The Anthropology of Law and Property in the Indonesian Islamic Context

John R. Bowen

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L'étude qui suit est publiée dans le cadre du **programme ANDROMAQUE** (Anthropologie du droit dans les mondes musulmans africains et asiatiques, ANR Suds II) et **PROMETEE** (Property in Moslem Transitional Environments, ANR FRAL).

Le programme ANDROMAQUE et PROMETEE poursuit un double objectif. Il s'agit, d'une part, de construire et de mener une anthropologie praxéologique du droit de la propriété et de son transfert, avec l'identification de ce vers quoi s'orientent en contexte et en action les gens impliqués dans les activités qui lui sont liées. D'autre part, il vise à montrer que le référencement à l'islam est occasionnel et que la dynamique du droit n'y est pas globalement subordonnée.

Le premier objectif consiste à poser les bases d'une anthropologie juridique ancrée dans la description des pratiques, à montrer comment le droit s'accomplit dans un rapport actif à des règles travaillées par les usagers et à traiter de la question du droit à partir des pratiques, du langage et des textes ainsi qu'à démontrer le caractère inextricablement lié des déterminations économiques et juridiques vers lesquelles s'orientent les personnes impliquées.

Le second objectif consiste à évaluer la place de la référence à l'autorité du droit islamique. On s'engagera vers une respécification de la question au lieu de se demander quelle est l'autorité islamique de la règle, on cherchera à décrire, en contexte et en action, les modes d'usage et de référence à la règle de droit et la production toujours située et ponctuelle de son autorité.

Le programme ANDROMAQUE et PROMETEE s'intéresse aux pratiques juridiques liées à des questions de propriété foncière, de transaction commerciale et de relation familiale, à partir de différents lieux fonctionnellement consacrés à la résolution des litiges qui peuvent surgir dans ces matières. D'une part, il s'agirait de procéder à l'analyse des systèmes normatifs s'apparentant au droit étatique, en ce sens qu'ils se fondent sur des règles écrites ou orales qu'un groupe de personnes est censé connaître et interpréter, qu'ils sont dotés d'instances chargées de les faire respecter et que les gens y font référence comme à un système juridique alternatif au droit étatique. D'autre part, il s'agirait de considérer les voies par lesquelles les acteurs appréhendent leur environnement juridique, le comprennent et agissent dans ce contexte, confrontant en permanence la pluralité des normes sociales de référence au caractère « unicitaire » du droit en vigueur.

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John R. Bowen
Dunbar-Van Cleve Professor in Arts & Sciences
Washington University in St Louis (Missouri)
jbowen@wustl.edu

Introduction

Studies of law and of property in Indonesia developed together as part of the Dutch colonial administration's efforts to regulate land use and keep social order. Although they usually considered forest lands to be without owners, or to have been the domain of a native ruler and subject to colonial usurpation, Dutch administrators tried to ascertain and codify local property rights in agricultural and settled lands so as to minimize frictions with local populations. The early anthropology of Indonesian property followed these lines of political interest, and investigated local ways of using and dividing property. Key concerns were how to conceive of the interrelation of local formulations of social order (sometimes codified as "adat law") with Islamic law (in Muslim regions of the country), and whether, or how to render these local and Islamic ideas in the form and with the force of positive law.

Post-colonial studies have continued to pursue these interests, with a greater attention to the formation of the independent judiciary and the state's pursuit of its interests in control and domination, as well as more recent work on the local and multinational exploitation of plantation, forest, and fishery resources, and the newer areas of intellectual and cultural property. Recent work also has attended to the consequences of judicial centralization and political decentralization for local property regimes. We pursue the latter theme in the paper on "Law, Politics, and Property in Reform-era Indonesia". Here we focus on the configurations of landed property regimes and the shifting judicial contexts for resolving disputes concerning the transmission and division of property.

Property categories vary considerably across Indonesia, unsurprisingly in a country with over 300 distinct languages. Certain main ideas inform their study, however. Most rural Indonesian societies are based on ideas that land is tied to places, the notion that where you are born and where you reside after marriage has a bearing on your rights to use productive land. Some of these ideas are rather formalized, for example in terms of lineages; others are relatively undifferentiated (or what used to be called "cognatic"), in that sons or daughters may be the people who take over stewardship of the land. These ideas extend beyond the individual; the group has a tie to the place in question, and may have duties toward a founding ancestor, or towards spirits of the land. Anthropological studies across Indonesia document the importance of these ideas of place to conceptions of ownership.

But in many societies different types of land are treated differently. Some lands are "ancestral" and fully partake of the above characteristics. Others, for example gardens cleared by a new household, may be less tied to social units and may be easier to alienate through sale, or to divide in more individualistic ways, for example through the rules of Islamic inheritance. Still other lands might be "common property" in the sense of remaining open for generalized use, such as grazing or ceremonial use. These latter lands have been the most susceptible to state appropriation and lease as private concessions.

Much of the story of property and law in Indonesia since colonial times concerns the imposition of a Western legal grid on top of these older property categories, and the gradually increasing appeal to an Islamic property grid. The two

processes partially merge in the 1990s with the development of an Islamic law code. All these developments are accompanied by strategies of resistance to legal change and also of accommodation to that change. Much of the anthropology of Indonesian law and property concerns those processes.

Colonial rule and adatrecht

Overview

To the extent that colonial rulers wished to rule indirectly, they tried to determine what the local laws might be, and those they consolidated into what they termed *adatrecht*, adat law.[1] Anthropologists and administrators compiled manuals of the laws in each "adat area" in the Dutch East Indies, and in some regions judges continue to rely on these colonial-era manuals in making decisions. These processes of creating adat law did not so much "invent" it, the term often used for the parallel processes in Africa (see Moore, 1986), but made into rules those expressions and proverbs that once had been public starting-points for complex political processes. These older processes did not apply rules, but sought out equitable solutions to social problems (Benda-Beckman, 1979; Bowen, 2003; Ellen, 1983).

