

Guardianship, Inheritance and Land Law in Post - Tsunami Aceh



International Development Law Organization
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FOREWORD

Law and the institutions of justice are cornerstones of stability in our communities. It is of vital importance that they remain strong and relevant in times of crisis. The devastating tsunami that struck South East Asia in December 2004 brought loss of life and destruction on an epic scale. The sheer force of those waves also tore into the very fabric of society, crippling the ability of affected countries to manage recovery and ensure a secure future based on law and justice. The International Development Law Organization (IDLO) has prepared this Guidebook in cooperation with local and international partners in Nanggroe Aceh Darussalam and with the generous support of the Governments of Finland, Ireland and Italy, to help ensure that the challenge of recovery and ongoing community life under law and justice can be met.

The law and justice sector is more than just lawyers and judges; it concerns ordinary people and their interactions and relationships between themselves and with the State. Respect for the rule of law and the individual's access to justice are key features which must be present in any community's effort to achieve sustainable development. The community's perception that the State is capable of ensuring orderly and predictable systems to guarantee official recognition of family and other legal relationships and rights, including in relation to property, creates the conditions for respect for the rule of law. Absent such perception, the individual is left to self-help and the risk of violence.

As Nanggroe Aceh Darussalam re-establishes itself after the tsunami, legal issues concerning land, inheritance and guardianship have arisen and require urgent attention and fair and public resolution within the law. This Guidebook offers relevant, practical and user-friendly information on key legal principles concerning land, inheritance and guardianship, and on the processes through which issues around these matters can be resolved. It is hoped that by providing this Guidebook, IDLO is making a useful contribution to helping tsunami-affected persons and communities, especially women, receive effective, efficient and fair outcomes in these core areas of community concern.

I would like to extend particular thanks to representatives from the Mahkamah Syar'iyah, Pengadilan Negeri, the Majelis Adat Aceh, BPN, BRR, University Syiah Kuala, IAIN Ar-Raniry Banda Aceh, the World Bank, and the United Nations Development Programme (UNDP) for helping to ensure the relevance and legal accuracy of the Guidebook. UNDP also provided premises to the IDLO in support of its Post-Tsunami Assistance Initiative. I wish also to acknowledge all those at IDLO in its Rome, Sydney and Banda Aceh offices who have contributed to the design and implementation of IDLO Initiative and this Guidebook. Most importantly, I would like to acknowledge the courage of tsunami-affected persons and communities throughout South East Asia and pass onto them the Organization's most heartfelt best wishes.



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1. Preface

The following guidebook details the legal principles, processes and institutions relevant to the resolution of land, inheritance and guardianship disputes in post-tsunami Aceh. It has been designed to promote awareness and understanding regarding the applicable law, how to access the legal system, and the rights of women and children in the judicial process. The guidebook's intended audience is individuals and organizations involved in post-tsunami reconstruction and rehabilitation, including NGOs conducting community land mapping, legal professionals, government officials and aid agencies. This guidebook forms part of a series of information resources produced by IDLO, in both English and Indonesian, on land, inheritance and guardianship law in Aceh.

It must be noted that this guidebook focuses on the laws applicable to Muslims. This is because, while Aceh is home to people of different religions, the population is predominately Muslim. It should also be highlighted that the sections of this guidebook dealing with adat law and customary practices are based upon research conducted in District of Aceh Besar and the Municipality of Banda Aceh. Not all of the practices and customs referred to will be relevant or applicable in other parts of Aceh. Finally, this document is intended as a guide only. The jurisprudence applicable to Aceh is evolving rapidly and many of the judicial institutions involved in dispute resolution have only recently been established. As such, this guidebook is presented, not as an authority on *Sharia* or the applicable law in Aceh, but rather as a practical tool to assist tsunami-affected communities address the many and complicated legal issues which now shape their lives.

2. Methodology

The information contained in this guidebook has been drawn from a series of research activities conducted by IDLO in 2005 and 2006. Such research began with a literature review of relevant scholarly work produced by both Acehnese and international academics, jurists and legal practitioners. Between March and May 2006, a team of local and international consultants undertook a field-based research exercise in 12 tsunami-affected villages in Banda Aceh and Aceh Besar. The objective was to compile information on formal and customary (*adat*) laws in the areas of land, inheritance and guardianship. This information was gleaned through interviews with judges, adat leaders and individuals, and from observations of formal court sessions and informal dispute resolution. Particular attention was paid to the rights of women, orphans and other vulnerable groups when land, inheritance and guardianship cases were being resolved. The results of this research were presented to a group of Acehnese legal experts on 30 May 2006. This guidebook also draws upon the results of a research paper commissioned by IDLO in 2005 entitled '*Inheritance, Guardianship and Women's Legal Rights in Post-Tsunami Aceh: The Interaction of Syariah, Adat and Secular Laws*' written by Professor Tim Lindsey and Ms Robyn Phillips; and a research paper written by Dr Arskal Salim

entitled ‘*Praktek Penyelesaian Formal dan Informal Masalah Tanah, Kewarisan dan Perwalian Pasca Tsunami di Banda Aceh dan Aceh Besar*’ (also available from IDLO in English and Indonesian).

Table 1: Field Research Conducted by IDLO (March – May 2006)

City/District	Sub District	MUKIM	GAMPONG/KEL
BANDA ACEH	MEURAXA	Tgk. Lamjabat	1. Cot Lamkuweuh
		Meuraxa	2. Lambung
	KUTARAJA	Tgk. Dianjong	3. Gampong Jawa
		Tgk. Dianjong	4. Lampaseh Kota
	KUTA ALAM	Lam Kuta	5. Lampulo
		Kuta Alam	6. Lambaro Skep
ACEH BESAR	PEUKAN BADA	Lam Teungoh	7. Lamteh
		Baroh	8. Ajuen
	LHOKNGA	Lampuuk	9. Meunasah Balee
		Lhoknga	10. Mon Ikeun
	BAIUSSALAM	Klieng	11. Lambada Lhok
		Silang Cadek	12. Kajhu

3. Using this Guidebook

Chapter 1 of this guidebook provides basic background information on the legal system in Aceh, the primary legal institutions and relevant sources of law. This section has been designed for to assist readers who may not be familiar with Indonesian jurisprudence, *adat* or *Sharia* law. Chapters 2, 3 and 4 provide a detailed account of the laws applicable to guardianship, inheritance and land disputes in post-tsunami Aceh. Each chapter concludes with a summary of how such laws are applied and how the most common legal disputes might be resolved. It must be noted that in the post-tsunami context, there is significant overlap between these categories. The distribution of inheritance, for example, will often touch upon land ownership issues and, where minors are the recipients of inheritance, the appointment of a guardian. It is also important to note that there may be some disparity between Indonesian law, *adat* principles, and the manner in which disputes are resolved in different districts in Aceh.

Attached to this guidebook is a matrix summarizing key Indonesian laws, *adat* laws and Islamic legal opinion in the areas of land, inheritance and guardianship. This reference can be used separately or in conjunction with this guidebook and is designed to assist readers easily access the main laws and legal principles relevant when discussing land, inheritance and guardianship matters. It must be highlighted that Indonesian laws referred to have not been translated literally and that modifications have been made in the interests of enhanced readability and where Indonesian legal concepts do not easily translate into English.

List of Definitions and Acronyms

Adat: A non-codified body of rules of behavior, enforced by social sanctions, varying from time to time and from place to place.

Aqidah: The belief system that is based upon a firm conviction in all the fundamentals of faith and of the Oneness of Allah, i.e. creed. It is derived from the verb *aqada* meaning to firmly bind and knot. Whatsoever settles in the heart in a firm and definitive manner is said to be that person's *aqidah*. In the technical sense it refers to the definitive faith and certain ruling that is not open to any doubt.

Baitul Mal: Islamic treasury. In Aceh this denotes a provincial government to *gampong* level management of religious assets.

Camat: Head of *kecamatan* (sub-district).

Dinas: Provincial level government department.

Fatwa (plural *fatawa*): Legal opinion concerning Islamic law, issued by an Islamic scholar.

Fiqh: Understanding, comprehension, knowledge, and jurisprudence in Islam

Gampong: or village is the lowest unit of government. It is equivalent of the *desa* outside Aceh.

Gerakan Aceh Merdeka (GAM): Free Aceh Movement.

Geuchik: The village head. The *geuchik* is selected by the community and is officially appointed by the District/Municipality Government to lead the *Gampong* administration.

Hadith: These are reports on the sayings and the traditions of Prophet Muhammad SAW or what he witnessed and approved. These are the explanation, interpretations, and the living examples of the Prophet SAW for teachings of the *Quran*.

Hudud: Literally meaning 'limits'. A category of crime in *Sharia* which is specifically mentioned in the *Quran* as transgressing the limits which God has set on people's behaviors.

Imeum Mukim: Head of the *mukim* level of administration.

Imeum meunasah: Responsible for leading the prayers, religious and adat ceremonies at the village *meunasah*. In addition to this, he will also hold a respected role and take part in village level decision making, as well as carrying out duties such as performing village level dispute resolution, including over family matters.

Meunasah: refers to a multifunctional public building in the village. The word *meunasah* is derived from the Arabic word *Madrrasah*, a place of learning. *Meunasah* are found throughout Acehese villages as places for learning religion or to study, places to perform religious observation or to resolve disputes arising within the community. In some places the *Meunasah* has become a centre for village socio-cultural development.

MoU: Memorandum of Understanding.

MPU (Majelis Permusyawaratan Ulama): Consultative Council of *Ulama*.

Mukim: The next level of administration/governance after the *gampong*. A *mukim* covers all the villages that are linked to the main Mosque in the area. It is an administrative level of organization typical for Aceh and is loosely equivalent to the *kelurahan* or *kecamatan* elsewhere in Indonesia.

NAD (Nanggroe Aceh Darussalam): the full name for the province of Aceh.

Perda (Peraturan Daerah): Regional Regulation.

Qanun: Regional regulations issued at the provincial or district level in Aceh.

Qisas (or *Qishash*): Another category of crime in *Sharia* law. *Qisas* can be described as ‘equality in retaliation’, and the violation of a *Qisas* crime gives the strict legal right to inflict the same hurt on the wrongdoer as the wrongdoer inflicted on the victim.

Sharia: Islamic law. Literally means ‘a way to a watering place’, or the path to be followed.

Ta’zir: *Ta’zir* crimes are all those which are not classified as *hudud* or *qisas*. Their nature and the punishment for them may be determined by the ruler, or the state and awarded at the discretion of the judge. Crimes such as rape and robbery, which could be punished under the *hudud* provisions, may be punished under *ta’zir*, if for example, the evidence is not available for a *hudud* conviction.

Teungku: Traditional Leaders. A *Teungku* holds the position of leadership in relation to religion in the village. A *Teungku* is chosen on the basis of his religious knowledge.

Tuha peut: Village elders in Aceh. These village elders exert a traditional quasi-legislative function in Acehnese village communities.

Ulama: Muslim religious scholars.

Wakaf: A canonical Islamic concept which refers to a special kind of charity given for the purposes of benevolence and for the sake of God and with the understanding that the one who endows it will get reward from God. The word is used for charities and gifts that have permanence and continuity, so that people can benefit from them for years, generations or even centuries. This means that *wakaf* endowment is made of entities from whose usefulness, yield and fruit people can benefit, while the capital asset of the entity lasts and stays for a short or long period of time, such as a lot, a construction, a well and a tree.

Zakat – One of the five pillars of Islam is *Zakat*, which means purification and increment of one's wealth. A Muslim who has money beyond a certain quantity is to pay the *Zakat* (alms). The amount is generally calculated as 2.5% on the individual's excess wealth.

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CHAPTER 1
INTRODUCTION



CHAPTER 1

SOURCES OF LAW AND LEGAL INSTITUTIONS IN ACEH

Part A: Background

The Indonesian province of Aceh is located at the northernmost tip of the island of Sumatra. Aceh's relative isolation, particularly during the Dutch colonial period, and strong Islamic identity contributed to the development of a unique legal tradition inextricably linked to *Sharia*. Aceh's isolation was exacerbated by a separatist conflict between the *Gerakan Aceh Merdeka* (GAM) and the Government of Indonesia (GOI) which commenced in 1976. The conflict intensified between 1990 and 1998 when the GOI declared the province an 'Area of Military Operations' (*Daerah Operasi Militer*).

The development of the Acehnese legal system has been influenced by the various degrees of autonomy granted by the central government. In 1999, in an effort to halt the conflict, *Law 44/1999 On the Special Status of the Province of Aceh* was promulgated. 'Special Status' allowed for the implementation of *Sharia* in social life and the education system, facilitated policies designed to preserve and empower customary institutions, and permitted the establishment an institutionalized body of *ulamā* (religious scholars) to advise on regional policy.¹

Two years later, amidst growing tensions between GAM and the Indonesian Military, a second autonomy package was introduced. Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam* (NAD) formally created the province of NAD and granted a more extensive form of self-government.² Powers devolved by the GOI included greater control over fiscal matters and the profits derived from Aceh's natural resources,³ substantive control in the areas of policing and law and order,⁴ and the establishment of *Mahkamah Syar'iyah* with jurisdiction over intra-family, inter-family and social matters for Muslims.⁵ The law also facilitated the creation of formal symbols of autonomous government, in

¹ International Crisis Group, 2001, *Aceh: Can Autonomy Stem the Conflict?*, Asia Report No. 18, 27 June 2001, available online at <www.icg.org/home/index.cfm?id=1456&l=1> (accessed 22 February 2004) 31; United Nations Development Programme (UNDP), 2003, *Aceh Regional Public Expenditure Review*, report on file with author 1;

T Lindsey and R Phillips 'Inheritance, Guardianship and Women's Legal Rights in Post-Tsunami Aceh: The Interaction of Syariah, Adat and Secular Laws' IDLO (2005) 3-4.

² ICG (n 1) 12; Lindsey (n 1) 4.

³ Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam* arts 4-7.

⁴ *ibid* arts 21-3.

⁵ art 25-26; see also 'Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development' UNDP (Draft Report, May 2006) 23.

particular the appointment of a *Wali Nanggroe* (symbolic Head of State) and *Tuha Nanggroe* (Council of Elders).⁶ Of most importance to the development of Aceh's legal context, was the power granted to the Acehese provincial legislature (the DPRD or *Dewan Perwakilan Rakyat Daerah*) to pass regional regulations based on *Sharia* called *Qanun*.⁷ The *Qanun* subsequently passed introduced a more codified form of Islamic law and established new Islamic legal institutions in addition to the *Mahkamah Syar'iyah*. These include the *Wilayahul Hisbah* (*Sharia* police),⁸ religious prosecutors and the *Majelis Permusyawaratan Ulama* (MPU or Religious Scholars Consultative Council).⁹

In May 2003, following a breakdown in peace negotiations, then President Megawati Soekarnoputri declared martial law in Aceh.¹⁰ At this time, Aceh's newly created Islamic legal institutions were still in their infancy and only partially operational.

On 26th of December 2004, an earthquake and tsunami struck Indonesia resulting in massive loss of life and widespread destruction. At the time of writing, the death toll stood at approximately 130,000. A further 37,000 persons remain missing and are presumed dead. Banda Aceh, Aceh Besar and Aceh Jaya were most severely affected by the disaster. In addition to the dead, missing and displaced, the tsunami displaced 514,150 persons and affected over 300,000 land parcels, with 252,223 houses either partially or completely damaged.¹¹ Six courts were completely destroyed, including computers, libraries and archives. The *Mahkamah Syar'iyah* lost 85 staff members including 5 judges and 13 administrative staff.¹²

⁶ art 10; see also ICG (n 1) 12; Lindsey (n 1) 4.

⁷ art 1(8), 9; Lindsey (n 1) 4.

⁸ Note that despite the fact that the institution of the *Wilayahul Hisbah* has been regulated by several *Qanun*, its legal basis is Governor's Decision No. 1/2004.

⁹ Lindsey (n 1) 6.

¹⁰ Martial law resulted in an increased the military presence in Aceh and tight restrictions on who could enter the province. The province was largely closed to independent international observers, foreign correspondents, media, diplomats and human rights organizations; 'Aceh under Martial Law: Unnecessary and Dangerous Restrictions on International Humanitarian Assistance', *A Human Rights Watch Briefing Paper*, Human Rights Watch, September 2003; see also Edward Aspinall and Harold Crouch, 'The Aceh Peace Process: Why it Failed', *East West Center, Washington*, 2003.

¹¹ 'Aceh and Nias One Year After the Tsunami: The Recovery Effort and Way Forward' BRR, December 2005, 14; Dr D Fitzpatrick 'Restoring and Confirming Rights to Land in Tsunami-Affected Aceh' UNDP/Oxfam Report (July 2005) 4-5; see also UNDP (n 5) 9.

¹² Mahkamah Syariah, NAD (2005), *Laporan Tahunan Mahkamah Syariah Provinsi Nanggroe Aceh Darussalam Tahun 2004*, unpublished paper, on file with T Lindsey; see also Lindsey (n 1) 8.

In the wake of the tsunami, the GOI and GAM agreed to recommence negotiations to end the conflict in Aceh. These negotiations took place in Finland and resulted in the signing of a *Memorandum of Understanding Between the GOI and the Free Aceh Movement* on 15th August 2005 in Helsinki. The MOU held that a new Law on the Governing of Aceh (LOGA) would be promulgated and enter into force no later than 31 March 2006.¹³

The LOGA was passed by the Indonesian House of Representatives on 11 July 2006 and signed by the President on 1 August 2006. This law takes precedence over previous legislation on Aceh's autonomy and enacts many of the provisions agreed upon in the Helsinki MOU. In particular, the LOGA provides greater clarity on the jurisdiction of the *Mahkamah Syar'iyah*, stipulating that the court has authority over all cases on family, criminal and civil law involving Muslims.¹⁴ The LOGA further provides that a regulation, to be enacted in the form of *Qanun*, must be passed to regulate the procedures of the *Mahkamah Syar'iyah*.¹⁵ Provisions for Jakarta to still exert some control over the court remain, including the appointment of judges by the President and Chief Judge of the Supreme Court and the fact that final appeals are heard by the national Supreme Court.¹⁶ Thus rather than modify Aceh's existing legal structure, the LOGA promises to strengthen the legitimacy of existing Islamic legal institutions and further facilitate the implementation of *Sharia*.

It is clear that Aceh's Islamic legal institutions will play a key role in the post-tsunami rehabilitation and recovery process. The vast majority of tsunami-related disputes concern inheritance, guardianship and land and will most likely fall within the jurisdiction of *Mahkamah Syar'iyah*. Yet at the time the tsunami hit, Aceh's primary legal institutions were far from fully developed. Since the tsunami, all have become more active as they respond to the legal problems caused by the disaster and increased pressure from some groups for a more 'Islamic' system. Aceh's post-tsunami legal context is therefore placed at the complex crossroads of an emerging set of Islamic laws and legal institutions, an unprecedented natural disaster, a fledgling peace process, and a regional government with new and increased autonomy.

¹³ Art 1.1.1-1.1.2 *Memorandum of Understanding between the GOI and the Free Aceh Movement* on 15th August 2005.

¹⁴ Art 128 *Law on the Governance of Aceh* (11 July 2006).

¹⁵ *ibid* art 132.

¹⁶ *ibid* art 131 and 135.



IDLO Field Research April 2006



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Part B: Islamic Law in Indonesia

1. Introduction to Islamic *Sharia*

Islamic law, also known as *Sharia*, literally means ‘a way to a watering place’, or the path to be followed. The *Quran* and the *Sunnah* are the primary sources of *Sharia*. The *Quran* is not, in itself, a legal text, however it does contain approximately 500 injunctions of a legal nature. *Sunnah*, or ‘an appropriate course of conduct’, has come to mean acts and sayings of the Prophet Muhammad and everything that the Prophet approved.¹⁷

Fiqh is the science of deducing Islamic laws from evidence found in both the *Quran* and the *Sunnah*. According to Professor Tim Lindsey, for Muslims, *Sharia* is God’s law, as revealed in the *Quran* and the *hadith*, while *fiqh* is man-made law and jurisprudence, attempting to interpret and apply it. *Sharia* is immutable, whereas *fiqh* is contestable and can change according to the circumstances to which it is applied. *Fiqh* is hence more specific and gives indications as to how *Sharia* is to be applied in particular circumstances.¹⁸

Hadith is a written record of an act or saying of the Prophet written after his death and is used as narrative evidence of the Prophet’s conduct, while *Sunnah* is an example or law which is deduced from the *hadith*. The *Quran* takes precedence over *Sunnah*, which should only be used for legal guidance where the *Quran* does not provide clear guidelines on the point in question.¹⁹

A *Fatwa* is a legal ruling given by a recognized religious scholar in answer to a question of religious importance. *Fatawa* must be based on the religious sources of the *Quran* and the authenticated *hadith*. *Fatawa* may also draw on legal inferences and extractions made by recognized scholars (*mujtahid*) through their *ijtihad* (the exercise of their personal reasoning based on the *Quran* and the *Sunnah*) in the event that the sources are not clear on the matter or where there is no available text.²⁰ In Aceh, official *fatawa* are issued by the *Majelis Permusyawaratan Ulama* (*Consultative Council of Ulama*). *Fatawa* are also issued by a range of other, nationally-based religious organisations. *Fatawa* are not law, but considering the esteemed position that *Ulama* hold in Aceh, their opinions and rulings are extremely influential in that province.

¹⁷ J Hussain, *Islam: Its Law and Society* Federation Press 2nd Ed (2004) 28-9, 32. See also, generally, MB Hooker, *Indonesian Islam: Social Change Through Contemporary Fatawa*, Allen & Unwin (2003); J Schacht, *Introduction to Islamic Law*, Clarendon Press (1964).

¹⁸ *ibid* 29-29.

¹⁹ *ibid* 32-33.

²⁰ *ibid* 36.

There are five major schools of law in Islam — *Hanafis*, *Malikis*, *Hanbali*, *Shafi* (all *Sunni* Schools) and the *Shia* school. Indonesians, like most South-East Asians, follow the *Shafi* School, which was founded by Imam As-Shafii.²¹

2. *Sharia* in Indonesia

Islam was brought to Aceh during the thirteenth century. From then until the mid-nineteenth century, Aceh enjoyed relative independence and Islam soon became the predominate religion.

