Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society 1960–1994

John R. Bowen

I draw on the archives from two Indonesian courts to analyze how judges have reached decisions in the face of conflicting legal norms. Judges in the town of Takèngën, in the highlands of Aceh province, hear claims based on Islam and on local social norms (*adat*). Between 1960 and the mid-1990s, they changed the way they resolved disputes over inheritance cases, from accepting village settlements as valid, to rejecting those settlements as either contrary to Islam or as coercive. I examine the justifications offered in the earlier and the later periods for these decisions. I find that in both periods judges employed creative legal devices to resolve or bridge differences between Islam and *adat*, and that they consistently referred to broader cultural values of agreement and fairness. I suggest that the change in their decisions was due to the combination of political centralization, increased legitimacy of the Islamic court, and judges' perceptions of a more individualized society.

Between 1960 and 1994, Islamic court judges in the Gayo Highlands of Central Aceh, Indonesia, radically changed the way they judged disputes over family property. Whereas once they had generally upheld local Gayo social norms (*adat*) about who received family property, by the early 1990s they consistently overruled settlements based on those same norms and redivided property according to Islamic law. From a conservative court that turned down requests to overturn past divisions of farm lands, the religious court became an activist court that routinely overturned such divisions. And yet over this time the relevant substantive law changed very little, and judges recognized that both *adat* and Islam provided legitimate bases for decisions. Why, then, and based on what reasons, did the court shift its overall stance so markedly?

I take this question as my point of departure for exploring the recent social history of judicial reasoning in the Gayo Highlands, drawing on case dossiers, interviews with judges, and field research into the political and economic history of the region.

Field research was funded by the National Science Foundation and the Wenner-Gren Foundation. I would like to thank Jack Knight, Daniel Lev, and Susan Silbey for their comments.

Law & Society Review, Volume 34, Number 1 (2000)

The issues involved are broad ones. Judges everywhere find themselves having to select among competing legally relevant social norms, such as what counts as a contract, or where lie "the best interests of the child."[1] Choosing among norms, or, more often, weighing them against each other, usually is shaped by a sense of community standards, by an estimate of how the choice will affect community life, or by policy preferences. Furthermore, this weighing is likely to change along with the social and political context in which judges live and work.

Postcolonial societies offer particularly interesting places to study how judges have reasoned in the face of competing norms. Judges in these societies have been finding their interlegal feet amidst a multiplicity of statutes, court decisions, religious doctrines, and colonial-era treatises on "customary law."[2] Their public statements on laws and customs often become flash points for national cultural debates. In most societies with large Muslim populations, these debates turn on judgments about the relative legitimacy of secular and religious sources of law.[3] In Indonesia, a multiconfessional state with the world's largest Muslim population, not only have there been extensive public discussions about the validity of claims based on customary norms, Islamic law, statutes, and judicial decisions, but these discussions also have been part of a process of general, heightened reflection on the proper relation of Islam to national identity.

In the Gayo courts judges have paid particular attention to local processes of reaching consensus, and their evaluations of such processes are of significance to broader political discussions in Indonesia. Achieving consensus through deliberation," *musyawarah mufakat*, a central element in Indonesian ideology, bears some relationship, not yet well understood, to local ways of resolving disputes. In cases from the 1960s and from the 1990s,

[1] Rather than attempting to define "law," I would note that in societies where actors recognize the existence of one or more "legal systems," distinctions between laws and other types of social norms are made, regarding how they are created (e.g., as statutes or as custom), how they are enforced, or both. Any social norm can, however, become legally relevant to a decision or action. Precisely how such terms as "law" (or "religion") are used comparatively cannot itself be a matter for social science legislation, I believe, because such terms are defined, and often contested, within each society. (See Tamanaha [1993] for a related critique of the concept "legal pluralism.")

[2] Although legal anthropology has developed quite an extensive literature on the ways ordinary people choose among several possible forums for resolving disputes, less attention has been paid to judges' reasoning processes in the face of competing norms (Benda-Beckmann 1984 is one exception). Analytically closest to the perspective adopted here are ethnographic studies of how disputants manipulate legal norms and meanings (Comaroff & Roberts 1981; Just 1990), historical studies of how new legal norms are constructed, whether in the United States (Horwitz 1992; Karsten 1997) or in other settings (Moore 1986), and legal studies of how agreement is produced in appellate courts (Epstein & Knight 1998; Sunstein 1996). "Interlegal" is taken from Santos (1987); Merry (1992) reviews studies of law in postcolonial contexts.

[3] Among recent studies of the interactions between Islamic and secular legal systems are Esposito (1982) on changes in family law and Brown (1997) on judicial systems in Egypt and the Persian Gulf states.

the Islamic court judges in the Gayo Highlands (and their colleagues on the neighboring general court) advanced theories as to how such local processes should be understood, and they based their decisions in great part on those theories. The theories themselves, however, changed radically. A close reading of the judges' justifications, and an attention to the political-economic context of those justifications can, I think, help us understand the historically-specific ways in which state legal institutions elaborate and extend the links between political ideology and local-level practices.

Indonesian Interlegality

The coexistence of several sets of legally-relevant norms has long been emphasized in studies of Indonesia. Indeed, Dutch colonial administrators conceptualized Indies social and cultural diversity through a legal lens. In their efforts to link colonial rule to local structures of authority, they demarcated naturally occurring culture areas in terms of what they took to be the prevailing "*adat* law" (*adatrecht*) (Ellen 1983, Benda-Beckmann 1984). Some Indonesianists have continued to view *adat* or *adat* law as the normative anchor of culture, the guarantor of locality and difference in the face of Islamic and European legal competition. For instance, in a series of lectures designed to highlight the cultural organization of legal reasoning, Clifford Geertz (1983) counterposed the local substance and symbols of *adat* to the other forms of law—"foreign machinery" (1983:214)—whose very presence was due to outside interventions. The assumption implicit in this counterposition is that certain ideas and practices can be construed as being more culturally embedded, more indigenous, than are their competitors.[4]

Viewing *adat* as the guarantor of local culture has its difficulties: are those men and women who choose Islamic norms thereby less culturally Indonesian? And yet, highlighting the conflict among norms does raise important analytical questions. How does a judge in a general court, following procedures and substantive law inherited from the European civil law tradition, apply Islamic norms? If a judge in an Islamic court gives Islamic legal rules priority, do local social norms no longer figure as legal norms? What arguments do judges employ in order to choose among, or to integrate, these competing normative systems?[5]

[4] At the same time, Africanists were making quite distinct analytical points, highlighting the invented character of customary law institutions (Chanock 1985; Moore 1986). The contrast may be due to the very different histories of creating political units in the two continents; I find, however, a nostalgia for authenticity more often among Indonesianists than Africanists. Why this is so is an interesting question not pursued here.

[5] The issue is not a new one in Islamic history. Muslim jurists have incorporated "custom" into law through a variety of means (Libson 1997). However, the perception of

Indonesia has several distinct judicial systems; the two that concern us here are the Islamic judiciary (Peradilan Agama), which handles matters of marriage, divorce, and family property among Muslims, and the general judiciary (Peradilan Negeri), which handles all other civil matters and all criminal cases. (In most parts of Indonesia, Muslims may take inheritance disputes to either court.) Each system has its own set of first-instance and appellate courts. Appellate decisions in either system may be brought to the Supreme Court, which acts as a tribunal of cassation. Although the Supreme Court's decisions are not binding in the sense of *stare decisis*, some decisions are published in books called Yurisprudensi, and appellate courts often cite these decisions in overturning lower court findings. Despite a "separation of powers" doctrine inherited from European civil code ideology, Indonesian judges are multiply dependent on the government: all judges are civil servants, and thus financially dependent on the government; courts are administered by various ministries, not by the Supreme Court; the Supreme Court is highly subject to executive political pressure.[6]

Judges must take into account this complex legal and political context as a source of external constraints on their decision-making as well as a source of substantive law. A judge on an Islamic court of first instance must consider past decisions of the appellate court and Supreme Court, publications issued by the Ministry of Religion (which are often critical of Supreme Court decisions), and instructions received from appellate court judges. He or she will be constrained by actions already taken at the neighboring general court, which may have decided the validity of a document or the prior ownership of a land parcel. The Supreme Court may have ruled on an appeal emanating from either the Islamic court or the general court, and this ruling, whether it appears intelligent or idiotic, represents a further constraint on the judge's decision.

A judge may decide that popular opinion makes certain decisions difficult to enforce. Prior to 1989, the Islamic courts had no executory authority and had to rely on the general courts to enforce a decision—and their willingness to oblige might have depended on their own interpretation of the law or the nature of influence on them or bribes paid to them. (Indonesian general court judges have been generally thought to be highly susceptible to bribery and to influence from political authorities; Islamic court judges less so.) Judges also must consider how to weigh local social norms vis-à-vis Islamic law or statutes. These norms may be directly relevant to the application of statutory law: for

a conflict between law and custom probably has increased with the codification of religious and secular laws.

