exercise of autonomy over *harato pancaharian* in the form of dispositions during one's lifetime in Minangkabau was predominantly a problem for men (Chapter 5: 276). If women wanted to give their *harato pancaharian* away - to whom would they want to give it other than to their children? As their children would inherit it anyway, what did it matter whether or not they gave them their *pancaharian* property already during their lifetime? Minangkabau *adat* has not developed any conceptions which explicitly deal with this situation; its solution was always self-evident. In the case of men, however, the situation was different, for men often wanted to give their *harato pancaharian* to persons other than their *ahli warih*. In principle, Minangkabau *adat* allowed such transfers. There can be no doubt that the relationship to *harato pancaharian* could be diachronically transferred to a man's children during his lifetime; as has been mentioned already, even *harato pusako* held by a man could be given to his children. But the mere possibility recognized by *adat* did not give the individual full autonomy over his *harato pancaharian*. His autonomy was restricted by other criteria: In order to be valid, such transfer had to be carried out with the cognizance or the consent of his *kaum* members. The actual question therefore is, whether a man could transfer his *harato pancaharian* against the wishes of his *kaum* members. If the literature on this topic is reviewed, it becomes apparent that the differentiation just made is usually not considered.¹⁶ The reports differ in their statements about how much *harato pancaharian* may be given to the children, how much property is given to the children in general, and what the requirements of such a transaction are. As for the latter, two general kinds of statements are made: it is either the "knowledge" (*medeweten, kennis, setahu*) of the *mamak*, the *ahli waris*, and the *panghulu* which is necessary to validate the transaction, or the "consent" (*toestemming, saizin*) of these persons. Often the rules given are less clear, such as statements that the transfer has to be made with the "cooperation" (*medewerking*) of the *kamanakan* or that the *warih*-group must not be passed" (Korn 1941: 315). Statements, that consent is required, are more frequent than those according to which the "knowledge" or "cooperation" only is necessary.¹⁷

It is almost impossible to ascertain what "the people" thought of

this question, and it is equally difficult to assess the opinions of the *panghulu* and other *adat* experts in the course of time. In 1910, the Governor of West Sumatra summoned 18 *Tuanku Lareh*, 2 *panghulu* from Padang, and the Minangkabau head of the Teachers' Training College to Bukit Tinggi to discuss problems of the *adat pusako* with them (see AB 6: 207 ff.). More or less all complained about the *adat pusako* and demanded that it should be changed. Asked about their proposals, the *Tuanku Lareh* were of the unanimous opinion that one part of the *harato pancահarian* should "fall to" the children. There was some disagreement about the amount some considered 1/2, others 2/3, the appropriate amount. They thought that in cases where a man had neither wife nor children, all *pancահarian* should be inherited by the *kaum* (AB 6: 215). The *adat* leaders stated that they felt justified to speak for the whole population, and also mentioned that more and more *harato pancահarian* was surreptitiously given to the children. It is, however, remarkable that these *Tuanku Lareh*, who wished for a change in *adat*, at the same time stated the *adat* conceptions in a quite conservative version. The most conservative voice came from the *panghulu* of Padang where *adat* and practice supposedly was most progressive. Asked about the requirements for a transfer of *harato pancահarian* by *hibah* to the children, he said:

"... that according to the general opinion, the consent of the *waris* (*saizin waris*) was required. For the *pusako* is the basis of *pancահarian*, and the man has grown up on and is living through the help of the *pusako*. The *pancահarian* thus has to be considered as the 'fruit of the *pusako*'. Without the consent (*toestemming*) of the *waris*, one cannot dispose of the *pancահarian* to the advantage of the children. If one of the *waris* does not agree, the *hibah* is void" (AB 6: 214).

In pre-war court judgements, the tendency towards increasing individual autonomy is most marked. Particularly for the areas in the coastal plain the courts promoted this autonomy at a very early time. The RvJ Padang stated in a case in 1895:

"that nowadays, according to the Malayan *adat* which is in force in Padang, each Malayan can dispose by gift *inter vivos* of his *pancահarian*, even without the cooperation or knowledge of his *adat* heirs, if the property concerned is not property which has been acquired with the help of capital provided by the family" (Guyt 1936: 85; AB 6: 252, 254).

And a similar statement is found in a later judgement of the RvJ Padang from 1932 where it was said:

"that the *adat* at the coast ... in contemporary times recognizes as valid the disposition (by *umanat*) to the advantage of the wife and children, even in cases where the rule, that this should not be done without the knowledge of the *waris*, has not been adhered to, for this rule has be-

come obsolete in the course of time" (T 140: 227).¹⁸

However, in a different case the LR Padang, confirmed by the RvJ, took to a more restricted interpretation of *adat*, and demanded the knowledge of the *waris* (cf. T 131: 78).

There are not many published judgements on the *adat* in the Padang Highlands. A decision of the *Rapat* of the *Tuangku Laras* of Fort van der Capellen (Batu Sangkar) from 1874 demands, that the *kaum* and the *panghulu* be given notice of such a transaction (AB 28: 189). In a later judgement of the LR Solok in 1933 it was stated that such a gift of *harta pancaharian* required the cooperation (*medewerking*) of the *kaum* and had to be carried out in the presence (*ten overstaan*) of the *panghulu* and the *orang 4 jenis* (T 140: 205; cf. Guyt 1936: 79 ff.). It was in the *cause célèbre* of the inheritance of Dr. Muchtar in 1930, that the principle was firmly established, that the cooperation of the *waris* was not a requirement for the validity of an *umanat* for the benefit of wife and children (T 131: 82 ff.). This rule was upheld by the judgement of the Supreme Court of the Netherlands Indies. Later judgements followed suit (see LR Fort de Kock 1933 in T 140: 234). Guyt, who acted as judge in the LR of Fort de Kock and Payakumbuh in the 30's reports that in the jurisdictional districts of Agam and 50 Koto it had by then become the rule that the *pancaharian* holder could freely dispose of his *pancaharian* property, provided that it was no "impure" *pancaharian*. For as far as the latter was concerned, a previous *mupakat* with the *ahli waris* was still required (Guyt 1936: 87 f.).

In the Dutch colonial courts, unlimited autonomy thus already had been established in the 30's of this century, and the courts most probably were a step ahead of the rules as reported in the literature. In the post-Independence period, this practice seems to have been continued by the judges in the State Courts.¹⁹ In the contemporary period (from 1968 onwards), the courts whose work we studied applied the principle. In case 49 of 1970 of the PN Bukit Tinggi, in which the *harta pancaharian* of a trader were disputed, the court held:

"Haji A. was a trader, and as such he needed financial mobility. As a Minangkabau, he was bound by the rules that obtained in the sphere in which he lived. It is a basic truth of the development of the modern world, and also of the development in Minangkabau, that the traditional bonds between the members of the society undergo change. Haji A. lived separated from his *kaum*, which stayed in a village. He lived, together with his wife, in a conjugal family as a trader. It is already customary in Minangkabau that a husband who wants to give property which stems

from his *harta pancaharian* to his wife and children, does so by way of *hibah* in order to prevent future trouble. It is reasonable and appropriate (*sepantasnyalah*) that a member of the Minangkabau legal community, who lives together with his wife and children separated from his *kaum*, may dispose of his *harta pancaharian* as he wishes, the more so if he is a trader."

In a later judgement of the same court (case 16 of 1972) the principle was upheld without any remarks that could be interpreted as restricting the rule to the urban situation of the trader.

In contemporary *nagari* life this rule is also generally recognized. A man is thought to be free to dispose of his *pancaharian*. Morality however requires that he should do so after consultation with his *kamanakan*.

In order to understand fully the importance of these changes in *adat* conceptions I must draw attention to a fact which has, as far as I know, been overlooked completely in all discussions about this change. The individual's autonomy in contemporary *adat* is much greater than for example in Dutch law or western legal systems in general! As in Dutch law there are no restrictions in the synchronic dimension, but neither are there restrictions in the diachronic dimension, unlike in Dutch law where, for the protection of the "legitimate heirs", the exercise of the autonomy can be retroactively invalidated (see Chapter 4: 208). The two judgements just quoted illustrate that a dramatic change has occurred in the conceptualization of diachronic transfers. Heavily influenced by Dutch thinking about property relationships, it actually "overtakes" Dutch conceptions. Inheritance now is a matter of processes following death, so diachronic continuation is restricted to inheritance. The *hibah* is treated as purely synchronic, and as in Dutch law, no restrictions are placed upon the individual's autonomy, neither as regards the old legal heirs, the *kamanakan*, nor as regards the new legal heirs, the children. This was stated quite explicitly in case 16 of 1972 of the PN Bukit Tinggi. The plaintiffs, widow and children of the deceased, had claimed that the *jual* and *hibah* transactions, by which the deceased had transferred most of his property to his other wife and children during his lifetime, were void as they had been carried out without their consent. The court rejected this argument:

"It is true that according to Minangkabau *adat* law, the widow and the children are the legal heirs of a husband and father. But the right to inherit comes into existence only upon the death of the property holder.