Towards the end of the Dutch colonial period, in particular between 1900-1945, *Sharia* was given legal effect only to the extent that it was accepted by the government or courts as having been absorbed by – or received into - *adat* or local customary law ('reception theory').²² The Dutch introduced a system of separate laws for different racial groups, which was formalized as positive law in the Netherlands East Indies in the *Regeerings Reglement Stbd.1855 No. 2* and in *Stbd 1929 No. 221*, the latter confirming that Islamic law no longer had status as an independent source of law. *Stbd. 1937 No. 116* completed the process by restricting the jurisdiction of Islamic courts to inheritance and a few other issues of private law.²³

'For many Muslims, reception theory was the devil's theory – *teori iblis* – ... because it directly conflicted with the idea of Islam as *din wa dawla*, both religion and state, and placed non-Muslim sources of law above divine law'.²⁴ In opposition, to the Devil's theory, two alternative analyses were put by advocates of a broader reading of *Sharia*. The first, *reception in complexu*, held that *Sharia* had become one with *adat* and applied in full for Muslims. *Adat* practices that were contrary to *sharia* were thus deviant and should not obtain legal weight. The second, *receptio a contario*, provided that *adat* only applied to the extent that *Sharia* did not apply (or to extent it had been 'received into Islamic law'). This theory has always attracted strong support, including from the Dinas Syariat and MPU in Aceh.²⁵

In any case, regardless of Muslim opposition, 'reception theory' was applied across Indonesia by the Dutch, with the effect of marginalizing the place of *Sharia* within

²¹ *ibid* 35.

²² Hooker, M.B., 1984, *Islamic Law in South East Asia*, Oxford University Press Singapore 244; Lindsey (n 1) 28.

²³ Lindsey (n 1) 28.

²⁴ Ramulyo, H M Idris, 2000, *Kumpulan Soal ujian Negara Cicilan Hukum Islam*, Penerbit Sinar Grafika, Jakarta 206; Lindsey (n 1) 28.

²⁵ Ramulyo (n 25) 128; Lindsey (n 1) 28-29.

the secularized legal system. Despite much criticism, it is still the law in Indonesia today.²⁶

3. The Role of *Sharia* in Modern Aceh

It is important to highlight that Aceh is not a ‘*Sharia State*’. Aceh remains a province within Indonesia’s secular political and legal system. In terms of national legislation, the primary source of *Sharia* is the Islamic Law Compilation (*Kompilasi Hukum Islam*, or KHI). Drawn from classical *fiqh*, the KHI is a mix of different *madhhab*, or schools of Islamic thinking. It comprises 3 books — inheritance, marriage and charitable trusts. While it is the primary authority on Islamic Law throughout Indonesia, the KHI is a non-binding guide on the applicable law. In practice, judges of the Religious Courts will first look to the KHI in determining cases under their jurisdiction, however other sources of law such as Law No. 1/1974 *On Marriage* and Law No. 23/2002 *On Child Protection* are also applied. In Aceh, an additional source of *Sharia* (or at minimum, *fiqh*) is *Qanun* (regional regulations) passed by the DPRD (Acehese Regional Legislature). Finally, while customary law (*adat*) differs through Aceh, such law is based largely on *Sharia* principles.²⁷

Part C: Primary Legal Institutions in Aceh

While the KHI and *Qanun* are the most authoritative statements regarding the applicable law in Aceh, the following Islamic legal that institutions shape, interpret and enforce *Sharia* play a crucial in transposing the written law into practice.

1. The *Mahkamah Syar’iyah*

It is important to highlight that Indonesia has a religious legal jurisdiction which operates throughout the archipelago under the name of Religious Courts (*Pengadilan Agama*).²⁸ These courts have jurisdiction over Muslims in the areas of marriage, divorce, inheritance, guardianship and *wakaf* (charitable trusts/endowments). In Aceh, the Religious Courts were replaced by *Mahkamah Syar’iyah* in 2003 by way of Presidential Decree.²⁹ These courts sit in each district, with appeals heard by the provincial level *Mahkamah Syar’iyah* in Banda Aceh, and finally by the *Mahkamah Agung* (Supreme Court) of Indonesia in Jakarta. The power to appoint, promote and dismiss judges rests with the Indonesian Supreme Court and Judicial Commission (*Komisi Yudisial*).³⁰

²⁶ Hooker (n 23); Lindsey (n 1) 29.

²⁷ UNDP (n 1) 3; Hooker, M.B. and Lindsey, T., 2003, ‘Public Faces of *syariah* in Contemporary Indonesia: Towards a National *Madhhab*?’ 10 *Studia Islamika* 23, 44-50; Lindsey (n 1) 30.

²⁸ See Law 7/1989 *On Religious Judicature*.

²⁹ Art 36 (1)-(2).

³⁰ Lindsey (n 1) 35.

The *Mahkamah Syar'iyah* share the same jurisdiction as the Religious Courts, although *Qanun* passed by the DPRD have extended this jurisdiction to include authority over *ibadah* (Islamic worship) and *Siyar Islam* (activities undertaken to enhance the good image of Islam), and certain criminal matters.³¹ Although property matters fall within the ambit of the General Courts (*Pengadilan Negeri*), this jurisdiction becomes less clear when a property dispute is connected to a broader inheritance matter. This is particularly important in post-tsunami Aceh where a large number of landowners died whose property must be distributed among a number of legal heirs.³²

With respect to the applicable law, *Sharia* is applied as found 'within the system of national law' and as further regulated by *Qanun*.³³ In practice therefore, where there is no relevant legislation, judges are most likely to apply the Islamic Law Compilation (*Kompilasi Hukum Islam*, or KHI), a secularized version of classical *fiqh*. The court will also look to *Qanun* or refer to cases of the *Mahkamah Agung* and other scholarly doctrine. At this stage the *Mahkamah Syar'iyah* appears unlikely to refer to *fatawa*; however this may change in the future.³⁴

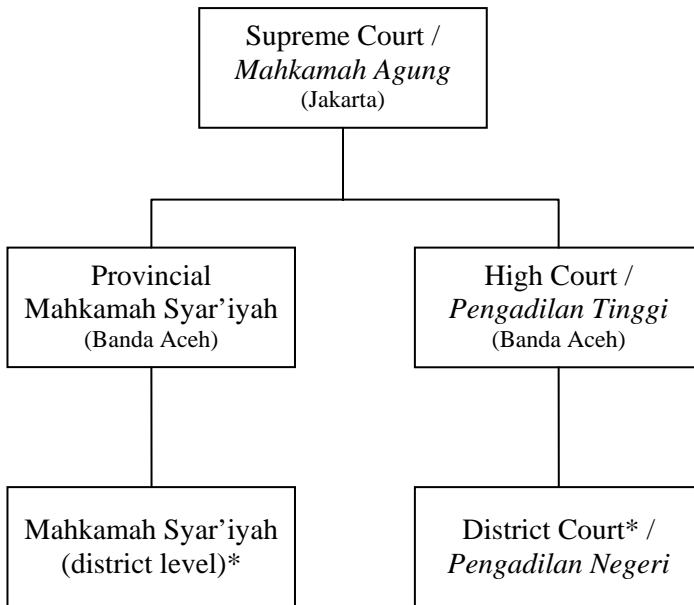
³¹ Lindsey (n 1) 41-48; see also UNDP (n 5) 23-24.

³² This issue is discussed in greater detail in Chapter 4, Part B of this Guidebook 'Resolving Land Disputes'.

³³ Art 26(2) Law 18/2001 on *Special Autonomy for the Province of Nanggroe Aceh Darussalam*; Lindsey (n 1) 35.

³⁴ Lindsey (n 1) 33.

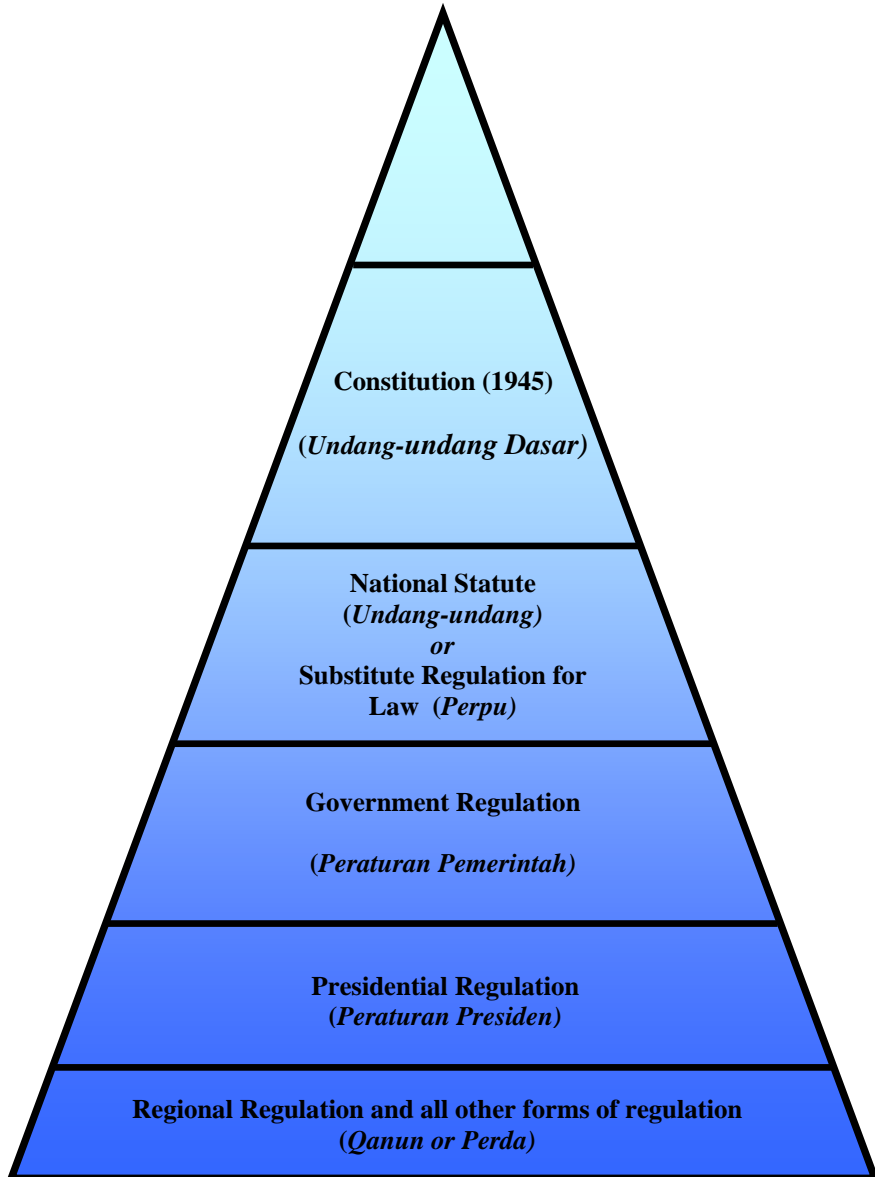
Court Structure Relevant to Tsunami-Related Cases



50%

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Hierarchy of Indonesia's Laws³⁵



³⁵ Based on Law No. 10/2004.

2. The MPU

The Consultative Assembly of *Ulamā* (*Majelis Permusyawaratan Ulama* or MPU) was established by *Qanun* in June 2000.³⁶ The MPU has separate councils in each of Aceh's *Kabupaten* (regencies)³⁷ which are overseen by a central authority located in Banda Aceh.³⁸ The MPU's structure includes a leadership body (a Plenary Council of *Ulama*) called the *Dewan Paripurna Ulama* or DPU, and 8 commissions which are divided by subject matter, covering areas such as Islamic *Sharia* and *fatwa*, 'Empowerment of Women and Families', and 'Community Harmony and Political Studies'.³⁹ The DPU is comprised of 27 members who are *ulamā* from the Province, Kabupaten and town levels as well as religious scholars.⁴⁰

It is important to highlight that *Ulama* have always been important figures in Acehese society who have long held authority in both religious and political spheres. Thus while the MPU is a new institution with formal legislative powers, it is by no means a passive advisory body. The MPU is specifically expressed to be an 'equal partner to the Regional Government and the DPRD',⁴¹ and must be consulted on all *Qanun* passed by the provincial authorities. The MPU also has power to issue *fatawa* and 'to provide their considered opinion whether requested or not, particularly in the fields of governing, developing and improving society, and Islamic economic ordering'.⁴² Using these provisions as justification, the MPU has asserted a *de facto* right to veto legislation it considers 'un-Islamic' and claims that Bills cannot become law without MPU approval.⁴³ With respect to the implementation of *Sharia*, therefore, the MPU is certainly a relevant, albeit informal, source of authority for the *Mahkamah Syar'iyah*, the *Dinas Syariat* and even the *Qanun*.⁴⁴

3. Dinas Syariat

Dinas Syariat is the section of the Governor and *Bupati*'s office which oversees Islamic law in Aceh. It is responsible, *inter alia*, for coordinating Regional Government activities which are concerned with matters of Islamic faith and

³⁶ *PerDA 3/2000 On the Establishment of the MPU* (22 June 2000).

³⁷ *ibid* art 3(4).

³⁸ *ibid* art 16.

³⁹ *ibid* art 18.

⁴⁰ *ibid* art 15; see also *PerDA 43/2001 On the First Amendment Towards Qanun 3/2000 on the Establishment of the MPU*; Lindsey (n 1) 37-38.

⁴¹ Art 3(2) *Qanun 3/2000* (22 June 2000).

⁴² *ibid* art 5.

⁴³ Interview between Tim Lindsey, MB Hooker and Muslim Ibrahim, MPU chair, February 2003, Banda Aceh; see Lindsey (n 1) 37-38.

⁴⁴ Lindsey (n 1) 38-39.

drafting the *Qanun* which regulate *Sharia* in the province.⁴⁵ It is important to note that Dr Alyasa Abu Bakar, head of the *Dinas Syariat* and a senior *Ulama*, has indicated a preference for ‘moderate’ Islam, and the development of a cultural and ‘distinctly Acehnese version of *Sharia* to be implemented slowly, perhaps over several decades’.⁴⁶ It should be noted that since the tsunami, however, the implementation of *Sharia* has begun to move significantly faster, its expanded jurisdiction through *Qanun* being a prime example in this regard.

4. The General Courts (*Pengadilan Negeri*)

Aceh has general state courts in each district, and an appellant court located in Banda Aceh. These courts have jurisdiction over a wide range of matters, including criminal and civil offences, land, industrial relations, trade and tax.

Pure land disputes are dealt with by the general courts, as part of their general jurisdiction pursuant to art 50 of Law No. 2 of 1986 *On the General Court*.⁴⁷ While this principle is generally accepted, the position may be less clear in Aceh, following a Letter of Decision of the Chief Justice of the Supreme Court (6 October 2004) which purported to confirm a transfer of jurisdiction for *jinayah* (criminal) and *muamalah* cases covered under *Qanun* to the *Mahkamah Syar’iyah*.⁴⁸ Ordinarily, *muamalah* would be seen as covering almost all civil cases and, in particular, commercial cases, and that might seem to catch most litigation relating to land. While the *Mahkamah Syar’iyah* and the general courts appear to have developed an informal protocol for dealing with these cases, such practices are not followed consistently across Aceh.⁴⁹ For the purposes of this guidebook, the primary problem is whether disputes about inheritance which concern land fall within the jurisdiction of the *Mahkamah Syar’iyah* or the general courts. The *Mahkamah Syar’iyah* has been quite assertive in such matters, relying on the Supreme Court letter and *Qanun*

⁴⁵ Art 6 PerDA 5/2000 *On the Implementation of Islamic Sharia*; Lindsey (n 1) 39. Art 5 PerDA 33/2001 *On the Establishment of Dinas Syariat* stipulates that the jurisdiction of the *Dinas Syariat* includes (a) planning programs, researching and developing aspects of *Sharia*, (b) Conserving Islamic values, (c) Guiding and directing the implementation of *Sharia* (d) overseeing the implementation of *Sharia*.

⁴⁶ Lindsey (n 1) 40.

⁴⁷ Lindsey (n 1) 52.

⁴⁸ KMA/070/SK/X/2004; see also Joint Decree of the Governor, Head of the Provincial Police Force, Head of the Provincial Prosecutors, Chairman of the *Mahkamah Syar’iyah*, Chairman of the Aceh State Court and the Head of Provincial Office of the Department of Law and Human Rights of 9 August 2004; Lindsey (n 1) 52.

⁴⁹ Drs H Soufyan Saleh, 2005, *Pembagian Hak Warisan (Praktek Mahkamah Sar’iyah di Nanggroe Aceh Darussalam)*, unpublished paper, copy on file with T Lindsey, 4; Lindsey (n 1) 53.

No. 10/2002 to claim it can deal with any land dispute where the land dispute forms part of a broader inheritance dispute.⁵⁰

Part D: Customary Law

1. What is *Adat*?

Adat is roughly translated as customary or traditional law.⁵¹ It refers to a set of beliefs, norms or customs that traditionally apply in societies across Indonesia. Its content comprises descriptions of what a community does, as much as a set of commands as what its members should do. For these reasons, any written version of *adat* may become outdated in a relatively short time.

It has been estimated that at least 19 (and perhaps as many as 300) distinct indigenous legal systems based on *adat* co-exist in Indonesia. They include laws derived from origins as diverse as *Sharia*, animist beliefs once common to many Southeast Asian cultures, and Hindu and Buddhist traditions. Accordingly, the content of *adat* can - and does - vary significantly within relatively short distances, as do local cultures and beliefs in Indonesia. As stated by academic Lindsey, 'within a few hundred miles the dominant *adat* may alter for example, from Islam to Hinduism, from matrilineal to patrilineal inheritance or from communal to individual land title'.⁵²

2. *Adat* in Aceh

The *adat* found in Aceh is strongly influenced by Islam, particularly when compared to other parts of Indonesia. The reforms that led to the introduction of selected Islamic legal norms through *Qanun*, has also resulted in a strengthening of *adat*. Thus, given Aceh's increased autonomy, there has been a move to create new institutions that promote and strengthen the place of *adat* within Acehese public life. These include the positions of *Wali Nanggroe* (symbolic Head of State) and *Tuha Nanggroe* (Council of Elders).⁵³ It should be noted that at the time of writing, these positions have not yet been appointed, however they are intended to assist in the conservation of Aceh's traditions and culture.⁵⁴ Also established was the *Majelis Adat Aceh* (Aceh Adat Council) as a province-wide coordinating body to strengthen and develop *adat* values and structures in the community.⁵⁵ The Adat Council has authority to deal with those aspects of *adat* law that are seen as distinct from *Sharia* or *fiqh*.

⁵⁰ Saleh (n 49) 4; Lindsey (n 1) 53.

⁵¹ '*Adat*' is an Arabic term, meaning 'custom, 'rule' proper behavior, 'propriety' or 'law'.

⁵² Lindsey (n 1) 12.

⁵³ art 10 Law 18/2001.

⁵⁴ ICG (n 1) 12; Lindsey (n 1) 4.

⁵⁵ Lindsey (n 1) 17.

Other reforms have focused on the administration of *adat* justice (*peradilan*) at the village level.⁵⁶ *Perda 7/2000 On the Administration of Adat Life* recognizes different *adat* institutions and *adat* laws at the village level, to the extent that they do not contradict *Sharia* principles or national law.⁵⁷ This by-law also clarifies the function of *adat* institutions (which is to mediate disputes between community members and resolve disputes at the village level) and articulates the types of cases which can be heard.⁵⁸ Importantly, it requires that police give the *imeum mukim* (head of *mukim*) and *geuchik* (village leader) the opportunity to settle those disputes falling within their jurisdiction at the *mukim*⁵⁹ and *gampong* (village) levels before commencing investigations.⁶⁰

Various *Qanun* further regulate the administration of *adat*. Key developments include:

- The *camat* having the authority to resolve land disputes, strengthen women's empowerment and promote *Sharia*;⁶¹
- The *mukim*⁶² being headed by an *imeum mukim*, whose role is to facilitate resolution of village level disputes and implement *adat* law;⁶³
- The *gampong* leaders being empowered to promulgate and codify village level rules, guidelines and *adat* customs which are then forwarded to the *bupati* for approval.⁶⁴
- That the *mukim*'s decision is final and binding.⁶⁵

It must be highlighted that the principal effect of these developments is to define and confirm existing customary practices. They do not alter *adat*'s formal legal standing; *adat* remains Aceh's default legal source, applicable only informally or where regulations are silent.⁶⁶

⁵⁶ *id.*

⁵⁷ Further, that national legislation takes precedence over *adat* law in the event of any inconsistencies; UNDP (n 5) 29.

⁵⁸ art 6 *Perda 7/2000*.

⁵⁹ *Mukim* is a traditional Acehese governance structure that sits between the *Gampong* and *Camat* levels. It will generally have responsibility for a few *Gampong*.

⁶⁰ art 10 *PerDA 7/2000*; UNDP (n 5) 29, 65.

⁶¹ art 5 *Qanun 3/2003* (art 5); UNDP (n 5) 27.

⁶² A governance structure which joins several villages.

⁶³ *Qanun 4/2003 On the Mukim Governance Structure*; UNDP (n 5) 27-28.

⁶⁴ *Qanun 5/2003 On the Gampong Governance Structure* UNDP (n 5) 28-29.

⁶⁵ art 12(3) *Qanun 5/2003*; UNDP (n 5) 91.

⁶⁶ Lindsey (n 1) 17.

3. The Role of *Adat* in the Indonesian Legal System

The chief authority regarding the legal standing of *adat* is found in Article II of the transitional provisions annexed to the Indonesian Constitution (1945). This states that all existing institutions and regulations valid at the date of independence would continue, pending the enactment of new legislation and institutions, and provided they were in conformity with the Constitution.⁶⁷ The constitutional recognition of *adat* arose due to the legal pluralism inherited from the Dutch. During the colonial period, *adat* was the default law for the indigenous population, and post-independence, the transitional provisions in the Constitution ensured that *adat* remained a valid source of law. Further, *adat* is now given additional, but still limited, recognition in the Indonesian Constitution (as amended) through articles 18B(2) and 28I(3).⁶⁸ Any disputes concerning *adat* that enter the court system fall under the jurisdiction of the general courts. The general courts are therefore the primary authority for determining whether an *adat* principle is valid.⁶⁹

4. The Substance of Acehese *Adat*

While *adat* in Aceh is closely linked to Islamic principles and *Sharia*, determining the specific rules and norms applied is a difficult exercise. This is primarily due to the lack of formal regulation of *adat* and because the outcomes of cases are rarely available in written form. There is also significant variation in what constitutes *adat*. First, the substance of *adat* varies between (and sometimes even within) districts, including the extent to which *adat* reflects *Sharia* norms. Second, the views of *Ulama* – who undoubtedly hold strong influence over informal dispute resolution – are not homogeneous across Aceh, or even within the MPU. In fact, there appears to be considerable unorthodoxy and doctrinal variety among Acehese *Ulama*, particularly in more remote areas. For this reason, a preoccupation of the leading *Sharia* institutions in Aceh, the *Dinas Syariat*, the MPU and the *Mahkamah Syar'iyah* is to 'socialise' among the public a consensus on key issues of Islamic law.⁷⁰

5. *Adat* in Practice

At the village level, *adat* is primarily the responsibility of the *geuchik* (village chief), *imeum meunasah* (village religious leader), local *Ulama* (religious scholar) and *tuha peut* (village elders). If a dispute occurs, these village leaders will attempt to resolve the issue through *musyawarah* or consultation. In this process, joint resolution between the parties is sought with a village leader assisting both parties to agree on a mediated resolution. It is important to note that the vast majority of disputes in Aceh

⁶⁷ Lindsey (n 1) 13.

