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### FAIRNESS AND LAW IN AN INDONESIAN COURT

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#### *Introduction*

Recently, historians, sociologists, and anthropologists (Dupret 2000; Libson 1997; Moors 1995; Powers 1994; Tucker 1998) have addressed the ways in which Islamic court judges draw on broad social norms in making their decisions. In the general spirit of this enterprise, in previous works (Bowen 1998, 2000, 2003) I sought to identify the social norms underlying legal reasoning by Indonesian judges. Here I shall focus on the language of justification employed by judges in deciding inheritance cases, taking as my examples several recent decisions from the Islamic court of Central Aceh, in the highlands of Sumatra.

Indonesia has a nationwide system of Islamic courts that runs parallel to its system of civil courts. In each of these two legal systems, one may appeal from a court of first instance to the provincial appellate court. The Supreme Court may review cases from either an Islamic or a civil appellate court. The jurisdiction of the Islamic courts is limited to matters of marriage, divorce, and inheritance in cases involving Muslims. Jurisdictional conflicts in cases involving mixed-religion couples do arise and have not been definitively resolved. To a great extent, the organization, procedures, and the language of decisions in the Islamic courts are modeled after Western-style civil courts (Lev 1972).

The judges who serve on the Islamic courts are appointed by the Indonesian government, and they are rotated from one post to another during their careers. Most current judges graduated from one of Indonesia's State Islamic Institutes, the IAIN (Institut Agama Islam Negeri), where they specialized in Shari'a. Some judges also obtained a law degree from a general university, and all chief judges now are required to have done so. At the IAIN, they learn the basics of the legal method (*uṣūl al-fiqh*), details of the substantive law areas in which they will be ruling (marriage, divorce, and inheritance law), legal procedures, and relevant bodies of Indonesian state law. Since the mid-1990s they also have studied the state Compilation

of Islamic Law in Indonesia. Until a new arrangement took hold in 2005, they were responsible to two distinct bodies: as civil servants they worked for the Ministry of Religion, but the Supreme Court oversaw their competence as judges. Since 2005 the Court has responsibility for both administrative and juridical matters.

As with many other Indonesian courts, the Islamic court in the town of Takèngèn, Central Aceh, developed out of older Islamic legal institutions. During the Sukarno years (1945–1965), the court was staffed by local men, some of whom had no formal legal training. Some of these early judges served on the court for decades. Under President Suharto (1966–1998), efforts were made to rotate judges more frequently and to demand a more uniform legal training. In the 1980s and 1990s, the province-level appellate court in Aceh exercised increasing degrees of control over local courts by overturning decisions and by summoning local judges for frequent “upgrading” sessions, where they were informed of new legal developments and sometimes upbraided for incorrect judicial decisions.

The legal and political situation has changed rapidly, and often violently, over the past ten years. In 1991, Suharto proclaimed that a newly-written Compilation of Islamic Law was to be the sole source of law for judges serving on the Islamic courts (as well as for other civil servants). Since 1991, judges have justified their decisions in terms of that Compilation. In Aceh, the escalation of violence in the 1990s and early 2000s led many judges to flee the province. In 2001, a new set of laws for Aceh province, now renamed *Nanggroe Aceh Darussalam* (The State of Aceh, the Abode of Peace) to capture resonances of its past as an Islamic sultanate, promised that “Syariah” would be the basis for laws and that the courts would now be called “Mahkamah Syariah.” By 2006 a peace agreement appeared to have taken hold, permitting the provincial courts, the provincial administration, and Jakarta to negotiate and broker a new working relationship.

#### *A sketch of the Islamic court*

The court hears cases from throughout the district of Central Aceh, an area with about 200,000 people. Takèngèn is the largest town both in the district and in the Gayo highlands, a larger area comprising Central and Southeast Aceh districts. Although the majority of highlands residents speak the Gayo language, considerable numbers of Acehnese (the majority people in the province) and Javanese also live there—the Acehnese mainly as traders, the Javanese as farmers, brought to the area through the government resettlement program called transmigration. Acehnese domination in

provincial politics and economics long has been an irritant to many in the highlands, and at present there is considerable support in the highlands for the creation of a separate province, to consist of the non-Acehnese areas.

Takèngèn has a civil court and an Islamic court. Since the 1970s, civil court judges have come from outside the province, and have looked at Takèngèn as a way-station in a series of short-term appointments. Many of the Islamic court judges, however, were born in the highlands, speak the Gayo language, and are knowledgeable about Gayo social norms (*adat*). In court these judges play the role of the wise counselor, and often correct witnesses who mistakenly describe a rule of Gayo *adat*. Many Islamic judges served for long periods because the Indonesian government had trouble recruiting enough judges to staff the court. The court should have nine judges, but at the very least it must have three judges in order to hear cases involving disputes over property transfers (inheritance, gifts, and bequests). In order to reach even that minimum number, the provincial government approved the appointment as judge of a local man, Aman Arlis, who had served as chief clerk in the 1950s and 1960s and did not have a law degree. By the late 1990s, the court had been fully staffed with three Gayo judges, two Acehnese judges, one Malay man from the city of Medan who had lived for a long time in North Aceh, and three Javanese judges. (The three Javanese judges fled the highlands in 1999 to escape violence that was directed against Javanese settlers.) For a period of a few months in 1988, a woman judge (from West Sumatra) had served on the bench.

The court meets in a one-story wooden structure on a quiet residential street in the center of town. The court is near shops, primary schools, the mosque, and the district administrative offices. Two large buildings are joined by an open walkway. During court hours people mill about in the front courtyard, most of them relatives or supporters of someone appearing before the court that day. The scene is chatty and informal; people sit and openly discuss the cases at hand with much less animosity than I expected to find. Even in 2000, as violence was increasing in the highlands, the court was busy.