Since Indonesian independence the matter has become much more complex. In the late 1950s, thus shortly after independence, the Indonesian Supreme Court claimed that the Revolution had propelled Indonesians toward a new, national kind of adat law, in which the equality of men and women was a notable principle. The dissonance between this claim and actual social practices left to local courts the problem of figuring out how to decide what adat law was or was to be. Was a norm part of local adat law if it guided the current handling of local affairs, or if it was how old men said affairs used to be handled, or if it is how the Supreme Court said all Indonesians ought to conduct their affairs? Put another way, is adat to be discovered, remembered, or prescribed (see Lev, 1962, 1965)?

As colonial administrators and scholars discovered adat law, they also had to contend with property claims made in the name of *hukum Islam* or *fiqh*. The term “hukum” has three quite distinct meanings in Indonesia. In its broadest use it refers to "law" in general, and includes statutes, anything given legal status in courts, and broader notions of penalty, judgment, or consequence such as "law of the jungle" (*hukum rimba*). Within Islamic discourse the term refers to the legal value given to any action, from obligatory (*wajib*) to forbidden (*haram*). In some village contexts it came to mean the Islamic laws of inheritance, as that was the domain in which appeals to Islamic rules might be made in a court.

The actions of the colonial and post-colonial states to incorporate adat and Islam into substantive or positive law created new ambiguities. Some of the uncertainties stemmed from Dutch policies that segregated the legal systems, with "natives", "Europeans", and non-native "Asians" treated as legally different types of persons, and within the category of "natives", differential treatment of Muslims and non-Muslims. This policy of state-law pluralism meant that, upon independence, some citizens of the new Indonesia were used to having their affairs judged under something other than the civil law tradition, and, indeed, many of them saw this compartmentalization of laws as granting them a small measure of autonomy, whether as Muslims, or as members of an ethnic group (Lindsey, 1999; Lev, 1972b).

As a result, creating a unified legal system after independence meant either replacing adat law and Islamic law with positive law, or developing a legal rationale for preserving separate spheres of judgment. What happened during the Sukarno and Suharto regimes was a combination of these two processes, replacement and compartmentalization, along with an intermittent attitude of laissez-faire, allowing local courts or other bodies to proceed as before, without a consistent rationale as to why they should do so (Lev, 1973). Thus, the 1974 Marriage Law provided a set of positive law

[1] This section draws on the historical analysis in Bowen (2003).

redefinitions of and constraints on Islamic procedures for marrying and divorcing, and the 1992 Compilation of Islamic Law extended this "positivization" process to inheritance disputes. These laws were intended to replace an older set of practices, where judges on Islamic tribunals drew on Arabic-language books of jurisprudence, with a more civil-law process of applying a code.

At the same time as these efforts to replace fiqh with positive law, judges on Islamic or civil courts remained free to ratify agreements made among parties on the basis of local norms on any subject where doing so would not contravene positive law, a position which allowed judges to continue to apply a form of "adat law". And, finally, the Supreme Court has tended to look the other way when lower courts systematically enforce local patrilineal inheritance norms, despite the Court's rulings against these norms since the early 1960s.

Developing distinct spheres

As it developed in the course of the nineteenth century, the colonial legal system was differentiated by its separate laws and procedures for Europeans, for natives, and for others. Europeans had their disputes heard in a court system where proceedings were governed by civil and criminal codes incorporating the rights guaranteed in Holland. Native matters were heard in a separate set of courts, the highest of which, the Landraad, was presided over by a Dutch judge (although by the 1920s "natives" had begun to serve as chairmen). A separate procedural code, with fewer guarantees of rights, was used in these courts. After independence, Indonesia adopted the 1941 version of this code, the Revised Indies Regulation (H.I.R.) for its courts. Jurisdiction was in reality much more complicated; not only were there Chinese and Foreign Orientals to allocate, but the setting of a dispute and its nature could change the law deemed applicable, on which see Lev (1985, pp. 61-63).

Each of these systems had to have substantive law as well as procedural regulations. The Europeans were governed by the Civil Code (the Burgerlijk Wetboek), but what was the law for natives? At first colonial rulers had assumed that Muslim natives were governed by Muslim family law, and allowed local Islamic judges or officials (*qadis*, *pengulus*, or *imams*) to handle disputes involving family law matters of marriage, divorce, and inheritance. On Sumatra, Sulawesi, Borneo, and smaller islands the Dutch generally allowed religious authorities to develop or stagnate on their own. On Java and Madura, however, they tried to regularize and regulate what they thought were native institutions, or rather what would become "appropriate" native institutions if given proper tutelage. In 1882 the colonial authorities created religious courts for Java and Madura, built along Dutch ideas of what a proper court would be, with a panel of three to eight judges (precursors of today's tribunals). These courts had jurisdiction over family law matters, though they depended on the civil courts, as had their immediate predecessors, to issue an order of execution for a contested decision.

By the 1920s, colonial policy had taken a different course, one that moved away from accepting Islam as a basis for social life, and toward the substitute notion of "adat law" as the appropriate basis for hearing disputes among natives, even Muslim natives, particularly on property and family matters. Dutch scholars of adat law, especially Barend ter Haar and Cornelis van Vollenhoven, argued that each Indies society had its own set of concepts and rules, and that colonial policies of indirect rule ought to rely on these indigenous systems rather than on the foreign ones of Islam or the civil code (Holleman, 1981).

Here entered the adat law scholars--Dutchmen and their Indies, particularly Javanese, students--who divided the colony into nineteen "adat law areas", each defined usually by the relative mixture of kinship and territoriality used to create social units, so: clans; villages; clan-villages; and so forth. The best-known version of this adat mapping was by C. van Vollenhoven (Holleman 1981, pp. 44-53), who provisionally distinguished 19 law areas in the Indies, and then made further distinctions within each circle, either by

place or ethnic group, in terms of the different rules followed by each.

Dutch administrators had, of course, a particular interest in these mappings of native legal structures, for they were to furnish the base for the administrative structures of indirect rule. Social-structural anthropology fit well with the practical burdens of colonial life, and some of the best social anthropological studies of Indonesia--Vergouwen's (1964) analysis of Batak "customary law" comes to mind--grew out of this rather specific conception of "adat law." The outcome of these studies was a comprehensive map of the Indies, on which every person was assigned his "law area." In turn, each study of an area further mapped the "tribal areas" within each area, as did Vergouwen (1964, endpiece) for the Batak societies.