⁶⁸ Lindsey (n 1) 13.

⁶⁹ Lindsey (n 1) 33.

⁷⁰ Lindsey (n 1) 33-34.

are not litigated, but are resolved according to *adat*.⁷¹ This preference for non-formal dispute resolution can be partially explained by a lack of understanding on the part of *adat* leaders regarding their role in dispute resolution. For example, while the law regulates the types of cases that *adat* leaders can deal with⁷², research conducted by UNDP suggests that beliefs vary among *adat* leaders regarding their jurisdiction, most understanding that they can examine civil and family law cases, land disputes, and sometimes criminal cases.⁷³ This is somewhat exacerbated by provisions in the formal law. For example, Qanun 5/2003 provides that the *mukim*'s decision is final and binding⁷⁴ and *Perda* 7/2000 requires that disputants attempt to resolve their disputes through *adat* before approaching the formal justice system.⁷⁵ This has led many *adat* leaders and community members to believe that *adat* is the only forum for resolving disputes, that decisions based on *adat* cannot be appealed and that directly referring disputes to formal legal mechanisms is prohibited.⁷⁶ Such misunderstanding is exacerbated by the fact that *adat* decision makers, who may possess only a minimum understanding of *adat* law and procedure, are communities' primary source of information regarding dispute resolution.⁷⁷

According to UNDP's research, some Acehnese found *adat* processes to be corrupt, and unaccountable, leading to unfair decision-making which did not produce lasting resolutions. A further complaint was that community members have little understanding of *adat* procedures.⁷⁸ The research also suggested that the enforcement of *adat* decisions was weak and that powerful figures may ignore decisions – a situation which has encouraged forum shopping among some segments of the population.⁷⁹ A primary conclusion was that women, minorities and other vulnerable groups (who have little or no influence over dispute resolution and limited opportunity to seek formal remedies outside the village/sub-district structures) are most disadvantaged and discriminated against under *adat* processes.⁸⁰

However *adat* has wide support and is the favored forum for dispute resolution in Aceh. Most find *adat* to be fast, familiar, simple, inexpensive, culturally relevant, and a preferable option to court-based litigation, which is considered expensive and

⁷¹ Lindsey (n 1) 33.

⁷² *Perda* 7/2000.

⁷³ UNDP (n 5) 65, 90.

⁷⁴ art 12(3) *Qanun* 5/2003.

⁷⁵ art 10 *Perda* 7/2000; UNDP (n 5) 91.

⁷⁶ Which contravenes art 17 Law 39/1999 on *Human Rights* and art 28d(1) of the Constitution of the Republic of Indonesia; UNDP (n 5) 91.

⁷⁷ See also UNDP (n 5) 43, 77.

⁷⁸ UNDP (n 5) 50.

⁷⁹ *ibid* 66-67.

⁸⁰ *ibid* 67, see also 71, 79.

bureaucratic.⁸¹ The extent to which such opinions are influenced by lack of information and access to alternatives remains unclear. A further factor is the role of cultural norms that promote harmony over individual rights and adversarial processes. Individuals who seek recourse through the formal justice system, particularly vulnerable groups such as widows, may be stigmatized, creating strong disincentives to seeking formal redress outside of *adat*.⁸²

⁸¹ *ibid* 50-54, 97-98.

⁸² *ibid* 51-52, 79, 97.

CHAPTER 2

GUARDIANSHIP LAW IN ACEH



CHAPTER 2 GUARDIANSHIP LAW IN ACEH

The tsunami created an estimated 30,000 orphans,⁸³ 20,000 of which have not yet been appointed a legal guardian.⁸⁴

1. What is Guardianship?

Under Indonesian law, guardianship (*perwalian*) is defined as the authority to perform legal acts that represent the interests of, or are undertaken on behalf of, a child whose parents have died or who are not competent at law.⁸⁵ The laws governing guardianship regulate the care of orphans as well as the management of any inheritance that such orphans may be entitled to. These laws can be found primarily in Law No. 1/1974 *On Marriage* and the Compilation of Islamic Laws or *Kompilasi Hukum Islam* (KHI). In Aceh, the relevant court with jurisdiction over guardianship matters is the *Mahkamah Syar'iyah*, which applies the KHI, as well as relevant *Qanun*. There are also several *fatawa* (legal opinion) which have been issued by the MPU dealing with guardianship. While *fatawa* have no formal legal effect, they are highly influential. Issues of guardianship are also regulated through customary law, however it should be noted that there is often little difference between the formal law and customary law, as both are based upon Islamic principles.

2. To Whom Does Guardianship Apply?

Courts have the authority to appoint a guardian where a child's parents are dead or are without legal capacity.⁸⁶ A parent may be deemed to be without legal capacity when s/he is also a minor (under 21 years of age), or has severe physical or mental disabilities. Indonesian law implies that guardianship will only be applicable to children who have lost both parents. In Acehese society, however, a guardian will often be appointed, not only when both parents have died, but also where only a child's father dies.

3. Types of Guardianship

Under Indonesian law, a guardian has responsibilities over both their ward's welfare and property, including inheritance.⁸⁷ The manner in which guardianship is managed in practice, however, is more complicated. In Aceh, the appointed guardian (usually

⁸³ UNDP (n 5) 11.

⁸⁴ Discussion with Rosmawardani, Judge of the Banda Aceh *Mahkamah Syar'iyah* 30 May 2006.

⁸⁵ Arts 50-54 UU 1/1974 *on Marriage* and Arts 107-112 KHI deal with *perwalian* or guardianship; Lindsey (n 1) 58.

⁸⁶ Arts 33(1) Law No.23/2002; Art 49(2) Elucidation of Law 7/1989.

⁸⁷ Article 50(2) UU 1/1974 and art 107(2) KHI.

a male relative on the father's side of the child's family) will generally take responsibility only for managing a ward's assets. For the purposes of this guidebook, such guardians will be referred to as 'inheritance guardians'. The welfare, or day-to-day care of the ward will usually be vested in the child's mother or, where she is not alive, a female relative on the mother's side of the family.⁸⁸ Acehese society also recognizes another important type of guardian — the marriage guardian — who is responsible for indicating the bride's consent during the Islamic marriage ceremony.⁸⁹ In Aceh, the marriage and inheritance guardian are usually the same person.⁹⁰

A common scenario where both parents have died, therefore, is for a female maternal relative to assume the role of primary care giver, while a paternal relative, usually an uncle, is appointed as inheritance/marriage guardian. In this case, the inheritance guardian should make regular payments from the child's inheritance or assets to the primary care giver to pay for the child's day-to-day needs. This is not to imply that all three functions (primary caregiver, inheritance guardian and marriage guardian) cannot be vested in the one person, or that this person will always be a male paternal relative. The question of who can be appointed guardian is discussed below.

⁸⁸ Badruzzaman Ismail 'Wali perempuan dari Aspek Hukum Adat di Provinsi NAD' paper presented at Child Guardianship Workshop organized by the NAD Provincial *Mahkamah Syar'iyah*, Putroe Kande Foundation and UNIFEM, Banda Aceh, 9-11 September 2005, 3.

⁸⁹ It is important to note that Indonesian law does not specifically deal with question of who can be a *wali* for the purposes of the marriage ceremony. The Sunni *fiqh* is clear, however, that this role can usually only be performed by a man and there is no dispute on this issue in Indonesian Islam; see Syahrizal 'Wali Perempuan dalam Perundang-undangan Indonesia'; paper presented at the Child Guardianship Workshop organized by the NAD Provincial *Mahkamah Syar'iyah*, Putroe Kande Foundation and UNIFEM, Banda Aceh, 9-11 September 2005, 2; Lindsey (n 1) 58.

⁹⁰ Clearly, there are important differences between the manner that guardianship is regulated under Indonesian law, and how communities deal with guardianship issues at the village level. When reading the following chapter, therefore, it is important to note that while different Acehese communities recognize different forms of guardianship, such categories are not necessarily reflected in law.

Table 2: Guardianship in Acehese Society⁹¹

	Responsibilities	Delegate
Primary Care-Giver	Responsible for a ward's day-to-day care and upbringing. The welfare guardian has no legal rights to represent or act on behalf of the ward.	The child's mother (if alive), or a female relative on the mother's side of the child's family.
Inheritance Guardian	Management of a ward's inheritance and other assets and ensuring that the ward's assets are used to pay for the child's day-to-day needs. ⁹²	A male relative on the father's side of the child's family (generally an uncle).
Marriage Guardian	Only applicable in the case of female wards. Marriage guardians are the person through which a bride gives her consent during the Islamic marriage ceremony. Under the <i>Shafii</i> school of Islam (followed in Indonesia) the consent of the marriage guardian is essential and the guardian must be male. ⁹³	A male relative on the father's side of the child's family (generally an uncle).

4. The Appointment of Guardians

(i) The Appointment of Guardians Under Adat

Since the tsunami, the majority of persons assuming guardianship responsibilities have not been formally appointed, but have been selected based on consensual agreement within families or communities. While the village leaders will usually be informed of such decisions, appointments are usually informal, and few, if any, records are kept. In certain cases, however, the appointment of a guardian may

⁹¹ This table is based on IDLO research and fieldwork undertaken between March and May 2006.

⁹² Article 50(2) Law 1/1974; Art 107(2) KHI.

⁹³ Under the *Shafii* School of Islam (followed in Indonesia), the consent of the *wali* is essential in all circumstances; art 50(2) Law 1/1974.

involve an *adat* process. In such situations, a simple ceremony will be held, possibly at the *meunasah* or during a *gampong* (village) meeting. The purpose of the meeting is to confirm the appointment and to inform community members of this situation. Only in disputed cases will the appointment of guardians be referred to the *geuchik* and/or *imeum meunasah* for resolution.

(ii) *Appointment by the Court*

Where a child has inheritance, such as land or money, there is a greater trend to seek formal recognition of guardianship through the formal legal system. This is often done to enable the guardian to access a ward's inherited assets, such as bank accounts, on behalf of the ward. For this to occur, and for guardianship to be legally valid, a guardian must be appointed and confirmed by a court. In Aceh the relevant court is the *Mahkamah Syar'iyah*. Formal guardianship can be vested in a person, or a legal entity such as a foundation, government institution or non-government organization.⁹⁴ In Aceh, the *Baitul Mal* (Islamic treasury)⁹⁵ can be appointed as legal guardian of a child.⁹⁶

(iii) *The Appointment of Guardian through the RALAS Programme*

In Aceh, land titling and registration is being conducted through a programme named RALAS (Reconstruction of Aceh Land and Administration System).⁹⁷ Where minors have inherited land, they must register their rights to this land through a guardian appointed through the RALAS programme. First, the guardian must complete a form provided by RALAS entitled 'Form of the Evidence of Guardianship Approval' (annexure 3). This form must be signed by the *geuchik* or *imeum meunasah* and then be validated by the *Mahkamah Syar'iyah*. Guardians do not have to travel to their district *Mahkamah Syar'iyah* to obtain validation. Instead, a 'Mobile *Mahkamah Syar'iyah*' will travel to villages and judges will conduct confirmation hearings, usually in the *gampong* office or *meunasah*, free of charge.⁹⁸ Such hearings are short and normally involve only the proposed guardian and witnesses (neighbors or relatives) who can provide a statement supporting the

⁹⁴ Art 107(4) KHI; Art 31(1) and (3) Law No.23/2002.

⁹⁵ The *Baitul Mal* is a public treasury established to manage assets for the benefit of the *Masakeen* (needy Muslims).

⁹⁶ Armia Ibrahim 'Perwalian Anak Menurut Hukum Islam dan Hukum Positif' paper presented at Faraidh Workshop III conducted by Yayasan Lamjabat, Banda Aceh 8-10 April 2006. See also *Al-Indzar* Dinas Syariat 'Perwalian Atas Harta Anak Yatim dalam Praktek Masyarakat Aceh dan Peraturan Perundang-undangan' Publication No. 4 (15 September 2005), 6-8.

⁹⁷ The RALAS programme is discussed in detail at Chapter 4 Part C: 'The RALAS Programme'.

⁹⁸ Manual of Land Registration in the Affected Tsunami Areas at Naggroe Aceh Darussalam and Sumatra Utata, BPN Decree No. 114-11 2005, 16-17.

guardian's relationship with the child.⁹⁹ As at May 2006, *Mahkamah Syar'iyah* in Banda Aceh and Jantho had appointed 46 guardians through the RALAS programme, 14 of which were women.¹⁰⁰ It must be noted that this form of guardianship is only applicable for the land registration process. To obtain legal guardianship (guardianship which covers a child's welfare and other aspects of inheritance) an order must be obtained from the district *Mahkamah Syar'iyah* through the process described above.¹⁰¹

Table 3: Guardianship Appointments through the Mobile *Mahkamah Syar'iyah*

City/District	Sub-District	Gampong	Guardianship
Banda Aceh	Meuraxa	Ulee Lheu	1
		Cot Lamkuweuh	3
		Asoe Nanggroe	6
		Baro	6
		Punge Ujong	13
		Lamjabat	5
Aceh Besar	Lhoknga	Mon Ikeun	4
		Meunasah Masjid	8
TOTAL			46

5. Who Can Be Appointed Guardian?

Indonesian law requires that wherever possible, an appointed guardian should be from the orphan's own family. If there are no close relatives, an adult from outside the orphan's family can act as a guardian, provided that they meet the requisite health and character conditions.¹⁰² Such requirements include that the guardian be of the same religion as the child.¹⁰³ Parents will often nominate a guardian through will or testament.¹⁰⁴ However, where parents have not made such provision, a prospective guardian may submit a request to the court.¹⁰⁵ Under either scenario, the guardianship must be confirmed by a court to be legally valid.

⁹⁹ Interview with Rafiuddin (27 April 2006).

¹⁰⁰ See Fakri Karim 'The Existence of Peureumoh in Housing Rehabilitation and Reconstruction Trough Community Base After Tsunami Disaster in Aceh', p. 5.

¹⁰¹ See also Box A of this chapter.

¹⁰² Such as maturity, healthy, just, honest and good behavior; Art 51(2) Law No.1/1974; Art 107(4) KHI.

¹⁰³ Art 31 (4), 33(3) Law No. 23/2002 on *Child Protection*.

¹⁰⁴ Art 51(1) Law 1/1974.

¹⁰⁵ See Art 49(2) Explanation of Law No.7.1989 *On the Religious Judicature*.

As stated above, in Aceh, the *Baitul Mal* (Islamic treasury) can be appointed as legal guardian of a child.¹⁰⁶ There is some question, however, as to the practicality of this provision. The *Baitul Mal* was established as a formal institution in Aceh by Governor's Decree in 2003,¹⁰⁷ and at present they have only been set up at the Provincial and District levels. While establishing the *Baitul Mal* at the village or *Gampong* level is envisaged under *Qanun*,¹⁰⁸ the *Baitul Mal* cannot realistically perform a role with respect to guardianship until this greater village-level structure is created. Further, this research could not identify any situations in which the *Baitul Mal* has been appointed guardian, or has provided financial support for an orphan.

6. Women and Guardianship

(i) *Women and Guardianship Under Indonesian Law*

There is nothing within Indonesian law which prevents women from being appointed as guardians over their own, or other children.¹⁰⁹ Leading Indonesian jurists such as Subekti have argued, in fact, that where a parent dies, any surviving spouse will automatically 'by operation of statute' become the guardian of any surviving children under the age of 18.¹¹⁰ This appears not to be the practice in Aceh, where there exists a perception that women cannot be appointed as guardians. As a result, where a surviving mother wants formal recognition of her status as guardian, she will make an application to the *Mahkamah Syar'iyah*.

This should not be construed as the *Mahkamah Syar'iyah* being resistant to the notion of female guardians. Both the *Mahkamah Syar'iyah* and the *Dinas Syariah* support the appointment of female guardians with responsibilities over both a ward's

¹⁰⁶ Armia Ibrahim 'Perwalian Anak Menurut Hukum Islam dan Hukum Positif', paper presented at Faraiddh Workshop III conducted by Yayasan Lamjabat, Banda Aceh 8-10 April 2006.

¹⁰⁷ Governor Decree (*Keputusan Gubernur Propinsi*) No. 18/2003 on the Establishment of *Baitul Mal* in Nanggroe Aceh Darussalam.

¹⁰⁸ Art 19 *Qanun* 7/2004 On the Management of Zakat; art 39 Governor Decree No. 18/2003 On the Establishment of *Baitul Mal* in Nanggroe Aceh Darussalam.

¹⁰⁹ Note that given the Indonesian Constitutional guarantee against discrimination and the absence of any gender-specific terminology in either the Marriage Law or the KHI, it is hard to see how the law could be interpreted as excluding women from *perwalian*. This interpretation is 'strengthened by the recent amendments to the Indonesian Constitution that inserted a comprehensive human rights charter in Chapter XA, drawn from the Universal Declaration of Human Rights. Article 28I (2), in particular, provides that "[e]ach person has the right to be free from discriminatory treatment on any grounds and has the right to obtain protection from such discriminatory treatment" '; Lindsey (n 1) 59.

¹¹⁰ Syahrizal, 2005, *Wali Perempuan dalam Perundang-undangan Indonesia*, unpublished paper, copy on file with T Lindsey 2; Lindsey (n 1) 59.

welfare and assets.¹¹¹ It is acknowledged, however, that this is most likely to occur where there are no appropriate male relatives to perform the role. Since the tsunami, more than 40% of guardians appointed by the courts in Banda Aceh and Jantho have been female.¹¹² Such women are usually close relatives of the child, for example a sister, maternal aunt or grandmother.

Table 4: Guardianship Appointments

Court	Guardian Appointments	Women Guardian
<i>Mahkamah Syar'iyah</i> (Banda Aceh) Jan 2005 – Mar 2006	192	67
<i>Mahkamah Syar'iyah</i> (Jantho) Jan 2005 – Dec 2006	51	33
Total	243	100

(ii) *Women and Guardianship Under Customary Law*

Acehnese academic Hamid Sarong, argues that at *adat*, where a father dies, a surviving mother automatically becomes the guardian of any surviving children. She is also responsible for any assets which the child inherits, unless she is considered legally incompetent. In such cases, the woman is given authority over a child's assets to ensure that the child is properly cared for and so that she does not have to depend on the family of her deceased husband for maintenance.¹¹³ According to Badruzzaman Ismail, the head of the Acehnese Adat Council:

Women as wali, (*voogdij*, in the sense of responsibility for protecting, and caring for and managing the assets of children left by a deceased husband), from the perspective of *adat*, is fully in line with Islamic law in which women are seen as having the same status as men as legal subjects (*personensrecht*), so that women are seen as legally capable and able to perform legal acts to

¹¹¹ Lindsey (n 1) 58-9.

¹¹² see table 4.

¹¹³ Lindsey (n 1) 58; Hamid Sarong, 'Wali Perempuan dan Perlindungan Anak di Nanggroe Aceh Darussalam', paper presented at Child Guardianship Workshop organized by the NAD Provincial *Mahkamah Syar'iyah*, Putroe Kande Foundation and UNIFEM, Banda Aceh, 9-11 September 2005, 3.

become *wali*, giving protection, supervision and benefit to the estate of the children.¹¹⁴

It should also be highlighted that under customary law, a child who is classified as *kafalah* (independent) may be involved in choosing their own guardian (a practice derived from *Sharia*). Factors relevant to this determination are whether the child can wash, feed and dress themselves and fulfill all requirements to be considered independent. If a child is determined to be *kafalah*, then they should be allowed to choose their own guardian from any of their maternal or paternal relatives.¹¹⁵ In practice, however, a ward choosing her/his own guardian appears to be rare.

(iii) Women and Guardianship in Practice

As suggested earlier in this chapter, the abovementioned formal law and adat principles are often ignored in practice. Instead, guardians are usually selected according to the following hierarchy:

1. Male from the father's side of the family;
2. Male from the mother's side of the family;
3. Female from either side of the family.

Thus while primary care-giving will usually be the responsibility of the mother or another close female relative, only in exceptional cases will females be selected to perform the official guardianship function. Even in such situations, such women will not be given the title of 'guardian'. This is because in Aceh, the word guardian, '*wali*', has male connotations. This may be attributed to the requirement under Islam that only a male can perform the role of marriage guardian, and the fact that in Aceh the role of marriage and inheritance guardian are usually vested in the same person.

7. The Duration of Guardianship

There is some inconsistency within the law regarding the age range for which guardianship is applicable. Law No.1/1974 *On Marriage* states that 'a child who is not yet 18 years old or never married and that is not under the custody of her/his parents will be under the authority of a guardian'.¹¹⁶ However the KHI provides that guardianship is only for children under 21 years of age or for those who are not

¹¹⁴ Badruzzaman Ismail 'Wali perempuan dari Aspek Hukum Adat di Provinsi NAD' paper presented at Child Guardianship Workshop organized by the NAD Provincial *Mahkamah Syar'iyah*, Putroe Kande Foundation and UNIFEM, Banda Aceh, 9-11 September 2005, 3.

¹¹⁵ Tgk. H.M. Daud Zamzamy 'Kedudukan Wali Perempuan Kajian Fiqh Klasik' paper presented at the Child Guardianship Workshop organized by the NAD Provincial *Mahkamah Syar'iyah*, Putroe Kande Foundation and UNIFEM, Banda Aceh 9-11 September 2005, 3.

¹¹⁶ Art 50 (1) Law No.1/1974 *on Marriage*.

married.¹¹⁷ Given that Indonesian legislation supersedes the KHI (which has the status of a Presidential Instruction), the *Marriage Law* should be regarded as the authoritative law.