A man or woman coming to the court for any reason first visits the clerks' building, which in the 1990s housed about a dozen male and female court clerks. Some clerks already have their law degrees and are waiting for judicial appointments; others have completed only high school. A clerk will interview the petitioner, usually in an effort to persuade him or her to settle the matter privately. Failing that, the clerk will help prepare the paperwork for the case and often give advice about how the petitioner

should present his or her case, for example, suggesting which of many possible complaints about marital life are legitimate grounds for divorce.

An informal division of labor operates among the clerks. Some clerks do most of the initial interviewing, while others travel to villages to survey land under dispute. In the mid-1990s, three men shared duties as court reporter, sharing also a single dark sport coat that they would don before entering the courtroom. One clerk usually is charged with filing current cases, law books, and copies of the official Ministry of Religion journal *Mimbar Hukum*, and another with trundling older cases into the archives, a small back room with dusty, nearly forgotten files dating back to the 1940s.

Next to their large, shared work area is the office of the chief clerk, the *panitera*, who supervises the stream of paperwork flowing between clerks and judges. There is also a small, one-judge courtroom. The second court building contains a larger courtroom, in which all cases tried by a panel of judges are heard, and two judges' offices: one for the chief judge and another shared by the remaining judges. Each office has a back door, which permits the judges to enter the larger courtroom without first exiting the courthouse.

Most of the clerks who had been working at the court in the early 1990s were still at their jobs in mid-2000 when I next visited the highlands. In one room three clerks were typing up documents on resounding manual typewriters. One woman had become the informal leader of the clerks, and it was to her that most court visitors first addressed themselves. Dressed in a white headscarf and a long print dress worn over trousers, she addressed everyone, judge, supplicant, or colleague, in the same friendly and direct manner. On a June day in 2000 she was busy typing up divorce papers for a Javanese couple in their late teens, lamenting to all who could hear, "Oh, you're so young and you're divorcing! Well, I guess you're no longer meant to be together (*tidak jodoh lagi*)."<sup>1</sup> She asked them if they had children, and if the wife was pregnant, maintaining an informal tone with the couple. In another room a senior clerk was dealing with a large group involved in an inheritance case. A young man was visibly fuming about the fact that his adversary was occupying the house and selling goods from it even while the suit was in progress. The clerk kept urging him not to take matters into his own hands (*main hakim sendiri*), i.e., not to turn a civil suit into a criminal matter.<sup>1</sup>

The jurisdiction of the Islamic court is strictly limited to certain types of cases; all others are heard at the civil court. The Islamic court hears cases regarding marriage or divorce, as well as matters directly related to marriage and divorce, such as the reconciliation of a couple or the custody

of children. As in all provinces of Indonesia, marriage and divorce cases involving Muslims may be brought only to the religious court. The court also hears demands to determine the rightful heirs to an estate, to adjudicate disputes over a gift or bequest of property, and to divide marital property as part of (or following) a divorce. In theory, disputes heard by the Islamic court may involve non-Muslims, if, for example, the heirs to an estate include people of more than one religion, or if a wife has converted to Christianity and then is sued for custody of her child. Such cases rarely if ever arise in Aceh, where all Acehnese or Gayo are Muslim, but they sometimes receive considerable popular attention when they arise elsewhere in Indonesia.

The frequencies of different types of cases have changed markedly through the years. In its first few decades (1945–1970s), the Islamic court in Takèngè heard a relatively small number of cases per year. Most of these cases involved either a request to register a marriage, or a dispute over the ownership of land. By the 1980s and 1990s the court heard a large number of divorce cases each year and fewer cases in other categories. The divorce cases involved requests for permission to take a second wife, demands that a husband meet his obligations to support his wife, petitions for divorce, requests that the court formalize the reconciliation of a divorced couple, and requests to determine the proper division of an estate. Table 1 lists the cases decided in the calendar years 1992 and 1993, and during the first half of 1999.

*Table 1. Number of cases decided in the Central Aceh Islamic court, 1992, 1993, and January–July 1999, by type. (Source: court records)*

Type of case	Number of cases decided in:		
	1992	1993	Jan–July 1999
<i>Marriage</i>			
Validation of marriage	28	25	0
Petition for polygamy	11	4	1
Petition for husband's support	3	2	0
<i>Divorce</i>			
Husband's petition	110	99	80
Wife's petition	95	102	91
Child custody	2	0	0
<i>Property division</i>			
After divorce <sup>2</sup>	0	3	4
Inheritance	12	5	3

Cases involving marriage occupy a small part of the court's time. People may request a marriage certificate if they either lost the original or were married before such certificates were routinely issued. These cases were numerous in periods of social upheaval, and again in the years after the passage of the 1974 Marriage Law, but there were no such requests in early 1999. Few requests were made for the court to approve taking a second wife. Divorce cases are the most numerous, and the number of such cases doubled during the 1990s. Inheritance cases are far fewer in number, but because they often require numerous witnesses (some of whom fail to appear the first time they are called), as well as trips to measure disputed plots of land, these cases usually stretch out over weeks or months. About half of the inheritance hearings I attended in 1994 lasted less than a quarter of an hour because a witness had failed to appear or one of the parties had failed to produce a document required for the hearing.

The cases are spread evenly throughout the year (including the fasting month of Ramadan). The court hears cases each Monday through Thursday, from about 9:00 in the morning until about 2:00 in the afternoon. A blackboard lists the cases scheduled for each day, along with the judges and clerk assigned to each. The court usually hears inheritance cases on Mondays, after each judge has finished hearing his assigned divorce cases and when three judges are free to make up the judicial panel. No hearings are held on Fridays, when the judges and staff spend a few hours catching up on paperwork, and then drift off to play badminton. Clerks set up ping-pong tables in the large courtroom and play until it is time to attend noontime congregational worship in the town mosque.