So in this case, the plaintiffs' rights had not yet come into existence during the deceased's lifetime. The deceased therefore had all freedom and legitimation to dispose of his *harato pancaharian* during his lifetime without having to ask the consent of the plaintiffs in their capacity of wife and children. In the *adat* of Minangkabau, it has never been the case that, as far as dispositions over *harato pancaharian* are concerned, the consent (*persetujuan*) of the children and the wife were required for the validity of the transaction."

Though this statement is quite in line with the Dutch conception of property law, in Dutch law a safeguard of the legal heirs is embodied in the diachronic dimension, in the protection given to the legitimate heirs. In the contemporary *adat*, there is no such protection. The argument was raised in case 49 of 1970 of the PN Bukit Tinggi. The plaintiffs, widow and children, claimed that the *hibah* and *jual* transactions which the deceased had carried out during his lifetime for the benefit of his other wife and children, were fictitious actions (*perbuatan pura 2, scheinhandelingen*), made in order to cheat them of their inheritance rights. This raised the question of whether some protection should not be given to the wife and children as the "new legal heirs", comparable to the one that is given in most western systems. But the court did not consider this argument, nor did the court of appeal which upheld the judgement (PT Padang case of 52 of 1972). Both courts here recognized the complete autonomy of the individual. It should be noted that this point was also not considered by the Dutch judges at the time when the *kamanakan* were still considered the legal heirs.

It is probably premature to abstract "the law" from the few decided cases. The situation in the two decisions was probably influenced by the fact that the beneficiaries of the transactions were new legal heirs. Though it is, of course, dangerous to speculate in such matters, I am quite convinced that the courts would have decided differently if all legal heirs had been passed completely in favour of other persons, e.g. the man's *kamanakan*. In interviews, most interviewees took the position that some protection should be given to the children, if they were really "cheated" of their inheritance. But the legal situation remains open. Cases of that kind are rare, both in the courts and in the *nagari*, as it does not frequently occur that individuals dispose of more or less all their *pancaharian* during their lifetime.

2. The Autonomy Over *Harato Pusako*

In the *adat* conceptions concerning society's members' autonomy over their *harato pusako* there has been only little change. With respect to pawnings, the four classical cases in which *adat* permitted a pawning of *harato*

pusako by and in the name of the *kaum* are not adhered to any more, either in the courts or in the *nagari*. The new conceptions are formed by the basic principle that nowadays such transaction must be for the benefit of the whole *kaum* and have the consent of all *kaum* members. But apart from this most general principle concerning the exercise of autonomy over *harato pusako*, somewhat different conceptions are held in the *nagari* and in the courts.

In the *nagari*, a differentiated view prevails. In Chapter 4 it was mentioned that the exercise of autonomy over *harato pusako* is primarily the right of the persons for whom the property objects are *harato pusako turun temurun*, and that by no means all "*harato pusako tinggi* of *kaum X*" is the *harato pusako turun temurun* for the whole *kaum* (Chapter 4: 152 ff.). Even if the presence of the *mamak kaum* is necessary for transactions regarding such property, this cooperation "cannot" be withheld, for in principle the persons holding their separate *harato pusako* can dispose of it. Villagers therefore maintain that representation by a *mamak*, and not necessarily by the *mamak kaum*, is required. This definitely holds true for synchronic transfers like pawnings and the transfer of pawnings. As *pusako* (one's own or another *kaum*'s) becomes *pancaharianized* to an increasing extent, the importance of the old *adat* restrictions pertaining to temporary or permanent alienations of *harato pusako* decreases. For these transactions actually do not concern *pusako* rights, but the rights to use the property objects on the basis of the money invested. They are temporary per se and do not affect the residual relationship of the other persons for whom the property objects are *harato pusako kaum* or *harato pusako turun temurun*: their rights can always be reasserted through redemption. The temporary character of these rights to use and to exploit also makes the transfer of these rights to one's children possible without having to pay attention to the constraints upon permanent alienation of *harato pusako*. However, if a permanent and definite transfer of such property is intended, if the transfer concerns the residual right to the *harato pusako* in the form of a sale or a *hibah*, the *adat* restrictions are held to apply. The transaction must have the consent of all *kaum* members, be carried out by the *mamak kaum*, and be witnessed by the *panghulu* and other *adat* elders.

The courts usually do not make this differentiation, for they adhere to the cliché of the "*harato pusako tinggi* of *kaum X*", so X must be

represented in all matters by the *mamak kepala waris*. For the validity of transactions involving *harato pusako*, therefore, the consent of the *kaum* members and the representation through the *mamak kepala waris* are required without exception. Most judgements additionally demand the co-operation as well as cognizance of the *adat* elders, at least of the *panghulu* of the *kaum*. According to our research in the State Courts, these conceptions, which pertain to the validity of synchronic and diachronic transfers, are restated in regular court practice.

But there are indications of a change in the direction of a more differentiated view in the courts, too. The PN Batu Sangkar, in a judgement which will be discussed in detail later (Case 39 of 1969, see p. 344 ff.) proclaims a differential standard of validity for transactions of "private *harato pusako*" and "*harato pusako* of the *kaum*". It was held that dispositions over "private *pusako*" - in this case it concerned inherited *pancaharian* which was held by one *jurai* - in the form of a permanent diachronic transfer (*hibah*) required only the knowledge of and the witnessing (*pengetahuan dan penyaksian*) by the other *kaum* members and the *panghulu*, but for dispositions over "*pusako* of the whole *kaum*", the consent (*persetujuan*) of the *kaum* members and the *panghulu* was demanded in addition.

This judgement and the new conceptions stated therein should not be taken as being representative. As I have shown earlier (Chapter 4: 191 ff.), it is questionable whether a categorical distinction in terms of substantive *adat* conceptions can be drawn at all between "consent" and "knowledge". As the story of Haji Batuah (Chapter 5: 235 ff.) illustrates, in the *nagari* such "knowledge" is still conceived of as a social process of taking cognizance, i.e. of information given and received. Besides, the judgement was invalidated by the appeal court, albeit on different grounds. But it does mark a new tendency of thinking about property relationships to *harato pusako*, the further implications of which will be dealt with later in this chapter (p. 358 ff.).

II. INHERITANCE

1. *The Inheritance of Harato Pancaharian in Historical Perspective*a. The Inheritance of Individual *Harato Pancaharian*

The legal prescription that a man's *harato pancaharian* property is inherited by his children is quite a new development in Minangkabau. The frequent statements in the literature which speak of a growing inheritance right in the father's line (Van Vollenhoven 1918: 271; Joustra 1923: 127; Schrieke 1955: 118 f.; Maretin 1961: 193; De Josselin de Jong 1951: 115) should be read as referring primarily to growing practices of giving *harato pancaharian* to one's children by way of *hibah*. In fact, until the second world war, in the huge body of literature on the inheritance of *harato pancaharian*, not one single statement upon which such an interpretation could be based refers to Minangkabau proper. The passage from Kooreman, written in 1892 (AB 11: 147) "that the *harato pancaharian* property becomes the property of the conjugal family and is inherited by the children", refers to Indrapura. The rest of the pre-war literature unanimously affirms the rule of *adat* that the *harato pancaharian*, or that part which a man had not disposed of during his lifetime, becomes the property of his *kamanakan* as *pusako rendah* (see Guyt 1936: 88 with references, and the sources collected in the Pandecten).