Under customary law, guardianship will generally continue until a ward enters into marriage, a practice which might be connected to *Quranic* verse *An-Nisa* 6: ‘orphans shall be cared for until it is time for them to marry’.¹¹⁸ However factors such as physical and mental development, maturity and self-sufficiency within the community will also be relevant in gauging whether a person should remain under guardianship. Under *adat* therefore, it is possible that the period of guardianship ends when the ward is around 16, either due to marriage or because the ward is seen as competent to manage their own affairs.

8. Children without an Appointed Guardian

The *Mahkamah Syar’iyah* has estimated that there remain approximately 20,000 children orphaned by the tsunami who do not have a legally appointed guardian.¹¹⁹ Under Indonesian law, where an orphan has inheritance entitlements but no appointed guardian, this inheritance should be managed by the *Balai Harta Peninggalan* (Public Trust) or another authorized institution.¹²⁰ The *Dinas Syariat Islam* has stated that in Aceh, the inheritance of such orphans should be managed by their village’s *Baitul Mal*.¹²¹ However as the *Baitul Mal* is yet to be formally established at the village level, this function cannot be carried out.

The findings of this research suggest that the majority of orphans with inheritance entitlements have had a guardian appointed, either formally or informally. Those without formal guardians are generally children with no inheritance owing to them. While there is nothing in Indonesian law specifying who should take responsibility for such children, MPU Fatwa 3/2005 states that orphans who have no inheritance will, with a decision by the *Mahkamah Syar’iyah* be maintained by the *Baitul Mal*, and that this relationship will be supervised by the *Mahkamah Syar’iyah*.¹²² It

¹¹⁷ Art107(1) KHI.

¹¹⁸ The full verse reads ‘And test the orphans [in your charge] until they reach a marriageable age; then, if you find them to be mature of mind, hand over to them your possessions; and do not consume them by wasteful spending, and in haste, ere they grow up. And let them who is rich abstain entirely [from his ward’s property]; and let him who is poor partake thereof in a fair manner. And when you hand over to them their possessions, let their be witnesses of your behalf – although none can take count as God does’.

¹¹⁹ Discussion with Rosmawardani, Judge of the Banda Aceh *Mahkamah Syar’iyah* 30 May 2006.

¹²⁰ Upon legal confirmation by a court; see art 35(1)-(3) Law No. 23/2002.

¹²¹ *Al-Indzar* Dinas Syariat ‘Perwalian Atas Harta Anak Yatim dalam Praktek Masyarakat Aceh dan Peraturan Perundang-undangan’ Publication No. 4 (15 September 2005), 7.

¹²² Art 2(3) Fatwa MPU 3/2005.

should be noted that the *Mahkamah Syar'iyah* has questioned whether it has the resources and capacity to exercise such supervisory responsibilities and have indicated that the *geuchik* (Village Head) or *Baitul Mal* are the appropriate entities to undertake such duties.¹²³

In practice, most orphans in this situation are cared for by a non-relative. Such guardians generally have no familial ties to the orphan, nor any financial incentive to continue caring for the child. Given the absence of any strict selection criteria and the lack of formal safeguards, there is little to ensure that such informally appointed guardians perform their duties responsibly.¹²⁴

9. Obligations of Guardians

It is important to note that Islam places strong emphasis on the welfare of orphans. The *Quran* states that those who do not care for orphans are 'religious hypocrites',¹²⁵ and emphasizes that somebody who uses and consumes the property of an orphan can be compared to 'somebody who eats a flame of fire in hell'.¹²⁶ The *Quran* also asks the community to look after and protect orphans and to appoint a guardian to manage inheritance and property.¹²⁷ It also states that the guardian must be an honest person with a genuine intention to look after and develop the property of the ward. *Fatwa* MPU 2/2005 further reminds the community that the maintenance of orphans is *fardhu kifayah* (a collective obligation) for Muslims.¹²⁸

Under Indonesian law the responsibilities of guardians fall into three primary areas: general welfare, asset management and asset transfer.

(i) Welfare

Under Indonesian law, guardians have an obligation to care for their ward, to provide religious guidance, education and other skills.¹²⁹ Guardians also have an obligation to respect the religion and the beliefs of their ward.¹³⁰ Similar responsibilities exist under customary law. Guardians must provide health care, education, housing and (in the case of female wards) perform the role of marriage guardian.

¹²³ Discussion with the judges at the Provincial *Mahkamah Syar'iyah* (2 June 2006).

¹²⁴ Interview with *geuchik* Lampulo (4 May 2006); *Al-Indzar* Dinas Syariat Publication, 'Perwalian', 2-3.

¹²⁵ Q.S. Al-Ma'un; 1-2.

¹²⁶ Q.S. An-Nisa: 10.

¹²⁷ Q.S. Al-Nisa; 6.

¹²⁸ Art 1.

¹²⁹ Art 110(1) KHI.

¹³⁰ Art 51(3) Law No. 1/1974.

(ii) *Asset Management*

Law No. 23/2002 *On Child Protection* requires that guardians manage their ward's wealth for the benefit of that child.¹³¹ The *Marriage Law* similarly charges guardians with responsibilities over asset management and states that guardians may be required to pay compensation for losses incurred on such assets due to their own negligence.¹³² At the commencement of the guardianship an inventory of the ward's assets must be taken and guardians are required to document all changes to such assets.¹³³ Such responsibilities extend to conducting annual audits of the ward's assets to ensure that inventory is kept up to date.¹³⁴ A similar position has been put forward by the *Dinas Syariat* in a paper related to orphans under *Sharia*.¹³⁵ Despite such provisions, in practice it is rare for such an inventory to be made and when applying for guardianship at the *Mahkamah Syar'iyah* an inventory of the ward's assets is not usually required.

Guardians are prohibited from selling, transferring or pawning a ward's assets unless this is in the interests of the ward.¹³⁶ Guardians are also prohibited from tying up, burdening or dividing a ward's assets unless such action will increase the value of the ward's assets or cannot be avoided.¹³⁷ In the event that a guardian is forced to sell land belonging to a ward, permission should first be obtained from the *Mahkamah Syar'iyah*.¹³⁸

It is important to note that where a guardian is impoverished, a portion of the ward's assets or wealth may be used for personal needs. Such needs will be decided according to *ma'ruf* standards (a guardian's most basic level of need).¹³⁹ This can be linked to the *Qur'anic* verse which states that a poor guardian is permitted to use a ward's wealth only to fulfill their primary food needs.¹⁴⁰ The rules regarding the use of a ward's assets in such circumstances are somewhat vague, however it is clear this occurs in practice.

¹³¹ Art 33(4) Law No. 23/2002.

¹³² Art 51(5) Law No. 1/1974.

¹³³ Law No. 1/1974, 51:4.

¹³⁴ Art 110(4) KHI; Art 51(3)-(5) Law No. 1/1974.

¹³⁵ *Al-Indzar* Dinas Syariat Publication, 6-7.

¹³⁶ Art 52 Law No. 1/1974.

¹³⁷ Art 110(2) KHI.

¹³⁸ Discussion with Drs H. Armia Ibrahim, Judge MS (2 June 2006). Note that this requirement is not contained with a formal regulation, however was articulated in a draft Perpu on Land.

¹³⁹ Art 112 KHI.

¹⁴⁰ Q.S. An-Nisa, 6.

(iii) Asset Transfer

Guardians are required to transfer control over a ward's assets when the ward reaches the age of 21, marries or is otherwise deemed to be independent.¹⁴¹ Disputes concerning such transfers, including where a ward's assets may have been misused, eroded or lost, fall within the jurisdiction of the *Mahkamah Syar'iyah*.¹⁴² If a guardian is found to have acted negligently, they may be required to compensate their ward for any losses incurred on a ward's assets.¹⁴³ A ward's ability to prove negligence, mismanagement or misuse of assets will often depend on an inventory having been taken at the commencement of the guardianship as well as the existence of records tracking subsequent changes. As indicated above, however, such documentation is rarely filed at the *Mahkamah Syar'iyah* or at the village (*gampong*) level.

10. Supervision of Guardianship

Law No. 23/2002 states that the *Balai Harta Peninggalan* (Public Trustee) or another institution with similar authority may act as a 'supervisory guardian' to ensure that a ward's interests are looked after.¹⁴⁴ *Fatwa* MPU No.3/2005, however, states that the *Makamah Syar'iyah* will supervise the guardianship of children orphaned by the tsunami. As discussed previously, the *Mahkamah Syar'iyah* has questioned whether they are the appropriate institution or have the necessary capacity to perform such a role.¹⁴⁵ Further, if the *Mahkamah Syar'iyah* were to have a supervisory role, this could result in a conflict of interest if the court were to adjudicate a case involving a guardianship dispute.¹⁴⁶ Some judges have therefore suggested that the *Baitul Mal* is the appropriate institution to supervise guardians. In practice, guardians are generally supervised by the *geuchik*, *Imeum meunasah* and *tuha peut*.

11. Revocation of Guardianship

Where a guardian is not fulfilling their obligations, a ward's relative or the *Baitul Mal* can submit a request to the court to have the guardian's authority revoked. The court will revoke a guardian's authority and transfer such authority to another person or legal entity if it is found that the guardian:¹⁴⁷

¹⁴¹ Art 111(1) KHI.

¹⁴² Art 111(2) KHI.

¹⁴³ Art 54 Law No. 1/1974; Art 110(3) KHI.

¹⁴⁴ Art 35(2) Law No. 23/2002.

¹⁴⁵ Discussion with Soufyan Saleh, Chief Justice of the NAD *Mahkamah Syar'iyah* (2 June 2006).

¹⁴⁶ Discussion with judges of the NAD *Mahkamah Syar'iyah* (2 June 2006).

¹⁴⁷ Art 53 Law No. 1/1974; Art 109 KHI; Art 36(1)-(2) Law No. 23/2002.

1. Has neglected their ward;
2. Has acted inappropriately or abused their authority;
3. Consumes alcohol, gambles or is wasteful;
4. Is mentally unfit;
5. Has died or is without legal capacity.

In an *adat* context, where a guardian is not exercising their duties properly, the guardianship will be assumed by the *geuchik* or transferred to another relative.

12. Procedures to be Appointed Guardian

The following section is designed to provide practical information regarding the steps usually taken in relation to guardianship appointment. It must be noted that this information is intended as a guide only and that different procedures may be employed in different areas of Aceh.



Courtesy of A Harper UNORC



Courtesy of A Harper UNORC

A. Legal Appointment of a Guardian by the *Mahkamah Syar'iyah*

1. *Obtain Geuchik Recommendation:* An applicant should discuss the issue with their *geuchik*. The applicant should ask the *geuchik* to issue a letter which explains their relationship to the child and recommends that the applicant be formally recognized as guardian.
2. *Obtain Endorsement from the Camat:* The applicant should go to the *Kecamatan* (Sub-district) office and request the *camat* (Sub-District Administrator) to endorse the application for guardianship. The *camat* can either sign the *geuchik's* existing letter or issue a separate letter supporting the guardianship application.
3. *Submit an Application to the Court:* The applicant should take these documents to the office of the court clerk (*panitera*) at their district level *Mahkamah Syar'iyah* and attach a letter explaining the situation. There should be no fee charged for this application. The Chief Judge will then appoint a judge to hear the case who will set a date and time for the hearing. The court clerk will contact the applicant and inform them of when the hearing will take place. The hearing should occur within 30 days of the application being filed with the court and is usually a routine proceeding, rather than a full, formal hearing.
4. *Court Hearing:* The judge will examine the application and supporting documentation and hear witness testimony. Applicants should bring witnesses, such as relatives, community members, or the *geuchik* to provide testimony supporting the application. The judge will give an explanation of the rights, responsibilities and obligations of the guardian towards the child. If the application is successful, the judge will issue a written order (*surat penetapan*) formally appointing the applicant as guardian and will instruct the guardian to carry out certain responsibilities required under Indonesian law. The judge may require the applicant to provide an inventory of the ward's property. Even if the judge does not request such a document, it is often wise to do so as this will provide protection against future disputes or claims that the guardian has misused their ward's property.
5. *Other Information:* For all tsunami-related guardianship cases, applicants are not required to pay any fees to the court or to the judges. Given the simplicity of the process, applicants should not need the assistance of lawyer. If required, the court can conduct the hearing in an Acehese language.

B. Appointment of Guardians by the Mobile *Mahkamah Syar'iyah*

Where minors have inherited land, they must register their rights through an appointed guardian. This guardian is then able to represent an underage orphan in all administrative processes regarding land demarcation, including rebuttals. It should be noted that guardianship appointments through the RALAS are only valid for the registration of land rights. A formal application to the *Mahkamah Syar'iyah* (as described in Box A) will be necessary to legalize the guardianship for other matters such as accessing a ward's inherited assets.

1. *Determine when RALAS land registration will occur* – Ensure that the *geuchik* and *imeum meunasah* are aware of the applicant's intention to be appointed as guardian.
2. *Complete the form* – Those applying for guardianship, will complete the form entitled 'Form of Evidence of Guardianship Approval' (annexure 3). This form identifies the child and their guardian, and is an undertaking of the child's family, together the community, to jointly monitor the guardianship and the child's land inheritance. The form gives the guardian the authority to take care of the property and to arrange adjudication if a property-related dispute arises. It specifies that the land will be returned to the child when they are considered mature. The *geuchik* and *imeum meunasah* are required to sign the form.
3. *Validation by the Mahkamah Syar'iyah* – A judge of the *Mahkamah Syar'iyah* must then sign and validate the form. Guardians do not have to travel to their district *Mahkamah Syar'iyah* to obtain validation. Instead, a 'Mobile *Mahkamah Syar'iyah*' will travel villages and judges will conduct confirmation hearings, usually in the *gampong* office or *meunasah*, free of charge.¹⁴⁸ Such hearings are short and normally involve only the proposed guardian and witnesses (neighbors or relatives) who will be asked to provide a statement supporting the guardian's relationship with the child.¹⁴⁹ No fee is charged for the process.
4. *Land Registration* – Once the form has been signed by all relevant parties, the guardian can represent the child in the RALAS land registration process.

¹⁴⁸ Manual of Land Registration in the Affected Tsunami Areas at Nanggroe Aceh Darussalam and Sumatra Utara, BPN Decree No. 114-11 2005 16-17.

¹⁴⁹ Interview with Rafiuddin (27 April 2006).

C. Appointment of Guardians Under *Adat*

Since the tsunami, most guardians have been appointed by way of agreement between families or communities. For many people, guardianship is still considered a family matter and there is no need to inform the *gampong* apparatus or hold an *adat* ceremony.

The *Dinas Syariat* has suggested that a simple ceremony at the *meunasah* or during a *gampong* meeting should occur so that the community is made aware of who is the child's guardian. During this ceremony, the responsibilities of the guardian to look after the child should be explained. The *geuchik* should make a record of who has been appointed guardian and ask the guardian to make an inventory of the child's assets. The main benefit of guardianship confirmation ceremonies is to inform community members and promote community-wide supervision of the guardianship.

The guardian will generally be supervised by the ward's other relatives and neighbors to ensure that the child is properly taken care of and that their property is protected.

13. Resolving Guardianship Disputes

Disputes involving guardianship fall within the jurisdiction of the *Mahkamah Syar'iyah*. There is, however, strong authority in legislation for disputants to first attempt to resolve the matter at the village level.¹⁵⁰ Only if an acceptable solution cannot be reached, should the matter be referred to the *Mahkamah Syar'iyah*.

For all legal matters which do not involve the guardian (ie disputes to which the guardian is not a party), the guardian can represent or act on behalf of the ward.¹⁵¹ Disputes which involve the guardian, for example cases regarding the misuse or mismanagement of ward's assets, other relatives, the *geuchik* or elders within the *gumpong* may apply to the *Mahkamah Syar'iyah* to have the guardianship revoked.

The findings of this research suggest that the following situations are the most typical misunderstandings or disputes regarding guardianship. Simple descriptions of these scenarios along with possible courses of action are provided below.

¹⁵⁰ See for example *Perda 7/2000 On the Administration of Adat Life; Qanun 5 /2003 On the Gampong Governance Structure* and Art 9 *fatwa* MPU 2/2005 which states that the *Mahkamah Syar'iyah* should allow the opportunity for the *geuchik* and *mukim* to settle disputes regarding orphans prior to involving the courts. See also chapter 1, Part D 'Customary Law'.

¹⁵¹ Art 34 Law No. 23/2002.

D. Disputes over the Guardianship of a Child

Scenario: Both of C's parents were killed in the tsunami. C has inherited a significant amount of land and relatives of both C's mother and C's father want to be appointed guardian. C's paternal uncle claims that he has a right, under customary law, to be appointed guardian.

- The dispute will first be referred to the *geuchik*. The *geuchik* will ask both parties to present their case and provide evidence regarding their relationship with the child. The closest male paternal relative will often have the strongest claim, however, the suitability of the potential guardian and their ability to provide for the child will also be considered.¹⁵²
- The parties will attempt to resolve the dispute through *musyawarah*. The *geuchik* will generally lead a discussion, often with the assistance of the *imeum meunasah*, with the aim of facilitating a joint resolution between the parties.
- If a settlement cannot be reached, either party, or both parties can submit an application to the *Mahkamah Syar'iyah* to be appointed guardian (see Box A).
- When the judge hears the application, any other parties who would also like to be appointed guardian will be given an opportunity to present their case. The judge will hear from both parties and choose the most appropriate person.
- It should be noted that under Indonesian law, both men and women can be appointed as guardian of a child and the *Mahkamah Syar'iyah* support the appointment of female guardians.¹⁵³
- The judge's decision can be appealed to the provincial level *Mahkamah Syar'iyah* in Banda Aceh.

¹⁵² See Part 6 of this Chapter: 'Women and Guardianship' and specifically section (iii) *Women and Guardianship in Practice*.

¹⁵³ See Part 6 of this Chapter: 'Women and Guardianship' and specifically section (i) *Women and Guardianship Under Indonesian Law*

E. Misuse of a Ward's Assets

Scenario: C's parents were killed in the tsunami. C went to live with his mother's sister and C's paternal uncle was appointed as guardian through an adat ceremony. Everyone was happy with this situation until recently when C's aunt became concerned that the guardian was misusing C's inheritance. C's aunt and her husband would like the guardianship to be transferred to them.

- It must be noted that under both Indonesian and customary law, guardians are prohibited from misusing or misappropriating assets belonging to their ward. The only situation where a guardian is permitted to use a portion of a ward's property is when they are extremely poor, and even then the guardian's use of such assets is highly regulated.¹⁵⁴
- Any concerned person can discuss the matter with the guardian, remind them of their responsibilities towards the child and ask why they are using the child's assets for their own purposes.
- The concerned person can also approach the *geuchik* and *imeum meunasah* who can advise the guardian of their responsibilities towards the child, both as a guardian and under Islam.
- If the guardian's behavior does not change, the dispute can be resolved through *adat* or *musyawarah* (see box D).
- If a solution cannot be reached, an application can be made at the *Mahkamah Syar'iyah* for the guardianship to be revoked. As there is no specific court form for this application, the applicant should write a letter to the court explaining the situation. At a hearing, the judge will evaluate the behavior of the guardian and revoke the guardianship if s/he is found to have neglected their ward, acted inappropriately, misused their assets, are an alcoholic or are mentally unfit.¹⁵⁵
- The court has the power to order a guardian to pay compensation to their ward if they have misused the ward's assets.¹⁵⁶ The court can also appoint another guardian to replace the original one.¹⁵⁷

¹⁵⁴ See Part 9 of this Chapter 'Obligations of Guardians', specially section (ii) *Asset Management*.

¹⁵⁵ See Part 11 of this Chapter 'Revocation of Guardianship'.

¹⁵⁶ See Part 9 of this Chapter 'Obligations of Guardians'.

¹⁵⁷ See Part 11 of this Chapter 'Revocation of Guardianship'.

F. The Location of the Orphan is not Known

Scenario: A's sister and brother in law were killed in the tsunami, however their child, C, survived. A has been looking for C but cannot find him. A has been told that in the confusion after the tsunami, C was taken to a nearby village and was living with a family there. A would like to find C and be appointed guardian.

- Relatives of missing orphans can speak with the *geuchik* or *imeum meunasah* of the villages where the child might now be living.
- Relatives can also inquire at local orphanages (*panti asuhan*), boarding schools (*dayah*), or temporary shelters where people from displaced areas are residing.
- The Indonesian Red Cross Society (*Palang Merah Indonesia* or *PMI*) operates a tracing service for missing persons. PMI has branches in Banda Aceh (tel: 0651 755 1001), Lhokseumawe (tel: 0645 48218) and Simeulue.
- It should be noted that under both Indonesian and customary law, guardians should always be chosen from the orphan's immediate family.¹⁵⁸ Therefore, even if an orphan is living with another family, an application for guardianship can be lodged at the *Mahkamah Syar'iyah* (see box A).

¹⁵⁸ See Part 5 of this Chapter 'Who Can Be Appointed Guardian?'.

G. Contributions to a Ward's Upkeep

Scenario: C was orphaned by the tsunami. C now lives with her maternal aunt, while C's paternal grandfather has assumed the role of 'inheritance guardian'. The geuchik was informed of this decision. C's aunt is poor and is having trouble paying for the costs of C's upkeep. She has requested that C's grandfather provide her with a small amount of money from C's inheritance to cover the costs of C's food, clothing and school books. C's grandfather has told her that he is not allowed to distribute any of C's inheritance.

- There is nothing in either customary or Indonesian law which prevents a portion of a ward's inheritance being used to assist with their upkeep. In fact, the law requires that a guardian use a ward's inheritance in the child's best interests. This should include the purchase of essential items such as clothing and school supplies.
- A person who is responsible for an orphan's upkeep, but who is not an 'inheritance guardian' could approach the *geuchik* or the *Mahkamah Syar'iyah* to resolve the dispute.
- A person who is acting as a primary care giver can also submit an application to be appointed as a formal guardian to the court, which would then give that person control over a ward's inheritance (see box A).

H. Accessing Bank Accounts and Other Inheritance

Scenario: U was appointed as the guardian of C through an adat ceremony. C's parents held a bank account in Banda Aceh which is still in their names. U would like to change the name of the bank account so that he is able to use some of the funds to invest in a house for C to live in. U does not know how to do this, or whether the name on the bank account should be changed to his or his ward's?