One judge suffices to hear a divorce case or to legalize a marriage (although by 2000, with what in theory was a larger staff, three judges had begun to hear divorce cases). Three judges must sit as a panel to hear an inheritance case. In 1994, twenty to thirty people would show up for the inheritance cases, fewer for divorce cases. Farmers for the most part, they dress up for the occasion. The women wear long batik wrap-around skirts (rather than the everyday India-cloth kind), dressy shirts called *kebayas*, and headscarves. The men wear good shirts, trousers, decent sandals, and black caps. One or two men don sport coats.

The larger courtroom can hold forty people if they sit close together on the long wooden benches. Witnesses sit on folding chairs, toward the front of the room, facing the judges. The three judges sit behind a table on a raised dais, with the court reporter to their right and slightly behind them. The judges wear robes with maroon fronts and black sleeves, with a white ascot tied around their necks. They wear the same black caps worn by all

other local men. Although the court has a permanent chief judge, in the courtroom the judges take turns presiding.

When a case is ready for hearing, the presiding judge rings a bell, and a clerk calls for the parties to enter the courtroom. The judge calls the session to order by pronouncing the *basmala* formula (“In the Name of God, the Merciful, the Compassionate”), and proceeds to business. When the session is over he says so, pounding his gavel once to emphasize closure. The inheritance hearings are entirely open to all visitors, as are the initial hearings in divorce cases, when the judge tries to reconcile the parties. If, however, efforts to reconcile fail, then the judge continues in closed session.

Plaintiffs always sit to the judges’ right and defendants to their left. The witnesses are asked to leave at the beginning of the session so as not to be influenced by others’ testimony. They are then called in one by one to testify. After giving testimony, each witness joins the others on the long benches.

Between sessions each judge sits in an office, reads new or pending cases, listens to the radio, and fields requests from petitioners. As I sat in the chief judge’s office one day in 1994, a steady stream of people knocked on his door and entered. One woman came to request a divorce. The judge posed some questions to determine the grounds for her claim (her husband had taken her to her parents and not returned for 14 months) and then gave her the right form to fill out. Other people came with various bits of paperwork to be filled out by the judge.

Judicial procedure follows a colonial-era version of European civil law. Plaintiffs and defendants introduce written statements, replies, and counter-replies, which are handed to the judges and entered into the court record. Attorneys rarely are involved in any way. After questioning the parties and their witnesses, judges write a decision in which they outline the arguments and testimonies offered by each side, and present the legal considerations relevant to the case, followed by their decision.

At the appellate level, the judges reiterate lower court proceedings and then issue a judgment. Generally they work only from the documents forwarded to them. The appellate court might overturn, affirm, or send back the case for further evidentiary hearings at the first-instance level. From time to time it will set aside the lower court’s decision, and issue a new ruling. The Supreme Court has the same options, but it generally restricts itself to the question of whether or not the lower court interpreted the law correctly, and avoids weighing claims about evidence, or considering arguments not already introduced at a lower level. A published account of a case that has been heard by the Supreme Court includes the decisions of

the first-instance and appellate courts, and thus allows the reader to follow the arguments and legal reasoning presented at all stages.

Two types of family property cases showed up most frequently in a sample of cases drawn from the court's archives: requests to divide estates and marital property suits.<sup>3</sup> In the first type of case, a plaintiff asks the court to divide an estate according to Islamic law. The defendant is a sibling, cousin, or other close relative who has refused to divide the property. In some of these cases, the defendant does not contest the request, and the court divides the property. In other cases the defendant makes the counter-claim that he or she had received some of the estate as a gift (*hiba*) from the deceased. The court either accepts or rejects the counter-claim, according to the proof offered by the defendant and the burden of proof required by the court. Marital property suits first were brought to the court in the 1970s. In these cases, the plaintiff, an ex-wife, asks for her share of marital property.

Women have benefited more from the court's actions than have men. For the 49 cases for which I have complete information concerning the litigants, women were the plaintiffs in 31 cases, usually against men, and they won significantly more frequently than did male plaintiffs. As has been reported elsewhere (Hirsch 1998; Tucker 1998), women often perceive Islamic courts to work in their interest, not because the substantive rules constitute an improvement over traditional rules, but because the courts can offer property divisions relatively quickly. In the case of the Central Aceh Islamic court, moreover, judges increasingly have added purported gifts and testaments back into the estate pool, thereby increasing the absolute size of the shares received by daughters (Bowen 1998, 2000).

#### *The form of court decisions*

Islamic court documents are almost identical to documents produced in the local civil court. Each case has a number indicating the year it was introduced. Each time a court decides a case it issues a document called a "Decision" (*putusan*). It is written in Latin-script Indonesian; quotations from the Qur'an or Prophetic reports are written in Arabic and then translated into Indonesian.

In a typical inheritance dispute, the Decision consists of three major sections. In the first section, called *Tentang duduk perkaranya* ("Concerning the dispute in question"), the judges summarize the statements and testimony presented by the two sides during the course of the trial. The judges first

list all plaintiffs and defendants in the case; when needed, they assign each a number (e.g., “Plaintiff 3”). The substance of the case is presented as a list of propositions claimed by one side or the other, and findings of fact by the court, all written as a series of clauses of the form “Considering that x. Considering that y.” These clauses are grammatically subordinate to the final section in which the judges reveal their decision. This series of claims extends over most of the Decision, including the presentation of both parties’ positions and replies, the evidence introduced by each side, any findings of fact by the court (such as the size of land parcels under dispute), and the testimony of witnesses. The court may also cite a verse of the Qur’an or a Prophetic report as one such “consideration.”

In the second major section of the Decision, *Tentang Hukumnya* (“Concerning the law”), the judges restate the problem before them, evaluate each piece of evidence as strong or weak, make additional findings, most commonly concerning the identity of legitimate heirs to the estate, and cite the relevant Qur’anic verses, Prophetic reports, or articles from the Compilation of Islamic Law. Sometimes the court will also specify the amount of land or money due each heir according to Islamic law. It is, however, in the third and final section, entitled *Mengadili* (“Judges” or “to Judge”), where the court declares its judgment, including the division of land and other objects, the payment of court costs, and the names of the judges presiding in the case. (I will label the three sections “Claims,” “Law” and “Judgment.”)