Court decisions, as far as accessible, show a very similar picture. Three judgements have been published which have been quoted for an early recognition of the childrens' inheritance rights in their father's *harato pancaharian*. But these judgements cannot be said to establish a new prescriptive *adat* rule for *pancaharian* inheritance. The judgement of the LR Padang of 1917, according to which "*pancaharian* is inherited by the children" (T 112: 134), concerned the inheritance from a female *pancaharian* holder (see also Guyt 1936: 89). In 1931, the RvJ observed in a rather general manner that, in the area of Padang, *harato pancaharian*, or at least a part of it, *could* in some cases be inherited in the father's line (T 135: 313). And the third case concerned property which had been pawned by a married couple for the benefit of (*ten behoeve van*) their children. When after the mother's death her (other) *kaum* members claimed the property as *harato pusako*, the LR Padang Panjang held that it went to the children only (T 140: 237).

But apart from these three decisions, the published court judgements in general are quite in accordance with the statements given in the literature: as long as the person has not disposed of his property *inter vivos*, the *pancaharian* are inherited by his family (*kaum*) and *kamanakan* (see LR Solok, RvJ (1932) in T 138: 480; LR Padang (1932) in T 140: 240; LR Padang and Raad (1929) in T 131: 78). It should further be emphasized that this principle was also upheld in the famous case of dr. Muchtar, as this case is often quoted by contemporary lawyers as marking the new inheritance rule "from father to the children". The case concerned the validity of a testament (*umanat*) from a father to his children which was disputed by the *kamanakan* (see also p. 330). The validity of the testament was acknowledged, but as far as the matter of inheritance was concerned, the Raad held:

"The court agrees with the two advisory opinions and makes the views and conclusions expressed therein its own, and therefore states as its opinion that the plaintiffs (the *kamanakan*) would be the only persons entitled to the inheritance of dr. Muchtar ... if it had not been the case that dr. Muchtar had validly disposed of them."²⁰

It must further be stressed that the two advisory opinions given in this case by the leading professors in *adat* law, Ter Haar and Carpentier Alting, also declared that the *adat* rule of the *kamanakan*'s inheritance of *harato pancaharian* was still intact. To quote Ter Haar:

"My conclusion is the following: according to the *adat* law of the Minangkabau society, the money saved by dr. Muchtar is *harato pancaharian* and as such it falls into the inheritance of dr. Muchtar and should therefore be inherited by Mr. Machmoed, the *mamak kepala waris* of dr. Muchtar's *kaum*, if it had not been the case that dr. Muchtar had disposed of it in a valid manner for the benefit of his children" (T 131: 96).²¹

Before the war, neither in the literature nor in the judgements of the courts, was a change in the *adat* rules of inheritance of *harato pancaharian* reported. The change came later. Tanner, to whom we owe the first post-war data on this matter, reports a case which was decided in 1961 (1971: 309). In this case a widow had sued her husband's *kamanakan* for her *suarang*-share. In addition, she claimed that the *suarang*-share of her husband should be divided between his/her children and his *kamanakan*. Whereas the court granted her her own part of the *harato suarang* (as a division of marital property, not as inheritance) the claim to an inheritance portion of her husband's *suarang* part for the children was denied. The court still in 1961 upheld the principle that a man's *harato pancaharian* are inherited by his *kamanakan*. The change only came with

the other *cause célèbre* of Minangkabau inheritance law, the so-called *kincir*-(rice-mill) case, which went through all stages in the national court system and was finally decided by the Supreme Court of Indonesia. Since the three judgements given in this case reflect three different opinions on the problem of *pancaharian* inheritance, and at the same time are an interesting example of the interpretations of *adat* sayings, they should be reported in some detail (the three judgements are reprinted in "Jurisprudensi Indonesia" 1969 III: 17-33).

PN Padang Panjang, case 11 of 1962

In this case, a widow and her children sued the *kamanakan* of her deceased husband for the delivery of a piece of land upon which a *kincir padi*, a rice-mill, was located. This land and the mill, the widow claimed, had been the *suarang* of her husband and herself. The defendants, however, claimed that both land and rice-mill were *harato pusako* and had already been the *harato pusako* of their *mamak*, the deceased husband of the plaintiff.

After weighing the evidence, the court concluded that the property had indeed been the *harato pancaharian/harato suarang* of the deceased and his wife. On this basis, $\frac{1}{2}$ was awarded to the widow. The other half had been the *suarang* of the husband, and on the inheritance of this portion the court gave the following ruling (also discussed at length in Tanner 1971: 309 f.):

"With respect to the half of Dt. M. (the deceased) we shall decide upon a division, thereby giving recognition to the rights of the heirs (*hak alhi waris*), that is of the heirs who are the children, and of the heirs according to *adat*, who in this case are the defendants. For such a division we consider to be just (*memenuhi prinsip keadilan*): (It is true) that according to the system of Minangkabau *adat* law named *mamak kamanakan*, the *kemanakan* have the right to a man's *suarang* part, whereas his children do not receive anything. But this principle has already undergone change in the direction of the recognition of a right of the children. This is revealed by the fact that fathers, before they die, often make *hibah* of property to their children. In this case, the defendants can be lucky to receive $\frac{1}{2}$ of their *mamak's suarang* part, as they are not close *kemanakan (kandung)*."

For the first time it is here made explicit that the development of closer relationships between father and children not only has led to the recognition of a man's autonomy to dispose of *harato pancaharian* during his lifetime, but also to the recognition of an intestate inheritance right (*hak waris*) of the children.

PT Bukit Tinggi, case 46 of 1967

The judgement was appealed, and in appeal, the PT Bukit Tinggi awarded all the property to the defendant *kamanakan* of Dt. M. However, the principle which was established by the PN was not explicitly revoked. For the PT reversed the judgement on the ground that the legal status of the property had not been *harta suarang/pancaharian*, but had belonged to the deceased before he married the plaintiff. The PT therefore found it appropriate to apply the *kata adat*: "*Harta yang didapati tinggal - yang dibawa kembali-suarang diagih - sakatu dibalah*" - "the property which has been received, remains - the property which has been brought, returns - the *suarang* is divided - the alliance is dissolved". In the PT's interpretation, the rice-mill was "*harta yang didapati*" of the widow, which must be left (*tinggal*) to the defendants, as this was part of the inheritance of Dt.M. to be received by his *ahli waris*, his *kamanakan*: "...sehingga dengan demikian maka kincir padi sebagai harta yang didapati oleh penggugat harus ditinggalkan penggugat karena adalah sebagai harta peninggalan I. Dt. M. bagi ahli warisnya dalam hal ini Tergugat2."

The judgement of the PT was then appealed before the MA (No. 39K/Sip/1968), which reversed both previous judgements on the following grounds:

1. The PT had given a wrong judgement, as
 - the PT had attached wrong legal consequences to the *harta tepatan* (*dapatan*) according to Minangkabau *adat*;
 - the *harta tepatan* is the property which has been acquired by husband and wife during their marriage, and must be inherited by the children;
 - the property which has to be returned to the *kaum* are the *harta bawaan*;
 - according to the development of Minangkabau *adat* law, there is now a division of property into two kinds: *harta pusaka* and *harta pancaharian*. The *harta pusaka* are the property and riches of the *kaum*, and the *harta pancaharian* are the properties handed down to the children by their owner.
2. The PN had given wrong judgement, as due to the growth of Minangkabau *adat* law an inheritance right of the *kamanakan* with respect to *harta pancaharian* did not exist anymore.

The final message of the MA is clear: The *harta pancaharian* are inherited by the children, the *kamanakan* do no longer inherit their *mamak's harta pancaharian*. Minangkabau had its new *adat* law for *pancaharian*-inheritance. It is this new rule which is important. Yet the courts' interpretations of the *adat*-sayings so blatantly contradict my description and interpretation as given in Chapter 4, that some comments must be made on this conceptual usage and the rationalization of the judgements in general. Of course it is not the task of the social scientist to declare court judgements to be "wrong". But in order to forestall any critical comments upon my interpretation, I should like to point out that the conceptual usage of the courts is not supported by either *adat* or logic. This is the less understandable as both the chairman of the PT as well as the judge in the MA are highly reknown Minangkabau *adat* experts.

The PT judgement:

The PT interprets the *harta yang didapati* (*dapatan*) as those property objects which came into the possession of the widow, but had been the property of her husband before his marriage. This is very unusual, and I have never heard or read of such an interpretation. The *harta dapatan* in Minangkabau *adat* is commonly understood to be the property the wife brings to marriage, and it remains (*tinggal*) with her or her *kaum* after the marriage has been dissolved. The PT rather gives the contrary meaning to it: property the husband had before the marriage, and to be returned to his *kaum*. But this is commonly expressed by: "*pambaoan kembali*" or "*yang dibawa kembali*" - "what had been brought in, returns". Although the PT's interpretation runs contrary to the general terminological usage, it must be noted that, if the PT had employed the "correct" usage, it would have arrived at the same result. The property would then have been "*yang dibawa*", and had to "*kembali*", be returned, to the defendants in this case.