- To access a ward's inheritance or purchase assets on a ward's behalf, the guardian must be formally appointed by the *Mahkamah Syar'iyah* (see box A).
- If the application is approved, the court will issue an order (*surat penetapan*) which must be taken to the bank.
- The parent's bank account can be changed to the name of either the child or the guardian. Whether it is possible to have the child's name on the account depends on whether the child has an official student card (*kartu tanda siswa*). A child may obtain this card when they are in junior high school, however schools can request that children in primary school be issued with a student card for the purpose of accessing a deceased parent's bank account. If a child does not have a student card, the bank account should be changed to the name of the guardian. In this case, proof of guardianship, such as order from the *Mahkamah Syar'iyah* will be required.
- It must be recalled that guardians are advised to make an inventory of a ward's assets, including money held in bank accounts, at the commencement of the guardianship. Guardians should also document any changes to such assets, such as the acquisition of property.

CHAPTER 3
INHERITANCE LAW IN ACEH



CHAPTER 3 INHERITANCE LAW IN ACEH

Part A: Basic Inheritance Principles

It must be noted that that following section refers to the laws applicable to Indonesian Muslims and that other laws may apply to different groups.

1. Identifying Eligible Heirs

The Compilation of Islamic law identifies three primary groups of heirs:

- Male heirs: Father, son, brother, uncle and grandfather
- Female heirs: Mother, daughter, sister and grandmother
- Heirs through marriage: widow or widower.¹⁵⁹

Where all of the abovementioned heirs are alive, only the deceased's spouse, children, father and mother have a right to inherit. Only if the deceased had no sons, or these son(s) are dead, will other relatives (siblings, uncles or grandparents) be eligible to inherit.¹⁶⁰ It must also be noted that after primary heirs have received their share of the deceased's estate, there are other heirs who can receive remaining property. These are called residuary heirs (*'asabah*), and they will receive any remaining property according to the following hierarchy:

1. Son
2. Grandson
3. Father
4. Grandfather
5. Biological brother
6. Brother with the same father
7. Son of biological brother
8. Son of brother with the same father
9. Biological brother of father and then of the same father
10. Son of biological brother of father¹⁶¹

Heirs will lose their inheritance rights if they apostate from Islam, are convicted of murdering or attempting the murder the deceased, or have accused the deceased of

¹⁵⁹ Art 174 KHI.

¹⁶⁰ Art 174 KHI

¹⁶¹ See Modul Tatacara Penyelesaian Hak Waris/Pembagian Harta Warisan dalam Masyarakat Aceh, (Banda Aceh: Majelis Permusyawaratan Ulama, 2006), 8.

having committed a crime which carries a penalty of more than 5 years imprisonment.¹⁶²

In the event that there are no surviving heirs, or heirs cannot be located, the deceased's property will be transferred to the *Baitul Mal* (Islamic treasury) to be used for the interests of Islam and public welfare.¹⁶³ In Aceh, where the benefactor's estate consists of land, the *Baitul Mal* will usually transfer the management of such land to a person within the village. Any benefit derived from this land (for example income generated through cultivation) will be divided amongst the community annually, for example in the form of congee porridge, during the month of *Ramadhan*.

2. Obligations of Heirs

Before inheritance can be distributed, heirs must fulfill certain obligations including:

- Organizing the funeral;
- Paying the deceased's debts and collecting debts owed to the deceased;
- Executing any will or testament left by the deceased (for example gifts to be bestowed).¹⁶⁴

3. A Deceased's Estate

The deceased's property is referred to as *harta peninggalan*, and comprises both material assets and entitlements (such as pensions or superannuation).¹⁶⁵ *Harta peninggalan* must be distinguished from the deceased's estate (*warisan*), which is *harta peninggalan* less debts, medical bills and gifts bestowed to relatives (see diagram below).¹⁶⁶ Under Indonesian law, where debts and expenses exceed the value of the deceased's estate, residual debts do not pass to heirs.¹⁶⁷ Under customary law, however, such debts are assumed by heirs and their payment is considered a cultural imperative — non-payment casting shame onto heirs as well as the deceased.

¹⁶² Art 173 KHI.

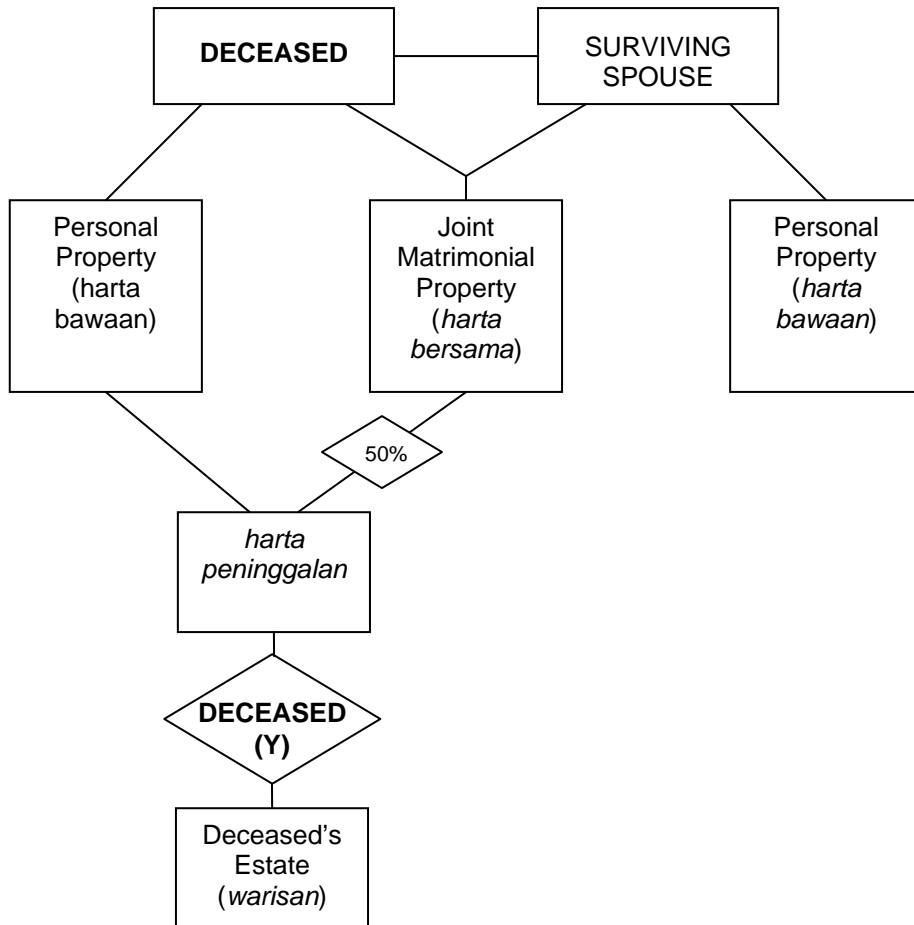
¹⁶³ Art 191 KHI.

¹⁶⁴ Art 175(1) KHI.

¹⁶⁵ Art 171(d) KHI.

¹⁶⁶ Art 171(e) KHI.

¹⁶⁷ Art 175(2) KHI.



4. Personal Property (*Harta Bawaan*)

Harta bawaan consists of assets acquired by either a man or a woman prior to marriage, plus any gifts, bequests or inheritance received from a third party during marriage.¹⁶⁸ Unless displaced by a prenuptial agreement, *harta bawaan* remains the property of the individual and under their control throughout the marriage. Indonesian law provides that ‘in principal, there is no mix of wealth between husband and wife that happens because of marriage’, and further that ‘the wife’s

¹⁶⁸ Art 35(2) UU No. 1/1974.

wealth will stay as her right and is under her full management and so does the husband's wealth'.¹⁶⁹ *Harta bawaan* (*hareuta tuha* in Acehnese) is recognized under customary law¹⁷⁰ and is defined as property obtained by either a man or a woman prior to marriage, in the form of inheritance, gift, or property which is purchased or created.¹⁷¹

(i) Peunulang Property

Certain districts in Aceh (including Aceh Besar and Aceh Pidie) recognize a form of *bawaan* property named *hareuta peunulang*. *Hareuta peunulang* is a bequest of non-movable property (either a house or land) to daughters by their parents upon marriage. Such gifting is generally witnessed by the *geuchik*. The custom evolved to compensate for the fact that inheritance distributions are weighted heavily towards male heirs.¹⁷²

(ii) Peunulang Property as Inheritance

It should be noted that while *peunulang* property may be considered 'inheritance',¹⁷³ it does not form part of the parents' estate, nor does it displace a daughter's normal inheritance rights. In practice, this means that *peunulang* property is *bawaan* and hence remains under the daughter's complete and exclusive control.¹⁷⁴ It should not be shared with other heirs. It is also important to note that it is very unlikely that other heirs would contest an appropriation of *peunulang* property, as to do so would be considered disrespectful of the decisions of deceased. This can be linked to the *Hadith* '*Menarik kembali hibah seumpama anjing yang muntah kemudian memakan kembali muntahannya*' (retrieving a bequest is like a dog eating its own vomit).¹⁷⁵

While the concepts of *bawaan* and *peunulang* property are generally respected, there is still some confusion regarding how such property is to be distributed upon the death of its owner.¹⁷⁶

¹⁶⁹ Art 86 KHI.

¹⁷⁰ Syahrizal, *Hukum Adat dan Hukum Islam di Indonesia: refleksi terhadap beberapa bentuk integrasi hukum dalam bidang kewarisan di Aceh*, 267.

¹⁷¹ *ibid* 217.

¹⁷² Interview with T.I. El Hakimy (26 April 2006).

¹⁷³ This practice is consistent with art 211 KHI which holds that a bequest from a parent to a child can be considered as part of an inheritance.

¹⁷⁴ Syahrizal (n 166) 218-219.

¹⁷⁵ *ibid* 219-220.

¹⁷⁶ Interview with Meunasah Balee gampong apparatus (May 10, 2006).

5. Joint Matrimonial Property (*Harta Bersama*)

Indonesian law recognizes the concept of joint matrimonial property, or ‘wealth acquired during marriage’.¹⁷⁷ Joint matrimonial property may consist of tangible assets or entitlements. Indonesian law prevents such property from being sold, transferred or used as collateral without the consent of both husband and wife.¹⁷⁸

Harta bersama (or *hareuta sihareukat* in Acehnese) is recognized under customary law. If a couple wishes to sell, trade or gift *harta bersama*, the consent of both parties is required. For example, for the sale of immovable *harta bersama* (eg house or land), both the husband and wife should sign the contract of sale. In practice however, the wife will usually give her consent orally. In such situations, the relevant authorities (such as the *Pejabat Pembuat Akta Tanah*) will generally accept that the *geuchik*, who also signs the contract of sale, will have witnessed the wife’s oral consent.¹⁷⁹ Contracts of sale involving immovable property will normally be held at the office of the sub-district leader (*camat*).

In the absence of a pre-nuptial agreement, Indonesian law requires that joint matrimonial property be divided equally between husband and wife, whether they separate through divorce or death.¹⁸⁰ Where one spouse dies, therefore, 50% of the joint matrimonial property will be transferred to the surviving spouse, and the remaining 50% will be added to the deceased’s *harta bawaan* and be distributed among that spouse’s heirs (including the surviving spouse).



KKTGA Legal Information dissemination and counseling, Lhok Nga barracks, 28 July 2006

¹⁷⁷ Art 35(1) UU 1/1974 *Perkawinan*.

¹⁷⁸ *ibid* art 36;art 91-92 KHI.

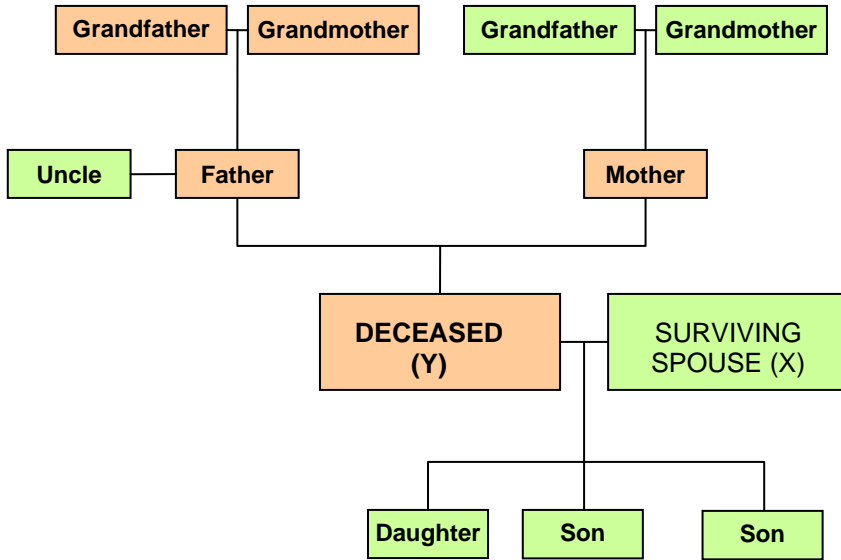
¹⁷⁹ Syahrizal (n 166) 272-273.

¹⁸⁰ Art 97 KHI.

Scenario 1

(It should be noted that the ‘scenarios’ depicted in this section are not real cases but have been constructed to illustrate, what this research found to be, the most common disputes and misunderstandings regarding inheritance)

Scenario: Prior to the tsunami X and her family (2 sons and 1 daughter) lived in a house that was inherited by X from her parents who died several years earlier. X's husband Y died in the tsunami, along with Y's parents, siblings and maternal grandparents. X's brother-in-law is told her that the house became joint matrimonial property when X and Y got married, and because of this, 50% of the house should be distributed amongst Y's heirs.



Deceased relatives: mother, father, maternal grandfather, maternal grandmother, sister.

Surviving relatives: wife, sons (2), daughter (1), uncle, paternal grandfather, paternal grandmother

Legitimate heirs: wife, daughter (1), sons (2)

Step 1: X receives $\frac{1}{2}$ the couple's joint matrimonial property (JMP) and retains her *harta bawaan*;

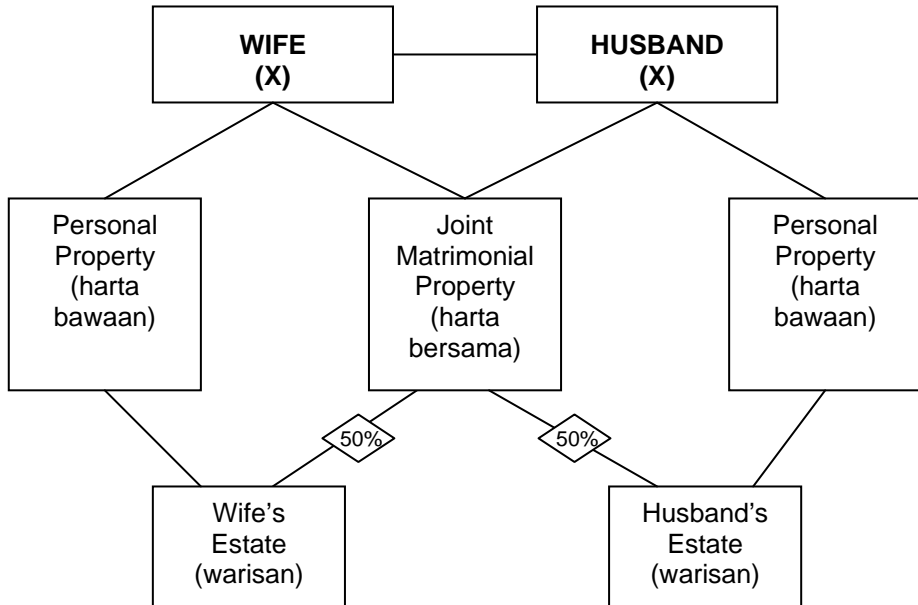
Step 2: X receives $\frac{1}{8}$ of Y's *warisan*;

Step 3: The remaining *warisan* is divided into 5 portions (reflecting that fact that sons receive double the shares of daughters);

Step 4: Each son receives 2 portions and the daughter receives 1 portion.

Resolution: As demonstrated in the above diagram, Y's warisan comprises half the couple's joint matrimonial property, plus Y's bawaan property, less debts. X retains the family house as it is her harta bawaan.

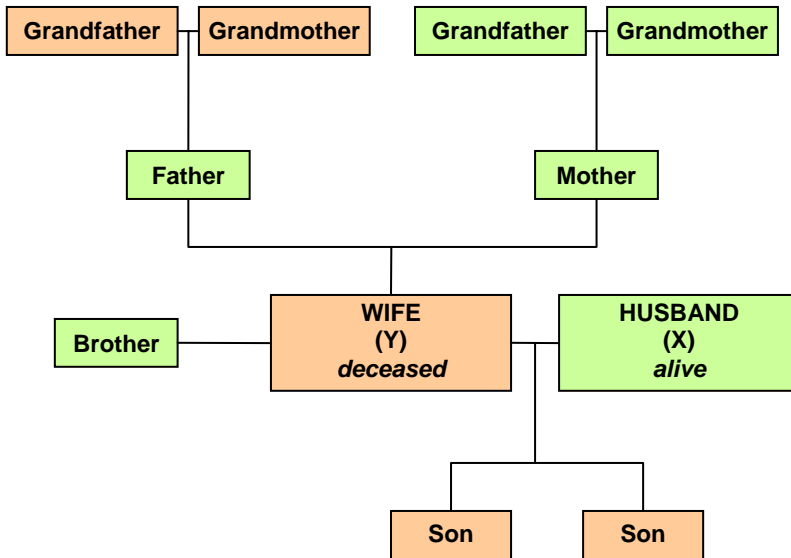
Scenario 2



Deceased Relatives: wife, paternal grandparents, sons (2);
 Surviving Relatives: husband, brother, father, mother, maternal grandparents;
 Heirs: husband, mother and father ('residuary heir').

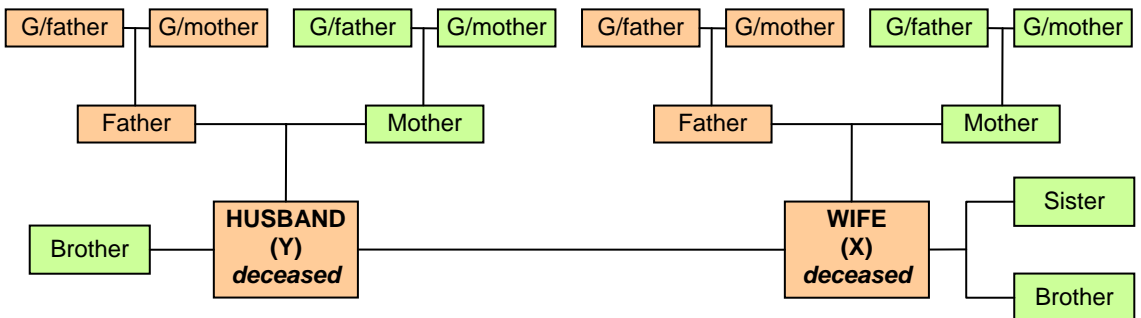
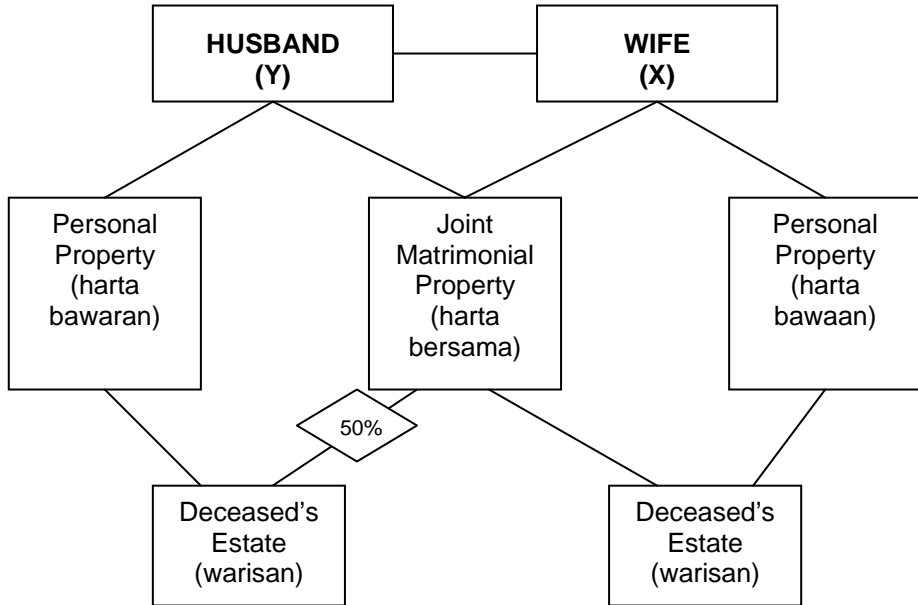
- Step 1: Husband receives 1/2 JMP;
- Step 2: Husband receives 1/2 of the remaining *warisan*;
- Step 3: The mother receives 1/3 of *warisan*;
- Step 4: Father receives the remaining *warisan*.

Neither the maternal grandfather or maternal grandmother receive any inheritance.
 The brother of the deceased also does not receive any inheritance as he is blocked by the father, who is the residuary heir.



Scenario 3

Scenario: Both X and Y died in the tsunami, they had no children. X's surviving relatives are a brother, sister, mother, maternal grandmother and maternal grandfather. Y's surviving relatives are a brother, mother, maternal grandmother and maternal grandfather. Because X and Y have no children, their estates will be divided separately. Because X and Y had no sons a 'residuary heir' will be necessary.



- X's Heirs: Mother, sister, brother (residuary heir);
 Step 1: Mother receives 1/3 X's *warisan*;
 Step 2: Remaining *warisan* is divided into 3 portions (reflecting that brothers receive double the portions of sisters);
 Step 3: Sister receives 1 portion, brother receives 2 portions.
 Y's Heirs: Mother and brother (residuary heir);
 Step 1: Mother receives 1/3 *warisan*;
 Step 2: Brother receives remaining *warisan*.

Like under Indonesian law, customary law requires that joint matrimonial property be divided between spouses upon divorce or the death.¹⁸¹ Such division, however, will not necessarily be equal. According to Acehese academic Syahrizal, communities in Aceh have six different ways of dividing joint matrimonial property depending upon the customary law followed:

Table 5: Division of Joint Matrimonial Property under Acehese Customary Law¹⁸²

Reason for Separation	Children	Other heirs	Distribution
Divorce	No	NA	Wife receives 50% and husband receives 50%.
Divorce	Yes	NA	Wife receives 50%, husband receives 25%, children share 25%.
Death	No	Yes	Surviving spouse receives 75% and the remaining 25% is divided among legal heirs.
Death	No	No	Surviving spouse receives 75% and the remaining 25% is distributed to the <i>Baital Mal</i> .
Death	Son	NA	JMP to be shared by the surviving spouse and son.
Death	Daughter	NA	Surviving wife receives 1/8, daughter will receive 1/2 (or in the case of 2 daughters, they will share 2/3) and the guardian will receive the remaining JMP.