The Decision, then, is a long statement, conceptually a single sentence, collectively authored by a panel of judges, which presents a smooth, continuous process of legal reasoning. The court presents all the evidence as grammatically and logically subordinate to a main clause, containing its finding, which comes only at the very end of the document. The form of the Decision represents the legal process as one of, first, evaluating the evidence and, second, deducing the judgment from the relevant laws.

These formal representations of the legal process derive from the European civil law tradition, as transformed by the Dutch colonial administration, applied in the colonial civil courts, and then adopted for the new, post-independence civil and Islamic courts. This resemblance between Islamic and civil court processes probably will increase, as Islamic court judges more frequently graduate from law faculties as well as from the State Islamic Institutes (IAINs). In parallel fashion, the sources cited by Islamic court judges in their decisions increasingly resemble those cited by their civil court counterparts. Islamic court decisions written in the 1950s and 1960s referred to Arabic-language books of Islamic jurisprudence as well

as to the Qur'an, but never to state law. The 1974 Marriage Law significantly modified the content of marriage law and expanded the competence of the courts. Judges began to cite this law shortly after it was signed into law. By the early 1990s, the Compilation of Islamic Law, declared binding on judges by then President Suharto, began to appear as a major and sometimes sole justification for a decision (Bowen 1999), although some judges continued to cite the older books of *fiqh*.

In the ways in which they represent their processes of legal reasoning, then, Islamic court judges in Indonesia highlight processes of deductive reasoning, and rely increasingly on positive law. Even if they hold dissenting views on the matter, the appellate process and the top-down supervision of judges together have compelled judges to publicly reason following a civil law tradition model of law. Elsewhere (Bowen 1999), I consider difficulties with the state's efforts to make *fiqh* and state law appear as perfectly compatible, particularly with regard to agency in divorce (who makes a *talāq* happen?) and legality of marriage (which acts constitute marriage?). Here I wish to look at the way judges bring other norms to bear in their decision-making.

*Was there an agreement? The anatomy of an inheritance case*

I present here a case decided in 1998 involving a disputed inheritance division. The case is one of many in which the court has had to sort out conflicting claims made by the parties concerning bequests (*wasiat*), consensual agreements (*musyawarah*), and division according to Islamic law (*fara'id*). In this case, as well as in others heard during the 1990s, the judges drew on non-legal social norms to make up their minds, but couched their decision in terms of such issues as the burden of proof, state law, and the rules of Islam governing the division of an estate. In these cases, the two parties do not differ on the relevant substantive Islamic law. The major issues facing the court have to do with the intentions of the parties and the fairness of any prior divisions of an estate.

The case at hand, which for convenience I shall call *Inen Maryam v Aman Mas* (there were, in fact, four plaintiffs and three defendants), is representative of inheritance disputes heard in Takèngèn during the past two decades with respect both to the form of the case itself and to the direction of the legal reasoning carried out by the judges. At issue was not how to interpret the law, whether it be *fiqh* or state law, but whether agreements made by the parties superseded legal rules.

In the case, four of six sisters asked the court to redivide their parents' estate. These sisters were daughters of Abdul Kadir Aman Siti Esah (Abdul Kadir, Father of Siti Esah), and his wife Letifah Inen Siti Esah (Letifah, Mother of Siti Esah). The father had died in 1971, the mother in 1986. The estate consisted of several plots of land, a house, and other property, and most of it was in the hands of the only son, Aman Mas. The plaintiffs claimed that there never had been a meeting (*musyawarah*) to decide how to divide the land. Aman Mas said there had been such a meeting and that it had led to an agreement about the division. The two remaining daughters, who were listed as codefendants in the case, agreed with his version of the events. In 1998 the Court ruled in favor of the plaintiffs and ordered the land divided among all the heirs. The defendants appealed to the Islamic High Court in Banda Aceh, which affirmed the decision in August 1999. In January 2000, the defendants asked the Supreme Court to quash the decision; as of June 2000 the case was awaiting a hearing.

#### *Claims*

In their arguments, the plaintiffs claimed that Aman Mas had held on to more than his share of the estate. They said that their father had instructed Aman Mas to give a particular plot of rice land to one of the plaintiffs, Halimah, because she had been the one initially to clear the land. In their Decision the court quoted (in Gayo, without translation) the plaintiffs' version of the father's oral commission (*manat*) on this matter to Aman Mas, which included the threat to haunt him from beyond the grave if he did not comply. The plaintiffs said that Aman Mas had promised to give his sisters some land, but that he had added that they should take it or leave it, because as the son he was the one who could rightfully determine what happened to their parents' estate.

In his reply to these charges, Aman Mas stated that after their parents' deaths each of the children had enjoyed use-rights over portions of the land. In 1986 they had held a meeting governed by the norms of consensus, a *musyawarah mufakat*, and at this meeting all the children agreed that Aman Mas had rightfully received some land as a bequest (*wasiat*).<sup>4</sup> According to him, the heirs agreed that they would divide the remaining land by lottery, and that they were all satisfied "and would not demand anything more." Although the subsequent division of the wealth was done by lottery, in his testimony Aman Mas frequently used the verbal form *difara'id* ("to be divided according to Islamic rules") to refer to the division, seeking to suggest that it was in accord with Islam. The two code-

defendant sisters sided with Aman Mas regarding his claim that their father had bequeathed him a plot. When asked their opinion by the presiding judges, they agreed that there had been a consensual agreement among all the heirs.