These books and new ways of thinking, the changing of *adat* into *adatrecht*, were the product of a new relationship between state authority and everyday life that law now underwrote. Older village-level ways of resolving disputes did and do emphasize conciliation and mediation, with third party binding decisions considered a rather undesirable last resort . But the new "adat law" was meted out by third parties--Dutch third parties at that--after direct, often hostile, questioning of parties and witnesses. It is primarily in the new institutions that used it, rather than in its content, that adat law was, in Lev's words (1985, p. 64), "fundamentally a Dutch creation."

Colonial adat law was intended to be not just a set of administrable rules, but a specifically non-Islamic set of rules. Leading the charge against the very idea of a public role for Islam was C. Snouck Hurgronje, already a renowned Islamicist (famous for having surreptitiously entered Mecca) when called to the Dutch East Indies in 1891 to help win the war against the Acehnese. He urged the Dutch to ally themselves with the traditional rulers in Aceh and to oppose those rulers' rivals, the Islamic leaders. He then developed a sort of systematics out of this political advice, one based on a distinction between two kinds of Islam: Islam as worship, to be encouraged as a genuine source and means of piety; and Islam as politics, repellent to Snouck Hurgronje and to some other Europeans. Islam as politics contradicted European notions of what a liberal, civil society ought to be. It posed real (in Aceh) and potential dangers to colonial domination. And it seemed to them to be foreign, in contrast to the local or "native" norms of adat. This distinction between two Islams, one of worship, the other of politics, and their opposite valuations, continued in force long after the demise of colonial rule.

Law was Snouck Hurgronje's prime example of how Islam had lost touch with the real world. Laws must be--and therefore are--bent when they conflict with practical necessity, especially with regard to government and trade, he wrote, but "the schools of religious learning" cannot recognize this as legitimate so they continue to develop legal codes independently of practice (1906, II, p. 315). Throughout his writings Snouck Hurgronje contrasted "the law," or "the rules of fiqh" with "national custom, which gradually alters to suit changing needs" (1906, II, p. 320). Islamic law was for him a set of fixed rules which, by virtue of their rigidity, could never be implemented.

Snouck Hurgronje neatly reversed prior assumptions about what came to be called the "reception" of law into society. If his predecessors had assumed that Muslims followed Islamic law unless proven otherwise, he argued that only when one could ascertain that an element of Islamic law had been "received" into local usage should it be enforced. Here, inheritance law proved the most compelling example for his Dutch audience. The Islamic rules for dividing estates clearly had not been received on Java, or in most other places, because they differed at base from Indonesian social ideas. Adopted children were recognized as having the same claims to wealth as other children in adat, but not in Islam. Javanese adat gave sons and daughters equal shares of an inheritance, but Islam favored the sons. On Java grandchildren could inherit if their parents had died before them, but not in Islam.

The logical conclusion of the reception doctrine plus such "facts" as these was to return the domain of inheritance to bodies that would apply adat law. And this was what happened in 1937, when the state

removed jurisdiction on Java over inheritance from the Islamic courts and gave it to the civil courts. The regulation, which was passed six years earlier but not implemented until 1937, also created a single Islamic appeals court.

The adat law scholars won out against all unified legal concepts of the time, not just against Islam but also against proposals for a unified civil code for the colony. Such a code, argued its proponents, would bring natives into the modern age and facilitate the building of a more autonomous colonial structure. But Van Vollenhoven's conservative position worked to the benefit both of local rulers, whose powers were aggrandized through the indirect rule political system, and of the Dutch officials who ruled through adat institutions.

Furthermore, the pluralism of adat law was always motivated by fundamental political and economic considerations: how to best preserve political distinctions among groups of people, and how to ensure that Dutch prerogatives in the control of land and extraction of resources remained legally unchallenged (see Lev, 1985). In the Gayo highlands of Aceh, for example, the vast lands that were outside village agricultural systems had once been the prerogative of the district Lord, the Kejurun, but had been open to anyone seeking new garden land; he or she only had to ask permission and pay a nominal fee to the ruler. The Dutch took over this authority from the Kejurun on the grounds that they were assuming his adat-based prerogatives. They then used that authority to close these areas to local cultivators, and to grant concessions to foreign enterprises seeking large areas to grow tea, coffee, and especially the dammar pines whose sap is processed to make turpentine and hard resin. The local Dutch authority, the Controleur, deemed these leases to be commercial matters and thus outside the reach of adat law and the local court, the Landraad (Bowen 1991, pp. 76-79). After independence the Indonesian state assumed this authority, and in many parts of Indonesia used it to grant concessions that infringed upon local patterns of land use.

Property regimes in tension

Through the Japanese occupation (1942-1945) and after independence, Indonesia retained most of the colonial-era legal structure, both the basic laws (the Civil Code and the H.I.R. procedural code) and the very pluralism that had been an instrument of colonial repression. At independence, lawyers and intellectuals generally favored replacing the old system with a unified legal code, in tune with European civil law, but administrators (and President Sukarno) generally favored retaining the separate adat law system as the legal basis for a new political and social nationalism. This second position was also the inertial one: in effect, leave the laws alone until we have time to rethink them. As a result, in the constitutions of 1945, 1949, and 1950, all previous law was explicitly stated to be in force unless abolished or superseded by a new statute.

But the civil code applied mainly to Europeans and Chinese. For most Indonesians, in the early years of independence the relevant civil laws were those of adat. But there were many adat laws, and this multiplicity seemed to many to undermine the anti-colonial, revolutionary concept of the nation as consisting of one people, and the modern ideal of a unified legal system (Lev 1973). In order to create a national law out of this confusion of pluralities, some political leaders realized that they would have to draw on local ideas of adat to gain support, but that they also would have to assert a set of new, supra-local principles.

Consequently, in the 1950s and 1960s the Supreme Court took on the task of reconstructing these local adat law systems to fit post-revolutionary national sensibilities. The Court sought to discover, not adat laws, but the changing "sense of justice" of the people (Lev, 1972, pp. 312-3). The judges "nationalized" adat by recasting the specific features of local societies (for example, lineage structure) as general features that would be applicable across Indonesia (for example, as gender distinctions), and then modifying them according to the new national priorities.