¹⁸¹ Syahrizal (n 166) 274-275.

¹⁸² *ibid* 275.

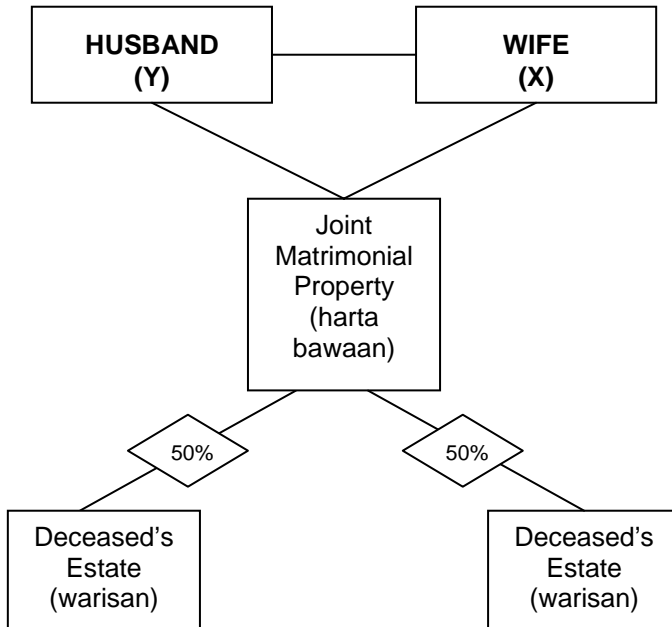
These are not the only methods of dividing joint matrimonial property under customary law. In Aceh Besar, for example, joint matrimonial property will either be divided equally, or at a ratio of 2/3:1/3 in favor of the husband. The rationale behind the latter model of division is that husbands (who are normally fisherman) are perceived as working harder during the marriage than wives (who raise children).¹⁸³

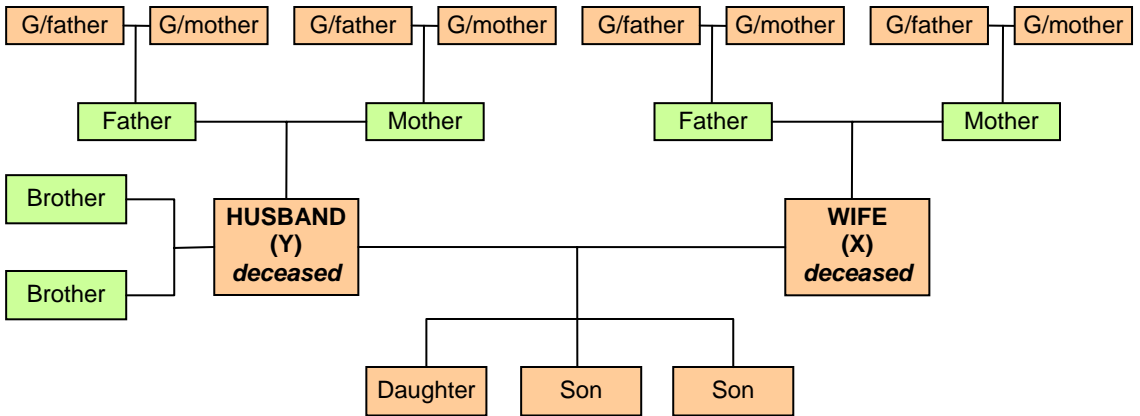
The findings of this research suggest that there is widespread confusion regarding how joint matrimonial property should be distributed. In many cases, the names on land certificates, sale contracts or bank accounts have been used to determine ownership. Because the name used during transactions or on bank accounts is usually that of the husband, there is a strong risk that joint matrimonial property is incorrectly classified as *bawaan* property of the husband.

¹⁸³ *ibid* 275-276.

Scenario 4

Scenario: X, Y and their children died in the tsunami. The only surviving relatives of the family are X's parents, Y's parents, and Y's brothers. X and Y got married when they were very young and neither brought any harta bawaan to the marriage. During the marriage, X and Y purchased property and a car, both of which are registered in Y's name. Y's brothers obtained the land certificate from the geuchik which clearly states that Y is the property's owner. They also have the contract for sale of the car, which has Y's name on it. X's mother and father believe that they are entitled to a portion of X and Y's joint assets. Y's brother's claim that such assets are Y's harta bersama as X did not work during the marriage and hence must have been purchased with Y's personal income.





- X's Heirs: Mother, father.
 Y's Heirs: Mother, father, brothers (2).
 Step 1: All joint matrimonial property should be divided equally between X's *warisan* and Y's *warisan*;
 Step 2: X's mother receives 1/3 of X's *warisan*;
 Step 3: X's father receives the remaining portion of X's *warisan*;
 Step 4: Y's mother receives 1/6 of Y's *warisan*;
 Step 5: Y's father receives the remaining portion of Y's *warisan*;
 Step 6: Y's brothers do not receive any inheritance as they are blocked by Y's father.

Resolution: In this case, XY's assets (property and car) are classified as joint matrimonial property as they were purchased after they were married. The fact that they were purchased in the name of Y or with income earned solely by Y is immaterial. X played an equal role in the marriage by raising XY's children and hence contributed to the purchase of such assets.

6. Distributing the Inheritance of Missing Persons

Where a spouse is missing, Indonesian law requires that the division of joint matrimonial property be postponed until death is confirmed or the Religious Court certifies that death is presumed (a *mafqud* case).¹⁸⁴ While there is not a complementary provision in the law regarding the distribution of the *harta warisan*

¹⁸⁴ Art 96(2) KHI.

of missing persons, it is generally accepted that the same principle applies. Since the tsunami, the *Mahkamah Syar'iyah* have issued many such certifications both separately and in conjunction with certifications confirming heirs.

Table 6: Post-Tsunami *Mafqud* Cases¹⁸⁵

	Certification of presumed death provided by the Banda Aceh <i>Mahkamah Syar'iyah</i>	Certification of presumed death provided by the Jantho <i>Mahkamah Syar'iyah</i>
Jan 2005	-	-
Feb 2005	-	-
Mar 2005	-	-
Apr 2005	1	-
May 2005	1	-
June 2005	-	2
July 2005	1	23
Aug 2005	2	-
Sept 2005	2	1
Oct 2005	1	-
Nov 2005	3	-
Dec 2005	4	1
Jan 2006	2	1
Feb 2006	-	-
Mar 2006	-	-
TOTAL	17	28

It should be highlighted, however, that the majority of *mafqud* cases referred to above, have not been related to the division of joint matrimonial property, but have been issued to allow widows to remarry (note that widowers are not required to obtain such certification from a court before remarrying).

Part B: Pension Money and Pension Savings

Many of those who lost their lives in the tsunami were civil servants or employees in private companies who contributed to pension or superannuation schemes. The heirs of such victims may be entitled to benefit from such schemes.

¹⁸⁵ This table is adapted from and based on both annual and monthly reports of submitted cases in both the Banda Aceh and Jantho *Mahkamah Syar'iyah*.

1. Civil Servants

Heirs are entitled to receive pension money (pension) and pension savings (superannuation) which normally would be paid to the deceased.¹⁸⁶ While such monies are classified as joint matrimonial property (if the contributor was married), such monies will be distributed in cash once per month to one of 3 heirs according to the following hierarchy:

- Widow/widower of the deceased until the widow/widower remarries or dies;
- Children of the deceased until such children reach 23 years of age, are employed or marry (note that the regulation does not specify how such monies are to be shared amongst children);
- Father or mother of an unmarried deceased civil servant for a period of time to be specified through regulations.¹⁸⁷

Where none of these heirs are alive, monthly pension payments cannot be received by other relatives (such as siblings or grandparents).

Heirs are also entitled to receive pension savings/superannuation (*Taspen*), paid in lump sum at the time of the contributor's death.¹⁸⁸ Unlike monthly pension payments, the regulations do not limit the distribution of such monies to only the surviving spouse, children and parents.¹⁸⁹

2. Employees of Private Companies and Businesses

Employees of private companies and businesses will only be entitled to pension income if they have contributed to a private pension scheme (*Dana Pensiun Pemberi Kerja* atau *Dana Pensiun Lembaga Keuangan*).¹⁹⁰

Indonesia has a compulsory superannuation/life insurance scheme (*Jaminan Sosial Tenaga Kerja* or *JAMSOSTEK*) for which all non-government employers are required to contribute on behalf of their employees. If an employee dies,

¹⁸⁶ Art 8 PP 25/1981. Note that 1/8 of an employees salary is contributed per month for both pension and superannuation.

¹⁸⁷ To date, however, there is no regulation specifying this time period; art 41(1) UU No. 40/2004; Art 10(2) PP 25/1981.

¹⁸⁸ Explanation of PP No. 25/1981 Art 9(2); Art 37(1) UU 40/2004.

¹⁸⁹ Art 37(4) UU 40/2004.

¹⁹⁰ Further information regarding pension funds can be found in UU 11/1992 *on Pension Fund*; PP 76/1992 *on Work Provider Pension Fund (Dana Pensiun Pemberi Kerja)* and PP 77/1992 *on Financial Institution Pension Fund (Dana Pensiun Lembaga Keuangan)*.

superannuation contributions and life insurance will be paid by lump sum, through installments or a combination of lump sum and installments.¹⁹¹ Such monies will be paid to one person according to the following hierarchy:

1. Widow/widower;
2. Children;
3. Parents;
4. Grandchildren;
5. Grandfather/grandmother;
6. Sibling;
7. Parents-in-law.¹⁹²

Article 37(4) of UU 40/2004 on the *National Social Guarantee System* states that if an employee dies, superannuation contributions and life insurance will be paid to the employee's 'legal heir'. This is understood to mean that where the employee's spouse and children have also died, other heirs (such as siblings, parents or grandparents) are entitled to receive the superannuation contributions. It should be highlighted that this regulation was only introduced in 2004 and many persons affected by the tsunami may not be aware of its provisions.

3. Life Insurance

The heirs of civil servants and private employees who died in the tsunami may also be entitled to compensation in the form of life insurance if they contributed to private life insurance policies.¹⁹³ The Supreme Court has held that financial contributions to an insurance policy and life insurance payments are the property of a widow and do not form part of a deceased's estate.¹⁹⁴

Part C: The Inheritance Rights of Women

It must be noted that, in practice, the law regarding inheritance (both formal and customary law) is not strictly applied. The manner in which inheritance is divided is highly dependant on the perspectives of the adat elders, agreements which children may make between themselves, relative economic status of heirs and their place of residence. The extraordinary positions that people have been placed in following the tsunami, also appears to have affected decision-making. This research identified several cases in which solutions resolved were inconsistent with *adat* and even *Sharia* principles. Such departures are, however, more reflective of the post-tsunami

¹⁹¹ Art 14(1)-(2) UU No. 3/1992.

¹⁹² Art 13 UU 3/1992.

¹⁹³ Art 45-46 UU 40/2004.

¹⁹⁴ Decision of Supreme Court No. 198K/AG/1992; 97/AG/1994.

context than any significant shifts in *adat* decision-making. The scenarios depicted below are those found to be most commonly encountered in post-tsunami Aceh.

1. Daughters

Under both Indonesian and customary law, when there are no sons, a single daughter will receive 1/2 of the benefactor's estate and where there is more than one daughter, 2/3 of the estate will be shared between those daughters.¹⁹⁵ If the benefactor has both sons and daughters, the share received by the daughter will be half of that which is received by her brother.

It should be recalled that in certain districts of Aceh, daughters will have received *peunulang* property from their parents when they entered into marriage. When such property is factored in to overall inheritance distributions, daughters may in fact received an overall greater proportion of inheritance than sons. It should also be highlighted that while *harta peunulang* may be classified as inheritance, the receipt of such property will not affect a daughter's inheritance rights.

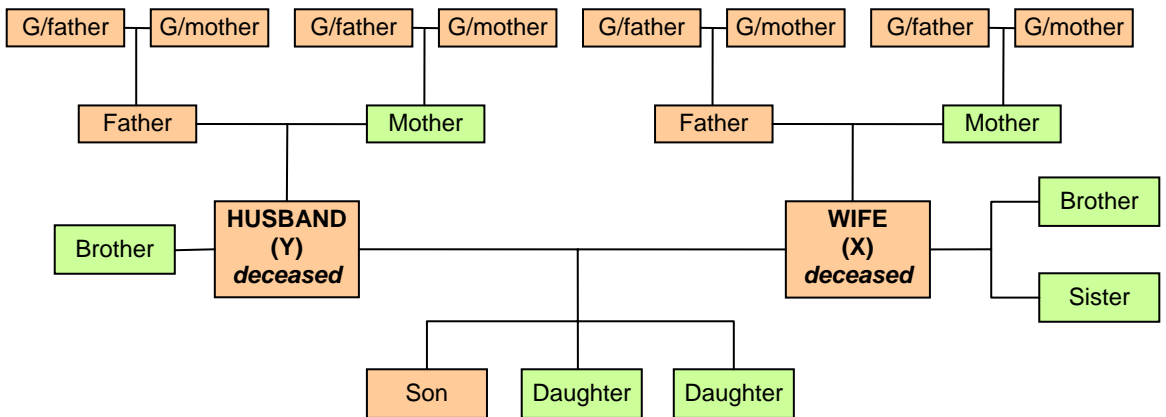
Finally, it is important to explain the concept of *'asabah* (residuary heirs). Females cannot be *'asabah*, meaning that they cannot inherit a whole estate, or a remaining estate. The most common situations in which *'asabah* is relevant are when a daughter or widow is the only surviving heir. In such situations, other residuary heirs will be called upon (such as an uncle or grandfather) to inherit the remaining estate, after the daughter or widow has received their share. If there are no surviving relatives, the remaining estate will be transferred to the *baitul mal*. It is important to note, however, that post-tsunami the *Mahkamah Syar'iyah* has issued decisions allowing a sole surviving daughter to inherit an entire estate, despite the existence of a paternal uncle.¹⁹⁶

¹⁹⁵ Art 76 KHI.

¹⁹⁶ Interview with Rafiuddin, Head of Syariah Council Jantho (27 April 2006). This research also identified cases resolved at the village level where sole surviving daughters have been permitted to inherit a residual estate, and in effect be *'asabah*. It should be reiterated that such decision-making appears to be related to the context of the tsunami and the extraordinary positions that people have been placed in, rather than any significant change in the way that inheritance law is applied in Aceh; Interview with Geuchik Kajhu (May 7, 2006).

Scenario 5

Scenario: X and Y die in the tsunami, as does their son. They have two surviving daughters. The only other surviving relatives are X's brother, sister and mother, and Y's brother and mother. In this situation, X and Y's joint marital property and harta bawaaan will usually be consolidated and distributed at the one time. Y's brother argues that he is entitled to a share in the estate, as neither X and Y's daughter and mothers are 'asabah ('residuary heirs').



Heirs: Daughters (2), X's mother, Y's mother, Y's brother ('residuary heir'), X's brother ('residuary heir').

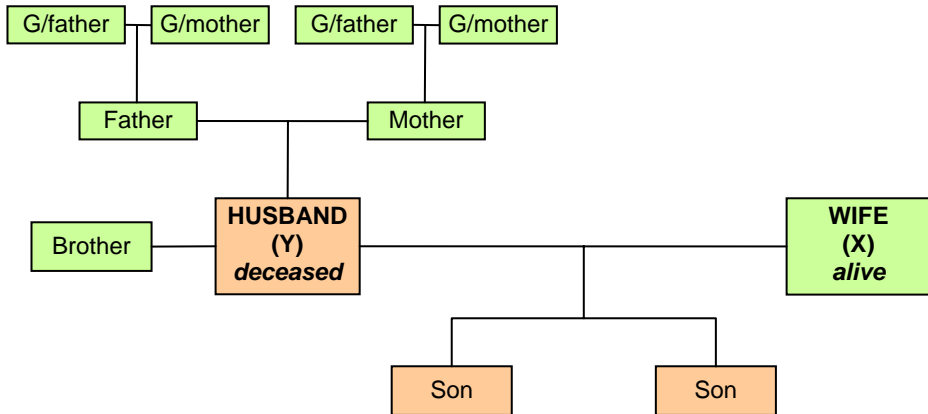
Step 1: Daughters receive 2/3 of XY's *warisan* to share between them;
 Step 2: X's mother and Y's mother each receive 1/6 of XY's *warisan*;
 Step 3: While both X and Y's brother are residuary heirs, the estate has been completely distributed therefore neither brother receives inheritance.

Resolution: Under customary (and Islamic) law, it is correct that neither the daughters, nor the mothers are 'asabah and thus cannot be residuary heirs. However, as demonstrated above, when the estate is fully distributed between primary heirs, the residuary heirs (X and Y's brothers) will not receive any inheritance.

2. Widows

Under Indonesian law, a widow will receive $\frac{1}{4}$ of the estate if there are no living children, and $\frac{1}{8}$ if there are living children.¹⁹⁷ In addition, a widow will be entitled to 50% of all joint matrimonial property.¹⁹⁸

Scenario 6



Surviving Relatives: wife, brother, mother, father, maternal grandparents, paternal grandparents

Deceased Relatives: Sons (2)

Heirs: Wife, mother and father (as the 'residuary heir')

Step 1: Wife receives 50% of joint matrimonial property;

Step 2: Wife receives $\frac{1}{4}$ *warisan* and mother receives $\frac{1}{3}$ *warisan*;

Step 3: Father (as residuary heir) receives remaining *warisan*.

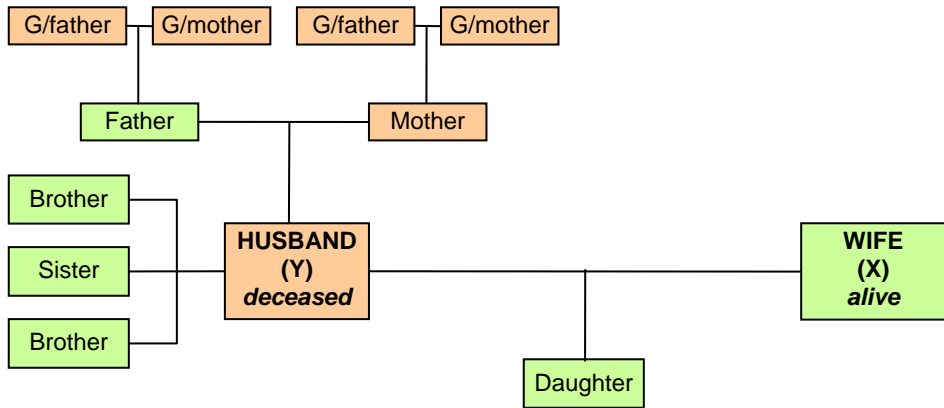
The only departure under customary law is that a widow may not be entitled to 50% of joint matrimonial property, but instead a reduced portion.¹⁹⁹

¹⁹⁷ Art 180 KHI.

¹⁹⁸ Art 96(1) KHI.

¹⁹⁹ See Part A: Basic Inheritance Principles of this chapter, and specifically Section 5: Joint Matrimonial Property (Harta Bersama).

Scenario 7



Surviving Relatives:	Wife, daughter, sister, brothers (2), father;
Deceased Relatives:	Mother, maternal grandparents, paternal grandparents;
Heirs:	Wife, daughter, father, brother (2), sister;
Step 1:	Wife receives 50% joint matrimonial property;
Step 2:	Wife receives $\frac{1}{8}$ <i>warisan</i> , father receives $\frac{1}{6}$ <i>warisan</i> , daughter receives $\frac{1}{2}$ <i>warisan</i> ;
Step 3:	Remaining <i>warisan</i> is divided into 5 portions (reflecting that brothers receives double the portions of sisters);
Step 4:	The sister receives 1 portion, brothers receives 2 portions each.

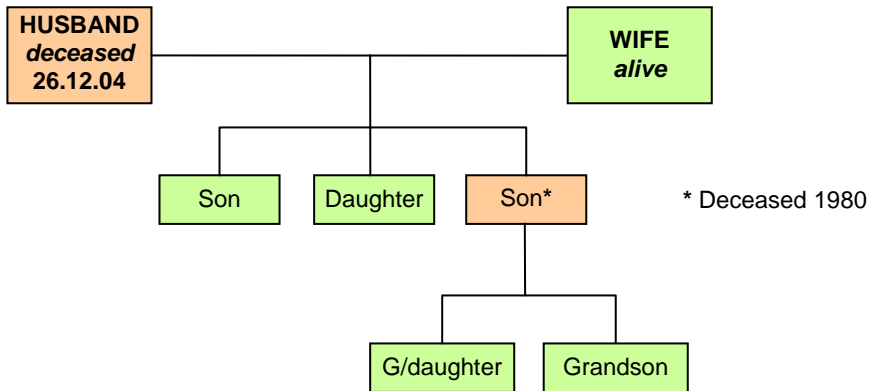
3. Granddaughters (the Custom of *Patah Titi*)

Under Indonesian law, when an heir predeceases the benefactor, this heir can be replaced by their children (male or female). In practice this means that, for example, a daughter and a son could (collectively) replace their predeceased father to inherit from their grandmother or grandfather. The total benefit that these heirs receive cannot exceed that which their parent would have been entitled.²⁰⁰ On one occasion the Supreme Court widened this rule to include not only an heir's children, but also their nieces and nephews, however it is unlikely that the *Mahkamah Syar'iyah* in Aceh will follow this precedent.²⁰¹

²⁰⁰ Art 185(1)-(2) KHI.

²⁰¹ See Armia Ibrahim, 'Ahli waris pengganti ditinjau dari aspek hukum dan penerapannya dalam Praktek Peradilan' 8. (paper presented at the workshop masalah faraidh conducted by Yayasan Lamjabat, Banda Aceh, 18-20 October 2005). It should be noted that the Chief

Scenario 8



Heirs: Wife, son, daughter, deceased son (replaced by the granddaughter and grandson).