After each side had presented its initial position statements, each had the opportunity, after a delay of some weeks, to submit replies: a *duplik* from the defendants, followed by a *replik* from the plaintiffs. At this point the two sisters who had sided with Aman Mas played an important role. Because they had not received large portions of the estate, one would have expected them to join their sisters in calling for the land to be redivided. However, they agreed with their brother that all the land had been divided, 42 days after their father's death, using the term *difara'id*. With this term, the sisters meant to say that the land had been divided in a way that gave to each party ownership of a share. They did not imply that the land had been divided according to the Islamic rules of division. Indeed, they went on to say that the division had been carried out according to a lottery.

In their reply to the initial statement of the defendants, the plaintiffs conceded that there had been a lottery, but complained about how it had been carried out. They explained that Aman Mas had first selected which plot was to be his own, and then held the lottery on his own. Only afterwards did he call them to his house and point out to each sister her plot. Each side offered witnesses. Among them was the village headman, who said that the division indeed had taken place in 1986, but that several years later two of the plaintiffs had come to him, saying it was not fair. At that time, he reported, Aman Mas had given them a house in return for "a promise that they would not ask for any more" from the estate.

### *Law*

The judges then presented their analysis of the issues and the relevant law. First, they enumerated those claims that had not been rebutted. The two parties agreed that the disputed land plots were part of their father's estate, and that there had been a lottery to divide the land. These claims could be set aside for the moment. They then considered claims that were yet to be resolved. For each such claim they focused on the credibility of the claim and the appropriate burden of proof.

The matter of allocating the burden of proof is of considerable importance in these cases. Very often the testimony offered by one side is countered by rebuttals from the other. Even written documents attesting to an estate division can be said to have been produced under duress or without

all signers fully understanding the meaning of the document, as in a case discussed below. As a result, if the burden of proving the case falls squarely on one side, that side is highly likely to lose. The effect of assuming the burden of proof increased during the 1990s, as the court began to demand higher standards of proof.

The judges do have a certain room to maneuver with regard to the burden of proof. They can assign the overall burden to the plaintiffs, on grounds that the plaintiffs have made a claim that has been denied by the defendants. They can rely on a notion of the preponderance of the evidence, handing the decision to the party whose proof is stronger with respect to a particular factual claim, such as the date when a plot of land was purchased. (This fact may be relevant to deciding whether land is part of the family estate or the property of one party.) In cases such as the one at hand, in which the plaintiffs request a division of the estate, and the defendants counter-claim that a division already had taken place, the judges might rule differently. They can claim that it is up to the defendants to prove the case, because they are the party making a “positive claim,” i.e., a claim about an event that took place in the past. My conversations with judges have led me to believe that sometimes they first decide who is telling the truth about a key matter of fact in the case, and then they assign the burden of proof to the other party.

The case involving Aman Mas fits into the third category of proof, that in which the burden falls on the defendants. The judges cited an article of the colonial-era civil law code stating that whoever makes a positive claim thereby assumes the burden of proof. In this case the defendants had claimed that the land already had been properly divided among the heirs. The burden of proof therefore fell on them to show that the land had indeed been divided in accordance with Islamic law. The key passage begins as follows (pp. 20–21):

Considering, that in court the Plaintiffs stated that the wealth left by the deceased had not yet been divided. It is true that by means of a lottery the female heirs were allotted shares, but the Defendant had already taken his share beforehand, and in any case the daughters were given shares not through a division, but by the Defendant designating plots as he wished.

Considering, that according to article 283 of the civil code, the burden of proof follows the system of positive proof. In this case, because the Plaintiff claims that the disputed items had never been divided among all the heirs, it is the Defendants, not the Plaintiff, who assume the burden of proving that the disputed wealth had been divided (*difara'id*) among all the heirs.

Considering, that the Defendants have offered witnesses, and we find that the second witness's testimony may be heard even though he is the husband of the second co-defendant.

Considering, that the second witness just referred to explained that before the division of wealth among the six female heirs, the Defendant took out his share. This testimony corroborates the admission of the Defendant. The Court (*Majelis*) is of the opinion that the division by lottery should have been held for all the heirs, male as well as female. However, this lottery was only used to distribute shares to the female heirs, such that there arose dissatisfaction among the heirs, and the Defendant later gave two of them, Plaintiffs III and IV, additional wealth in the form of a house.

Considering, that in these facts clear indications can be seen that the Defendant's share was much larger than the share he should have received, a point strengthened in the Defendant's own conclusions by his statement that the daughters each received 15 bamboo measures of land, plus a house to share among them, whereas the Defendant received 6 1/2 *kaleng* measures of land.

Considering, that despite the testimony of the Defendant's first and second witnesses that the disputed items had been divided following a *musyawarah*, the witnesses (supported by the Defendants) also stated that after the division there arose dissatisfaction among the Plaintiffs because the gap between their shares and that of the Defendant was too great and unbalanced, such that from the Defendant's share an additional house was given to Plaintiffs III and IV. These events were confirmed by the third defense witness.

Now, the division of the estate clearly had not been along the lines stipulated by the Islamic "science of shares": the son had taken much more than twice the share awarded each daughter. His claim that the court ought to ratify the earlier division rested on the claim that all the heirs had agreed both to the lottery and to the bequest of land to him by their father. The court does indeed regularly affirm agreements reached by parties and considers such findings to be a matter of Islamic law, a proposition strengthened by the Compilation of Islamic Law (Article 183). The court could have restricted their findings to an assessment of the evidence offered by the defendants that all parties had agreed to the division and to the bequest.

But the judges did not so restrict themselves. Instead, they made claims about the fairness of the division and the probable states of mind of the daughters. Although they did not object to a lottery qua lottery, they stated that the lottery should have been held for all the heirs rather than only for the daughters. Thus, the court did not object to the manner of division per se, to the absence of a reference to Islamic law, but to the control exercised by the son over the process. The fact that the son later added a house to the daughters' shares only confirmed in their minds that the daughters had been dissatisfied and that the son had recognized, if not the legitimacy of their complaint, at least its potential strength.

