

Spatial Scales of Property: Custom, Islam, and Law in Aceh

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Abstract

This paper considers the governance of property in Aceh and the effect of the tsunami disaster. In a complex social system, the mechanisms to ensure respect for property include contracts, coercion and coordination. Because these mechanisms cluster at spatial scales – such as households, neighborhoods and the state – there is a relationship between changes in scales of property governance as a result of catastrophe and alterations in proprietary bundles of rights. This was the case in Aceh after the tsunami disaster. Prior to the disaster in Aceh, certain types of “sticks” in the bundle of property rights tended to associate with particular scales of collective property governance. The disaster altered these spatial scales of governance in two significant ways. First, inheritance matters resolved informally within families became more likely to fall for determination at extended family or community levels of governance. Second, the application of systematic land titling introduced central government-based titling mechanisms that reduced the significance of unregistered future or co-ownership interests relative to registered rights of ownership. In these two respects, a perspective on property based on spatial scales of governance provides another way to consider the interaction of custom, Islam and law in pluralist cases such as Aceh.

Keywords: *spatial scales, property, Islam and law, Aceh*

1. INTRODUCTION

This paper considers the governance of property in Aceh and the effect of the tsunami disaster. Prior to the disaster in Aceh, certain types of “sticks” in the bundle of property rights tended to associate with particular scales of collective property governance. The disaster altered these spatial scales of governance in two significant ways. First, inheritance matters resolved informally within families became more likely to fall for determination at extended family or community levels of governance. Second, the application of systematic land titling introduced central government-based titling mechanisms that reduced the significance of unregistered future or co-ownership interests relative to registered rights of ownership. In these two respects, a perspective on property based on spatial scales of governance provides another way to consider the interaction of custom, Islam and law in Aceh. Prior to the disaster in Aceh, certain types of “sticks” in the bundle of property rights tended to associate with particular scales of collective property governance. For example, restrictions on alienation and rights of original acquisition associated with community levels of governance. Future interests for children, and co-ownership among spouses, associated more intensely with family governance. Rights of impersonal exchange associated with land administration institutions of the state. Although there were no broad-scale transitions along the continuum of common property and private

pluralist cases such as Aceh.

In a complex social system, the collective mechanisms to ensure respect for property include self-enforcing contracts to create property, coercive acts to defend property, and coordinated processes of respect for property.¹ Further, in the case of coordination, collective respect for property may develop from a number of focal points – including possession, socio-religious norms, small group leadership and law or legal order.² Because all these mechanisms cluster and interact at spatial scales – such as family households, neighborhoods and the state – there is a relationship between changes in scales of property governance as a result of catastrophe and alterations in proprietary bundles of rights.

property, there were alterations to spatial scales of governance which affected interconnections among rights of acquisition, succession and alienation. This relationship between rights and collective governance, and its implications for institutional change, is illustrated by a number of examples, including transitions to titling law, and women’s rights to land.

2. TRANSITIONS TO TITLING LAW

El Hakimy’s study of rural property rights in Aceh

illustrates the alterations in property that may arise from transitions to state-based systems of land administration.³ According to El Hakimy, individual rights of land ownership are subject to the following restrictions in rural areas. Relatives, neighbors and members of the village hold veto rights over proposals to alienate land, unless the land has first been offered successively to those groups. Village leaders have a right of consultation in relation to proposals for alienation. There is a right to acquire land for community needs. Neighbors hold a right of way where there is no other reasonable means of passage.⁴ El Hakimy further identifies as common property unallocated areas of land, water and forest within village territorial boundaries.⁵ There are rules governing allocation of the commons for new households through acts of clearing and cultivation.⁶ There are also complex community-based rules governing rights to trees on the land of another, rights to take forest products for commercial gain, and the status of land left fallow.⁷

The World Bank survey of gender and land after the tsunami sets out evidence that some property claimants transitioned from community-based scales of governance as a result of the catastrophe.⁸ For example, according to interviews with land notaries in Banda Aceh, there was an increased willingness to use notaries for conveyances of land in Banda Aceh in preference to the simple stamping or witnessing services of village heads.⁹ While relatively few landholders went on to register notarized transactions with BPN, the increased use of notaries appeared to reflect reduced trust in community-based institutions. In particular, the trend towards notarization corresponded with a reported decline in trust in village heads, largely because of their increased role after the disaster as intermediaries for humanitarian assistance. The decline in trust included perceptions of corruption or abuse of power, and a belief that too many village heads were inexperienced replacements for leaders who had died in the tsunami.¹⁰ There was also a reported willingness to take disputes beyond village processes to institutions such as the Shari'a Courts.¹¹ While all these trends moved from a very low base, they represented a significant enough shift to suggest the potential for alterations in rights to land that relied on community-based systems for definition and enforcement.