[6] The classic study of the Islamic courts is Lev (1972); for a recent analysis of the Supreme Court see Pompe (1996).

example, in suggesting what counts locally as a promise to repay a loan or as a consensus on a property division. They also may be a source of separate legal principles, but then judges may be forced to choose among alternative ideas of what *adat* really is. Is it a matter of long-standing local traditions, or a continually changing sense of propriety and justice? Whereas Dutch colonial practice was to codify *adat* as if it were a set of rules, unchanging but otherwise similar to positive law, the Indonesian Supreme Court has promoted the strikingly different idea of a "living *adat* law" among the people, a national *adat* that is gender-equal, revolutionary, and modern (Bowen 1988; Lev 1965). The view a judge holds on this question has implications for how he or she selects among competing norms. If the judge views *adat* as a set of unchanging rules, then testimony from local *adat* experts, a standard way for judges to discover the content of local *adat*, will trump other normative statements (and the older the expert, the better). If, however, he or she views adat as a "living law," then such testimony crumbles in the face of claims about modernity, particularly if supported by Supreme Court rhetoric (and the more recent the decision, the better).

Similarly, statutes may be seen as superseding *adat* norms, or, alternatively, as applying to those domains where *adat* and Islam are silent. For example, judges on the general court in the Gayo Highlands have ruled that local social norms give a right of first refusal to close relatives and neighbors of a landowner wishing to sell his or her land. A person in such a relationship may challenge a sale of land to a third party, and under certain conditions can win such a suit. But in recent cases, litigants have claimed that Indonesian statutes guarantee freedom to sell to anyone, and that such statutes override any local social norms. The issue of priority among alternative sets of legal norms is still unresolved.

It is in deciding cases about family property that such complexities most fully arise in Indonesia, where almost every conceivable type of indigenous inheritance system can be found. Among local systems that are tied to long-standing *adat* norms, some allocate a share to every child, others reserve shares of ancestral land either only to sons or only to daughters, and still others allocate ancestral lands to whichever children remain affiliated with the ancestral village after marriage. Most local systems consider the local corporate group, usually a village or lineage, to have some residual claim on ancestral lands. A considerable amount of property may be transferred *inter vivos*, via direct gifts of land, or bequests, or transfers of use-rights that then become ownership rights at the parent's death. Bequests, in particular, are a favored mechanism, because they allow the parents to fine-tune the transfer but retain the property, and through that property exercise some control over their children.

Islamic norms regarding inheritance stand in striking contrast to all *adat*-based systems.[7] Islamic jurisprudence knows nothing of village or lineage claims. Islamic law dictates that property be awarded in fixed ratios according to the gender of the claimants and their genealogical ties to the deceased. The Islamic jurisprudence currently dominant in Indonesia disallows any bequests to heirs and places limits on the giving of property (Bowen 1998).

Despite this sharp contrast between *adat* and Islamic inheritance norms, many Indonesian Muslims have been strong supporters of expanding the jurisdiction of Islamic courts to include the inheritance system, in part because the restricted jurisdiction of these courts was part of Dutch colonial policy. In 1937 the Dutch revoked the right of religious courts on Java and Madura to decide inheritance cases, thereby making Islamic inheritance law a symbol of the fight against colonial rule (Lev 1972).

These jurisdictional issues also have become arenas for postcolonial debate about national identity. In the 1970s, for example, Parliament considered allowing the general courts, not just the Islamic courts, to validate the marriages and divorces of Muslims. Heated debates ensued in the national press and in the streets on topics of national identity and religious freedom: some argued that the measure would contribute to creating an integrated national legal system; others, that it would abrogate the rights of Muslims. The proposals were abandoned, and a much different bill passed, one that preserved the monopoly held by the Islamic courts over Muslim marriage and divorce. When in 1989 the government successfully proposed expanding the overall jurisdiction and enforcement powers of the Islamic courts, a similar debate took place, with some parties warning that the bill heralded the creation of an Islamic state; others, that it finally undid the colonial wrongs perpetrated against Indonesian Muslims.

Many, though certainly not all, Indonesian Muslims today see the presence of strengthened Islamic courts as guarantors of their religious identity within a pluralistic, nonsectarian national context. From the many new political parties to have emerged in the wake of Suharto's fall in May 1998 have come a wide variety of platforms for Indonesia's future, but the parties that won significant shares of the vote in June 1999 agree on a view of a multiconfessional and legally pluralistic Indonesia.

[7] For the norms as found in classic jurisprudential literature, see Coulson (1971); Esposito (1982) documents modern reformulations of these norms.

Power and the Courts in the Gayo Highlands

The problem of implementing Islamic law in the context of local *adat* norms, and within a set of European-derived legal institutions, is nowhere more complex than in Aceh, the Indonesian province on the island of Sumatra containing the Gayo Highlands. Throughout Aceh's history, sultans, jurists, and judges have promoted Islamic institutions in the face of strongly held local norms and beliefs.[8] The Darul Islam rebellion against the central government began shortly after independence, and newer versions of the movement have simmered ever since, kept alive in part by resentment at the export of highly valuable oil, gas, and forest resources, and at the heavy hand of the mainly Javanese troops stationed there since 1985. Vigorous, sometimes violent, calls for renegotiating the relationship between Aceh and Jakarta followed the fall of Suharto in 1998.

Since the 1970s, an Acehnese Islamic legal and political hierarchy—composed of members of the State Islamic Institute (IAIN, Institute Agama Islam Negeri), the appellate Islamic court, and the Council of Ulama (Majelis Ulama), all located in the provincial capital, Banda Aceh—has sought to tighten its control over local judges. Stricter supervision has led to frequent reversals of lower-court decisions and a higher degree of confrontation between the norms of *adat* and those of Islam. Local social changes, including more smallholder growing of commercial crops, and national legal changes, including the granting of broader legal competency and enforcement powers to the Islamic courts, have led to more litigation and to a higher profile for these courts.

In the central, mountainous part of Aceh lie the Gayo Highlands, whose largest town is Takèngën. During the first fifteen years after independence, the highlands were in near-constant turmoil. The battles fought in northern Sumatra in the late 1940s against the returning Dutch and their allies involved many men and women from the highlands. The Darul Islam rebellion set villagers against one another and isolated the towns from the villages. The former were largely controlled by troops from Jakarta, and the latter were largely controlled by rebels. The massacres of the years 1965–66 followed on the heels of the rebellion and were exacerbated by still-raw resentments over betrayals and collaboration.[9]

The courts that were created in the highlands shortly after independence had very different histories and faced very differ-

[8] Perhaps only in the province of West Sumatra, home of the Minangkabau people, has there been a similarly complex history of Islamic political and legal innovation (see Benda-Beckmann 1984).

[9] For the political and economic history of the Gayo region to 1990, see Bowen (1991:60–135). For an analysis of recent uprisings in Aceh, see Kell (1995).

ent challenges, but they shared a commitment to create a more Islamic society and the problem of being weak institutions in a climate of turmoil and uncertainty. The general court (Pengadilan Negeri) succeeded a local colonial court and continued to hear all criminal cases and to accept litigation on a wide variety of civil matters. For its first three decades it was dominated by men from the Gayo Highlands or nearby northern Aceh, and its chief judges served for as long as ten years.

The Islamic, or religious, court (Pengadilan Agama), by contrast, was a new institution. During the colonial period no such courts had existed, and although in theory people could take inheritance cases to a religious official, they rarely did so. When the court was created in 1945, it was under provincial, not central, government authority. For its first few decades its legal basis remained unclear, it received little funding, and it had to rely on the general court to enforce its decisions. Although its authority to handle marriage and divorce matters was popularly accepted, such was not the case with its authority over inheritance disputes.[10] "Some people considered it a mock court," recalled one older judge. For staff and judges it depended on local talent, on those few Gayo men who had received training in Islamic law outside the region.

By the late 1970s, the backgrounds and interests of the judges on the two courts had diverged sharply. Today, all general court judges have law degrees and come from outside the region. Their career tracks involve Takèngën only incidentally. They spend three to five years in the town and dream of their next posting, which they hope will be in a larger city, or at least nearer to their birthplace. Islamic court judges, by contrast, remain tied to local concerns. Even as of the mid-1990s, the court only had two judges with law degrees; to make up the three-judge panel required to hear inheritance cases, a local man who had served as chief clerk in the 1950s and 1960s was appointed as judge, despite his lack of a law degree. These judges continue to perform the role of wise counselor, often speaking in Gayo to make a point more effectively, and rebuking witnesses who mistakenly describe Gayo *adat*.