The judges then addressed the claims that the division had been made according to a *musyawarah*. In the Indonesian political-cultural context, the

term *musyawarah* indicates more than a meeting; it implies that the participants reached a consensus on their topic of deliberation. The term is part of the state ideology, *Pancasila*, and its cognates appear in local ways of talking about dispute resolution in many parts of the country (Bowen 2000). To the defendants' claims that a *musyawarah* had settled the division, the court replied that witnesses had testified to the effect that the plaintiffs subsequently were unhappy with the division because of its unfairness. The judges concluded on the basis of the testimony that the defendant had failed to prove his case and that the *musyawarah* had not obtained the free agreement of the daughters.

Considering, that from the facts presented at the hearing, the court (*Majelis*) is of the opinion that the division of the disputed wealth carried out by the Defendant on the 44th day after the death of the deceased Letifah was not based on agreement and consensus (*kata sepakat dan mufakat bulat*) among all the heirs, but was dictated by the Defendant's own desires, this division therefore has no legal value and must be put aside (p. 22).

The court then took up the Defendant's claim that their father had left to him by bequest (*wasiat*) a plot of land.

The Defendant did not offer any proof in the matter, and according to the Compilation of Islamic Law, article 195 (3), bequests to heirs are valid [only] if they are agreed upon by all the heirs. In this case, however, the Plaintiffs said that they did not agree to it, and the court is therefore of the opinion that this *wasiat* never took place, and that it must be stated that the disputed objects are part of the deceased's estate and must be divided among the heirs (p. 22).

Here, too, the court reached a conclusion about the state of mind of the daughters at the time of the bequest based on their current testimony in court.

### *Judgment*

Most of the decisive judgments, in fact, had been made in the Law section, leaving to the final Judgment only the statement of the heirs and their shares.

Considering, that the heirs are the Plaintiffs and the Defendants, consisting of six daughters and one son. Because there are no other heirs with rights to receive the deceased's wealth, the division of the deceased's estate is based on the stipulation in the Qur'an [Q 4:11].

Written below this statement in longhand is the Arabic of the verse followed by its Indonesian translation as: “God has ruled (*mensyari’atkan*) that the share of a son is twice the share of a daughter” (p. 23).<sup>5</sup> Article 176 of the Compilation of Islamic Law is cited as the second basis for the decision; this article restates the ratio of shares to sons and daughters.

The plaintiffs had presented the court with estimates of the monetary value of each plot of land, and because these estimates were not contested by the defendants, they were accepted. The values were added up to produce an estimate of the total monetary value of the estate, and the shares awarded to each heir were stated in rupiah. Typically, the court would stop at that point in its calculations, but in the mid-1990s the appellate court began to insist that it also specify which plots each heir would receive. Accordingly, the court assigned a certain area to each heir in this case, awarding, for example, Siti Esah and Saunah each 4,479 square meters of plot 1. (The judges told me that they did not expect the siblings to take control of the land exactly as prescribed, because it made more sense for one party to sell to another.)

The court concluded by assigning court costs to the defendants and identifying themselves. The judge who presided over the case also wrote the decision: a Gayo judge, Drs. M. Anshary, SH (Sarjana Hukum, degree only awarded by law faculties). Judge Anshary, who studied at an Islamic Institute (IAIN) as well as at a law school, had been acting as Chief Judge of the court for much of the previous three years. Two other judges sat on the panel, Drs. Jumaidi (from Java) and Drs. M. Ihsan (from Medan), both of whom graduated from an IAIN, where they specialized in Shari’a, not from a law faculty.

### *Appeal*

Later that year, Aman Mas, dissatisfied with the decision, appealed to the higher Islamic court in Banda Aceh, the provincial capital. The estate had been divided by *musyawarah mufakat* in 1986, he complained, “such that the defendant/appellant is surprised and startled that after more than ten years, suddenly there arrives a lawsuit.” The Takèngèn court’s decision was wrong, he added, because it had overturned a *musyawarah mufakat*, and so doing “clearly invites social conflict, and it upsets our deceased parents (*Almarhum dan Almarhuma*) in the otherworld (*alam Barzah*).” Furthermore, he continued, property divisions carried out through *musyawarah mufakat* have a firm foundation in Islamic law because God said, “Consult among yourselves

in all your affairs” (*Bermusyawaralah dalam segala urusan*.)” After the appellate court affirmed the earlier decision, Aman Mas and the two daughters requested cassation from the Supreme Court. In each of these appeals, the original defendants, now called “the party requesting review/cassation,” submitted a *memorie* outlining their argument, to which the original plaintiffs, now “respondents,” submitted a *kontramemorie*. In these and other cases, both sides sometimes make strategic use of the original court’s arguments and rhetoric when formulating their memoranda. In this case, the four sisters, now in the position of respondents, quoted the husband of one of their opponents as admitting that Aman Mas had taken his share out of the estate before the lottery was conducted. To this quotation, which had been cited in the original testimony before the Takèngèn court, the authors of the memorandum now added that “he did this without *musyawarah*,” emphasizing the point made by the court.

*When do people really agree?*

In June 2000, as I sat in the courtroom reading through the typescript Decision of this case, Judge Anshary, its author, walked up to me and peered over my shoulder. I asked him how the judges had decided that the heirs had not freely consented to the division at the *musyawarah*. His answer linked the inequality of the division to the intentions of the heirs:

In that case, when we went to inspect the plots of land, we saw that the daughters had small plots of land, maybe one-half hectare for all six daughters, while the son had two hectares all to himself. We asked about each parcel, whether it had been bought, and for each they said no, that it had been left by their father for them. The difference in the size of the parcels assigned to the brother and the sisters was so great that it was clear that they had not agreed on the division. At that time people would divide by just pointing to parcels, but that is not valid. The men dominated and the women could not say anything, although as soon as there was an opportunity to go to the court, they would do so.