Transitions to titling law also have the potential to alter customary rights and restrictions – even where the intent of titling is to reflect rather than alter existing rights to land. For example, Indonesian land law allows for registration of rights of ownership, mortgage and long-term use, but makes no provision for registration of easements or neighborhood covenants.¹² While customary easements and neighborhood covenants may have a proprietary status, as a result of the qualified recognition of custom in the Basic Agrarian Law 1960 (“the BAL”), the BAL also grants unrestricted rights of alienation to registered title-holders.¹³

Because statutory provisions override custom, the statutory right of alienation is not subject to

customary restrictions of priority or consent.¹⁴ Subject to the possibility of informal controls, registered title-holders may sell land to others without obligations to comply with custom. In this sense, at least, there are alterations to interconnections among rights in so far as individuals’ transition from community-based to titling law.

This said, the RALAS case involves entropic effects where most individuals declined to alter preference for spatial units of property governance based around community ordering notwithstanding cost-based incentives to transition to more centralized law based on a system of registered titles. The World Bank study provides a telling piece of evidence. From a survey of 390 respondents in 41 villages across 15 districts, only 12% of females who received title certificates, and 24% of male certificate-holders, stated that they would register subsequent registrable transactions with BPN.¹⁵ In other words, there was remarkably low demand to maintain the currency of new certificates, even though Indonesian land titles law appears to provide cost-minimizing benefits in terms of identifying, demarcating and enforcing registrable rights to land. Although cost was a factor in choices not to register subsequent transactions, there were also issues of institutional supply and adaptive capacity. That is: small-scale private ordering institutions with a history of legitimacy established facts on the ground, through reconstruction of settlements, prior to intervention by titling laws derived from a contested centralized state. As a result, while most titleholders were happy to receive (free) certificates, and to use those certificates as an evidentiary basis for transactions, there was no critical mass adoption of the law of title registration as a new basis for property coordination.

3. WOMEN’S RIGHTS TO LAND

The disaster further induced a spatial shift in governance for intra-family rights in the form of co-ownership or future interests. The key drivers were the number and complexity of cases arising from mass mortality and population displacement. Because households were dispersed, and so many family members had died, there were limits to the capacity of intra-family mechanisms to determine inheritance matters involving widows and daughters. As a mechanism of collective governance for property, family households were disproportionately vulnerable to the catastrophic shock because they depended on possession and close-knit coordination for resolution of intra-family proprietary claims. In contrast, village-level mechanisms such as focal coordination on the basis of determinations by village imam were more resilient because they turned on survival or replacement of an individual lead. The disproportionate effects of the disaster on collective governance mechanisms for property led to far greater village-level involvement than before the disaster – in ways which affected interconnections among bundles of proprietary rights.

In field interviews, some village leaders and priests expressed uncertainty as to the applicable law in the

following types of cases:

- a. The rights of female orphans.
- b. Distinctions between joint and

independent property.

- c. The rights of residual heirs when an entire family had died

The relative rights of daughters and uncles.

- a. The rights of widows, particularly as against brothers of their deceased husband.
- b. The relative rights of granddaughters and sons.
- c. The status of marital property after divorce when there has been no divorce settlement.

the inheritance rights of women to a greater extent than Shari'a law. The tradition allows a widow who lives on her marital land to retain the house and a small area of land, with the remainder divided between the children according to Shari'a proportions.²³

1. Negotiated Solutions: Situational Justice after the Tsunami

There are a number of local customs and practices in Aceh that favour the land rights of women, notwithstanding the formal application of Sharia laws of inheritance, and references in the literature to the patriarchal nature of Aceh society.¹⁶ These customs and practices derive from matrilineal systems in Aceh prior to the arrival of Islam.¹⁷ In some parts of Aceh (including Pidie and parts of Aceh Besar) there is a uxori-local tradition that includes grant of a house (and perhaps rice fields) by parents to daughters at the time of their marriage.