The MA judgement:

The MA judgement increases the confusion. It quite correctly states that the property to be given back to the *kaum* is the *harta bawaan* (*pambaoan, yang dibawa*). But to the *harta yang didapati* it attributes yet another meaning: property acquired by husband and wife during their marriage, which generally is called *harta suarang*. On the basis of this interpretation it states that

- the PT attached the wrong legal consequences to the concept *harta dapatan*,
- the property to which these legal consequences should be attached are the *harta bawaan*,
- that the *harta dapatan* are the property objects acquired by husband and wife, which must be inherited by the children, as it has the status of *harato pancaharian*.

The logical fault is obvious: Without reconsidering the factual situation, which the MA is not expected to do, the MA should only have noted that the property, which the PT had stated as belonging to the husband before his marriage, was not - as the PN had wrongly assumed - *harta dapatan* but *harta bawaan*. The result would have been the same as that reached by the PT, whose conceptual usage, however, would have been corrected. But what the MA did was to construe a different factual situation - image (i.e. of the rice-mill being property acquired during the marriage - for which no evidence at all was quoted), under the guise of a reinterpretation of the *adat* concepts. The MA not only failed to correct the terminological usage of the PT, but used the wrong term and in its reinterpreted meaning attached to it the consequences which it wanted to lay down.

A short comment is also appropriate on the laconic manner in which the MA established the new conceptions concerning *pancaharian*-inheritance. It refers to "the present stage of the development in Minangkabau", a statement which is not further elucidated or supported by facts or precedents. This judgement then is quite contrary to other MA judgements concerning changes in inheritance law (cf. Lev. 1962). In a case from Pasamah (7/Sip/1953, reprinted in Subekti and Tamara 1965: 198), the MA held:

"In order to state a development in *adat* law, true evidence based upon facts is required, from which the conclusion can be drawn that a change has really occurred. The fact, that here and there a new way of the division of the inheritance is used, does not yet mean that the *adat* law has already really changed".

With the MA decision in the rice-mill case, however, Minangkabau had its new general *adat* conceptions concerning the inheritance of *harato pancaharian*. Whereas the reasoning and the terminological usage employed in the judgement is not followed, the new general rule is quite consistently applied by all State Courts in Minangkabau, sometimes with an explicit reference to the MA-judgement (as in case 4 of 1970 PN

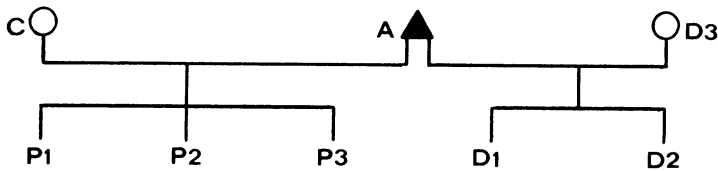
Payakumbuh, cases 49 of 1970 and 16 of 1972 PN Bukit Tinggi). But in case 16 of 1972, the PN Bukit Tinggi stated that "according to Minangkabau *adat* law, the widow and the children are the legal heirs of a husband and father". The inclusion of the widow calls for a clarification of who the new intestate heirs are, the children, or the widow and the children? As far as I can judge this question on the basis of the available material, the children only are the heirs of their parents' *harato pancaharian*, but spouses do not inherit from each other. We have found no single case (case 16 of 1972 of the PN Bukit Tinggi included), in which the widow (let alone a widower) actually inherited her (or his) spouse's *harato pancaharian*. The expression, "the new heirs are the wife and children", is sometimes used as a general reference to the new inheritance law. But the same speaker, when specifically asked whether a spouse is an heir to *harato pancaharian*, will emphatically deny this. He will also point out that the division of the *harato suarang* is a division of the commonly held marital property and not inheritance. The reference "to the wife and children" may well reflect the Minangkabau way of thinking of inheritance as of a process occurring in a group. By mentioning all members of the increasingly important social group, the conjugal family, *pancaharian* inheritance is assimilated to *pusako* inheritance within the *kaum*. However, this conception has no legal relevance (yet).

b. The Inheritance of *Harato Pancaharian* in the Polygamous Family

Since 1968 and with the new inheritance rule for *harato pancaharian*, the classic trouble-cases in which the children and *kamanakan* of a deceased man dispute the inheritance of his *harato pancaharian* have more or less disappeared from the court-scene. But new problems have arisen with the new rule. How is the property to be distributed between the children, and particularly, how is it to be distributed when a man has children by different wives?

Although there are not many cases in which the problem arises, it is the courts' practice (and the opinion of informants) that each child, regardless of his or her sex, inherits an equal part (see e.g. case 11 of 1964 PN Padang Panjang). The general *adat* rule (see Chapter 4 : 152), that a man married to several wives forms separate complexes of *harato suarang* with each wife, is also followed by the courts. This is implicitly recognized in case 11 of 1964 of the PN Padang Panjang²², and clearly expounded in the judgement of the PN Payakumbuh in case 4 of 1970:

Diagram of the parties' relationships



The plaintiffs P 1-3, children of A by wife C, claimed several property objects, worth about 1.8 Mill. *rupiah*, from the defendants D 1-3, A's other wife and her two children. By the plaintiffs' interpretation, the properties were *harta peninggalan* (heritage) left by their father A, who had recently died. The defendants denied this, stating that only a few objects had been acquired by A and D3 together; the rest of the claimed property objects belonged to D3 in her own right (*hibah* from her sister, inheritance from her mother, etc.). Whatever common property there was had largely been acquired by A and D3, who had been married from 1929 to 1934 and then again from 1944 until A's death. A's marriage to C, on the other hand, had already been dissolved in 1944.

The court first restated the rule according to which common *harato pancaharian* (*harta pancaharian bersama*) is for the wife and children, and then went on:

"It is a well known truth of contemporary Minangkabau society that men who are polygamists usually form separate property units with each wife. The children who are born in one marriage have no right to inherit the property of another property unit." ²³

c. Inheritance of *Harato Pancaharian* of Childless Property Holders

According to the new inheritance rule for *pancaharian* in Minangkabau *adat* it is inherited by the children. But what if the *pancaharian* holders had no children? The transfer of property in such cases is, of course, of great interest for the discussion of the question to what degree the new rules have changed the Minangkabau inheritance (or even social) *system*. Unfortunately (for the social scientist) most Minangkabau have children. No court case dealing with the inheritance of childless *pancaharian* holders could be found, and also in the pertinent discussions with villagers and *adat* experts nobody remembered one single case in which there had been no children to inherit the

harato pancaharian.

It therefore was only possible to discuss the problem in hypothetical terms to find out some rules on the problem. The answers, however, were quite unanimous. If *harato pancaharian* holders have no children, the property will be inherited by the sisters (or by the brothers, the *kamanakan*, or by the mother), i.e. according to matrilineal principles (see Guyt 1936: 88 with similar information on these hypothetical questions). The widow will not inherit, but may, of course, claim her part of the *harato suarang*.

In the case of predeceased children, the principle of representation will apply only in the female line: If a person leaves grandchildren by both male and female children, only the predeceased daughter's children will inherit. The predeceased son's children are *anak dirumah lain*, "children in a different house" and will not inherit. If the *pancaharian* holder dies, his property will be in the house of his wife (wives) and her children. Her daughters will remain there and her granddaughters also will remain and marry there. But her sons will have to move to the houses of their wives, and their children therefore will be "children in a different house".

It should be remembered, however, that the principle of representation can be introduced by individual autonomy. E.g. Haji Hassan directed in his testament that, if any of his children should predecease him, his or her part should be inherited by his or her children (Chapter 5: 273).