Step 1: Wife receives 50% joint matrimonial property;

Step 2: Wife receives 1/8 *warisan*;

Step 3: Remaining *warsian* is divided into 5 portions;

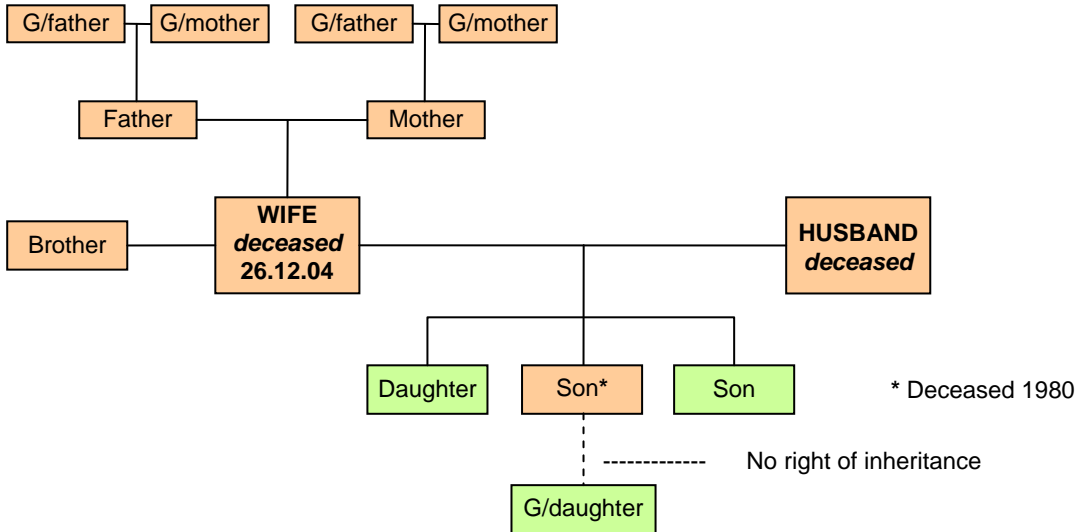
Step 4: The son receives 2 portions, the daughter receives 1 portion, and the remaining 2 portions (attributed to the predeceased son) are divided equally among the granddaughter and grandson.

Under customary law, the death of one party severs the chain of inheritance for all female heirs of the deceased. In practice, this means that heirs who predecease the benefactor cannot be replaced by their daughters. This custom is known as *patah titi* among the Acehnese.²⁰² In some areas, *patah titi* is no longer practiced, particularly where the *Mahkamah Syar'iyah* has conducted information dissemination campaigns.

Justice of the NAD Provincial *Mahkamah Syar'iyah*, Soufyan Saleh, has indicated that this precedent will not be followed in Aceh; discussion with Soufyan Saleh, NAD *Mahkamah Syar'iyah* (2 June 2006).; see also, Ibrahim 'Ahli waris Pengganti' 15-16.

²⁰² Note that according to Teuku Djuned, adat law professor at the University of Syiah Kuala, *patah titi* is not a purely Acehnese concept, but a concept derived from the Syafi'iyah mazhab that has influenced the Islamic inheritance practice in Aceh; Ibrahim 'Ahli Waris Pengganti' 7.

Scenario 9



Heirs: Son, daughter;

Step 1: Warisan is divided into 3 portions;

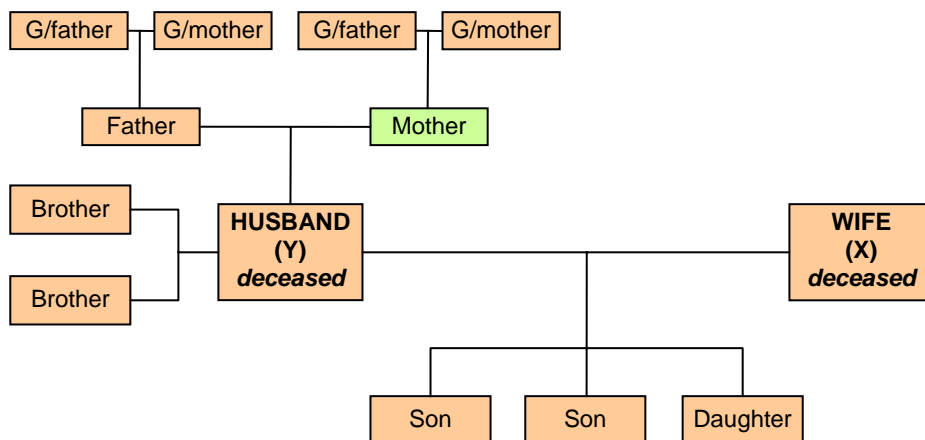
Step 2: The son receives 2 portions, the daughter receives 1 portion.

4. Mothers

Under Indonesian law, mothers receive 1/3 of the estate if the deceased leaves no children and has 2 or more siblings, and 1/6 of the inheritance if the deceased has a child and 2 or more siblings.²⁰³ Because a mother is not *'asabah*, the maximum portion a mother can receive will always be 1/3.

²⁰³ Art 178(1) KHI.

Scenario 10



(i) Inheritance Division under Customary law

Heirs: Mother

Distribution: The mother will receive $\frac{1}{3}$ *warisan* and the remaining estate will be transferred to the *baitul mal* (because the mother is not *'asabah*).

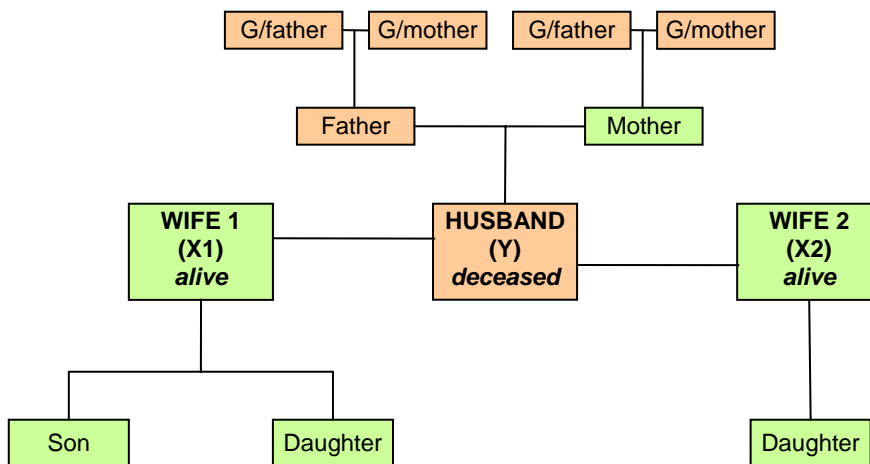
(ii) Inheritance Division under Indonesian Law

Heirs: Mother

Distribution: The mother will receive $\frac{1}{3}$ *warisan*. While Indonesian law does not specify who will receive the remaining *warisan*, case law indicates that it will most likely be transferred to the mother. Here, the *warisan* will, of course, include both the *JMP* and *harta bawaan*.

5. Widows from Polygamous Marriages

Scenario 11



Heirs: Mother, son, daughters (2), wives (2);

Step 1: Joint matrimonial property is apportioned between each marriage based on the length of marriage. 50% of the joint matrimonial property for each marriage is transferred to the surviving wife;

Step 2: Mother receives 1/6 *warisan*, wives each receive 1/8 *warisan*;

Step 3: The remaining *warisan* is divided into 4 portions (reflecting that sons receive double the portions of daughters)

Step 4: Each daughter receives 1 portion and the son receives 2 portions.

6. The RALAS Programme

Where inheritance is in the form of land, it is important to note the role of the RALAS (Reconstruction of Aceh Land and Administration System) program.²⁰⁴

RALAS have developed guidelines designed to protect the rights of women and girls who have inherited land, including that:

²⁰⁴ Manual of Land Registration in the Affected Tsunami Areas at Nagroe Aceh Darussalam and Sumatra Utata, BPN Decree No. 114-11 2005, 1.

- Where inheritance is not settled, land certificates can be issued in the names of heirs 'including those who are female and are still under-aged',²⁰⁵
- Under *Sharia* law, widows and children have inheritance rights to land. Widows and female children who obtain such inheritance rights 'must register their respective names'.²⁰⁶
- Where a daughter inherits land along with her brothers, the names of all heirs should appear on the land certificate. The land certificate will reflect the fact that the daughter(s) will receive half the proportion of the land received by her brothers.²⁰⁷

Part D: Implementation of Inheritance Division

1. Distributing Inheritance

(i) *When is Inheritance Distributed?*

Under Indonesian law, heirs, either individually or collectively, can request one heir to distribute inheritance.²⁰⁸ Where heirs are minors, their guardian may request distribution on their ward's behalf. Disputes regarding when inheritance should be distributed can be referred to the *Mahkamah Syar'iyah*. In Aceh, inheritance is normally distributed 100 days after the benefactor's death, however this time schedule may vary between families based on their individual circumstances and the preferences of the heirs.

(ii) *Who Distributes Inheritance?*

Where the deceased's estate is low in value, distribution of inheritance will normally be done within the family. In situations where the deceased's estate is of high value, or there is difficulty identifying which heirs should inherit, the *geuchik* and *imeum meunasah* may be asked to facilitate the distribution process.²⁰⁹

(iii) *Modifying Inheritance*

Under both Indonesian and customary law, heirs may agree to distribute inheritance in a way that is different from their legal entitlements.²¹⁰ The most common situation for this to occur is in the case of adopted children, who, under customary

²⁰⁵ *ibid* 9, 27.

²⁰⁶ *ibid* 10.

²⁰⁷ Interview with Hasyim Manan, Head of Banda Aceh Syariah Council (26 April, 2006)

²⁰⁸ Art 188 KHI.

²⁰⁹ M Hoesin, *Adat Atjeh*, depdikbud Atjeh, 1970, 100.

²¹⁰ Art 183 KHI.

law, are not entitled to inherit from their parents. In such situations, other heirs will often transfer a portion of the inheritance to adopted children.²¹¹

(iv) How is Inheritance Distributed?

It is important to note that in practice, when a deceased's estate is being distributed between heirs, such distribution is not based solely upon the monetary value of the deceased's assets. Houses and yards will often be distributed to daughters, while income earning property such as paddy fields, shops or animals will be inherited by sons.²¹²

2. Resolving Inheritance Disputes at the Village Level

While disputes involving inheritance fall within the jurisdiction of the *Mahkamah Syar'iyah*, there is strong authority in legislation for disputants to first attempt resolution at the village level before involving the courts.²¹³ At any rate, in Aceh, most inheritance disputes will first be referred to the *geuchik* and *imeum meunasah* for resolution. In complex cases, a religious leader (*teungku*) from the village may be asked to assist or to provide advice on Islamic inheritance principles.

As discussed previously in this guidebook, a primary characteristic of *adat* dispute resolution is the emphasis which is placed upon peaceful negotiations and mutual consensus. The need to obtain the agreement of both parties will often take precedence, even if this means a decision which is not consistent with formal law or *Sharia*.²¹⁴

The findings of this research suggest that the quality of *adat* decision-making will depend largely on the *geuchik's* understanding of formal and customary inheritance rules, their knowledge regarding the disputants' personal circumstances (such as the origins of a family's wealth and lineage), and the honesty of parties. A difficulty in many villages, therefore, is where a new *geuchik*, who is unfamiliar with such issues, has been appointed post-tsunami.

²¹¹ Under Indonesian law where an adopted child is not bequeathed a portion of a parent's deceased estate, a compulsory bequeathal shall be made to a maximum of 1/3 of this estate; Art 209(2) KHI.

²¹² Hoesin (n 204) 102.

²¹³ See for example *Perda 7/2000 On the Administration of Adat Life*; *Qanun 5 /2003 On the Gampong Governance Structure* and Art 9 *fatwa* MPU 2/2005 which states that the *Mahkamah Syar'iyah* should allow the opportunity for the *geuchik* and *mukim* to settle disputes regarding orphans prior to involving the courts; see also chapter 1, Part D: Customary Law.

²¹⁴ Interview with *Geuchik Kajhu* (7 May 2006), Imam Meunasah Lampaseh Kota (3 May 2006); *geuchik Cut Lamkuweuh* (1 May 2006).

A further conclusion of this research is that decisions resolved at the village level often prioritize the rights of male heirs over the female heirs, and similarly, the rights of a husband's family over his wife's family. Compounding this inequity is that women are less likely to refer unsatisfactory decisions to the *Mahkamah Syar'iyah* than men. This is primarily due to widespread lack of information on how to access the formal justice system. There are also cultural norms which discourage persons, particularly women, from resolving disputes outside of *adat* mechanisms.²¹⁵

3. Finding a Solution to Inheritance Problems through the *Mahkamah Syar'iyah*

As previously stated, Indonesian law provides that the resolution of inheritance disputes falls within the jurisdiction of the *Mahkamah Syar'iyah*.²¹⁶ This was reiterated in *Fatwa* MPU 3/2005 which states that matters relating to land ownership and inheritance can be referred to the *Mahkamah Syar'iyah* with valid evidence. Under Indonesian law, the statute of limitations for inheritance cases is somewhat unclear.²¹⁷ In Aceh, however, the MPU issued a specific *Fatwa* concerning tsunami-related inheritance disputes which requires adult disputants to bring such cases before the courts within 5 years, and cases involving children to be brought before the court before such children reach 19 years of age.²¹⁸

It should be noted that as at June 2006, very few tsunami-related inheritance disputes had been referred to the *Mahkamah Syar'iyah*, despite judicial expectations of large numbers.²¹⁹ Further, of these cases, the majority have been settled out of

²¹⁵ UNDP (n 5) 51-52, 79, 97; Interview with Geuchik Kajhu (7 May 2006), Imam Meunasah Lampaseh Kota (3 May 2006); and geuchik Cut Lamkuweuh (1 May 2006).

²¹⁶ Art 49 Law No. 7/1989 on the *Religious Courts* and Qanun No. 10/2002 on the *Islamic Syariah Courts*.

²¹⁷ According to the Indonesian Civil Code (KUH Perdata) all legal actions (relating to both property and people) have an expiry limit of 30 years. As such, if a person occupies property or a possession for longer than 30 years, he/she does not have to prove entitlement (KUH Perdata, Buku Keempat 1967). This 30 year expiry period does not apply to children who have not reached adulthood and for those under guardianship, except in a number of exceptional cases as outlined in the law (KUH Perdata, Buku Keempat 1987). The 30 year expiry period also applies to unmanaged inheritance property, except for that which is under guardianship (KUH Perdata, Buku Keempat, 1991) and to all heirs who are still in the process of negotiating their inheritance (KUH Perdata, Buku Keempat, 1992). There is, however, conflicting provisions in relation to inheritance as articles 110, 1116, 1124, 1129 of KUH Perdata (1) state that inheritance disputes have a three year statute of limitations.

²¹⁸ Art 8 *Fatwa* 2/2005.

²¹⁹ Note that most of the disputes referred to in table 7 are not tsunami-related and were referred to the court prior to the tsunami. The first tsunami-related inheritance disputes were

court. The court has issued number of certifications confirming legal heirs, however these have been uncontested, administrative matters. The presumption is that most cases have been resolved at the village level, however some believe that a ‘wave’ of contested inheritance matters will reach the court towards the end of 2006.

Table 7: Inheritance Case Brought Before *Mahkamah Syar'iyah* (Banda Aceh and Jantho)²²⁰

	Heir Confirmation <i>Mahkamah Syar'iyah</i> (Banda Aceh)	Heir Confirmation <i>Mahkamah Syar'iyah</i> (Jantho)	Inheritance Dispute <i>Mahkamah Syar'iyah</i> (Banda Aceh)	Inheritance Dispute <i>Mahkamah Syar'iyah</i> (Jantho)
Jan 2005	-	2	-	-
Feb 2005	-	18	-	-
Mar 2005	22	116	-	-
Apr 2005	101	71	-	1
May 2005	118	80	-	-
June 2005	110	93	1	1
July 2005	69	64	1	1
Aug 2005	91	64	4	-
Sept 2005	123	39	2	1
Oct 2005	104	24	-	-
Nov 2005	55	40	-	2
Dec 2005	134	67	1	1
Jan 2006	83	56	1	-
Feb 2006	70	39	-	1
Mar 2006	39	30	2	1
TOTAL	1119	803	12	9

4. Procedures for Resolving Inheritance Disputes

The following section is designed to provide practical information for resolving inheritance disputes. It must be noted that information provided is intended as a guide only and that different procedures may be employed in different areas of Aceh.

filed in early 2006, and as at July 2006 were only at the stage of preliminary hearings; interview with Chief Justice of Banda Aceh *Mahkamah Syar'iyah* (26 April 2006); interview with Chief Justice Jantho *Mahkamah Syar'iyah* (27 April 2006).

²²⁰ This table is adapted from and based on both annual and monthly reports of the submitted cases in Banda Aceh and Jantho *Mahkamah Syar'iyah*.

1. What Types of Inheritance Cases Can be Resolved at the *Mahkamah Syar'iyah*?

(a) Confirmation of Heirs:

Upon application, the *Mahkamah Syar'iyah* will issue an order which identifies legal heirs. Such orders are necessary to access a benefactor's financial assets, such as money held in bank accounts. The court will hear evidence from witnesses regarding the deceased's relatives to ensure that all heirs are included in the order. Heirs who are missing or presumed dead will usually be included in the order.

An individual who believes that they are a legal heir, but who has not been included in the court's order, can apply to the court to have their status recognized, even if the inheritance has already been distributed. This might include individuals who were living in other parts of Indonesia and were not well known to other surviving relatives.

(b) Presumption of Death (*mafqud* cases)

Where a spouse is missing, Indonesian law requires that inheritance distribution be postponed until death is confirmed or the Religious Court certifies that death is presumed.²²¹ In Aceh, legal heirs of the person who is presumed dead may submit an application to the *Mahkamah Syar'iyah* for an order confirming that death is presumed.

(c) Distribution of Inheritance

Where there is a dispute regarding how inheritance is to be distributed, or the inheritance division is complex, heirs can request that the *Mahkamah Syar'iyah* make a determination specifying how inheritance should be distributed. Such a request can be lodged, regardless of whether inheritance has already been distributed, or whether a decision regarding distribution has already been made under *adat* law. If an applicant is dissatisfied with the court's decision, an appeal can be lodged.

²²¹ Art 96(2) KHI; See Part A: Basic Inheritance Principles of this chapter and specifically Section 6. Distributing the Inheritance of Missing Persons.

2. Procedures at the *Mahkamah Syar'iyah*

1. Referring Non-Contested Cases to the *Mahkamah Syar'iyah*?

Non-contested cases, for example heir confirmation and *mafqud* orders, can be lodged by any legal heir at their district *Mahkamah Syar'iyah*. First, the applicant should write a letter to the court explaining the situation. The Chief Justice will then appoint a judge to hear the case who will set a date and time for the hearing. The court clerk will contact the applicant and inform them of when the hearing will take place. The hearing should occur within 30 days of the application being filed with the court. On the day of the hearing, the judge will examine the application and supporting documentation and hear witness testimony. Applicants should bring witnesses, such as relatives, community members, or the *geuchik*, who can provide testimony to support the application. If the case is successful, the judge will then issue an order.

2. Referring Contested Cases to the *Mahkamah Syar'iyah*?

The procedure for resolving contested cases, such as disputes regarding inheritance distribution, is similar to non-contested cases. The applicant should write a letter to their district *Mahkamah Syar'iyah* requesting that they distribute a deceased's estate in accordance with law. The Chief Justice will appoint a judge to hear the case and a date for the hearing will be set. On the day of the hearing both parties should be present and should bring with them witnesses and other evidence. At this hearing the judge may first try to assist the parties reach an agreement through mediation. If this is successful, the judge will issue an order stating that the dispute was solved peacefully and specifying the terms of the settlement.²²² If a mediated settlement is not possible, the judge will, after hearing evidence from both parties, issue a decision based upon relevant law and *Qanun*.

4. Other Information

For all tsunami-related inheritance cases, applicants are not required to pay any fees to the court or to the judges. Given the simplicity of the process, applicants should not need the assistance of lawyer. If required, the court can conduct the hearing in an Acehnese language.

²²² Interview with Hafidah Ibrahim, Banda Aceh *Mahkamah Syar'iyah* (16 May 2006).

3. Accessing Bank Accounts

- When seeking to access a bank account that is in the name of a deceased person, it will be necessary to prove that the person seeking access is a legitimate heir.
- First, the heir should obtain a certification from the *Mahkamah Syar'iyah* (see box 1).
- The heir should then approach the bank and explain the situation. They will provide a form to complete.
- Each bank has an investigation team that will look into the case to check the heir's identity and confirm that they are allowed to access the account.
- While the process is conducted on a case-by-case basis and will vary slightly between banks, it is the recommendation of the *Mahkamah Syar'iyah* that will be most important for the investigation team when determining whether the application to access the account is successful.

CHAPTER 4

LAND LAW IN ACEH



CHAPTER 4 LAND LAW IN ACEH

The destruction of land and property caused by the tsunami was overwhelming: 654 villages were damaged or destroyed, approximately 300,000 land parcels have been classified as tsunami-affected, and 252,223 houses were either partially or completely damaged leaving 500,000 people displaced. The tsunami also inflicted major damage upon the National Land Office (*Badan Pertanahan Nasional*) in Banda Aceh and the other affected districts. The majority of land records were either lost or are no longer legible.²²³ Post-tsunami, it is the destruction of ownership records, displacement of boundary markers and the complex nature of inheritance distribution which have the greatest potential to result in disputes and uncertainty.

Part A: Rights to Land under Indonesian Law

In Indonesia, there are two legal frameworks applicable to land law: *adat* and the body of formal legislation governing land ownership and registration. In 1960, the central government introduced a system of land registration whereby land ownership would be certified and placed on a national register.²²⁴ However the non-compulsory, complex and costly nature of this process has meant that the majority of land transactions in Indonesia are governed by *adat* processes and remain unregistered.²²⁵ In Aceh, the loss of what few written records did exist, combined with the destruction of land boundary markers, make determining ownership over *adat* or registered land even more complex.

1. Rights to Land under Statute

(i) Standard Ownership Rights Over Land (Hak Milik)

Indonesian law provides that all citizens (both male and female) have the same opportunity to acquire land rights and to benefit from such rights.²²⁶ According to Law No. 5/1960, ownership (*hak milik*) is a right that can be passed from generation to generation and is the strongest right that an individual can have over land.²²⁷ It is equivalent to ownership in the Western sense. Land may be registered, transferred,

²²³ Dr D Fitzpatrick 'Restoring and Confirming Rights to Land in Tsunami-Affected Aceh' UNDP/Oxfam Report (July 2005) 4-5; see also UNDP (n 5) 9.

²²⁴ Law 5/1960 *On Agraria*.

²²⁵ Lindsey (n 1) 19-20.