Already in a 1948 draft bill was introduced the concept of "the living law of

society", a concept used to justify a continuing role by authorities outside of the new civil courts. Daniel Lev argues (1973, pp. 21-22) that this language was acceptable both to Islamic leaders, who thought that it was a wedge to be used against adat, and to adat advocates, who thought precisely the opposite. In any case, by the late 1950s the phrase had become a thorn in the side of both groups. The Supreme Court invoked it to render invalid specific local adat provisions, and Parliament included it in a 1957 statute to qualify the jurisdiction of Islamic courts.

The Court used this concept of "living law" to promote the bilateral inheritance of property. In the 1950s they restricted their claims to stipulating that in any given society, men and women had equal rights to inherit unless otherwise specified by "the specific social structures concerned" (Subekti and Tamara 1965, p. 126). But in 1961 the court declared that bilateral inheritance was now "the living law throughout Indonesia" and that it superseded local adat in all cases (ibid, pp. 85-88).

As a vehicle for declaring a principle of national bilateral inheritance, the court chose a case brought by a woman from Karo Batak society in northern Sumatra. The plaintiff had married out of her patrilineage and had been denied a share of her parents' estate. The defendants argued that, under Karo adat law, daughters always married out of the patrilineage and therefore had no claim to lineage land. Daughters became part of the category of "wife receivers" (*anakberu*) upon marriage, and no longer could claim inheritance from their lineage of origin (Slaats and Portier, 1986). Their exclusion rested on the categorical opposition between lineage members and affines.

The court did not engage the issues of lineage structure, but framed the issue in individualistic terms, as a claim by daughters to shares in an estate. The judges decided that the "living law" in the region had changed to accommodate the post-revolutionary equal rights of women, and that daughters now had the same rights as sons. But the local, first instance court to which the Supreme Court sent the case for execution was able to reinterpret the ruling in such a way as to minimize its effect. The local judges ruled that the daughters (along with the sons) should receive goods acquired during the marriage, but that the more extensive ancestral rice lands would be reserved for the sons, as heirlooms (*pusaka*) rather than inheritance (*warisan*). Courts in the Karo area continued to apply the law in this way, and as a result they did not see a substantial rise in the number of cases brought for redivision (Slaats, 1988, p. 144). Nonetheless, the 1961 Karo case is generally mentioned as the landmark case in the Court's claims to have found a new, living law (see Harahap, 1995), and it continues to be cited as the jurisprudential basis for challenges against patrilineal adat from other parts of Indonesia: eastern islands, Java, and elsewhere in Sumatra.

The Minangkabau case

The opposition of a local, collective category of ownership to an individualistic and thus universalistic idea of ownership is found throughout Indonesia. The most important series of analyses of this opposition has come from Franz and Kebeet von Benda-Beckmann in their studies of Minangkabau property in West Sumatra (1979, 2004). Minangkabau society is best known for its matrilineal inheritance system, but it also features a strongly-held idea of community or “heirloom” (*pusako*) property and at the same time a long history of reformist Islamic challenges to those property practices (Dobbin, 1977; Kato, 1982).

In their publications, the Benda-Beckmans trace the continuity of pusako property in the face of these Islamic challenges and the heightened role of the state. Pusako property includes land and houses but also titles and clothing; ownership of these objects passes down from the original owners through the matriline and this property cannot be sold. In the 19th and early 20th centuries this method of transmitting property was attacked by proponents of Islamic law, but certain Minangkabau Islamic leaders proposed to interpret pusako property as a kind of waqf and thus not susceptible to division. But they argued that acquired

property, which had become assimilated to pusako in the next generation, ought to be transmitted through bequest or gift, or divided according to Islamic rules of inheritance. They allowed one-half of marital property to pass to the surviving spouse (thus converging on what was increasingly becoming a pan-Indonesia norm). Although these leaders intended that these forms of acquired property would thenceforth be transmitted through inheritance, in fact Minangkabau have assimilated such inherited property to pusako (Benda-Beckmann, 2004).

The Dutch had tried to urge conversion of pusako property into private property, through the introduction in the 1850s of registration offices. Although this effort did not lead to the individualization of title, the Indonesian government tried again. With the Basic Agrarian Law of 1960, the state set out to register lands as the "fee-simple" property of individuals. Despite repeated efforts to carry this out, by the early 2000s these efforts had been successfully resisted.

A different type of state intervention had more success. Village lands (*ulayat*), here as elsewhere in Indonesia, included lands held by a village or lineage, open to members of that group, and often used for grazing or collecting forest products. When the colonial state saw an interest in controlling such lands, to be used for plantations or mineral extraction, they declared (in 1874 for West Sumatra) them to be the domain of the state, and to be subject to long leases to private interests. The state also declared areas to be forest reserves, which were not open to local people but subject to exploitation for logging or other purposes.

The Indonesian state, and particularly the New Order regime, made liberal use of these methods of state control to grant concessions to family members and their allies. Logging, mining, and export crop plantations expanded. Laws passed as part of the post-1998 decentralization policies did not roll back these concessions, but established *ulayat* rights for those lands that had continued as *ulayat* over the previous decades. Village Adat Councils have demanded stricter local controls but so far to little avail.

The Minangkabau is but one example, albeit the best-documented, of tensions between adat procedures, Dutch and Indonesian state regimes, and, where applicable, actors advocating the application of Islamic law, all regarding the transmission of property.

In many smaller communities, local management of forest and fishery resources has been placed in risk by state and private encroachment, but, particularly since 1989, has been reframed in terms of the rights of "adat communities". Local management often combines individual and collective rights, *hak milik* with *hak ulayat* (Djalins, 2011; Zerner, 2003). Sometimes these rights can apply to the same area of land, as primary vis-à-vis residual rights. This more recent, sophisticated understanding of property rights replaces an older, mistaken notion (contained in the Basic Agrarian Law of 1960) that rights are either individual or communal. Recent studies (Djalins, 2011; Mariko, 2010) emphasize the complexity of local efforts to gain control over forest and agrarian lands in the name of adat, when local elites make such claims at the expense of the rights of politically marginalized peoples.