In other words, a true *musyawarah* had not been held.

The judge distinguished between overt acts of agreement to a division of property, and true, sincere agreement. Yes, there had been a meeting at which all parties had come to a conclusion, and there was no evidence that anyone objected to the meeting at the time. It was only several years later, according to the village headman, that some daughters had complained that the division was unfair, and twelve years passed before they brought suit. Did their earlier participation in the meeting mean that they

had once agreed and later changed their minds? And, regardless of the answer to that question, could they contest the earlier division on the grounds that it did not correspond to the Islamic “science of shares”?

In the 1960s and early 1970s, the Takèngèn court routinely said “yes” to the first question and “no” to the second question. In cases adjudicated in the 1960s, the court said, “We should not keep redividing property”: Once a settlement had been reached, the court was reluctant to change it. Indeed, the civil court—to which, until the rules of jurisdiction in Aceh changed in 1970, one could also bring inheritance cases—invented a legal category of “elapsed claims” and used it to disallow such requests to redivide property. The judges treated as irrelevant the objection that sons had coerced daughters into agreeing to the settlement, on the grounds that a settlement had been reached, and Islam supported agreements among heirs. In some cases the judges also accepted defendants’ arguments that according to Gayo social norms (*adat*), once a daughter married out of her natal village, she lost her right to make future claims on the family estate.

By the early 1990s the court had changed its position on this issue. It now could do so because it was politically stronger than before—it had a firmer foundation in statutory law, it had the backing of an authoritarian government, and it now operated under conditions of relative stability (which were, however, to change). Moreover, the judges had changed their views on what women and men thought about rights and rules. Judges now assumed that all daughters, regardless of where they married, considered themselves to have rights under Islamic law.

Even in cases in which a purported *musyawarah* had led to the signing of an agreement, the objective inequality of the division sometimes led the judges to declare that the daughters could not have freely consented to the arrangement. In the 1987 case *Samadiyah v Hasan Ali*, for example, a daughter who had received nothing from her parents’ estate demanded the share due her according to Islamic law. The other children acknowledged that they had all quarreled over the disposition of these lands in 1969, but said that they had settled the dispute in a large village meeting that same year. They also said that their father had left a bequest stipulating that whoever took care of him would get certain lands, and that it was one of the sons, a man named Egem, who had done so. They noted that the bequest and the transfer of those lands to Egem had been made publicly at a meeting and had been approved by all the children. They produced a document attesting to the bequest that had been declared valid by the Takèngèn civil court in 1970.

The practice of leaving land to the child who cares for his or her parents is widely followed in the Gayo highlands. Such bequests, called *pematang*,

are generally considered to be the privilege of the parents. A parent's bequest is ipso facto valid; its authority comes from the right of the owner to dispose of the wealth, not from the consent of the other children. Bequests can be, and indeed are, challenged as contrary to Islamic law ("no bequest to an heir" unless all heirs agree to it). Indeed, the Compilation of Islamic Law, Article 195 (3), follows general Indonesian interpretations of *fiqh* in allowing bequests to heirs only if such agreement is produced (a rule cited by the court in the case described earlier).

In *Samadiyah*, the Islamic court ruled that despite the document, the very fact that some heirs now contested the case was a sign of the absence of consensus. (Although the judges made no mention of this to me, they may have disregarded the general court's finding as having been tainted by bribery.) Furthermore, the judges argued that even according to Gayo *adat*, bequests must be agreed to by all the heirs. "*Pematang*, according to the Gayo *adat* that is still held to and approved of by the people, is considered valid only if all Wahab's children accept and approve of the declaration [of the agreement]," explained one of the judges who ruled in the case (interview, 1994). The judges ruled that because the plaintiff and two of the defendants said they knew of no such declaration, the bequest could not be approved. The judges ordered all the wealth divided.

The defendants appealed the case to the Aceh appellate court, insisting that the document proved that all the heirs had agreed to the division. The higher court, which heard the case in 1990, returned the case to the Takèngèn court, ordering them to take a second look at the document. The lower court did as they were told. "We still thought the daughters were pressured, but we followed instructions," Judge Kasim commented to me. In 1992 they sent the case back up, unchanged, to the court in Banda Aceh, which set aside the decision and ruled in favor of the plaintiffs. (The case was appealed to Jakarta, and has yet to be settled.)

On what grounds did the judges determine that consensus had not been reached despite the existence of a document attesting to the contrary? Judges Hasan and Kasim explained to me in 1994 that the other heirs, principally the two daughters, could have sincerely accepted the 1969 agreement only if it had been in accord with their Islamic rights. That agreement clearly was in contradiction with the contents of the Qur'an, however, because it did not award them their rightful shares. It therefore could not have been the product of consensus. Judge Kasim stated that he and the other judges had felt that the two daughters had been pressured into signing the 1969 document, even though such pressure could not be proven.

Because no daughter would freely sign such an agreement if it were clearly against her interests, he reasoned, there must have been pressure.

Judge Kasim's statement also helps clarify the first case above, *Inen Maryam v Aman Mas*. In both cases, the judges concluded from the objective unfairness of an earlier settlement that the plaintiffs could not have sincerely accepted the settlement, a conclusion based on the assumption that all parties knew and accepted the social norm that estates ought to be divided according to Islamic law, and not according to Gayo *adat* or any other arrangement. This assumption concerns the normative knowledge of the population, and not the law itself.

In this case, however, the judges went one step further. Not only did they find the bequest invalid because Islamic law requires a true consensus to have been reached, but they also claimed that Gayo *adat* requires such a consensus. In years of work in Takèngèn and nearby villages I have never heard anyone characterize the rule concerning bequests in this way. The court in effect recategorized the Islamic rule regarding bequests as "local custom." They did not need to do so in order to rule as they did, because the Islamic law on the matter is clear. Their invention made it possible for them to base their ruling not only on an Islamic rule, but also on an agreed-upon local social norm. This claim made the decision not a matter of enforcing *adat* over Islam, but of enforcing a rule found in both *adat* and Islam.