Traditionally, the house will be in the same compound as the parents' house. The daughter (wife) is recognized as the sole owner of the house (and land) from a period commencing 1 or 3 years after the marriage (often corresponding with the birth of a child).¹⁸ For example, women interviewees in Pekanbaru, Aceh Besar, stated that, according to tradition in their village, a wife's parents usually provide their daughter and son-in-law with land and a house. Some will only provide land. In cases where parents cannot provide land or housing the daughter and son-in-law will live in the wife's family home until such time as sufficient funds can be raised for the husband and wife to build a new house.¹⁹ One women respondent said that when she was married her mother granted her land on which she and her husband built a house. Prior to the tsunami there was a land certificate over this piece of land in her mother's name.²⁰

In parts of Pidie, Aceh Besar and even Banda Aceh itself, unmarried daughters may also inherit their parents' house and surrounding residential land. The rest of the state divides according to Sharia proportions.²¹ In some places, only the youngest daughter inherits her parent's residential land and house. In return, there is an expectation that the daughters (or youngest daughter) will care for her parents up until their deaths. For example, interviewees in the village of Teungoh, Meuraxa sub-district, Banda Aceh described inheritance practices in their land, where sons are entitled to agricultural land while daughters inherit residential land and housing. The youngest daughter, who has responsibility for caring for her parents' health, has priority to inheritance residential land and housing. Once inherited the daughter has full ownership of the land and can bequeath, gift or sell the land, however any proposed sale must be discussed with relatives who have a right of first refusal.²² There is a further tradition known as *ujung kafan* that favors

Law No 44 of 1999 allowed the application of Syariah law in Aceh, and Law No 18/2001 allowed the establishment (or re-establishment) of Syariah Courts. Under Qanun 10/2002, the Syariah Court has jurisdiction *inter alia* over inheritance, guardianship, and the legal status of missing persons. While it does not have jurisdiction over land rights (see Law No 7/1989, article 50), it may make land ownership determinations when they form part of a larger inheritance dispute (see Law 3/2006 amending Law 7/1989 on Religious Courts).

While Sharia law has formal applicability to inheritance determinations in Aceh, it appears common for family groups and village leaders to shape solutions for inheritance cases that are more beneficial to women than the strict provisions of Sharia law.²⁴ After the tsunami, in particular, many of our interviewees noted that families often agreed to a more equitable division of assets than the 2:1 division among sons and daughters prescribed by Sharia law.²⁵ In an interview in 2006, the Chief Justice of the Sharia Court in Aceh stated that the Sharia court would verify inheritance allocations agreed by all family members, even when the agreement did not adhere to the proportions of Sharia law.

In interviews after the tsunami, village leaders acknowledged that households often avoided Shari'a inheritance rules of son/daughter division through intra-family processes of consensus and compliance with tradition. One village chief commented that there were "countless cases" where consensus among family members led to equal division among men and women.²⁶ Similar comments were made in a focal group discussion with displaced women in Kajhu, Banda Aceh. These women also noted that family members would seek advice from the village imam if there were no consensus, and that the imam would apply the 2:1 rules of Shari'a law.²⁷ Another group of women from Uleelheu further commented that village leaders, including the village imam, often have different interpretations of Shari'a law than the judges of the Shari'a Court.²⁸ Relatedly, the Chief Judge of the Banda Aceh Shari'a Court stated that most post-tsunami inheritance cases were determined by village leaders who "have a variety of interpretations regarding Islamic inheritance law", and that "many cases [after the tsunami] indicated that village decisions had undermined women's rights".²⁹

The inheritance interviews suggest that alterations in

spatial scales of governance, as a result of the disaster, affected the nature of rights commonly managed within a family household. Because households were dispersed, and so many family members had died, there were limits on the capacity of intra-family mechanisms to determine inheritance matters within the family. As a mechanism of collective governance for property, family households were disproportionately vulnerable to the catastrophic shock because they depended on possession and close-knit coordination for resolution of intra-family proprietary claims. This was particularly the case where male relatives such as uncles claimed land on the basis that prior to the marriage it was solely owned by their brother (i.e. the deceased husband/father).