Until 1970 disputes over inheritance—a general term I shall use to include estate divisions, gifts, and bequests—could be brought to either court, although this "forum shopping" possibility always aroused some discontent. Indeed, general court rulings on Islamic law were often overturned by the appellate court as

[10] In 1953 the Aceh Chief Justice, Tengku M. Hanafiah, wrote to the head of the Office of Religious Affairs (*Kantor Urusan Agama*) in Banda Aceh, with copies to the religious courts throughout Aceh, that although the courts do have jurisdiction over inheritance disputes, settling them "makes things very difficult" (*sangat merumitkan*) because the court's status has not been clarified by the central government. "But we cannot just refuse to hear such cases," complains Judge Hanafiah, "so what should we do?" (letter in court archives).

overstepping the court's competence. In 1970, public protest against decisions taken by a general court judge in West Aceh led the two appellate courts to reserve to the Islamic court decisions on how an estate ought to be divided. However, because many inheritance disputes involve side issues that do fall under general court jurisdiction, such as the validity of a document or the ownership of a plot of land, some cases end up at both courts even today. (Several cases from Takèngën reached the Supreme Court twice during the 1990s, once from each of the two courts of first instance!)

Affirming Consensus in the 1960s

During the 1940s and 1950s, few Gayo people brought inheritance disputes to the Islamic court. This was so for a number of reasons: the institution was new, the region was in turmoil, and older *adat* procedures were strongly reinforced in the villages. By the 1960s, a handful of such cases began to show up in the court each year, but even then most suits were withdrawn after the two parties reached a settlement.[11]

When the parties failed to settle, the dispute usually involved a conflict between the Islamic norms cited by the plaintiff as the ground for requesting a redivision of wealth and the *adat* norms invoked by the defendant according to which the wealth had in fact been divided. It was precisely the stark opposition between the two sets of norms that made settlement in such cases difficult. However, the judges tried to avoid siding explicitly with either Islamic law or *adat*, but instead searched for a standard that could be reconciled with both normative systems. Sometimes they found that a prior agreement between all parties nullified the plaintiff's claim. Because the general idea of agreement, contract, or consensus is present in *adat*, in Islamic law, and in civil law, this finding allowed the judges to avoid giving priority to one or the other of the two normative systems.

In the public dossier for a case, the presiding judge must give the reasons for the decision in a deductive manner, in the format associated with the European civil law tradition (but unusual for Islamic judiciaries; compare Messick [1993] and Rosen [1989]). The judge's statement thus allows us to understand something of the public interpretive process at work.

[11] For example, the religious court's record for 1960 lists 9 divorce cases, 18 cases where a wife demanded material support from her husband, 10 requests for marriage certificates, 2 requests that a gift be declared valid, and one dispute over the division of shares (marked as withdrawn, thus settled without a ruling). I hesitate to give counts of kinds of cases based on all the files I have read for a given set of years because I do not know whether the files are complete. For example, a record without a decision probably means that the case was withdrawn, but it could, especially during the years of local armed struggle in the 1950s, simply mean that the decision is missing. Thus for a sense of the frequency of cases I rely on the few annual tallies provided in the archives.

Illustrative of the reasoning in this period is the 1961 case *Usman* v. *Serikulah* (PA 41/1961).[12] The case pitted the child of a sister against the child of a brother. Usman asked the court to redivide land once belonging to his mother's father, and to do so according to Islamic law. He admitted that two years earlier, in 1959, there had been an attempt to divide the rice fields by general agreement among the heirs, but he stated that now he was not satisfied with the results of this meeting. The defendant, Serikulah, was the daughter of the original owner's son, and thus was Usman's mother's brother's daughter. Her son Sahim controlled the land at the time of the suit, and had obtained title to it from the District Land Registration Office (making a redivision of the land difficult).

Serikulah said that Usman's mother (her own father's sister) had married out of the village, and that, following Gayo *adat*, when she married out she had received bride goods (tempah) that were intended to cancel any future claims to a share of the estate. Thus, she said, according to Gayo norms the plaintiff's claim was without basis. Her claim that the bride goods signaled Usman's mother's renunciation of any further claim on the estate fits my own information about Gayo norms and practices prevailing at that time (and to a lesser extent today). Daughters or sons who married out of the village lost claim on village lands, affirming a cultural emphasis on maintaining social continuity by keeping all ancestral lands in the hands of members of the village. Land, village, and residence were of a piece.

But Usman's claim that Islamic law gives him a share of his grandfather's lands regardless of such payments or marriage type also agrees with the understandings of religious norms commonly held by scholars and judges at that time, as well as today. No obvious error in logic or in claims about the norms of the time are to be found in either party's case.

The case thus presented the judges on the Islamic court, all Gayo men, with a clear choice between two sets of norms, Islam and *adat*. The judges could have taken either side, redividing the property in the name of Islam, as the plaintiff wished, or reaffirming the appropriateness of Gayo norms, in accordance with the defendant's rebuttal. But taking either side on these grounds would have been difficult. Affirming Gayo *adat* against Islamic law would have contradicted the judges' sense of their mission as Islamic judges, their very reasons for having joined the court. Several of the judges, in particular Tengku Mukhlis, Chief Judge from 1945 until 1972, were vocal proponents of a greater Islamization of Gayo society.

[12] The case numbers indicate either Pengadilan Agama (PA), religious or Islamic court, or Pengadilan Negeri (PN), general court, followed by the number and year when the case was first heard.

Affirming Islamic law against *adat* would not, however, have been an attractive alternative. Property divisions in the 1960s continued to follow the general logic of *adat*, and to oppose them would have required a great deal of authority, and the power and willingness to withstand sustained opposition. Such were not the characteristics of the Islamic court in 1961. Although overturning *adat* practices in the name of Islam might have been the policy preference of some judges, doing so at that time with respect to inheritance would have severely eroded the already thin legitimacy of the court.

Taking a strong stand one way or the other might also have had immediate political consequences during a period of continued rebellion by an Islam-based movement. No judge wished to invite retaliation from the rebels by coming out against Islamic law, or risk accusations of rebel sympathies by coming out against *adat*. Furthermore, most judges on both courts saw their own tasks as incorporating norms of Islam and *adat*. Most considered their judicial roles to be part of a general effort to replace colonial-era institutions with new ones that better reflected the shared Islamic orientation of Gayo people. However, they also saw the norms of local *adat* as important safeguards of Islam—as the "fences guarding religion," in the words of one religious teacher.

In the end, the judges avoided framing the case as "Islam versus *adat*." Instead, they decided that in 1959 the two parties had already reached an agreement, a *penyelesaian secara perdamaian*, "bringing (the matter) to a close through reconciliation." The 1959 meeting had ended by awarding Sahim the rice fields. The judges noted that the plaintiff, Usman, was present at the meeting but that he had remained silent, even after the meeting's presider had called out three times to all present: "Don't anyone ever bring suit over these fields again." The judges concluded that Usman's silence had implied his consent to the agreement. They rejected his suit.

Other cases were decided in similar ways. In a case heard the following year, *Inën Deraman* v. *Inën Nur* (PA 25/1962), the plaintiff, who had married out of the village, had received about one-half as much land as had her sister, who had remained in the village. The plaintiff requested a division according to Islamic law, which would have given the two sisters equal shares. The defendant replied that when the plaintiff had married out of the village she had received bride goods. At the hearing, a man who had been a judge on the Islamic court in the 1950s testified that he had attended the meeting where land had been divided, and that the plaintiff had been overjoyed to get anything, "because in those days women who married out of the village never inherited land." The court said, "We should not keep redividing wealth," and again rejected the plaintiff's claim.

During this period, judges at the nearby general court were also hearing appeals to divide wealth. In the 1960s these judges resembled their counterparts on the religious court: they were mostly Gayo men, often from religious backgrounds and sometimes without law degrees, although with some previous court experience. As with their counterparts on the Islamic court, they sought to avoid overturning past property divisions, and they argued, again in agreement with their colleagues on the other court, that outcomes of village deliberations rested on consensus.

Principal among these judges was Abubakar Porang. Born in the southern region of Gayoland, Judge Porang was a strong proponent of Islamic law, but he was also reluctant to challenge older Gayo practices. He joined the court in 1961 and served until his death in 1970. In the 1960s, the general court no longer avoided deciding inheritance cases; indeed, in 1961 alone they decided seven of them. Abubakar Porang wrote most of these decisions. He claimed that the court was enforcing *adat*, and that the "living *adat*" in the Gayo Highlands was now Islamic law.[13] Accordingly, in cases in which the plaintiff asked for a division of property and the defendant did not make a reply based on *adat*, the judge generally found for the plaintiff, and ordered a division according to Islamic law. When these decisions were appealed the appellate court overturned them on grounds that the general court did not have jurisdiction to determine the heirs or divide property.[14]

However, in those cases in which the defendant did claim that general agreement based on *adat* norms had been reached when the property was divided, Judge Porang and his colleagues tended to support the defense. Indicative of his reasoning was a 1964 case, *Inën Saidah* v. *Aman Jemilah* (PN 47/1964), which presents facts similar to the religious court cases examined above. Two sisters, both of whom had married out of the village, sued their cousin, Aman Jemilah, who had remained in the village, for equal shares of lands once owned by their grandfa-

[13] Indeed, the Supreme Court (MA 564/1975), in its comment on a case originating from Takèngën in 1969, agreed, stating that in Gayoland the Adat Law on inheritance was that division is according to Islamic Law (*Yurisprudensi Aceh* 1979:7). The court may have based its statement on a 1973 study by law students in the highlands, or on Judge Porang's decisions. As with most such statements, which are meant as prescriptions but masquerade as descriptions, this one in no way reflected local practices.