In 1994, Judge Kasim discussed with me a similar case that was awaiting review by the Supreme Court, *Syamsiah binti Mudali v M. Aji Aman Sarana*. "A father had a son and four daughters," he explained:

The father gave a lot of his rice land to the son and the son's wife; the son also received a large bequest. He gave very little to the daughters. In the 1970s, he drew up a document and had everyone sign. He even sent one of his grandchildren to persuade a daughter who had been reluctant to sign, and she signed. She was not satisfied, though. Later a second document, probably drawn up by the son, but written as if it were from the father, stipulated that the bequest was made officially to the son, and the son's portion of the remaining lands was increased! Each daughter, who should have received 2.5 *tem* measures of land [under a hectare], received only 0.5 *tem*!

This was going too far, it deviated too far from justice. There is a *hadith* that says that, although gifts should be given fairly, they can still be valid even if they are not fair. But this is going too far. Finally, after the father died, the daughter petitioned the court. She was joined by his other daughters, but at least one daughter sided with the son. The defendant based his case on the first document, but we said it was going too far. They appealed and lost, and the case is now with

the Supreme Court. We are very interested in seeing whether the Court can support our judgment, because it introduces a sense of justice (*rasa keadilan*) into the court. Now, no one is totally fair—just look at the fingers on one hand: they work together but are all different lengths. And so it is with children: some will taste sweet, some rich, some bitter. But there are limits.

Observe in this case how easy it would have been for the judge to say that the agreement was valid. After all, all the interested parties had signed the letter of agreement, and no proof of coercion was offered. But the judges said that they disbelieved these documents. Here again the judges contrasted sincere (*ikhlas*) agreement, which could only be obtained if the division had been fair, with mere procedural correctness.

In 2000 I was able to see the case in the court files. The Takèngèn court's ruling had indeed been appealed to the Supreme Court.<sup>6</sup> The father's document had stipulated that the daughters could not sell the land they had received to anyone but their brother, the defendant, because the land was *tanah pusaka*, "heirloom land"; this was their father's "final *wasiat*" to them.<sup>7</sup> The land was divided at a meeting held in the presence of the village headman. However, the headman announced at the meeting that the division was conditional, saying to the recipients that "if you sell the rice land, then one-half of your land will go to the defendant."

In their written decision the Court, with Judge Kasim presiding, stated that they doubted the validity of the letter, adding that "the division is far from being just, and is 'tied' (*mukhait*, referring to the restrictions on selling the land), leaving the rights of the heirs unclear; therefore this exhibit [the document] is not accepted." Unfairness both in the division and in the power wielded by men over women rendered the settlement invalid despite the presence of a contract.

### *Conclusion*

In all three cases, the judges found in favor of daughters who had demanded that estate divisions be redone to give them their rightful shares. The judges drew on two kinds of social norms to reach their decision: their own ideas of equality and fairness, and their assumptions about ideas held by the daughters at the time of the earlier division. In the course of developing a mode of reasoning that would support their conclusions, the judges rejected a written agreement that had been validated by the civil court, and they invented a rule of Gayo *adat* that would correspond both to their own norms and to Islamic law.

The judges might have reasoned otherwise within an Islamic legal framework. Indeed, their predecessors had done so (Bowen 2000). In two of the cases, *Samadiyah* and *Syamsiah*, they might have fallen back on the strength of the written agreement as a contract binding on all parties. In *Inen Maryam*, even without a written agreement, the testimony of the village headman could have served as a basis for a ruling that the heirs had, in fact, reached an agreement. In all three cases, the judges might have argued that unless the plaintiffs could prove that they had been coerced (thereby shifting the burden of proof), there was no compelling reason to place that agreement in question.

That they found as they did, then, is illustrative both of the capacity of judges to reach a range of decisions in what is formally and substantively “the same” judicial framework, and of the importance of their moral and social ideas in shaping their decisions. From where did the judges derive these ideas of equality and fairness? One can find such ideas in the traditions of Islamic jurisprudence, in norms of *Gayo adat*, and in the general values of gender equality that have served as a ground for a number of Indonesian reinterpretations of Islamic law (Bowen 1999). Moreover, the Indonesian Supreme Court long has urged lower courts to overturn property settlements when those settlements disproportionately favor men (Lev 1972). In other words, the judges may have drawn on one or more of several distinct normative frameworks in arriving at the conclusions they did.

The judges themselves did not justify their stance in legal terms; they did not refer to Islamic sources, to specific rules of *adat*, or to Indonesian statutes or court decisions. Instead, they referred to what we might call a common sense version of *adat*: not a body of law-like rules (the *adatrecht* constructed by the Dutch and taken over into Indonesian jurisprudence), but a set of everyday principles. In the explanation quoted above, Judge Kasim referred to the kind of equality that we can see in the fingers of the hand, with each finger performing different functions, but just as important as the others. This and other concrete images of equality draw from the *Gayo* poetic tradition of *didong* (Bowen 1991), in which concrete images are described at length as ways of talking about social life.

In its appeal to common sense and mundane life, this language has much in common with a style of reasoning about Islamic law that I frequently encounter in Takèngèn and Jakarta, in which everyday social practices provide a normative ground for rethinking law (Bowen 1998). That village men and women work together in the fields, equally sharing the burdens and the fruits of their manual labor, offers concrete proof that equality



and fairness are socially appropriate bases for choosing among alternative interpretations of the law. Takèngèn judges (and, I would argue, most Indonesian Islamic judges and jurists) reason much as do judges and jurists everywhere, in striving to make the law fit with the norms of social life, and social life with the norms of the law.