2. The *Pusakoization* of *Harato Pancaharian*

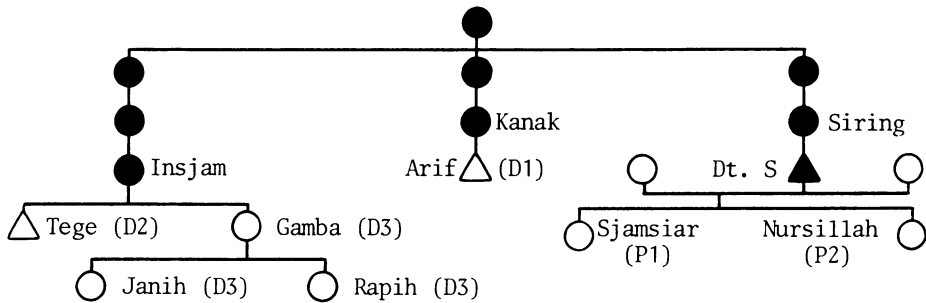
Pancaharian inheritance not only concerns the problem of who shall receive the deceased's property objects. In addition, the *adat* rule of *harato pancaharian* becoming *pusako* upon the death of its holder pre-determines also the future diachronic transfers of these property objects. This "*pusakoization* of *harato pancaharian*" - rule is of basic importance for the maintenance of the *pusako* system, for it guarantees that, through time and inheritance, all property will be *harato pusako*. This rule can still be regarded as a valid conception of contemporary *adat*, unaffected by the changes in the inheritance rules. While in former times the *harato pancaharian* became *harato pusako* for the *kamanakan* of the property holder, they now become *pusako* for his children, to be *turun temurun* in their *jurai*.

When villagers and judges in Minangkabau speak about the *pusakoization*

of *harato pancaharian*, they usually do so in a rather abstract manner, without reference to a concrete problematic case. Either one speaks of property objects which already are *harato pusako*, and there is no (more) problem; or one speaks about property objects which still are *harato pancaharian*, and then the problem is not yet acute. People assume that such property will become *harato pusako* after the holder's death. What primarily happens in concrete cases of *pancaharian* inheritance is that the property objects "are inherited by the children". Whether they are *harato pusako* and actually treated as *harato pusako*, will generally only become apparent in the more distant future. The courts, the agents of objectification from whom we most likely might expect statements about the contemporary validity of the *pusakoization* rule, do not usually deal with the question explicitly either. They decide who in a concrete case inherits the property, and they usually do not care about what will become of it in the next generation.

However, there are first indications of a further change which may not leave the *pusakoization* rule untouched. Under the conditions just described, it is difficult to present much evidence. I have found only one case in which the problem is dealt with explicitly: case 30 of 1969 PN Batu Sangkar. For the presentation of my hypothesis it is a beautiful case, and I consider it symptomatic for the development which is going on in Minangkabau. Yet one must be careful not to take this single case as being representative of contemporary Minangkabau *adat* in general, nor expect that all courts would decide likewise in this matter. But since the change of the *pusakoization* rule is likely to have a profound effect upon the whole system, I shall pay more attention to it here than its rarity so far would seem to justify.

The case concerns the inheritance of property objects the legal status of which was disputed by the contending parties. The relationships between the parties are shown in the diagram on the next page.



The plaintiffs claimed that the property was *harato pancahari* of their father and should therefore be inherited by them as heirs according to Minangkabau *adat* law. As evidence, they presented a "letter of sale" concerning plot B, dating from 1919, of which the most important entries are the following:

It was signed by:

Kami nan mambali (we who have bought): Siring, Duka (the later Dt.S.)

With this letter they wanted to prove that their father, Dt. S., had bought the land in 1919, and that it therefore was his *harta pancaharian*. As additional basis for their claim, they presented a "Letter of Gift of Land to the Children" (*surat pemberian tanah kepada anak*). In this letter Dt.S. states that he has given the land to his daughters already during his lifetime. Of this letter, however, only a copy was produced. This copy bears the signatures of Dt.S. and his daughters. The names and titles of the *adat* functionaries of Dt. S.'s *suku* are typed on the copy, but there are no signatures.

The defendants' version was different: Dt. S. had not bought plot B, but Siring and Kanak had done so. After their death the property had become *harta pusaka* of their *kaum*. Plot A had not been bought at all by Dt. S. but had been given to him as *wakaf* for his *kaum* by a man from *suku* J. Finally, it should be evident that the plaintiffs' claim was unfounded because the other children of Dt. S. had not joined the suit.

The PN Batu Sangkar considered the problems in the following way:

- That the other children of Dt. S. had not joined the suit was declared irrelevant.
- The plaintiffs had not procured any evidence concerning the plot A (the one with the *surau*) and this plot did not play a role in the subsequent reasoning.
- With respect to plot B, the court had to determine first:

1. Whether the property had the status of *harta pancaharian*, or of *harta pusaka* stemming from the *harta pancaharian* of the defendants' *mamak* (Dt. S.). For this question, the letter of sale was decisive. In the court's interpretation, the sale had actually occurred between Upiek Gadang and Siring, Dt. S.'s mother. The property therefore could not be regarded as Dt. S.'s *harta pancaharian*, for

"in Minangkabau there is a basic division of property, namely between *harta pusaka tinggi* and *harta pusaka rendah*. The distinction lies in the origin of the property: *Harta pusaka tinggi* originates from the result of the hard work of the matrilineal ancestors and has been handed down through the generations in the matriline. *Harta pusaka rendah*, however, is property which does not originate from the ancestors' efforts but has been acquired by sale or other legal means."

The property therefore was *harta pusaka rendah*, being the plaintiffs' grandmother's former *harta pancaharian*.

2. Once the status of the property had been determined, it was then necessary to decide whether the property should be regarded as (belonging to) the property of the defendants' whole *kaum* or as the *harta pusaka rendah* of one *kaum* member only, namely of Dt. S. As the property originally had been *harta pancaharian*, the court now had to determine whether (a) it had been inherited by Dt. S. individually (*telah diwarisi oleh ibu bernama Siring kepada anaknya sendiri Dt. S. pribadi...*), or (b) whether it had been intended for Dt. S. and his *kaum*.

a) If the former were the case, then the following considerations would have to be taken into account:

"That it could not be prohibited in Minangkabau to give property to the children, by *hibah* or other means, which had been *harta panca-*

harian originally and which, according to its development, had obviously and definitely become individual property (*hak milik pribadi*) of a *kaum* member. In such a case, the gift has to be carried out with the knowledge and the witnessing (*pengetahuan dan penyaksian*) of the giver's as well as the receiver's *kemanakan* in order to foreclose future quarrels."²⁴

- b) If, however, the latter was the case, and the property had been intended (*ditentukan*) for Dt. S. and his *kaum*. If in this case Dt. S. wanted to give the property to his children, then this should have been carried out in accordance with *adat* law, which means that Dt. S. needed the consent, the knowledge, and the witnessing (*persetujuan, pengetahuan, penyaksian*) of his *kaum* members, including the defendants in this court case.

3. In order to decide which of these two possibilities would apply, two facts were regarded as relevant and conclusive:

- a) The house of the defendants stands on the plot B. It had already been used by them during Dt. S.' lifetime.
- b) Dt. S. had already tried to sell the land once, but had not succeeded as his *kamanakan* had prevented the sale.

4. On the basis of these facts the court took the position that the property had been intended for (*ditentukan*) and inherited by Dt. S. and his *kaum*. The rules elaborated under 2 b therefore applied. As the plaintiffs could not prove that their father's gift had occurred with the consent of the Dt. S.' *kaum* and in the presence of the *adat* functionaries, the transfer had been void. The plaintiffs' claim was consequently rejected.

The defendants appealed. The PT took a different view in this matter and awarded the property (plot B) to the plaintiffs (PT Padang 36 case of 1972). The PT could not agree with the PN that Siring had intended the property for Dt. S. and his *kaum*:

"For the land, as *harta pancaharian* of Siring, had after her death gone over to her child; in other words, to Dt. S. as her one and only heir. This was so in accordance with the development of Minangkabau *adat* law concerning *harta pancaharian*. This development, which runs parallel with the development of the social structure of Minangkabau in general, had already begun before Independence and has continued since: The family ties between husband, wife, and children become closer while the ties between the *kaum* members become looser. This

has the consequence that the division between *harta pancaharian* as the property of the conjugal family (*Keluarga*) and the *harta pusaka* as the property of the *kaum* gets sharper, too. As a result of this development *harta pancaharian* can become *harta pusaka* of the *kaum* only if it is the wish of the *pancaharian* holder, i.e., if it can be proven in a clear way that the property holder wanted his property to become *harta pusaka* of the *kaum* and that it should not be inherited by the children, as it, in principle, should be".²⁵

In the case under consideration the defendants had not been able to prove this. The transfer therefore had not required the presence and the consent of the *kaum* members but was valid without it.