[14] Among such cases are PN 28/1961, 121/1963, 66/1964, and 110/1964. In these cases Judge Porang ordered that the estate be divided "according to faraid [Islamic shares]"; the appellate court found that this instruction overstepped jurisdictional bounds. The Aceh appellate court's comment in overturning PN 110/1964 was typical: "It is the Religious Court that has the right to investigate and decide cases involving inheritance and inheritance disputes, according to the laws in force in this area." The appellate court acted in the same manner on appeals from first instance general courts elsewhere in Aceh. For example, in a 1964 inheritance case from Lhokseumawe, in North Aceh, the appellate court ruled that the first instance general court did not have jurisdiction to hear an inheritance dispute (Mimbar Hukum 1990,2:97–98).

ther.[15] The defendant stated that he had received the land as a gift from his father and had farmed it ever since then. Several witnesses testified that at his father's funeral, when there was a call for anyone to whom the deceased owed money to step forward, the plaintiffs did not say anything.

This dispute involved a conflict between two ways of interpreting "Gayo *adat*," not a conflict between *adat* and Islam. Neither party referred to Islamic legal concepts, nor did Judge Porang.[16] The plaintiffs demanded their equal rights in the name of the "living *adat*," a phrase used by the Supreme Court in a series of decisions granting equal rights to an estate to all children (Subekti & Tamara 1965:47–49, 85–88, 126). The defendant based his claim to the land on the argument that the plaintiffs were silent during the period when he worked the land.

In *Inën Saidah*, Abubakar Porang found for the defendant. He stated that the two sisters had received bride goods at marriage, and that "often among the bride goods is included a share of the estate, which sometimes is made official and sometimes not. Furthermore, from the time when the defendant's grandfather still lived, to the defendant's father, to the defendant, the plaintiffs never came forward to make a claim, such that the plaintiffs, according to *adat* law, are 'hanging, not quite reaching, having no wealth; with a broken bridge, having no inheritance,' *laman*."

The decision justified the prior division of wealth on the basis of two norms of Gayo *adat*. One of these norms resembles the concept of "adverse possession" in Anglo-American law, that a claim elapses if the plaintiff has allowed the defendant to possess property without objecting to that possession. Judge Porang emphasized that a great deal of time had elapsed after the property settlement with no one objecting to it.[17] This norm had been invoked by the court in earlier cases concerning property that had been abandoned or lent out and then reclaimed; some of these decisions (e.g., PN 76/1959) quoted the same Gayo maxim. The other norm was that cited by the Islamic court in the cases discussed above, that the plaintiff had already received a share of the estate at the time of marriage and so expected to receive no further portion of the estate. This norm served to explain the plaintiff's silence. Justified in this way, the general court's decision did not contradict the Supreme Court's ruling

[15] The record is unclear as to the genealogical connection. The sisters had married outside of their village; whether the tie to the original landowner, the grandfather, was through their mother or their father is not recorded, precisely because it is the form of their marriage that is the relevant fact, not the genealogy.

[16] Perhaps Judge Porang's experiences of being overruled by the appellate court had made him wary of mentioning Islam as a legal basis for his decisions.

[17] The colonial-era civil law code, the Burgerlijk Wetboek (Subekti & Tjitrosudibio 1961), which is still cited in decisions, recognizes a version of "adverse possession."

on the "living *adat*," and it was upheld by the provincial appellate court in 1975.

As I have discussed elsewhere (Bowen 1988), the justification involved an extension of Gayo concepts into new domains. In its everyday use, the term *laman* refers not to the elapse of claims but to the specific right of a ruler to withdraw use-rights to land if stipulated conditions for that use (such as improving the land) are not met.[18] The maxim quoted by Judge Porang, also in support of his argument that Gayo *adat* recognizes the elapse of claims, is used in everyday social life to refer to the break that a daughter makes with her natal village when she marries into another village.[19] Understood in this way, the maxim did indeed apply to the case at hand—the daughter who married out had thereby lost her claim on her parents' estate. However, applying the maxim in that way would have directly contradicted the new distributional norms proclaimed by the Supreme Court. Understood in another way, concerning the plaintiff's implicit agreement to the property division (signaled by her inaction), the maxim invoked a general theory that a past consensus over how to distribute property ought to be respected. This understanding evidently was acceptable to the appellate court.

Thus, the Takèngën general court justified its conservative decisions regarding family property along the same lines as did the Islamic court, and elaborated the justification by incorporating a principle that had already been well established with regard to another class of cases.

Inspecting Consensus: The Assumptions Behind the Decisions

These decisions by the Islamic and the general courts rested on two assumptions. The first was the empirical assumption that the village-level deliberations dividing the estates were consensual rather than coercive. The second assumption concerned the correct set of norms to apply: that the social norms understood and accepted by the parties to the original divisions at the time of those divisions are the correct legal norms on which to base a current decision. From these assumptions one could quickly infer the decisions themselves. Because the prior distributions of property did indeed comply with the norms of *adat*, and because they had been ratified at village assemblies attended by the plaintiffs, the plaintiffs lost their cases. Both assumptions are open to

[18] Two surveys by the Ministry of Justice found that Gayo *adat* law did not recognize a concept of "elapsed claims" (Indonesian *daluwarsa*) for any type of property (Departemen Kehakiman 1973, 1984).

[19] On the ways in which Gayo *adat* is embodied in general maxims, to which village headmen, religious officials, or others claiming authority then give contextual specificity, see Bowen (1991:139–68).

question and, indeed, both later were rejected by judges on both courts. Let us consider each in turn. The first is that meetings involved consensus and agreement. Such claims are ubiquitous in Indonesia; indeed, "consensus through deliberation" (*musyawarah mufakat*) is a key plank in the state ideology. It is invoked daily in national political life, often as cultural cover for efforts to suppress popular dissent.[20]

Any legitimacy attached to these national claims is at least partly due to their resonance with long-standing local norms that decisions should be reached through consensus. In Gayo society, *mupakat* names the appropriate way of reaching all decisions through a consultation among village elders. Movement toward consensus is structurally part of the Gayo ritual-speaking that gave public conclusion and resolution to village-level disputes (Bowen 1991:139–68); this movement diagrammed the putative social process of people changing their opinions from divergent to convergent. So widespread in the archipelago are such norms that Clifford Geertz (1983) took Indonesian ideas of arriving at consensus through harmonious speaking as the defining feature of archipelagic *adat*.[21]

The frequency of claims that decisions were consensual does not make evaluating such claims any easier, however.[22] My own experience, most of it in the five-village complex of Isak, is that not only do different participants in village meetings evaluate the outcomes differently, but that even in the words of a single participant one can find more than one type of evaluation. In 1994, Tengku Daud Arifin, a former Isak religious official (*qadi*), whom I have known for two decades, explained, first, how these village deliberations produce a consensus and then, immediately afterward, how he and his siblings divided his parents' lands:

> When I was the Qadi we never had a case go to the Islamic court, nor has there been one since. I have often been called to resolve cases. I always first say what the divisions of the estate are according to Islamic law. But then some of those present will say, "But that is not fair (*adil*)," because the daughters get less then the sons. Or some of the children say, "I don't really need that," or the sons ask the daughters to renounce (*ikhlasën*, "give sincerely") their shares, because they are already provided

[20] So accustomed are political actors to deciding by "consensus," with varying degrees of de facto underlying coercion, that when in the post-Suharto era the national Parliament made a decision by "voting" (English in the original, in scare quotes), it was the headline story of the day (Kompas on-line, Sept. 1998).

[21] A distinct theory about consensus comes from Islamic jurisprudence, in which the consensus (*ijma'*) of jurists can be the basis for law. The validity of arguments from consensus is hotly debated within Islamic circles; on recent uses of the category in Indonesian legal reform, see Bowen (1999).

[22] The problem is a general one for theories of deliberative democracy as well as for studies of specific political processes. On what grounds can one claim "consensus," given that any deliberative process will involve people changing their minds (perhaps by definition), and such changes involve influence, probably authority, and perhaps power?