Courts and Positive Law

Ever since independence, Indonesian courts have found themselves straddling the line between adopting normative positions regarding adat and insisting on merely describing local practices. Judges sometimes term the former stance as "*normative*", the second as "*passif*". In this respect consider Daniel Lev's (1962) discussion of the rights of widows to inherit their husbands' property. Adat law scholarship on Java and Sumatra had generally indicated that widows were not heirs but they did have the right to continued support from their husbands' wealth. On Java, moreover, they had the right to either one-third or one-half of marital property (property acquired during the marriage). During the 1950s the Supreme Court chairman, Wirjono, argued that, in addition to what adat scholars had found, widows in some parts of Java received a portion of the wealth the

husband had brought to the marriage that was equal to that received by the children. The Court then found that in Central and East Java adat law had changed, and that it now granted widows half the marital property. In 1960 the justices stated that widows were entitled to inherit a share of the husband's property equal to the share received by each child. Protests and pressure on the Court led it to pull back somewhat from this position in part through granting shares to additional kin of the husband. In these decisions the justices did refer to the "sense of justice" (*rasa keadilan*) or to the "adat law" of a region as if they were making an empirical claim, but they also drew on their own ideas about what was implied by the ideals of a democratic, independent Indonesia. Judge Wirjono argued that the judge's sense of justice should itself be a source of law (Lev 1972b, pp. 216-218). The style of reasoning developed in colonial studies of adat law--that adat law was merely a translation into legal form what was already the common practice--continued to be used, even as the legal and political project had become quite different, namely, to change practice rather than freeze it.

The concept of "judge-made law" implied here broke both with adat law rhetoric and with the ideology of the civil law tradition, in which judges apply law created by the legislature--not that such a tension is at all unusual in civil law tradition countries. In Indonesia, the Supreme Court in theory functions as a court of cassation, that is, serving only to quash cases where lower courts have mistakenly interpreted the law, but not examining the validity of the law or the nature of the evidence. Even with a broader mandate the Court would have difficulty trying to create uniformity of lower court actions through its decisions alone. The Court could assert new principles by overturning, one by one, lower court decisions that were behind the times, but even if lower court judges were to wish to follow the Supreme Court's lead, in the 1960s they had difficulty even knowing what the Court had decided: libraries and law journals were hard to come by away from the major cities.

The conceptual weight of the civil law tradition and the weakness of the judiciary have led some scholars to propose new legal codes to supersede adat law and replace the older Dutch code (see Lev, 1965). In the 1950s and 1960s, law professor Hazairin proposed that inheritance law for all Indonesians guarantee widows a share of their husband's estate, not only on the grounds that some adat systems were developing in this direction already, but also on grounds that Islamic law, which was already widely used, treated widows as heirs, and the idea has been taken up since then by other writers.

However, judges on local courts continue to try and discover local "adat law", which they expect to find in the form of rules and regulations. Local notables continue to write lists of such rules and to testify about adat in courtrooms. Thus in 1994, I found a civil court judge from Java transferred to Takengen, Central Aceh, perusing a typescript written a decade earlier by the Islamic law professor Muhammad Daud Ali, called "Gayo Adat Law." The judge, Ibnu, had marked the passages in his copy that pertained to land sales and inheritance, where Daud Ali had provided rules. For example, according to Daud Ali, Gayo adat provides that wealth is to be divided before death, rather than afterwards as inheritance. Judge Ibnu concluded that such was Gayo adat, and he was not entirely wrong in so doing. This statement of a rule does have a relationship to social practices, namely, men and women have generally tried to allocate wealth to children during their lifetime (although this practice is now shifting in the direction of post-mortem divisions). They saw an advantage in doing so, mainly in that these allocations allowed their children to attract spouses, raise children, and eventually support their parents. However, it does not appear ever to have been the case that it was a rule, with normative force, that all wealth be so divided. In addition, people have seen a danger in dividing up all one's wealth, in that it left one open to neglect by one's children.

The general picture across Indonesia has been that, while the sense of adat as a set of "traditional" norms and practices continues to be applied in court proceedings, in those cases when that idea conflicts with that of "living adat", the

Supreme Court generally has found for the latter. From time to time, conflicts between these two ideas of adat rules reach the national spotlight, especially when large sums of money are involved. Someone with enough influence and money can always assemble an impressive body of adat experts to present his or her case.

Civil and Islamic Courts

Because the history of different courts varies across Indonesia, let me sketch out developments in Central Aceh, where I have done the most fieldwork. The Dutch invaded the region in the early years if the 20th century, but took until the late 1920s to set up a civil administration, which was ended by the Japanese invasion of 1942. As part of his duties, the colonial administrator of the district, the Controleur, presided over a native court called the Landraad, where he was advised by the local rulers and "adat experts." The Landraad dealt with those matters involving "natives" that the Controleur deemed injurious to the public interest--murder, attacks on colonial officers, nonpayment of the head tax, or local land disputes. Although inheritance disputes could also be brought to the court, seldom did that happen. The court continued to function during Japanese rule, and after independence was declared it became the civil court, called the State Court, *Pengadilan Negeri*, and was charged with hearing a full range of civil and criminal cases.

The Islamic court grew out of village-level institutions. No courts as such predated the colonial period; village officials presided over marriages, circumcisions, and funerals. (As one Islamic court judge put it, in the jargon of his profession, there was, at that time, "religious justice" (*pengadilan agama*), but no "religious judiciary" (*peradilan agama*). In the late 1930s, Gayo men who recently had returned from schooling on Java (where they would have learned of the religious tribunals created there by the Dutch) established an Islamic court in each of the two political domains lying in the immediate vicinity of the main town of Takengen. The courts were without enforcement powers and had no official status in the colonial legal system. Each had for a judge a *tengku*, a man learned in religious matters, with one or more associates. Although these courts were willing to determine the correct division of an estate, people rarely petitioned them to do so.