In contrast, village-level property governance mechanisms such as focal coordination were more resilient because they depended on social norms and local leadership. These disproportionate effects of the disaster on collective governance mechanisms for property led to far greater village-level involvement than before the disaster – in ways which affected interconnections among bundles of proprietary rights. While there was evidence of village-level determinations favoring the claims of widows and daughters, particularly in circumstances of family consensus,³⁰ there was also evidence of (1) applications of Shari'a law that overruled the customary claims of women,³¹ (2) village-level recommendations for widows to remarry in order to secure possessory entitlements to another parcel,³² and (3) extended family determinations that land had been owned independently by a deceased husband rather than jointly or solely by the widow.³³

There is further evidence that the titling program strengthened individual registered rights of ownership to the detriment of co-ownership claims by women. The World Bank study of gender and land found that "close to 12 percent of the land parcels registered in the names of the men were acquired during marriage and could have been titled as joint property".³⁴ The study further states that that "[o]nly a small number of residential land parcels were jointly titled in the names of both spouses".³⁵ A study by the Aceh Institute similarly concludes that joint titling of marital land is "extremely rare".³⁶ The World Bank study even notes that:

"forms for registration of land... often simply

[lacked] the space to indicate the joint registration of both spouses".³⁷ While, as noted, Indonesian law allows enforcement of unregistered spousal rights against registered rights on the basis of "custom", the shift from unregistered circumstances of spousal co-ownership to registered ownership in the name of husbands alone creates the potential for new forms of interaction among proprietary rights as a result of transitions to an administrative system of registered title.

4. CONCLUSION

The interaction of Shari'a, custom and law in Aceh is a complex long-running affair that includes considerable elements of syncretic accommodation, particularly among family and community mechanisms of governance.³⁸ Standard socio-legal techniques to analyse this type of legal pluralism involve a focus on strategic negotiation – the situational use of narrative, symbolism and public authority to support a particular property claim. This paper has sought to introduce a further perspective based on spatial scales of property governance, particularly so as to understand the effects of the tsunami disaster on bundles of property rights. This approach has structural characteristics in so far as it focuses on households, communities and the state.

The key argument is that alterations in spatial scales of governance as a result of catastrophic disruption necessarily affects relations within a bundle of rights. The argument is based on the proposition that interactions among property rights take place at spatial scales of interaction. For example, claims of exclusive use are more likely to interact with spousal or inter-generational interests at the family level, with restrictions on residential use at neighborhood levels, and with restrictions on alienation or appropriation at self-organized community levels. The paper sets out evidence that alterations in spatial scales of governance affected property rights in Aceh in two significant ways. First, inheritance matters resolved informally within families became more likely to fall for determination at extended family or community levels of governance. Second, the application of systematic land titling introduced central government-based titling mechanisms that reduced the significance of unregistered future or co-ownership interests relative to registered rights of ownership.