> for in their husbands' villages. So they work out a better arrangement peacefully. That's then fair and sincere.
>
> When my mother died [his father had died first] we all gathered together to divide the estate. One younger brother said if he did not find it fair he would not go along with what we did. Another suggested they divide it all up, and we worked out a division whereby I got the rice land way up in the weeds. But then I spoke, and as the eldest I could say: "No; let's try again," and we redid it, and now I got the lion's share of the rice land close to the village [here he breaks into chuckles]. The other siblings have not used their shares; I work all the land, and now my children and grandchildren [work it], because they are all civil servants [rather than full-time farmers with their own lands].

Tengku Arifin's recounting of the process was complex. He initially described the village deliberations as moving from an application of the letter of the law toward an application of superior arrangements that responded to ideas of fairness. This movement was possible, he suggested, because some participants sincerely renounced their rights in order to respect the balance of needs. It is this sort of characterization of village deliberative processes that makes plausible legal judgments (as in *Usman*) that agreements proceeding from such meetings ought to be taken as evidence of the sincere wishes of all participants, particularly in the absence of any public objections. I also heard villagers, usually men, counterpose the mechanical application of Islamic law to the morally superior recourse to feelings, needs, and sincerity.

But Tengku Arifin spoke in a different way later in the passage, when he chuckled over the way he, the eldest brother, could dictate which agreements would be acceptable and that he could also, even after the agreement, retain de facto control of most of the land, with the justification that his own children, with civil service occupations, did not have their own land. It is precisely this power of eldest brothers to defer divisions and retain control that has driven some children, or even grandchildren, to sue for redivisions in the court.

As the *qadi's* "double-voiced" recollections illustrate, one can infer from these meetings either consensus or coercion, or some combination thereof. Judges in the 1960s tended to practice a "consensus" reading of such meetings. To support their reading in any particular case, they would point to evidence indicating that, despite the plaintiff's subsequent dissatisfaction, at the time of the original agreement she or he was part of this consensus. This evidence could include testimony that the plaintiff had been silent when the deliberations were read aloud for final approval, or that the plaintiff freely accepted the result, as in the former judge's testimony that the plaintiff had been happy with the outcome.

Of course, the plaintiff's satisfaction at the time may have been because the then-prevailing social norms did not offer any alternative. As the former judge said, that was how things were settled at that time; no one who married outside of the village ever inherited wealth. That the satisfaction of the plaintiff some years earlier should be decisive brings into play the second major assumption underlying decisions of the 1960s, namely, that it was the role of the judges to render decisions according to what was appropriate under the local social norms prevailing at the time and not to challenge those norms on the basis of the plaintiff's rights under Islamic law or a new interpretation of *adat* law.

As applied by the Islamic court judges, this assumption, which may or may not have been publicly articulated, resembles the so-called reception doctrine advanced by colonial administrators, under which Islam was considered to be the law of the land only insofar as it had already been accepted into local *adat.* (This doctrine has become emblematic of colonial anti-Islamic policy, and for that reason a religious court judge would be horrified at my comparison.) The assumption justified the courts proceeding cautiously and conservatively at a time when that course may have seemed more prudent to the judges.

Hierarchy and Economy Since the 1970s

Changes in highlands (and national) political and economic life that began in the 1970s have presented the Islamic court with a new set of possibilities and constraints. The court's prestige and the volume of its tasks have risen since the mid-1970s, due in part to changes in the national legal environment.[23] The 1974 marriage law required all Muslims, men and women, to declare their divorces in the Islamic court; no longer could men simply pronounce the divorce utterance, the *talaq*, in order to be recognized as divorced. A 1989 bill created a uniform system of Islamic courts throughout Indonesia and gave the courts the power to enforce their own decisions. The Compilation of Islamic Law, given the force of a Presidential Decree in 1991, was intended to render the substance of religious court decisions uniform throughout Indonesia (see Bowen 1999; Cammack 1997).

At the same time that these measures gave greater powers to the Islamic judiciary, other measures were intended to increase the degree of hierarchy within that judiciary. The Ministry of Religion has required all courts to subscribe to its publication *Mimbar Hukum*, which presents critical reviews of decisions by lower, appellate, and the Supreme Court. In Aceh, the provincial appellate court began to subject local judges to more scrutiny

[23] Recall that after 1970 decisions on the proper division of an estate were reserved to the Islamic courts.

outside of its appellate review process, through seminars and briefings held in the capital. Review itself became more likely, as litigants were more likely to persist in their attempts to redivide wealth, and to appeal to the appellate court in Banda Aceh, request cassation in Jakarta, and then start all over if they lost. Few cases in the 1960s were appealed; by the 1980s nearly all inheritance-related cases brought to either court were appealed. In Aceh, the appellate court has increasingly demanded that gifts, bequests, and other transactions be carried out to the letter of the Islamic law, as they see it, and they do not hesitate to rebuke the Takèngën judges when they err in this or in other regards. (I have witnessed rather sharp rebukes.)

But the broader political environment has also changed. The first decade of the New Order saw a gradually successful effort by the central government to suppress political dissent, to force local religious leaders into GOLKAR, the state party, and in general to penetrate civil society through state-run schools, mosques, foundations, and so forth. Interrogations of local religious leaders and the continual invoking of the "latent Communist threat" kept the level of fear high. Requiring general court judges to move from one posting to another at frequent intervals has been part of the strategy of greater central control; it prevents judges from developing sympathies with local movements and causes and emphasizes their financial dependence on the central government. Such dependence continued under the post-1998 Reform Era.

Finally, the decades since independence have witnessed a movement in economic activity and social norms away from a life focused on the village and on the ancestral land contained therein and toward a life focused on new cash crops and trading activities. In the 1950s and 1960s, even in villages near the town, farmland was usually ancestral rice land, tended by sons or daughters who had remained in the village after marriage. Households farming a group of contiguous plots shared the work of managing irrigation and performing rice rituals and saw the occasional outsider who acquired one of their plots as bringing disharmony to the land. Children who left the village after marriage had no continuing claim on village lands.

By the late 1970s, more and more villagers had chosen to pursue cash cropping, particularly of coffee, as coffee prices soared and as improved roads lowered transportation costs. Through the 1980s and 1990s, villagers left their home villages to open up new lands, some branching out into other crops such as patchouli or citronella. Sometimes they returned to their villages, but their movements had created a new sense of the relationship between village and land. Rather than something you inherited as part of your continuing membership in the village collectivity, land was more often than not something you obtained on your

own. More people after marrying were living in neither the husband's nor the wife's village but somewhere else again, where the resources were: the town of Takèngën, the coffee-growing villages to its north, or in a new area of settlement.[24]

As movement among villages became more common, and land became more likely to have been purchased or cleared than inherited, norms about passing on land to children also changed. Awarding shares of an estate to children who had left the village came to be seen as less radical a move than it had been (see Bowen 1988). This shift in the culture of land and home was reinforced by state laws, which recognized villages only as residential and administrative units and recognized only ownership of land by individuals, with title or other written evidence of ownership outweighing any other kind of claim.

Moreover, as the commercial value of some land increased, so did the stakes of battles over inheritance. Litigation today over lands generally concerns coffee plots or areas located near the expanding commercial section of town. Whatever the social cost of suing for such lands might be, the potential economic benefits have risen dramatically.

Suspecting Consensus: The Islamic Court in the 1990s

These changes—toward greater religious court autonomy locally but more supervision from above, toward more effective central governmental control of local affairs, and toward a more individualistic idea of residence and property—have meant that judges in the 1990s faced a very different set of possibilities and constraints than did their predecessors in the 1960s. In the early period, judges, especially Islamic court judges, found themselves with a weak political base and a relatively strong set of local norms. Judges on both courts operated in an environment of legal unclarity, both about which laws were to be applied and about who had the power to decide whether the court was operating correctly or not. By the 1980s and 1990s, Islamic court judges were expected to apply religious law, spelled out for them in the new Islamic law code, in appellate decisions, and in ministerial publications. They could do so in a social environment in which older Gayo norms about the transmission and division of property were no longer clear to many actors, much less thought to be generally applicable. The overall legitimacy of the Islamic court in Takèngën had increased, and judges had less fear of retaliation for unpopular decisions.

[24] For example, the Isak village I have followed in most detail, Kramil village, had 55 households in 1979 and had grown to 70 in 1994. But of those 70 households, only 47 had their main house in the village or in the nearby Isak shop area; the rest lived in coffee-growing areas. In 1979 only 6 households grew coffee; in 1994, 37 did.