In late 1945, shortly after Soekarno and Hatta declared Indonesia's independence, the new leaders of Aceh province sent out instructions for each district to set up an Islamic court, to be called the *Mahkamah Syariah* or Shariah Tribunal. In Takengen the two colonial-era religious tribunals took on this function, with an appeals court in the town itself. In 1950 these three courts merged into a single Mahkamah Syariah, officially called the Religious Court, *Pengadilan Agama*.

However, only in 1957, well after the outbreak of secessionist movements acting in the name of Islam in Aceh, West Java, and South Sulawesi, were courts on the Outer Islands given national legal standing. These religious courts now had jurisdiction over family law matters, but only to the extent that "according to the living law they are resolved according to the law of Islam". This clause in effect made the "reception theory" of colonial days the law of the independent land. Local courts consulted the easily available colonial-era studies of local adat law as a way of determining which court had the right to hear cases in which districts (Hooker, 1978, p. 103). To further complicate matters on the ground, although the law gave the religious courts jurisdiction over inheritance matters, it did not give them exclusive jurisdiction. A first-instance civil court might accept an inheritance case even if it thought that Islam was the local living law, and indeed the Supreme Court stated that they could do so. And because the civil court alone could execute decisions, order a bailiff to carry them out, it could declare its religious counterpart's decision null and void on "living law" grounds and retry the case. It was precisely such a nullification in the late 1960s in Aceh that led to mass protests and the provincial decision to forbid civil courts from hearing inheritance cases.

Nor were the judges on the Islamic courts necessarily supportive of Islamic political movements. On Java and Madura

the judges were by and large government officials who had come up through the ranks in colonial or post-colonial administrations. Their loyalties and learning had less to do with Islam than with government administration. Their religious education usually led them to be traditionalists, meaning that they considered the correct way to decide a case to be to consult fiqh books that lay within the Shafi'i legal tradition and not to engage in direct, individual interpretation of scripture.

Modernist Muslim jurists, those who did advocate the liberal use of such interpretation, avoided the courts, and took up positions in religious and political organizations. Those Indonesians who had formal training in civil law during the colonial period or thereafter generally thought little of the legal knowledge held by the religious judges--so much so that those law professors best trained in religious law, Professor Hazairin most notably among them, opposed the creation of Islamic courts on the grounds that the judges would be unwilling and unqualified to properly interpret Islamic law in the context of a changing Indonesian sense of justice (Lev, 1972a, pp. 86-88).

The staffing of the religious courts gradually began to change with the creation of Islamic institutions of higher learning, the IAIN (Institut Agama Islam Negeri, State Islamic Institute), beginning in 1960. One of the main career paths for graduates of the shariah faculty of an IAIN has been to become a judge on an Islamic court. And yet careers that pass through law faculties in the better universities have always been far more appealing and better-paid. By the 1970s, Islamic courts had been created in most districts of Indonesia (except those with mainly Christian populations), and appellate courts existed on the larger islands (Lev, 1972a, pp. 112-17). A 1970 law had given the Supreme Court authority to hear cases from the religious court system, and more judges, with more advanced educations, were being appointed.

But the religious courts were not on an equal procedural footing with the civil courts. A religious court still had to ask the local civil court to execute a decision. The 1974 marriage law preserved the dependent relation between the two courts on grounds that the religious courts did not have *bailiffs* (*juru sita*) to execute decisions. On Java and Madura, colonial rules still applied that restricted the religious courts to issuing opinions, rather than enforceable decisions, in inheritance cases, even though people preferred to take disputes to the religious courts (Lev, 1972a, pp. 199-205). Elsewhere the "living law" clause of the 1957 statute meant that the religious court's jurisdiction could always be challenged on grounds that Islamic law was not locally "living."

On the national level, the Ministry of Religion established a strongly centralized system of religious administration, with an Office of Religious Affairs (Kantor Urusan Agama, KUA) at each administrative level, from Jakarta to the village. This hierarchy paved the way for the eventual creation of a unified court system. Even today, KUA village officials continue to act as the real first-instance institution with respect to marriage and divorce, where they try to reconcile couples before they reach the courts. (Their role with respect to inheritance seems to be minimal, however.) The Ministry also set out to organize religious courts, and a separate Directorate of Religious Justice was eventually established for this task. And in the absence of either a unified national religious court system or an Islamic chamber in the Supreme Court, the Directorate took on functions of checking lower court decisions for consistency, creating a rudimentary system of jurisprudence, and circulating noteworthy decisions to other courts. The office even assumed a de facto function of judicial review (Lev, 1972a, pp. 92-101), which the office continued to covet well after the Supreme Court began to assume a review function in the 1970s.

Only in 1989 were the many Islamic courts in Indonesia given a uniform status (Cammack, 2007). Since that time, all such courts, now uniformly called Pengadilan Agama (except in Aceh, where since 2001 they are, once again, with a slight innovation in spelling, called Mahkamah Syar`iyah), handle matters of family law, mainly marriage, divorce, and inheritance, for Muslims. Judges are to apply Islamic law, since 1991 with a Compilation of Islamic Law in hand, but they often devise

special exemptions for local practices they consider to be valuable, or at least to not openly contradict tenets of Islam. The civil courts, the Pengadilan Negeri, handle all other civil petitions, (including, in most provinces, but not Aceh, inheritance cases from a Muslim who prefers to take it to that court) and all criminal cases. Here judges apply statutory law and "adat law"--but whether "adat law" means the Supreme Court's notions or those of the local notables is in practice up to the judges to decide.

Finally, shortly after succeeding with its 1989 bill, the government decided to compile a code that would be enforced by the Islamic courts. The Compilation of Islamic Law that resulted did contain a number of significant innovations, which only gradually became apparent. It contains clauses that formalize practices already accepted among jurists (such as the equal division of common marital property) and other clauses that were intended to change local practices (such as the treatment of orphaned grandchildren). But it also constituted a claim to have squared the circle of state control and ulama independence, in a fashion typical of the New Order. The commentators and proponents of the Compilation have presented it as both the result of a consensus among Indonesian ulama, and positive, state-issued law. As the consensus of Indonesian Muslim jurists, it is supposed to represent the "living law" of Indonesia. But its state-legal force derives from its promulgation as a Presidential decree. The presentation of the code has thus come to signify both a particular way of ordering Islamic law and a particular process of legitimizing that ordering (Nurlaelawati, 2010).