The courts take different points of view. The PN still recognizes the process of *pusakoization* of *harato pancaharian*, although it states differential rules concerning the individual's autonomy over "private *harato pusako*" and over the "*harato pusako* of the *kaum*". The PT, however, seems to be abolishing the *pusakoization* as a matter of law. It declares it to be the exception, and makes it dependent upon the intention of the property holder: the *pancaharian* holder is free to determine what legal status his or her property is to have after his or her death! When referring to the property it has awarded to the plaintiffs, the court speaks of "property". It does not express the legal status of that property in terms of *adat* concepts, for the conceptual system of *adat* cannot accommodate this construction of property. The argument, that the ties between husband, wife and children get stronger, and that there is a sharper division between *harato pancaharian* and *harato pusako* is, in my view, not decisive in this case. Nobody would have disputed it, and both plaintiffs and defendants assumed that the *harato pancaharian* of Siring were legitimately inherited by her son. Actually, with female *pancaharian* holders such a case does not present a problem at all. The problem was that of the legal status of the property after it had been inherited by Dt. S. The PT states that "in these times" it depends on the intention of the *pancaharian* holder whether the property is to become *harato pusako* of the *childrens' kaum*, and finds no such intention in this case. But what is the alternative? The property once inherited can hardly be called *harato pancaharian*, for it is no "*pancaharian*", self-acquired property. On the other hand, it cannot be called *pusako* if its actual legal status is one of private property the disposition of which is unrestricted. In practice,

this leads to the recognition of property, either as *pancaharian* through the generations and through cases of inheritance, or as a kind of *pusako rendah*, to be treated as *pancaharian* with respect to its legal consequences. Clearly, the conceptual system of *adat* has no word for such property.

The PN, with its distinction between "private *harato pusako*" and "*harato pusako* of the *kaum*", is also ahead of "classical" *adat*. The way the court arrives at the distinction is much more interesting than the rules it lays down with respect to the validity of dispositions of such property. For the latter are not unknown in the *adat* system, whereas the kind of distinction made by the court is. According to *adat*, Siring's *harato pancaharian* would have become *harato pusako rendah* in the *jurai* of which she is the apical ancestress; i.e., Dt. S. alone would have the exclusive right to use and exploit the property during his lifetime. Upon his death Siring's *jurai* would be extinct and the property would then be inherited by the other *jurai* in Siring's *kaum*, i.e. by the defendants in this case. As it has since long been acknowledged that the last members of an extinct group have a rather large degree of autonomy over their group's *harato pusako*, the PN's statement, that a *hibah* as intended by Dt. S. required the knowledge and witnessing of the *kaum* members, cannot be regarded as very progressive. In posing the alternative between the private *harato pusako* and the *harato pusako* of the *kaum*, however, the PN adopts a different line of reasoning. This distinction is not conceptualized in terms of *adat* inheritance rules. The legal status of the property objects is more or less inferred from what happened after Siring's death, from occurrences *after* the inheritance. Where one would assume that the legal status of the property would be determined in *adat* at the time the inheritance occurs, the PN takes refuge in an *ex-post* evaluation. Or what else must we conclude from the statement that the relevant facts were that Dt. S. in vain tried to sell the land, and that it had been used by the defendants? It is definitely not a reference to some presumptive wishes which Siring may have had with respect to her property; the only reference is to the social processes which took place after her death. As Siring had no other children it was quite natural that her sisters and sisters' children would use the house, for Dt. S. would live in the houses of his wives. The PN makes this *ex-post* evaluation further explicit by speaking of "properties which originate from the *harato pancaharian* and which have, *according to their development*, become private property".

The determination of the legal status of inherited *harato pancaharian*, the traditional process of *pusakoization* by virtue of *adat* is thus not treated as something occurring automatically any longer, but as dependent upon intentions and social processes. In this, both judgements are equally dangerous for this key-principle of *adat*. The only difference is that the PN is conservative and leaves the determination more or less to the autonomy of the heirs/*kaum* members, whereas the PT makes it dependent upon the autonomy of the *pancaharian* holder.

3. *The Inheritance of Relationships to Harato Pusako*

In the conceptions pertaining to the inheritance of relationships (residual or provisional) to *harato pusako* there has been little change, both in the *nagari* and in the courts. All rights which are based upon one's status as a member of a *pusako* holding group are inherited strictly according to the matrilineal inheritance system described in Chapter 4: 157 ff. It must be kept in mind, though, that in cases where *pusako* property has been *pancaharianized* by pawnings or transfers of pawnings, only the right to redeem, the *hak menebus*, is inherited by the matrikin in the *pusako*-holding group, whereas the right to work and exploit the property object is inherited in accordance with the rules pertaining to the inheritance of *harato pancaharian*.

Many conflicts arise about *harato pusako* which has been given as *harato pambaoan* to a marrying male *kaum* member. When the man dies, the *kaum* members often reclaim the property, whereas the man's wife and children or their *kaum* do not want to give it back, often claiming that it is their *harato pusako*. The *adat* conception of *pambaoan kembali*, that "brought" property must return, is in principle upheld in the courts and in the *nagari*. But I have found one case in which, in terms of concrete conceptions, the general rule is modified under the special circumstances. In case 18 of 1969 of the PN Bukit Tinggi, the plaintiff *mamak kepala waris* reclaimed property which had been given as *pambaoan* to his granduncle (MMB) at his marriage. The court established in the course of the proceedings, that the property in question had been *harato pusako pambaoan* of the plaintiff's *kaum*, indeed, but then proceeded to state:

"As the property in dispute is controlled and worked by the defendants for such a long time already, and as there are family relations between the *kaum* of plaintiff and defendant which cannot be severed just like that, the court is of the opinion that it is fair (*pantas*) and natural (*wajar*) if only one half of the property is given back and the other

half is kept by the defendants".

The court thus transforms an originally temporary/provisional transfer into a permanent transfer of the residual right. That the judge speaks of the 30 odd years, during which the plaintive *kaum's pusako* were worked by the defendants as of "such a long time", well reflects the modern Minangkabau attitude towards time and continuity, in which 30 years are considered to be a "long", instead of a brief period in the continuous existence of the property holding *kaum*.

D. THE MINANGKABAU CONCEPTUAL SYSTEM OF PROPERTY RELATIONSHIPS IN HISTORICAL PERSPECTIVE

I. INTRODUCTORY NOTE

The degree of autonomy which is granted to individual property holders in contemporary Minangkabau - both in respect of *harato pancaharian* and of *harato pusako* - is difficult, if not impossible, to express in terms of the conceptual system of the *adat pusako*. In practice, the conceptual problems which arise are largely neglected or not dealt with explicitly. The courts have to decide concrete cases in which property and inheritance is disputed. They usually express their judgement in terms of the concrete interests and claims of the parties and are not concerned with the construction of a new conceptual system. It is symptomatic that the PT Padang, when it more or less abolished the principle of the *pusakoization* of *harato pancaharian* as a matter of *adat* (p. 347 ff.) did not conceptualize the legal status of *harato pancaharian* which, after the death of its holder, did not become *harato pusako*.

Another way to resolve the conceptual problem is to employ the concept of *hak milik*. The use of *hak milik* is quite frequent in contemporary Minangkabau, although it is by no means the statistical rule. Characteristic is the judgement of the PN Batu Sangkar already quoted. In order to arrive at its concept of *harato pusako pribadi*, "private *harato pusako*" - a term which does not exist in the *adat pusako* - it had to speak of property objects "which have become *hak milik pribadi*", i.e. private "property", "ownership", "*eigendom*". Usually, only property objects which have the status of *harato pancaharian* are character-

ized this way, but as the PN Batu Sangkar shows, the use of *hak milik* is also extended to the *harato pusako*.

It is extremely difficult to give an adequate translation of *hak milik* in this usage. The terms *hak* and *milik*, and also *hak milik*, are of course not new in Minangkabau. *Hak milik* is the Indonesian translation for the Dutch concept of *eigendom*, and it is also used in the Basic Agrarian Law to denote the most complete form of autonomy over land, which to a great extent corresponds to the Dutch conception of *hak milik/eigendom* (cf. Gautama and Harsono 1972: 39 ff., see also Koesnoe 1977: 207 ff. on the various meanings of the concept *hak milik* in contemporary Indonesia). *Hak* and *milik* had also been employed in Minangkabau *adat*, but not in its combined form (see Chapter 4: 162 ff.). But the use of *hak milik* in contemporary Minangkabau is different. The term is used as a figure of speech, and its concrete meaning must be inferred from the way in which it is used. From its practical usage it can be concluded that it shares most of the connotations of the western conception of ownership/*eigendom*: It expresses the highest degree of autonomy recognized over a property object. These relationships are further reified: *Hak milik* not only denotes the *relationship* the *hak milik* holder has to the object, it denotes the *object* as well. It also shares the dominant characteristic of western notions of *eigendom*: it is abstract in terms of time. *Hak milik* is and will remain *hak milik* in perpetuity, no matter how it was acquired or by whom it has been or will be inherited.