In the 1990s judges considered themselves obliged to redivide an estate when the plaintiff was within her or his rights. In discussions with me in 1994, they explicitly denied that there was any temporal limitation on the right to bring suit. At the general court, I asked a judge from Java about a hypothetical case in which an estate had long ago been divided and the plaintiff had never raised the matter, but who then, ten or twenty or more years later, brought suit to the court for a redivision. I asked, "Does the delay weaken her case?" The judge's reply was "No, there is no statute of limitations in such civil cases. Furthermore, that she was silent would not signal that she had accepted the earlier division of wealth; she would have had to acknowledge that she agreed with that division." A judge at the Islamic court explained: "There is no statute of limitations in the religious court. In rights to land there is: for example if you and I work some land, and I let mine go, and after awhile you start working it, and 20 years later I demand it back, that's too late. But if the case is clear a division made a long time ago can be successfully challenged." I then asked, "What if the plaintiff was silent at a public meeting and sues much later?" The judge responded: "Well maybe she was silent because she was embarrassed (*kemèl*) about opposing her parents' wishes."

Following this logic, the Islamic court judges in recent years have generally divided estates when asked to do so, declaring that the plaintiffs have the right to demand an Islamic redistribution of the property even if prior agreements had been made. When defendants have protested that they had received portions of the estate as bequests (*wasiat*) or gifts (*hibah*), the judges usually have declared that the consent of all the heirs would have been required for those transfers to have been legitimate, and they have voiced suspicion about claims that consensus among the heirs was reached, even when a document to that effect was produced.[25]

Contributing to such suspicions is a greater litigiousness in Takèngën. Today "consensus" is difficult to make stick, even when an agreement is reached in court. Not that the courts do not continue to try. The head of the Islamic court, Judge Hasan, explained in 1994

> that when people come to us, they usually begin by asking what the law is, to see if they have a claim. Of course, the people who come are those who feel they have not received their due; they are equally likely to be men or women. We explain that heirs have a right to a share of the wealth, and they also have the duty to pay off debts. We urge them to work out something by searching for consensus in their village. Even if they make a formal request for a finding we send them off for two weeks or

[25] For a detailed analysis of the current and shifting jurisprudence on gifts, see Bowen (1998).

> sometimes one week to try and work it out first, and only then let them come back. Sometimes they come and ask me to divide the estate before them in a familial manner (*secara kekeluargaan*), not in the form of a lawsuit, and then I do that in the Islamic way.

If the heirs reach an agreement outside the court (usually with the help of a legal scholar), they usually write down the result and have it witnessed by their village headman. The document (a *surat penetapan*) then has legal standing: it is, for example, recognized by the Office of Land Registration as the basis for a valid claim to own a plot of land.

The following case illustrates the court's willingness to validate such agreements and also the difficulty of making them stick. *Sulaiman* v. *M. Ali* (PA 60/1973) was first heard in 1973, and ostensibly settled in that year, but it was resolved only in 1994. The dispute concerned a small amount of rice land once owned by Inen Lebah, who had three children. Her son had inherited all the land and had passed it on to his own children; these two grandchildren of Inen Lebah were the defendants. The three plaintiffs were the children of Inen Lebah's eldest daughter, who themselves had inherited no land from their grandmother.

In February 1973 the plaintiffs and defendants approached the Islamic court and were told to settle the dispute among themselves. They informed the court that they had agreed to divide the land into three equal portions, one for each of Inen Lebah's children (each then to be subdivided among the children's children). The court agreed to divide the wealth in this way, "equally among all parties, given that this *musyawarah mufakat*, consensus through deliberation, does not conflict with the rules of Islamic law, and so it is proper to accept and ratify their agreement." The court cited as justification the letter signed by all parties.[26]

One might have thought the matter would be over, but the defendants refused to give up any of the land. Judge Hasan, in discussing the case with me, speculated that another relative had intervened and told the principal defendant that he was being stupid: why should he give up his greater right as a son's child under Islamic law for the merely equal share to which he was entitled under the agreement? At that time the Islamic court did not have the power to enforce the agreement, and the plaintiffs turned to the general court for help. The general court put them off until 1984, when a judge ordered a marshall to put the land under court seal. The appellate court in Aceh overturned this

[26] The court also cited verse 11 of the Qur'ân chapter An-Nisa', which stipulates that sons receive twice the share of daughters! The court's citation was probably a slip; but shows how any agreement among the parties is held to be proper despite the ratio of Qur'ânic shares.

order, however, on technical grounds. (The defendants also countersued in the civil court, but lost.)

Finally, in 1994 the original plaintiffs returned to the Islamic court and asked that court itself to divide the land, an action which since 1989 the court had been empowered to carry out. In May 1994 the Islamic court marshall took possession of the land and divided it into thirds, laying out new boundaries in front of the village headman.[27]

This sort of behavior by litigants has led the judges to look with suspicion on any claims to have reached consensus. But the judges also seem to hold different theories about the prevailing social norms and about how to differentiate consensus from coercion than did their counterparts in the 1960s. In the 1960s the judges on both courts stated that people followed the norms of *adat* and that agreements based on *adat* norms involved true consensus. By the mid-1990s, Islamic court judges had adopted a different theory; namely, that Muslim women and men know the estate shares to which they are entitled under Islamic law and they would not freely agree to a consensus that deprived them of those shares. The judges began to demand additional proof that an agreement had been freely agreed to by all parties before recognizing it as valid. They still stated that Gayo *adat* norms of distribution were legitimate, but they qualified that statement with the stipulation that the party relying on *adat* prove that all relevant parties had agreed to the division. In the absence of such proof, they rejected in practice nearly all litigation based on *adat* norms.

As I noted earlier, the cases in which these issues arise usually involve claims by the defendants that they hold their lands as bequests or gifts from their parents. I will consider the case of bequests here (see Bowen 1998 on gifts). Under standard Islamic law interpretations, which are followed in Indonesian Islamic courts, bequests to heirs are only valid if all the heirs agree to allow them. Under long-standing Gayo norms, however, parents may bequeath a parcel of land called *pematang* to whomever among their children cares for them as they are dying. The decision is up to the parents, and the siblings usually respect the bequest. Their consent to the bequest is not necessary for it to be considered valid under *adat* norms.

Sometimes, however, siblings do contest the claim that there was a bequest, and in the cases I read from the 1980s and 1990s,

[27] In most cases decided in the 1990s the court set new boundaries, or at least specified the new amounts due each party in square meters, rather than, as was the previous practice, merely setting out fractions of the estate. The change was due to a demand by the appellate court that the lower courts divide, and not just determine, shares in line with their new powers under the 1989 Courts Bill. In this and most other cases, even though the land was divided the parties were expected to buy each other out—a portion of a hectare divided into six or eight parts is hardly enough to be farmed—but there was no compulsion to do so from the court.

the judges then have disallowed the bequests on Islamic law grounds, even if considerable evidence exists that indicates agreement among the heirs. Agreement came to be presumptively suspected, whereas it had once been presumptively accepted. Consider *Samadiah* v. *Hasan Ali* (PA 381/1987), with additional defendants Amiruddin, Hadijah, and Tawariyah. The case involves the estate of Wahab and Maryam, who had five children: Egem, Muhammad, Hadijah, Samadiah, and Tawariyah. Muhammad had died before his parents. The case pitted one of Wahab's daughters, Samadiah, against two other daughters (Hadijah and Tawariyah) and the sons of his two other children (Hasan Ali, son of Egem; a daughter; and Amiruddin, son of Muhammad). Wahab and Maryam had left a good deal of wealth, including a house and about 4 hectares planted in rice or coffee. Samadiah had received none of it, and she asked for the wealth to be divided among the heirs.[28]

Of the four defendants, the two men responded in one way and the two women in another. Hasan Ali and Amiruddin stated that Wahab already had divided the land except for some bequested (*pematang*) lands consisting of a 1/4-hectare garden, about 1/2 hectare of rice land, and a house plot. The children had quarreled over the disposition of these lands in 1969, but had settled the dispute in a large village meeting that year, they claimed. Wahab had left a bequest that whoever took care of him would get these lands, and, according to the two men, it was Egem, Hasan Ali's mother, and her husband who had done so. They also stated that the bequest and the transfer of these lands to Egem was made publicly at a meeting and was approved of by all the children. They produced a document attesting to the bequest, a document that had been declared valid by the general court in 1970.

These two men were in a strong position to control the family wealth. Both Hasan Ali's mother and Amiruddin's father had remained in the village after marriage, and they had taken control of family affairs. The two other defendants, the daughters Hadijah and Tawariyah, had married out of the village. They appeared as defendants only because they each had received a small amount of property at the 1969 village meeting, and Samadiah wanted this land redivided, along with the larger portions controlled by the men. Under the judges' questioning, Hadijah and Tawariyah contradicted the men's story, stating that they knew nothing about a bequest and that the estate had simply been turned over to the village headman, who had divided part of it but who had left the rest in the men's hands. They, too, thought that the rest of the land should be redivided.

[28] Not to be included in the distribution were Muhammad's children, who, under the jurisprudence of the time, were kept from inheriting when their father died before their grandfather. This rule has since changed.