Two substantive matters have raised controversy among jurists: the fate of orphaned grandchildren, and whether daughters may inherit the entire estate in the absence of sons. The first issue concerns grandchildren whose linking parent died before the grandparent. More controversial has been the provision that even a single daughter will inherit the entire estate if both her parents have died. Other heirs, for example the brothers and sisters of the deceased, are "blocked" (*terhijab*) by her from receiving any share. This change was motivated by the Indonesian cultural model of bilateral kinship that lies beneath the Compilation, but the Supreme Court and supporters of the Compilation have tried to justify it in fiqh terms, as an acceptable interpretation of the Qur'an. This provision ran against established Indonesian practice and generally accepted interpretations of the relevant fiqh books, and continues to raise objections to court decisions in Aceh (Bowen, 2003, pp. 189-199).

The Case of "Marital Property"

The case of marital property (*harta bersama; gono-gini*) illustrates how change has resulted from local and national level social dynamics. Such property is very important for women who divorce.[2] Both civil courts and religious courts throughout the country state that upon dissolution of a marriage through death or divorce a spouse has the right to a share of all property acquired during the marriage. The marital property is not divided among heirs, and in towns and cities it is often far more valuable than the inheritance itself. Consequently, the national Women and Family Legal Aid Institute has given high priority to ensuring that widows and divorced women know of their rights and are able to obtain their share of this property (Irawati Dasaad, SH, interview, Jakarta, 1 June 1995).

In many agrarian areas of Indonesia, in particular where the economy was based on wet-rice cultivation, older norms for dividing property were based on the assumption that wealth was relatively stable. After all, a rice field that yielded six sacks of unmilled rice this year would do about the same a decade from now. Marriages brought in wives or husbands to work the field and consume its product, but they neither added to nor subtracted from its wealth. Death or divorce meant that the spouse left the village, but he or she had no claim to part of it. Islamic legal interpretations gave the wife no share of the husband's resources after divorce or death,

[2] For more on the early legal history of this category in Indonesia see Cammack and Feener (2008); for detailed case histories from Central Aceh see Bowen (2003, pp. 214-224).

only a short-term subsistence payment. Classical Islamic law only provided for maintenance of a divorced woman for the 3 month (iddah) period after divorce, or during up to two years if she was nursing a child.

From the standpoint of classical fiqh, the principle of dividing joint property is a major innovation. The change came both from the ground up and from the top down. Let me return to my Central Aceh case to explain the development from the ground up. In 1994, the local Muhammadiyah leader, Ali Jaidun, pointed to the conditions of work and production in the time and place where Islamic law was formulated: "Back in the time of Imam Shafi'i there were no gardens or rice fields, and so it made sense that the man kept everything". In the Gayo highlands, these ideas began to change when the material conditions of life shifted. In the 1920s and 1930s a growing number of households cleared forest land to make coffee gardens. They had created new wealth. Some of those households dissolved in divorce, and ex-wives began to complain to the colonial court, the Landraad, that they had the right to a share of such lands because they had contributed to the creation of the wealth.

The legal response to this challenge took place at several levels. Local judges borrowed legal categories from other societies, where these change processes had already occurred. The Supreme Court also developed a jurisprudence of marital property, one that eventually superseded local innovations. In the Gayo highlands, courts created two sets of distinctions concerning family wealth, based on legal developments elsewhere. Wealth that was newly created was to be distinguished from wealth that had been inherited. Wealth that was created by the two spouses was to be distinguished from wealth created from only one spouse's labor or capital. The two categories are conceptually distinct--one may create new wealth without a spouse's assistance--but over time they were collapsed into one distinction, between marital property, acquired during the marriage and assumed to be jointly created, and property inherited by one person.

To label wealth that was newly created, the Takengen Landraad[3] borrowed an Acehnese phrase *poh roh*, meaning "to work fallow [land]" and referring to the principle in both Gayo and Acehnese societies that the returns from long-fallow land go entirely to the laborer for some period of time, because of the high start-up costs involved. The opposite of *poh roh* wealth was inherited wealth, *pesaka*, and the distinguishing feature of the former was that the household created it through their *usaha diri*, "own efforts". At least by the late 1930s, "own efforts" land was divided according to the relative labor contributions of husband and wife. Inherited land was part of the capital contributed by the family in whose village the couple lived, and would remain with that family, and with the children of the couple.

These norms continued to be applied by the civil court after independence when faced with the question of whether land was to be divided among heirs or retained by a household as the fruit of their "own efforts". But how was "own efforts" land to be divided between husbands and wives? Here a second distinction was made, one that runs orthogonal to the first, concerning not the input of labor but the source of wealth. It separates wealth brought to a marriage by one party, *harta bawaan* or "brought wealth ", and wealth created by both parties, *harta bersama* or "together wealth ". Whereas *poh roh* referred to fallow land that was made productive by the labor of husband and wife (and thus not inherited productive land in which the village would have a residual right), *harta bersama* referred to any wealth that did not clearly belong to only the husband or only the wife. Property that was neither brought to the marriage by one of the parties, nor purchased with money brought to the marriage, nor given to one of the spouses alone, would be declared as marital property. Often the Takengen court used the Javanese phrase *gono-gini*, because the distinction had first been clarified by the Supreme Court with respect to Javanese practices.

In the early 1960s, cases decided by the Takengen civil court vacillated between

[3] Dutch expression meaning civil court.

awarding one-half and two-thirds of joint property to the husband, depending on judgments concerning their respective labor contributions. However, a series of Supreme Court decisions in the late 1950s and 1960s began to push civil courts everywhere toward gender equality, and published as jurisprudence a 1974 decision that all wealth obtained during marriage must be divided equally between the husband and wife.[4] The Takengen civil court generally followed this ruling, citing the 1974 marriage law as its basis (although that statute does not specify an equal division). The effect of these decisions was to bring about a consequential shift in how the fairness of a division was to be understood: from measuring the relative contributions of labor from each party, now judges were to look for the origins of wealth, to distinguish between wealth brought to a marriage and wealth created during the marriage.