Reification and the elimination of the diachronic dimension from the conceptual world of property relationships are new in Minangkabau *adat* (if compared to the system of the *adat pusako* as analysed in Chapter 4). They are the result of a longer process which shall be described in the following, and they reflect the increasing individualization of property relationships in the conceptual world.

II. THE ELIMINATION OF DIACHRONY FROM THE CONCEPTUAL SYSTEM AND THE REIFICATION OF PROPERTY RELATIONSHIPS

Hak milik remains *hak milik*, irrespective of its manner of acquisition. Its use permits a "clean" distinction between synchronic and diachronic dimensions as tied to the lifetime of the individual, thus making inheri-

tance the only form of diachronic continuation. This is, of course, quite foreign to the system of *adat pusako*. The *adat pusako* distinguished property objects in the diachronic dimension. Within this dimension, the distinctions were achieved by reference to the mode of acquisition of the property objects and the relative distance in time of such acquisition (see Chapter 4: 194).

Harato pancaharian probably was no *legal* concept at all in the early *adat*. It was rather that the categories of *harato pusako*, i.e., *harato pusako tambilang basi* and *tambilang ameh*, were defined with reference to the fact that they *had been* "*pancaharian*", self-acquired. *Harato pancaharian* was an *explanans* rather than an *explanandum*. One could speak interchangeably of *tarukoan*, newly cultivated land, and *pancaharian*, self-acquired land. Both terms indicated the way in which some *pusako* property had been acquired. It is symptomatic of this (hypothesized) state of *adat*, that in the immense wealth of proverbs and *adat* sayings there was and is not a single one which mentions *harta pancaharian* or *pancaharian*. Even in the *adat* saying pertaining to the division of marital property, only *harato suarang* is spoken of, and *pancaharian* again is an *explanans*: *Harato suarang* is such property as has been acquired as *pancaharian* during the marriage. Likewise, *dapatan* and *pambaoan* contain no mention of *harato pancaharian*, although they may consist in part of the *pancaharian* which the spouses acquired before marriage. In the whole literature, and during all interviews in which I searched for sayings in which reference was made to *pancaharian*, I have found only one, namely in the recent publication of I.H. Dĕ. Rajo Panghulu (1973: 58) : "*Anak dipangku jo pancaharian - kamanakan dibimbiang jo pusako*" - "The Children are carried with the *pancaharian* - the *kamanakan* are led with the *pusako*". But this clearly is a recent invention, for the line, "*anak dipangku, kamanakan dibimbiang*", is part of a 6-line *papatah petitih*, which rhymes on the -u and the -iang.²⁶ I therefore think it justified to assume that *pancaharian* was not an *adat* concept denoting a specific legal status of property objects, but an acquisitive reference. The time-restricted *pancaharian* was submerged in a conceptual system of property relationships dominated by the diachronic dimension. Yet, as an acquisitive concept, *pancaharian* provided the link with an incipient individualization which in the course of time became also legally important.

A new phase of development began with the coming of the Dutch judges and administrators. This phase is characterized by a greater importance

given to *harato pancaharian* and the beginning of the devaluation of the diachronic dimension. This was no radical deviation from *adat*, since no alternative terminological system was introduced. It was rather that a new way of thinking about property relationships was introduced into *adat* when the Dutch imposed their colonial judicial system on Minangkabau. The Dutch lawyers and administrators interpreted the *adat* system in terms of their own basic assumptions on property relationships, property relationships being distinguished synchronically and by reference to the individual property holder, and the legal status of property objects being defined by rights which are reified. The basic division of property in Minangkabau *adat* was consequently seen in the distinction between *harato pusako* and *harato pancaharian*, as only this distinction could be used in reference to individual lifetimes.

This is the dominant tenor of nearly all Dutch publications and judgements. The *harta* that were *pancaharian*, were from the start conceived of as "private ownership", individual *eigendom*.²⁷ The *pusako* property by contrast, was conceived of as communal ownership held by the *familie*. The kind of ownership most authors had in mind was a form of common ownership, the *gebonden mede-eigendom* of Dutch law, which had developed out of the Germanic notion of the *Gesamthandseigentum*, characterized by the institutions of accrual and decrease. Van Bosse and Smits described the *harato pusako* complex exactly in these terms: Each time an individual family member dies, the shares of the remaining group members increase automatically. Each time a group member is born, the respective shares of the others decrease automatically. In this thinking, there was no room for individual inheritance within the family, and it was frequently stated that, in the Minangkabau *adat*, the institution of inheritance devolving upon individuals was unknown, and that it could only occur between *pusako* holding groups, between *sabuah paruik* (*buah gadangin* terms of CKL), the *suku*, or the *nagari*.²⁸ It was only a minority which opposed this view. Willinck, in particular, pointed out the significant differences between the *harato pusako* complex and western notions of common ownership. In western law, the individual co-owners always have the right to ask for the division of the common property.²⁹ The fiction, that each individual co-owner is the full owner of the whole property but restricted by the equally full rights of the other co-owners, cannot be maintained for the *adat pusako*, as the individual can never come into the position of full owner of the *harato pusako* (Willinck 1909: 575 f., 769 ff.). In *adat*, "*pusako indak buliek diagieh*", "*pusako* may not be

divided". Should a division occur, this meant a group split, through which again only communally held *pusako* can come into existence. In *adat* the group relationship to *harato pusako* can not be reduced to a sum of individual *eigendom*. A further decisive difference is that, in *adat*, the residual relationship between the group and the *harato pusako* is not conceptually specified. We have seen that, besides the "having" character, there is only a dual characterization of this relationship in terms of the *hak* held by the *mamak* and the *milik* held by the *kamanakan* (Chapter 4: 162 ff.). However, the provisional relationships *within* the *pusako* complex are well specified conceptually in the form of *dapatan*, *pambaoan*, and *ganggam bauntuek*. The *ganggam bauntuek* is even treated like a thing which can be inherited. In *adat*, the relationships operating *within* the group-*pusako* relationship are reified. In contrast, it is the group-holder relationship which is reified in the conception of common ownership in western law, whereas the internal relationships are not, and not even conceptually, specified but are treated under the general heading of "administration" (for German law see par. 2038 BGB). These internal provisional relationships could well be inherited in Minangkabau. Thus there was no question of accrual or decrease. If a new *kaum* member was born, this did not affect the shares of the other *kaum* members at all. Their part in the "having" relationship could not be affected, as the birth had no direct relevance for what property objects they were allowed to use and exploit. The relationships legitimating their use and exploitation of the property objects, on the other hand, were regulated by the *ganggam bauntuek*, *dapatan* and *pambaoan*. On this level, nobody was affected by the birth of a new *kaum* member, and only a few persons were affected by the death of a *kaum* member, namely the heirs of the *ganggam bauntuek*. This again was only emphasized by a minority, particularly by Willinck (1909) and later by Sarolea (1920). Willinck correctly stated: "It just depends what you call inheritance", and called the diachronic transfer of the *ganggam bauntuek* "inheritance", with the justification that in Dutch law, too, other rights than *eigendom* (i.e. provisional property rights) could be inherited (1909: 771 f.).

The way of thinking in which most Dutch judges and administrators approached Minangkabau property relationships did not remain without impact on the conceptual system of the *adat pusako*. The old distinctions of the different kinds of *harato pusako*, which denoted the property objects according to the means and time of their acquisition were ne-

glected and hardly ever used in court. The concept of *ganggam bauntuek*, not fitting well the ideas of communal ownership of *harato pusako*, was increasingly less employed, although it was the concept coming most close to the Dutch notion of common ownership. This had practical consequences, too. Only with the trivialization of the *adat* conceptual system and of the differential property relationships could notions be upheld and enforced such as "that the *harato pusako* is the property of the whole *kaum*", "that all disputes over *harato pusako* must be in the name of the *kaum* and be represented by the *mamak kepala waris*", "that only the whole *kaum* and not its subbranches, the *jurai*, were property holding 'legal communities'", "that the *harato pancaharian* became the common property of the whole *kaum* after the death of the *pancaharian* holder" (see Chapter 4: 152, 190).