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- ² Focal Points Are Features Of The Environment That Parties Choose As The Basis For Coordinated Behavior In Payoff Circumstances Where The Worst Possible Outcome Is Mutual Non-Coordination. The Seminal Study Is Thomas Schelling, *The Strategy Of Conflict* (1980) For A General Introduction To Focal Point Coordination See Robert Sugden, *The Economics Of Rights, Cooperation And Welfare* 65–86 (2005) For A Discussion In Relation To Property Rights, See James E. Krier, *Evolutionary Theory And The Origin Of Property Rights*, 95 *Cornell Law Rev.* 139, 152 (2009).
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- ⁴ *Id.* At 51–55.
- ⁵ *Id.* At 18–22.
- ⁶ Permission Must First Be Sought From Village Leaders If The Person Involved Is An “Outsider” Or If The Land Exceeds The Minimum Size: *Id.* At 68. See Also Van Vollenhoven On Indonesian Adat Law, *Supra* Note 40 At 97–99.
- ⁷ El Hakimy, *Supra* Note 84 At 65–68.
- ⁸ World Bank Land Survey, *Supra* Note 54, At 53 (Limitations On Customary Institutions), 72 (Increased Trust In Formal Institutions).
- ⁹ *Id.* At 96.
- ¹⁰ *Id.* At 82, 95.
- ¹¹ *Id.* At 74 (Identifying The Shari’a Court As The Most Likely Formal Institutions For Appeal Should Familial Or Community Processes Fail To Resolve A Dispute).
- ¹² Basic Agrarian Law 1960, Arts. 19, 23 (Registration Of Ownership); Arts. 32, 38 (Registration Of The Right Of Building Use).
- ¹³ See Basic Agrarian Law 1960, Art. 20, Para. 2, 24, 27, 49, Para. 3, Art. 25 (Setting Out Rights Of Alienation For Holders Of Statutory Ownership Rights).
- ¹⁴ Basic Agrarian Law 1960, Art. 5. For Further Discussion See Fitzpatrick, *Disputes And Pluralism*, *Supra* Note, At 182.
- ¹⁵ WORLD BANK, *supra* note 54 at 42. The survey data also concludes that 78% of women, and 63% of men, planned to register their next land transaction with the village head only.
- ¹⁶ *id.*
- ¹⁷ James Siegel Quotes Snouck Hurgronje, The Well-Known Dutch Ethnographer Of 19th-Century Aceh: “The [Acehnese] Woman Is, So Far As Lodging And Maintenance Are Concerned, Practically Independent Of Her Husband, Since She Continues To Form An Integral Part Of The Family Wherein She Was Born.”: See Siegel, *The Rope Of God*, *Supra* N. 22, At 54.
- ¹⁸ *Id.*, At 52, 138-9. Siegel Surveys A Village In Pidie Where Every Married Women Owned The Marital House In Her Own Right, Independently Of Her Husband: *Id.* At 141-2
- ¹⁹ Group Discussion With Maemunah, Salmah, Aminah And Rifky (Women From Meunasah Tuha), Kecamatan Pekan Bada, 28 November 2006.
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- ²¹ See Siegel, *The Rope Of God*, *Supra* N. 22, At 139. According To Siegel’s Survey Of A Village In Pidie Women Owned 54% Of Rice Land And 31% Of All Land In The Village Territory: *Id.*, At 143-4.
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- ²⁴ This Phenomenon Is Not Only Post-Tsunami In Nature. Siegel Reports Judges Of The Islamic Courts Stating That The Customary Acehnese Practice In Which Unmarried Daughters Receive Houses From Their Deceased Parents Estate Was Not “Contrary To Islamic Law” Although, They Would Find In Favor Of A Son That Sued For Division Of The Entire Estate According To Sharia Proportions. Siegel Reports That No Son Had Ever, In The Memory Of The Judges Interviewed In Pidie And North Aceh, Commenced Court Proceedings Over Customary Grants Of A House And Land To Daughters: See Siegel, *The Rope Of God*, *Supra* N. 22, At 139.
- ²⁵ See e.g. Interview with Zaenabun (from Meunasah Tuha Village, Kecamatan Pekan Bada, 28 November 2006, Interview with Sudirman Arif (from Kade Gelumpang Teungoh, Desa Surien, Kecamatan Meuraxa Banda Aceh), 27 November 2006, Group discussion with Maemunah, Salmah, Aminah and Rifky (women from Meunasah Tuha, Kecamatan Pekan Bada), 28 November 2006, Group Discussion with 18 women and one male village facilitator from LOGICA, Kajhu barrack, Darussalam, Aceh Besar, 30 September 2006; Interview with Zaenabun (from Meunasah Tuha Village), Kecamatan Pekan Bada, 28 November 2006; Interview with Sudirman Arif (from Kades Gelumpang Teungoh, Desa Surien, Kecamatan Meuraxa Banda Aceh), Uplink’s Offices, 27 November 2006; Group discussion with Maemunah, Salmah, Aminah and Rifky (women from Meunasah Tuha), Kecamatan Pekan Bada, 28 November 2006.

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- ²⁹ Interview by author with Manan Hasyim, A. (Chief Judge, Syariah Court, Banda Aceh), Banda Aceh, Indon. 26 April 2006. NGO representatives also identified restrictive interpretations of Islamic law as a major challenge for women's claims to co-ownership or testamentary estates after the tsunami.
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- ³⁴ Id. At 26–27. See Also World Bank, *Supra* Note 54 At 61 (Identifying Cases Of Pressure And Invitation Leading To Loss Of Women's Claims To Land).
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