Now, two aspects of the case probably would have led the Islamic court of the 1960s to refrain from redividing the land. First, the village headman had already presided over a process of dividing the land that eventuated in an agreement. Second, although two defendants denied that all the land had been included in the agreement, the written agreement did include all the lands, and it had been signed by the defendants as well as the plaintiff and subsequently had been upheld by the general court.

But the Islamic court judges ruled otherwise, stating that, despite the document, the very fact that some heirs now contested the case showed the absence of consensus. (Although they made no mention of this to me, they might have disregarded the general court's finding as the result of bribery.) Furthermore, the judges argued that according to *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 only considered valid if all Wahab's children accept and approve of the declaration (of the *pematang* agreement)." Because the plaintiff and two of the defendants said they knew of no such declaration, continued the court, the *pematang* bequest could not be approved. The judges ordered all the wealth divided. They awarded $^2/_3$ of the wealth to the 4 daughters to divide equally among themselves (following the text of Qur'ân, An-Nisa' 11) and the remaining $^1/_3$ to the six children of Muhammad (as "residual heirs"). Hasan Ali and Amiruddin appealed the case. The Aceh appellate court heard the case in 1990, and returned the case to the Takèngën court, ordering them to take a second look at the document attesting to the 1969 settlement. The lower court judges did as they were told ("We still thought the daughters were pressured, but we followed instructions," said Judge Kasim), and sent the results back up to Aceh in 1992. Based on the general court's ratification of that original document, the appellate court overturned the decision and decided the case itself, in favor of the plaintiffs.[29]

As I mentioned earlier, the way the Islamic court currently interprets Gayo *adat* on bequests is inconsistent with village norms and practices, in the past and in most places today. A par-

[29] For the record, here is how the case stood in the mid-1990s: the appellate court judges stated that the defendants had admitted that the continuing dispute was about the lands that were not part of the *pematang*, and that the *pematang* lands had been properly awarded already. They then specified that the estate consisted of $1^1/_2$ hectares of rice land, a house, and a 2-hectare garden. Hasan Ali and Amiruddin asked the Supreme Court to quash the ruling, pointing out (correctly) that the appellate court had included the *pematang* lands in the estate, and that these lands had been disposed of by the 1969 agreement that the court declared as valid. (They also claimed that all the rest of the land had also been divided, either in 1969 or as separate gifts from Wahab dating back to the 1950s, and they listed the lands received by each.) As of mid-1994 the case was still before the Supreme Court; one can safely predict that the court will refuse to consider the new substantive arguments and information as inappropriate to cassation, but that the confusion caused by the appellate court, in validating the 1969 agreement but redividing the lands disposed of in that agreement, will encourage the disputants to continue their arguments for years to come.

ent's bequest is ipso facto valid; its authority comes from the right of the owner to dispose of the wealth, not the consent of the other children. The rule enunciated by the court is, however, an accepted part of Islamic jurisprudence; what the judges did was to recategorize the Islamic rule 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. But 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 *adat* versus Islam but one of enforcing a rule found in both *adat* and Islam.

But on what grounds did the judges find 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 only have sincerely accepted the 1969 agreement if it had been in accord with their Islamic rights. But that agreement was clearly in contradiction with the contents of scripture, because it did not award them their rightful share, so it 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 one would freely sign such an agreement if it were so clearly against her interests, he reasoned, there must have been pressure.

Consensus and Fairness

The Islamic court's invention of a Gayo *adat* norm concerning bequests calls to mind Judge Porang's earlier invention of a norm of adverse possession. These two inventions had opposite effects—letting past divisions stand in the earlier case, overturning them in the later one—but they both depended on a theory of consensus. In the older decision, consensus was said to be sufficient for the property division to stand, and it was presumed to have been achieved. In the second, consensus was deemed necessary for the division to stand, and it was presumed never to have existed.

In both cases, the court created a new norm, not only about consensus but also about how we can tell whether consensus has been achieved, in effect an evidentiary rule. In the first case, Judge Porang argued that waiting too long to bring suit was grounds for assuming that one had agreed to the preexisting state of affairs (the "adverse possession" rule). He argued that this was not only a rational supposition but also that it was part of Gayo *adat.* This was the invented part of his argument. It was reasonable to make the assumption, he said, because Gayo people adhered to the norm that people marrying out of the village

lose claims to the estate. This norm was not invented by the judge; rather, a maxim that embodied it was slipped over and attached to the new, invented norm, giving "adverse possession in inheritance matters" the weight of a native custom. This slippage made it plausible to claim that when the plaintiff, and others in similar positions, had remained silent, they did so knowing that their silence showed their general agreement with the way the estate had been divided. Making the rule of adverse possession into a part of local *adat* made silence evidence for agreement.

In the later case, the Islamic court argued that the very fact that some heirs were suing in court added plausibility to the supposition that they never had agreed to the prior division of property. Such lack of consensus among heirs renders bequests invalid. Note that the court did not argue that the plaintiffs' agreement was not sought, as might have happened had such agreement been considered unnecessary, but that it was coerced. This claim is more plausible if at the time of the purported bequest of land the rule that bequests require the consent of heirs was a generally accepted Gayo social norm; that is if the defendants knew that consent was required.

As evidentiary rules, these inventions have their weaknesses. The Islamic judges today believe that community settings exert a great deal of pressure on individuals, and that Islamic social and legal sensibilities about the free assent of each heir are hardly well served in such settings. And yet written documents carry a lot of weight, especially when, as in the above case, they are ratified by judges on the general court (who tend to be less aware of village life than are their colleagues on the Islamic court). In the case in question, the existence of the document led the appellate court to overrule the Takèngën Islamic court.

With that problem in mind, in recent decisions the Takèngën Islamic court judges have emphasized the substantive issue of unfairness of the division of wealth recorded in a document. In a case that in mid-1994 was awaiting a hearing before the Supreme Court, Judge Kasim had ruled that an inheritance division backed by a signed document unfairly distributed land to heirs. "We are very interested in seeing whether the Supreme Court will support our judgment," he told me in 1994, "because it introduces a sense of justice into the court. No one is totally fair—just look at the fingers on one hand; they work together but all are different lengths [this image was made popular by a famous *didong* sung poetry composition of the 1950s]. And so it is with children; some will taste the sweet, some rich, some bitter foods. But there are limits."

The Islamic court's conflict with the appellate court is part of a more general pattern in which highlands institutions try to go over the head of the unhelpful Acehnese to a more responsive

central government: voting for the state party, GOLKAR (when the rest of Aceh usually votes for the Muslim party); sending Gayo sons and daughters into civil service in Jakarta, rather than in Banda Aceh; and seeking trading partners in the large city of Medan to counteract ethnic Acehnese dominance of export trade networks in the province. But in this case, the conflict has a specific legal content, and it turns on the issue of whether general substantive considerations of equality can override the specific rules found in Islamic jurisprudence. This conflict is thus both part of a long-running debate about the appropriate relationship between *adat* and Islam and part of a continuing tension between the highlands and the powerful provincial institutions.

Conclusions

I have provided the material for more than one type of explanation for the changes in court decisions over this period. One could assume that over this entire time the Islamic court judges have held the same policy preferences—namely, encouraging behavior consistent with Islamic law—and that the changes in their decisions derive wholly from changes in the constraints they have faced. Certainly those changes have been significant ones. Between the 1960s and the 1990s, the state, largely through the military, increased its direct control over Indonesian social life; one effect of this greater state power has been to guard the Islamic court from reprisals against unpopular decisions. In this period, the Islamic courts gained independent executory powers and greater legitimacy (though this latter characterization would not be true of the general courts). At the same time, court decisions have been subjected to greater scrutiny for the faithfulness of their decisions to an increasingly codified form of Islamic law. The judges' increased tendency to apply Islamic law would then appear as the outcome of two changes: more power to overturn local social practices and more pressure from their superiors to apply Islamic law.

A quite different story may also be told, however, one that emphasizes alterations in how the judges perceive Gayo social life and how they perceive their own role in social life. The Islamic court judges today argue that changes in Gayo social norms not only justify but also require the application of Islamic law. They see Gayo people as wishing increasingly to be governed by Islamic rules and not by older ones; village meetings are seen as a means to coerce recalcitrant siblings rather than as emblems of democratic deliberation. The Islamic court judges also see Gayo men and women in a more individualistic, materialistic, light, and they are saddened by this perception. They derive it as much from their experience in divorce cases, which they see as reflecting a growing individualism, as from their noting the increase in

bitterness and prolongation of inheritance disputes. They are also aware that economic and demographic behavior has changed in ways that support this shift in norms. They see their own roles in the 1990s as less about Islamizing the highlands than about urging people to act in a decent manner toward each other. They see Islamic law as a way to do that in accord with evolving social norms.