In the Takengen civil court, between the 1960s and the 1980s, judges gradually broadened their criteria for deciding that property was jointly owned by a couple. The older definition was in terms of effort; it considered property cleared and worked by the couple to belong to them jointly. Wealth that could be tied to capital owned by one party prior to the marriage remained in the category of “brought wealth” and thus not included in marital property. The newer definition was in terms of the period when the property was acquired; it assumed that households acquired and used wealth as a single unit. Because it is men who do the bulk of the labor on new fields, and because these fields tend to be planted in the more profitable cash crops, this change in legal reasoning substantially increased the share of wealth going to women. Under the older definition, a wife who kept house but did not work on a field received at most 1/3 of the field's value, but under the new definition she was guaranteed 1/2 of all new wealth. In 1994, Chief Judge Nazifli Sofyan of the Takengen civil court refused to even speak in terms of respective contributions, only in terms of the period during which property is acquired: "If property has been obtained while the couple is married, then it is joint property. It does not matter who worked it, nor from where the money came to buy it: wealth given to them is also presumed to be joint property unless one party can prove it was given only to him or her. So the origin of the property is not important, only the time when it was obtained." The same view was expressed at the Islamic appellate court in Aceh: the Chief Judge of that court told me in an interview in Banda Aceh (25 July 1994): "Before 1974 we divided joint wealth according to who had worked it. If the wife had been at home, cooking, and taking care of the children, well then the wealth that the husband had worked was divided 2 shares for him, 1 for the wife; if they worked it together, then equally. But the 1974 marriage law says that all wealth obtained during the marriage is to be divided equally, and so we do that. All that has to be shown is that the wealth was not brought to the marriage, that it was obtained while they were married."

Now, until the Court Bill of 1989, religious courts did not consider themselves empowered to divide joint property, and all petitions for these divisions went to the civil court. But in Takengen the same general principle followed in the civil court also was applied informally by the religious court judges. Tengku Mukhlis, the first head of the religious court, would be approached for a fatwa in dividing property, and he would say `if poh roh, then divide equally', recalled Tengku Ali Jadun (first head of the religious court) in 2000. Ali Jadun himself was, and is frequently called on to divide property. "When people divorced, I would divide poh roh equally. People had to accept this; it was the law."

The most ideologically Islamic of judges in the 1950s were the members of the Darul Islam rebellion who operated in the hills, in the areas controlled by the rebels. These judges divided marital property much as did civil court judges.

As Aman Kerna of Isak, a local man, explained to me in 1994, the judge balanced different sets of norms in making his decision. "The D.I. judge would decide all cases according to religion. In inheritance disputes he would divide all the wealth

[4] The Supreme Court ruling was MA 1448/Sip/1974, reprinted in *Yurisprudensi Indonesia* 1977-II.

among the children, with two shares to sons and one share to daughters, and he would divide joint property according to how much effort the wife had put into working the land. Generally it was divided as two shares to one, favoring the husband, but if the wife had worked the land along with her husband then it was one to one. For, there are three kinds of law: *hukum Allah, hukum adat*, and the law of reason (*hukum akal*). In cases like these you have to use the law of reason and set aside religion and custom. You have to ask: How much did the wife work? Perhaps, as is often the case, the husband would leave the wife on the rice fields and the garden, and he would go off somewhere else, so that she did more work than he did. But, even then the division was never more than one to one."

Since 1989 the Takengen religious court has regularly divided property as part of divorce settlements, or upon separate petitions. The religious court judges employ substantially the same criteria as do the civil court judges, with one difference: they subtract from the value of the household wealth any capital brought to the marriage.

In 1994, the then chief Judge Kasim explained: "The 1974 law makes clear that joint property is all wealth obtained during the time of the marriage. But we do look into where the money came from to buy the wealth. Let's say the couple buys a coffee garden during their marriage. If the money came from her bride goods that she was given at marriage, then we subtract the value of the bride goods and divide the rest as *harta bersama* (joint property): the bride goods are brought property (*harta bawaan*). But here as in the other matters each judge has discretion to decide the way he wishes, so there are different versions of all this."

Nationally, obtaining marital property upon divorce is one of the major tasks of women's legal advocacy groups. What constitutes "property" is of course increasingly hard to define. Just as the increase in cash crops led local courts to redefine marital property early in the twentieth century, in the beginning of the twenty-first century religious jurisprudence is challenged by stock options, insurance policies, and leasing arrangements. Wahyu Widiana, the head of the Religious Judiciary Directorat at the Department of Religion, noted (interview, July 1995) that these cases are the most complex arising in the larger cities, and increasingly with divorce comes a complicated web of economic rights and obligations to unravel.

Conclusion

The background to current research on property and law in the Indonesian Islamic context involves several overlapping elements. The long tradition of studying “adat law” developed from the immediate needs of Dutch administrators, and was part of a long debate concerning the appropriate sources of law for ruling the colonies. This tradition has played a role in developing judicial and legislative strategies for creating a national legal system, in that the Supreme Court sought to develop a “modern adat”, and the creators of the Compilation of Islamic Law sought to represent their efforts as a kind of “Islam that is adat”, not unlike the otherwise much-reviled “reception doctrine.” Since 1998, “adat” has come to stand for that which is indigenous and that which is authentic or legitimate in the face of the legacy of corruption and oppression associated with the Suharto era. Struggles over control of land, including forests, reflect a long history of tension between local property categories (such as *ulayat*) and the claims by the state of the power to allocate “unused” lands to companies for creating plantations or logging concessions.

In parallel fashion, references to Islam have gradually become integrated into a centralized judicial structure and given the force and form of positive law. As Islamic courts were gradually given legal recognition, in the 1950s and 1960s, they took on greater powers to hear disputes over inheritance, although the degree to which such courts have been used continues to differ greatly from one province to another—contrast their much greater importance in Aceh compared to West Sumatra. With the 1989 Court Bill and the 1991 Compilation, the officially mandated sources of law for resolving property disputes moved from selected books of fiqh to the new legal code.

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