Through the construction of a basic division of property on the synchronic level by the Dutch, the concept of *harato pancaharian* gained in importance. As one of the basic categories of property, it had to be defined in terms of normative consequences in order to contrast it with the normative consequences attached to the concept of *harato pusako*. Whereas in former times, *pancaharian* had been the *explanans* for the *pusako* categories of *tambilang ameh* and *tambilang basi*, it now became an *explanandum*, which had to be explained in terms of legal consequences. In consonance with this, *harato pancaharian* also became the dominant concept to be used in marital property relationships. In former times one spoke of the *harato suarang*, which was explained as being the *harato pancaharian* which husband and wife had jointly acquired during their marriage. But in the courts one generally spoke of the *harato pancaharian* of the spouses and was concerned with the legal consequences attached to it. With the dominance given to the synchronic dimension of property relationships the diachronic dimension was consequently devaluated. A distinction in the diachronic dimension was still retained - the distinction between *harato pusako tinggi* and *harato pusako rendah* - but in the courts' view this was not the basic distinction of property in Minangkabau.

This interpretation of Minangkabau property relationships has to a great extent been continued by the Indonesian judges, mainly Minangkabau themselves, who act in the post-Independence State Courts. The old *adat* logic is still applied by some judges. Thus the judge in the PN Batu Sangkar whose decision has already been mentioned several times, still declared the difference between *harato pusako tinggi* and *harato pusako*

rendah to be the basic distinction of Minangkabau property categories. He employed the diachronic dimension, in which *harato pusako rendah* and *harato pancaharian* can be equated. Significantly, the judge in this case was a *panghulu*. Most State Court judges, however, keep to the distinction in the synchronic dimension, and adopt a purely prospective attitude towards inheritance as in the MA-judgement in which the new inheritance rule for *harato pancaharian* was established (see p. 338 ff.). I should like, of course, to give a more representative picture of the correlation between socialization in western law and the dominant thinking about property in the synchronic dimension. The judgements, in which such distinctions are elaborated at all, are, unfortunately, too rare for this to be done.

It is difficult to assess the influence the conceptual usage in the courts has had, and still has, on the conceptual usage in the *nagari*. The villagers still are, and probably always were, somewhat confused by the courts' inability to understand their property relationships as far as *kaum*- or *buah gadang*-internal relationships are concerned - a misunderstanding mainly resulting from the conceptualization of *harato pusako* as a form of communal ownership. But cases where internal group relationships are disputed in court are extremely rare (Chapter 5: 307). Most disputes concerning *harato pusako* are inter-group disputes, generally cases in which pawnings are disputed or the inheritance of groups that are extinct. Since the villagers know their *adat* well enough not to be misled by the conceptual usage of the courts, it may be assumed that they were able to express their claims in a manner that the courts could understand, and yet retain their more differentiated conceptual system to deal with property relationships in the *nagari*. Yet the new way of thinking about property will have had its general impact on the conceptual usage inasmuch as the new style of thought is increasingly employed, as it proves to be the most suitable one to express the new degree of autonomy over property recognized also in the *nagari*. In contemporary Minangkabau, so far as we can judge from our discussions with villagers in CKL and other *nagari*, both attitudes towards property relationships and their diachronic transfers are employed. People distinguish *harato pancaharian* and *harato pusako*, but they also speak in terms of the *pusako tinggi* - *pusako rendah* distinction. The old quadrupartition of the *harato pusako* is still used, but the employment of the "shortened" version, "*tinggi-rendah*", is much more frequent.

Through the increasing autonomy over *harato pancaharian* and finally through the establishment of *harato pancaharian* inheritance by the children as matters of law, however, a new threat is posed for the remaining distinction in the diachronic dimension. The concept of *pusako* firmly embodies the idea of property which has been and will be inherited in the matriline. As long as the *kamanakan* inherited their *mamak's pusako*, this principle remained unaffected. But it becomes difficult to maintain the idea when *harato pusako rendah* are inherited by the children. I have mentioned that this difficulty is partly solved by speaking of inheritance with the future perfect-perspective, by equating *pancaharian* and *pusako rendah* in the diachronic dimension. But just because the speakers are forced to employ the diachronic dimension, which in Minangkabau thought embodies the pro- and retrospective, the statement becomes illogical and impossible, for the connotation of matrilineal inheritance can be attached to the property objects in question only in one direction. When the prospective heirs themselves die, the property which they inherited and which became their *harato pusako rendah*, will be inherited by their *kamanakan*. But they themselves have not inherited in accordance with the principle of matrilineal inheritance. In terms of the prospective attitude towards inheritance, which slowly gains dominance in Minangkabau, the statement that *harato pusako rendah* are inherited by the children is "impossible" anyway.

These two factors put a great strain upon the use of the concept *harato pusako rendah*. Combined with another factor, the explicit or implicit wish to stop the *pusakoization* of *harato pancaharian* in general, this leaves little room for the employment of the concept *harato pusako rendah*. The consequence of this, namely the abandonment of the concept, has already been demanded. At a conference on Minangkabau *adat* and history held in Batu Sangkar in 1969, it was explicitly proposed by a Minangkabau lawyer (Damciwar S.H.) that in the Minangkabau *adat* of property relationships only the concepts of *harato pusako* and *harato pancaharian* should be recognized in the future, and that the concept of *harato pusako rendah* should be abolished. The consequences were stated quite explicitly:

"The *harato pusako* (which generally have been called *harato pusako tinggi*) which already exist, will be left in peace. I.e., there will be no further possibility for the existence of *pusako rendah*, as this would lead to an increase in *pusako tinggi*."³¹

Another important consequence, not explicitly mentioned so far, is that the *harato pancaharian* which have been inherited have no defined

legal status in *adat*. They cannot be called *harato pancaharian*, as they have not been acquired by their holders' own efforts. They are not to be called *pusako rendah* anymore. The conceptual gap is filled by the use of *hak milik*: *Harta pancaharian* is *hak milik*, and *hak milik* remains *hak milik* after it has been inherited. The diachronic dimension is eliminated completely.

It is important to remember that *hak milik* is not used only to denote the rights of the property holders, but the things themselves as well. It is the *harato*, the material property objects, which are denoted as *hak milik*, not just the relationships the property holders have with respect to the property objects. In contemporary Minangkabau the *harato - hak milik* equation is generally used only for *harato pancaharian*, which in this way can be treated as *harato pancaharian* = *hak milik* in perpetuity. But the judgement of the PN Batu Sangkar indicates that also *harato pusako*, at least "private" *harato pusako*, can be denoted as *hak milik*. If this tendency should develop into the dominant way of speaking and thinking about property relationships, the scene is set for a conceptual system in which *hak milik* is the common denominator for all property. In this system, a distinction between *hak milik* with *pancaharian* character and *hak milik* with *pusako* character, may be maintained. But this distinction would only be relevant for prospective inheritance, for a limited set of legal consequences. This would mean an essential reversal of the logic of the *adat pusako*. The rights which formerly did not denote things, are now reified, and the property concepts which formerly did denote things are now de-reified and transformed into legal consequences.

In this reification of the *hak milik* concept and the de-reification of the *harato*-concepts lies a great potential for the further development of the *adat pusako*. Once property relationships have been reified, it becomes quite easy to change the legal consequences that are attached to the property object without changing its legal status. The development of the concept of ownership/*Eigentum* in contemporary Europe provides a good example. The concept denotes a property *relationship* which expresses the highest degree of autonomy over property objects. But once the relationship has been reified, the property *objects* will remain *Eigentum* even if the legal consequences attached to it are drastically changed. In Europe, the individual autonomy over *Eigentum*-property objects has been increasingly restricted, yet *Eigentum* has remained *Eigentum*. If the actual property relationships were to be reified now,

probably no one would arrive at a concept that carries the connotations which *Eigentum* as a legal concept had in former times. A similar development *might* occur in Minangkabau. Once the relationships signifying individual autonomy have been reified in the new *hak milik* status of property objects, the *pancaharian*- and *pusako*-like consequences may easily lose their legal character. *Pusako* may become such family property as we know it in western societies; a kind of property which carries strong moral and nostalgic connotations, but which has become legally irrelevant.