The first account emphasizes changes in the judges' constraints; the second, changes in their perceptions. The first explanation portrays Islamic court judges as newly empowered to apply Islamic law; the second, as letting their decisions reflect changing social norms. As is true in many such situations, the reason for the differing court decision is probably a result of some combination of the two sets of factors (see Bellow & Minow 1996).

I would emphasize, however, that these and other plausible explanations underscore the importance of the court as an institution concerned with the active interpretation of law and of society. The courts are not merely arenas for actors to implement "more basic" programs. The laws, the values and perceptions of the judges, and the powers of the court are all important in explaining the outcomes of the decisions.

Furthermore, the decisions themselves involve publicly accessible events of legal and social interpretation. We may never know what the judges "really thought"; what we can know, and, I believe, what most matters, is how they created new interpretations of law and of social life in their decisions. Let me emphasize three qualities of these interpretations.

First, judicial interpretations on both Takèngën courts have studiously avoided opposing *adat* to Islam, custom to law. Many of the more creative inventions advanced by the court involved precisely preventing such oppositions, either by claiming that the same rules are found in both *adat* and Islam (e.g., the rule that all heirs must agree to a bequest), or by claiming that rules of procedure precluded invoking one or the other (e.g., the rule that the right to bring suit had elapsed). Judges on both courts, over a considerable span of time, have endeavored to create a legal discourse that encompasses both sources of law. Efforts to separate "*adat*" from "Islam," then, whether carried out by anthropologists or by Islamic scholars, fail to capture the interpretive activities of, at least, these lower-court judges.

Second, across a long stretch of time the judges have continued to invoke the cultural category of "consensus." The judges interpreted "consensus" in distinct and changing ways, but the category remained constant, as a putative linkage between political ideology and ongoing social life. Clearly, the category of "consensus" (like "freedom" and "equality" in U.S. political life) admits of a wide range of interpretations, but at the same time it

signals a cultural and political rootedness. It is precisely this combination of consistent signaling and interpretive capaciousness that has allowed it to serve as a privileged cultural operator in the field of Indonesian law and politics.

Finally, the judges have provided consistent legal justifications for their decisions. The content of these decisions changed—from affirming long-standing social norms of property transmission in the older cases to overriding these norms in the later cases. But across these changes, the judges framed their decisions, and their various versions of what law was and what society was, in terms of law. Enfeebled by arbitrary state actions though it may be, the ideal of the rule of law in Indonesia has supported and continues to support the efforts of those who press for judicial reform and political accountability (Lev 1996). The importance of this ideal is hardly less at moments, such as those in the immediate post-Suharto period, when new foundations must be sought for political institutions and processes. In this respect, the interpretive history of judicial reasoning in this particular corner of Indonesia may prove useful, to the extent that it illustrates the capacity of judges to create a legal framework that can encompass multiple sources of law, amid rapidly shifting social norms.

References

Bellow, Gary, and Martha Minow (1996) "Introduction: Rita's Case and Other Law Stories," in G. Bellow & M. Minow, eds., *Law Stories.* Ann Arbor: Univ. of Michigan Press.

Benda-Beckmann, Keebet von (1984) *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau.* Dordrecht, the Netherlands: Foris Publications.

Bowen, John R. (1988) "The Transformation of an Indonesian Property System: *Adat,* Islam, and Social Change in the Gayo Highlands." 15 American Ethnologist 274–93.

——— (1991) Sumatran Politics and Poetics: Gayo History, 1900-1989. New Haven, CT: Yale Univ. Press.

——— (1998) "'You May Not Give It Away': How Social Norms Shape Islamic Law in Contemporary Indonesian Jurisprudence." 5 (Oct.) Islamic Law and Society 1-27.

——— (1999) "Legal Reasoning and Public Discourse in Indonesian Islam," in D.F. Eickelman & J.W. Anderson, eds., *New Media in the Muslim World: The Emerging Public Sphere.* Bloomington: Indiana Univ. Press.

Brown, Nathan J. (1997) *The Rule of Law in the Arab World: Courts in Egypt and the Gulf.* Cambridge: Cambridge Univ. Press.

Cammack, Mark (1997) "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" 63 *Indonesia* 143–68.

Chanock, Martin (1985) *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia.* Cambridge: Cambridge Univ. Press.

Comaroff, John, & Simon Roberts (1981) *Rules and Processes: The Cultural Logic of Dispute in an African Context.* Chicago: Univ. of Chicago Press.

Coulson, N. J. (1971) *Succession in the Muslim Family.* Cambridge: Cambridge Univ. Press.

Departemen Kehakiman (1973) *Masalah-masalah hukum perdata di Takengon* [Civil law issues in Takengon]. Jakarta: Direktorat Jenderal Pembinaan Badan-Badan Peradilan, Departemen Kehakiman.

——— (1984) *Masalah-masalah hukum perdata adat di Daerah Bekas Kawedanan Takengon* [Adat civil law issues in the former subdistrict of Takengon]. Jakarta: Direktorat Jenderal Pembinaan Badan-Badan Peradilan, Departemen Kehakiman.

Ellen, Roy F.(1983) "Social Theory, Ethnography, and the Understanding of Practical Islam in South-East Asia," in M.B. Hooker, ed., *Islam in South-East Asia.* Leiden, Netherlands: E.J. Brill.

Epstein, Lee, & Jack Knight (1998) *The Choices Judges Make.* Washington, DC: CQ Press.

Esposito, John L. (1982) *Women in Muslim Family Law.* Syracuse, NY: Syracuse Univ. Press.

Geertz, Clifford (1983) "Local Knowledge: Fact and Law in Comparative Perspective," in C. Geertz, ed., *Local Knowledge: Further Essays in Interpretive Anthropology.* New York: Basic Books.

Horwitz, Morton J. (1992) *The Transformation of American Law, 1870–1960.* New York: Oxford Univ. Press.

Just, Peter (1990) "Dead Goats and Broken Betrothals: Liability and Equity in Dou Donggo Law." 17 American Ethnologist 75–90.

Karsten, Peter (1997) *Heart Versus Head: Judge-Made Law in Nineteenth-Century America.* Chapel Hill: Univ. of North Carolina Press.

Kell, Tim (1995) *The Roots of Acehnese Rebellion, 1989–1992.* Ithaca, NY: Cornell Modern Indonesia Project, Monograph No. 74.

Lev, Daniel S. (1965) "The Lady and the Banyan Tree: Civil-Law Change in Indonesia" 14 *American J. of Comparative Law* 282–307.

——— (1972) *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions.* Berkeley & Los Angeles: Univ. of California Press.

——— (1996) "Between State and Society: Professional Lawyers and Reform in Indonesia," In D. S., Lev, & R. McVey, eds., *Making Indonesia: Essays on Modern Indonesia in Honor of George McT. Kahin.* Ithaca, NY: Cornell Southeast Asia Program Publications, Studies on Southeast Asia No. 20.

Libson, Gideon (1997) "On the Development of Custom as a Source of Law in Islamic Law." 4 (June) *Islamic Law & Society* 131–55.

Merry, Sally Engle (1992) "Anthropology, Law, and Transnational Processes." 21 *Annual Rev. of Anthropology* 357-79.

Messick, Brinkley (1993) *The Calligraphic State: Textual Domination and History in a Muslim Society.* Berkeley & Los Angeles: Univ. of California Press.

Moore, Sally Falk (1986) *Social Facts and Fabrications: "Customary Law" on Kilimanjaro, 1880–1980.* Cambridge: Cambridge Univ. Press.

Pompe, S. (1996) "The Indonesian Supreme Court: Fifty Years of Judicial Development." Diss. at Leiden Univ., Faculty of Law, Netherlands.

Rosen, Lawrence (1989) *The Anthropology of Justice.* Cambridge: Cambridge Univ. Press.

Santos, Boaventura de Sousa (1987) "Law: A Map of Misreading, Toward a Postmodern Conception of Law." 14 *J. of Law and Society* 279–302.

Subekti, R., & J. Tamara, eds. (1965) *Kumpulan Putusan Mahkamah Aguing* [Collection of Supreme Court decisions]. 2d ed. Jakarta: Gunung Agung.

Subekti, R., & R. Tjitrosudibio, eds. (1961) *Kitab Undang-Undang Hukum Perdata.* Jakarta: Pradaja Paramita.

Sunstein, Cass R. (1996) *Legal Reasoning and Political Conflict.* New York: Oxford Univ. Press.

Tamanaha, Brian Z. (1993) "The Folly of the 'Social Scientific' Concept of Legal Pluralism." 20 *J. of Law & Society* 192–215.

Cases Cited

Inën Deraman v. Inen Nur (PA 25/1962)
Inën Saidah v. Aman Jemilah (PN 47/1964)
Samadiah v. Hasan Ali (PA 381/1987)
Sulaiman v. M. Ali (PA 60/1973)
Usman v. Serikulah (PA 41/1961)