²²⁶ Art 9(2) Law No. 5/1960.

²²⁷ Art 20(1) Law No 5/1960. Note that Art 22(1) Law No. 5/1960 provides that the acquisition of ownership rights according to customary law is to be regulated by government regulations. However to date such regulations have not been passed.

bequeathed and mortgaged. It may also be the source of secondary rights such as use (*hak pakai*) and lease (*hak sewa*).²²⁸

Only Indonesian nationals and corporate bodies sanctioned by the state may hold *hak milik*.²²⁹ It cannot be held by any corporation (whether state-owned, domestic, foreign joint venture or 100% foreign-owned).²³⁰ Generally speaking, foreigners cannot own *hak milik*.²³¹ It may, however, be held by state banks, agricultural co-operatives, permitted religious bodies and social bodies.²³²

(ii) *Building Rights (Hak guna bangunan)*

This statutory building right allows its holder to construct and own buildings on another's land for a period of no more than 30 years. It may be extended for a further 20 years.²³³ The right is transferable, registrable and may be used as security for debts.²³⁴ While it may arise from agreement with a private landowner, it is generally obtained via direct grant from the government.²³⁵ Indonesian nations and corporations established under Indonesian law, including foreign joint venture and 100% foreign owned corporations, can hold *hak guna bangunan*.²³⁶ It is likely that *hak guna bangunan* obtained directly from the government and held by Indonesian citizens in tsunami-affected areas will be recorded as ownership under the RALAS programme (see further below).

(iii) *Right of Commercial Exploitation (Hak guna usaha)*

Hak guna usaha is a right of commercial agriculture over state land. Indonesian nationals and corporations established under Indonesian law, including foreign joint ventures and 100% foreign owned corporations, can hold *hak guna usaha*.²³⁷ It is granted for between 25 and 35 years, and may be extended for a maximum of 25 years. *Hak guna usaha* is a relatively uncommon right in tsunami-affected areas of Aceh and Nias. It will not be upgraded to ownership under the RALAS programme (see further below).

²²⁸ Arts. 19, 20, 23, 24, 27, 49(3) Law No 5/1960.

²²⁹ Art 25 Law No. 5/1960.

²³⁰ Art 21(2) Law No. 5/1960.

²³¹ Arts. 21(3), 42 Law No. 5/1960.

²³² Art 2-6 Law No. 5/1960.

²³³ Art 35(2) Law No. 5/1960.

²³⁴ Arts 35(3), 39, 57 Law No. 5/1960.

²³⁵ Arts 35, 37 Law No. 5/1960.

²³⁶ See for example Law No. 1 of 1967; Presidential Decree No. 23 of 1980.

²³⁷ *ibid.*

(iv) *Statutory Right of Use (Hak Pakai)*

Hak pakai grants a right to use and take the products of land. It may exist over state or private land, but is very rarely granted over private land. Such rights are generally granted for a maximum of 10 years, although for foreign investment purposes it may extend up to 30 years. It may be held by Indonesian nationals, foreigners resident in Indonesia, corporations established under Indonesian law and domiciled in Indonesia, and foreign corporations with representatives in Indonesia²³⁸ *Hak pakai* over state land is registrable.²³⁹

(v) *Rental Rights (Hak Sewa)*

Rental rights arise through agreement with private landowners. A rental right may be acquired by an Indonesian citizen, foreigners who are based in Indonesia, Indonesian legal bodies and foreign legal bodies that have a branch in Indonesia. Such rights are not registrable and cannot be acquired over state lands.

(vi) *Communal Land Rights under Indonesian Legislation*

The village or community right of control over local land is known in Indonesian as *hak ulayat*. While it varies in strength from region to region, it generally encompasses community rights to allocate land, approve land transfers, control land use and determine land disputes within a certain land area. Indonesian legislation now allows for formal recognition and recording of *hak ulayat* where specific *adat* laws and practices continue to apply to ancestral customary land. Importantly, however, *hak ulayat* will not be recognized and recorded where the land is already subject to statutory rights (including forest concessions).²⁴⁰

2. Rights to Land under Acehese Adat

At least 75% of tsunami-affected land parcels are held under customary, or *adat* tenure.

(i) *Communal Rights to Land*

While local Acehese tend not to use the pan-Indonesian term *hak ulayat* (communal rights),²⁴¹ in practice community rights over land in Aceh are similar to *hak ulayat*. The community, usually through the *geuchik* (and sometimes the *mukim*), has the right to allocate community land to village members or outsiders, approve the transfer of land in the community's area to outsiders, and determine (or

²³⁸ Art 42 Law No.5/1960.

²³⁹ Regulation of Minister of Agrarian Affairs No 1 of January 1966.

²⁴⁰ Regulation No 5/1999 of the Minister of Agrarian Affairs/Head of National Land Board concerning the guidance for resolution of problems of the *ulayat* rights of adat law communities.

²⁴¹ *ibid* at 20-21.

influence) the nature of land use. In theory at least, the community may also appropriate land from village members for community purposes.²⁴²

(ii) Customary Ownership Rights (Hak Milik Adat)

Customary ownership rights (*hak milik adat*) are the most common type of land right in tsunami-affected Aceh and Nias. It is the norm not only in relation to residential land, but also for rice fields and gardens. This right is similar in nature to statutory ownership rights but the local community has a greater influence over the way in which land may be used and transferred. Generally speaking, in rural areas a customary ownership right:

- may only be sold if offered first to neighbors (and possibly other community members as well);
- cannot be sold to community outsiders (although it may be leased etc with community approval);
- is subject to neighbors' and other community members' legitimate rights of access;
- may (in theory) be appropriated by the community for community purposes.²⁴³

The strength of these restrictions on customary ownership rights are considerably weaker in urban and periurban areas. They also often take the form of negotiated interactions with community members and the *geuchik*, rather than set rules which are applied in all circumstances.

(iii) Agricultural Usage Rights (Useuha)

This use right arises from continuous cultivation of land for a period of at least six months. In some cases the community member will need *geuchik* approval to begin cultivation. Legal scholar El Hakimy notes that at times this use right tends to merge into ownership (or perceived ownership).²⁴⁴

(iv) Rental Rights (sewa/kontrak)

As with statutory leases, customary rental rights arise through agreement. In urban areas, *sewa* is often used to describe the rent of a room, while *kontrak* is used to describe the rent of a house. Rental rights are common in a number of areas of Aceh.

²⁴² For a discussion based on fieldwork in Aceh Besar see el Hakimy, T. I. *Land ownership in rural areas in Aceh (at the village at Leupueng in Greater Aceh District)*, 1980, 18-20, 39, 44.

²⁴³ See, for example, El Hakimy (n 236) 59-65.

²⁴⁴ *ibid* at 65.

(v) *Sharecropping (bagi hasil, mawaih), pledge/pawn (gadai, gala), and cultivation rights (numpang tanam)*

These rights arise through agreements with private landowners. Sharecropping involves cultivation of another's land without paying money in advance. The return to the landowner is a share of the crops harvested. A pledge or pawn arrangement involves a loan of money to a landowner in return for physical control over, and usually cultivation, of land. This type of pledge or pawn arrangement may not extend beyond 7 years, and is a source of considerable injustice in Indonesia.²⁴⁵

Cultivation rights (*numpang tanam*) are akin to rental agreements over agricultural land. As they are often granted by landowners to their relatives and do not always involve the payment of rent.

3. Means of Acquisition of Land Rights under Indonesian Legislation

Statutory ownership may be acquired through:

- inheritance, gift or purchase;
- upgrading *hak guna bangunan* (on payment of a prescribed fee);
- registration of a customary ownership right;
- direct grant from the government.

Note that statutory ownership may also be proved where, in the absence of other evidence, a claimant has been in physical control of land for more than 20 years (see further below).

Statutory rights over building and cultivation (*hak guna bangunan* and *hak guna usaha*) are generally acquired through government grant. While both may also be acquired through private agreement with a landowner, this type of grant is very rare in Indonesia because of the absence of governing regulations.

4. Means of Acquiring Land Rights under Adat

Customary ownership rights may be acquired through:

- inheritance, gift or purchase; or
- clearing and cultivating land in a customary area.

In most cases in Aceh, community members will not need *geuchik* permission to clear and cultivate customary land. The community will recognize their ownership right after a certain period,²⁴⁶ and for as long as the land is in continuous use.²⁴⁷ In

²⁴⁵ Art 7, Law 56/Prp/1960.

²⁴⁶ El Hakimy (n 236) 49.

²⁴⁷ *ibid* at 52.

certain circumstances, outsiders may also receive *geuchik* permission to clear and cultivate customary land. While this type of customary mechanism for acquiring land ownership is recognized in Law No 5/1960, it is important to note that *adat* rights through clearing and cultivation may not necessarily be legally valid where the land in question is defined as state land. Other types of customary rights to land may be acquired through inheritance, gift, purchase or agreement. In certain areas, clearing and cultivation will only lead to a use right that is converted to ownership through inheritance.²⁴⁸

5. Different Types and Status of Land

(i) State Land (*Tanah Negara*)

Article 33(3) of the Indonesian Constitution states that all land, water and natural resources in Indonesia falls under the control of the state. State land (*tanah negara*) is also defined as land controlled by the state. This definition is notoriously unclear. In Aceh, there are no maps that clearly delineate the extent and boundaries of state land.²⁴⁹

(ii) Land Held under Private Rights

Privately held land includes land held under statutory and *adat* rights.

(iii) Communal Land in *Adat*

The various types and terms for communal land in Aceh include:

- *tanoh mukim* (public communal land);
- *tanoh umum* (public land);
- *tanoh rakyat* (people's land); and
- *tanoh masyarakat* (the community's land).²⁵⁰

(iv) *Wakaf* Land

Wakaf is a legal act whereby part of a person's wealth is gifted, either permanently or for a set period, for religious purposes and/or the welfare of the community in accordance with to Islamic law.²⁵¹ *Wakaf* is also recognized under customary law. Where the *wakaf* donation is land, such land is generally managed by the *geuchik* or *imeum meunasah*.

²⁴⁸ See e.g. El Hakimy (n 236) 65. Note again that the boundaries between use rights and ownership rights in *adat* are often blurred, and negotiated only when the circumstances demand this degree of legalistic clarity.

²⁴⁹ There are maps that show the extent of declared state forest land: see www.dephut.go.id.

²⁵⁰ *ibid* at 20.

²⁵¹ Art 1(1) UU 41/2004; Art 1 PP 28/1977, Art 215 KHI.

(v) *Peunulang Land*

Hareuta peunulang is a bequest of non-movable property (either a house or land) to daughters by their parents upon marriage. Such gifting is generally witnessed by the *geuchik* and records are kept at village level and/or *camat* offices.²⁵² At the time of the gift, the parents' land should be subdivided to vest the *peunulang* land in the name of the daughter.

6. Can I Transfer My Land Rights?

Under Indonesian law, ownership rights to land can be transferred to another party²⁵³ through sale, exchange, bequest, inheritance, gift, and other acts regulated in Government Regulations.²⁵⁴ Rights that arise through direct government grant (such as *hak guna bangunan*, *hak guna usaha*), or agreement with a private landowner (such as *hak sewa*), may only be transferred to the extent allowed in the grant or agreement.

Under customary law, ownership rights can be transferred through inheritance or through an intentional act of transfer (selling or bequest). As noted above, neighbors (and possibly other community members) may have a priority right to purchase *adat* ownership rights. Sales of customary rights to community outsiders may also need approval from the community (through the *geuchik*).

Mechanisms for transferring *adat* land rights other than ownership include *pusaka* (inheritance); *hibah* (presenting as a gift); *publoue* (selling); *gantoue peunayah* (compensation); *peugala* (pawning); *mawaih* (sharecropping) and *peuwakeuh* (grant as wakaf land).²⁵⁵ Note that 'compensation' is often used to describe the sale of a right (e.g. *hak useuha*) where it is not entirely clear whether the right amounts to ownership or not.

7. Proving Rights to Land

Under Government Regulation No. 24/1997, rights to land may be proved on the basis of written evidence, sworn statements by witnesses, and/or a statement from the claimant that can be verified by BPN. Where this type of evidence is not available, physical control of land for 20 years or more will be sufficient proof where the land is held in good faith and is not subject to inconsistent competing rights.

²⁵² See Chapter 3 'Inheritance Law', Part A: Basic Inheritance Principles, particularly Section 4. 'Personal Property (*Harta Bawaan*)'.

²⁵³ Art 20(2) Law No. 5/1969.

²⁵⁴ Art 26(1) Law No. 5/1960.

²⁵⁵ El Hakimy (n 236) 65.

At times there is confusion at the local level as to whether lack of documentary proof of rights to land means that such land must be defined as state land. At times also BPN only recognizes ‘rights’ to land that are registered, or have other forms of ‘official’ documentary proof (such as land tax records). As noted, the correct legal position is that sworn statements by claimants or witnesses, or even long-term physical control of land, can amount to sufficient proof of rights to land.

In Acehese adat, ownership rights are often evidenced through records generated by land sales (*akte jual-beli*), gifts (*hibah*), and inheritance-related divisions (*pembagian hak bersama*). In some districts these records are issued by the sub-district head (*camat*) and witnessed by the village head coordinator (*mukim*) and village head (*geuchik*). In other cases they are generated by the parties involved, and simply witnessed by the *camat*, *mukim* and *geuchik*. It should be noted that *adat* mechanisms for acquiring ownership of land are recognized in Law No 5/1960 (art. 56).

Under the RALAS programme, proof of land ownership arises from community agreement and signed statements from the neighbors (see further below).

8. Abandonment and Loss: Is It Possible to Lose My Rights to Land?

Under Indonesian legislation a right to land may be lost if the land has been abandoned,²⁵⁶ ‘perishes’, or the right is revoked by the State for public purposes (in which case compensation will be provided).²⁵⁷ Rights over land can also be lost when land is reclaimed by the sea, lakes or rivers, in which case the land comes under the control of the State.²⁵⁸ The Bappenas Master Plan for Aceh and Nias recognizes the need for further regulation concerning land that has been submerged or destroyed as a result of the tsunami.²⁵⁹ One issue for clarification is the status of land that re-emerges from its submerged state, either naturally or as a result of land reclamation. Under customary law, rights over land can be lost because of abandonment, erosion, or where boundary markings have disappeared. However, such rights can be reclaimed if ‘perished’ land is recovered (for example through reverse erosion).

²⁵⁶ Where a landowner intentionally does not use land in accordance with the title held, such land can be deemed abandoned. Ownership rights over land which has been declared abandoned are transferred to the State; Art 3, 15(1) PP 36/1998.

²⁵⁷ Art 27 Law No. 5/1960.

²⁵⁸ Art 12 PP 16/2004.

²⁵⁹ Regulation of the President of Republic of Indonesia Number 30 Year 2005 on Master Plan for Rehabilitation and Reconstruction for the Regions and People of the Province of Nanggroe Aceh Darussalam and Nias Islands of the Province of North Sumatra – Book 1 (‘The Bappenas Master Plan’) at IV-11.

The Master Plan also sets out provisions for compensation when rights to land are lost. It states that the amount of compensation is to be determined in accordance with existing regulations and the government's financial capacity. Those that will receive compensation include people who are re-located, and those whose land is required for tsunami protection and escape facilities. Additionally, the government proposes to provide assistance to those whose land has been destroyed, submerged or contaminated. For destroyed, lost or submerged lands, government assistance will take the form of 200 square meters of substitute land with a core house of 36 square meters per family 'at a location stipulated by the government'. This assistance will not derogate from the beneficiaries' rights to their original land. However, for land that 'technically is no longer feasible to be occupied' the government will provide the same form of assistance but the original land 'will become government property without compensation'. These distinctions concerning rights to lost land require further clarification.

9. Key Government Agencies

The Government agency responsible for land titling and certification in Indonesia is the BPN (*Badan Pertanahan Nasional*). BPN is responsible for confirming the boundaries of land which is:

- Owned but not registered; or
- Registered but without a letter of measurement or map; or
- Registered but without an existing or valid map.²⁶⁰

Such boundary confirmation is to be based upon the knowledge of the land owner and, to the greatest extent possible, with the approval of neighboring land owners. Where agreement between the land owner and the owners of the neighboring land cannot be reached, measurement is based upon existing land demarcation marks.²⁶¹

Local government officials (*geuchik*, *mukim* and *camat*) also play an important role in land administration. As noted above, they will hold records generated by land sales (*akte jual-beli*), gifts (*hibah*), and inheritance-related divisions (*pembagian hak bersama*). Copies of these records were held in *kecamatan* offices (not by BPN itself), however in most tsunami-affected *kecamatan*, have been damaged or destroyed.

²⁶⁰ Government Regulation (PP) No. 24/1997 *On Land Registration*.

²⁶¹ Art 19(1) PP 24/1997.

Part B: Resolving Land Disputes

1. Resolving Land Disputes through the Formal Legal System

(i) Jurisdiction

Determining which court has the authority to adjudicate land disputes is not always straightforward. Land disputes are primarily the responsibility of the General Courts.²⁶² However where the land matter forms part of a wider inheritance dispute — arguably the primary source of land ownership disputes affecting post-tsunami Aceh — the matter falls within the purview of the *Mahkamah Syar'iyah*.²⁶³

Recent changes in the law may have expanded the jurisdiction of the *Mahkamah Syar'iyah* even further. In October 2004, the Chief Justice of the Supreme Court issued a Letter of Decision which purported to transfer the jurisdiction for *jinayah* (criminal) and *muamalah* (civil) cases covered under *Qanun* to the *Mahkamah Syar'iyah*.²⁶⁴ Ordinarily, *muamalah* is seen as covering almost all civil cases, including commercial cases, which would appear to catch most litigation relating to land. This position was given additional legal authority through the LOGA, passed in July 2006, which confers jurisdiction for family, civil and criminal law matters involving Muslims to the *Mahkamah Syar'iyah*.²⁶⁵

The MPU has supported the expanded jurisdiction of the *Mahkamah Syar'iyah*, issuing Fatwa 3/2005 which affirms that tsunami-related land ownership and inheritance matters can be referred to the court with valid evidence,²⁶⁶ and that the

²⁶² Article 50 Law No. 7/1989 provides that all cases of ownership, including land, cannot be solved through the Religious Courts unless the case has been heard and a final decision handed down by the State Court.

²⁶³ Law No. 3/2006 regarding the Amendment of Law 7/1989 *On Religious Courts* states that where the subjects are Muslim, ownership disputes concerning inherited land fall within the jurisdiction of the Religious Courts.

²⁶⁴ Letter of Decision of the Chief Justice of the Supreme Court (6 October 2004) (KMA/070/SK/X/2004); see also Joint Decree of the Governor, Head of the Provincial Police Force, Head of the Provincial Prosecutors, Chairman of the *Mahkamah Syariah*, Chairman of the Aceh State Court and the Head of Provincial Office of the Department of Law and Human Rights of 9 August 2004; Lindsey (n1) 52-53.

²⁶⁵ LOGA Art 128(3). It should be noted that while such provisions are relatively recent, since the tsunami the *Mahkamah Syar'iyah* has asserted jurisdiction over disputes involving the inheritance of land disputes, relying on the Supreme Court letter and *Qanun* No. 10/2002: Soufyan M. Saleh, 'Pembagian Hak Warisan: Praktek Mahkamah Syariah di Nanggroe Aceh Darussalam', paper presented at the workshop 'Lokakarya Orientasi Pemahaman Harta Bersama, Penentuan Ahli Waris dan Perwalian dalam Masyarakat Aceh', Banda Aceh, May 2005.

²⁶⁶ Art I(3) Fatwa 3/2005.

authority to resolve disputes over land ownership, inheritance disputes, hereditary status (*nasab*) and missing persons (*mafqud*) lies with the *Mahkamah Syar'iyah*.²⁶⁷ It should be noted, however, that since the tsunami, very few land-related cases have been referred to the *Mahkamah Syar'iyah* in either Banda Aceh or Jantho. Nevertheless, it is expected that the number of property disputes will increase as larger numbers of people leave temporary shelters, return to their land, and seek confirmation of land title.

(iii) Statute of Limitations

Indonesian law provides a statute of limitations of 30 years for all 'personal or material' legal charges.²⁶⁸ This limitation period would apply to tsunami-related land disputes. In some contradiction, MPU Fatwa No. 2/2005 (7 February 2005) states that that disputes involving land titling and inheritance must be resolved within 5 years of the tsunami, with the exception of victims that were minors at the date of the tsunami. Such persons must refer their cases to the court by the age of 19.²⁶⁹ It must be noted, however, that while the MPU exercises strong moral authority, in practice, the *Mahkamah Syar'iyah* is more likely to follow Indonesian law and precedent than the *Fatwa*.²⁷⁰

2. Resolving Land Disputes at the Village Level

Given the small number of tsunami-related land cases filed at either the *Mahkamah Syar'iyah* or State Courts, it appears the majority of land disputes are resolved at the *gampong* level under *adat*.²⁷¹ There are several explanations for this. *Adat* is often perceived as easier, cheaper and more culturally relevant than formal adjudication at the courts which are considered corrupt, expensive and bureaucratic.²⁷² A compounding factor is the widespread lack of awareness and misunderstanding at the village level regarding court procedures and how to access formal legal institutions.²⁷³ Finally, some communities may be guided by MPU *Fatwa* 2/2005,

²⁶⁷ Art V Fatwa 3/2005. Note, however, that this may contradict MPU Fatwa 2/2005 which encourages the courts to allow the *geuchik* and *mukim* to settle disputes regarding land (and orphans) peacefully prior to involving the courts.

²⁶⁸ Art 1967 The National Private Code, Book 4 on Proof and Expiry of the National Private Code.

²⁶⁹ Art 8 MPU Fatwa No. 2/2005 (7 February 2005).

²⁷⁰ Discussion with judges from NAD *Mahkamah Syar'iyah* (2 June 2006). Note that prior to the tsunami, the NAD *Mahkamah Syar'iyah* refused to adjudicate an inheritance dispute on the grounds that the 30 year expiry period had passed. However this decision was not based on the legislative provision but on the *Al Nasyi'ah* book (vol.7:485) — a classical Islamic legal text.

²⁷¹ Interview with Judge, Banda Aceh *Mahkamah Syar'iyah* (26 April 2006); Chief Justice Jantho *Mahkamah Syar'iyah* (27 April 2006).

²⁷² UNDP (n 5) 50-54, 97-98.

²⁷³ Interview with Rafiuddin, Chief Justice of Jantho *Mahkamah Syar'iyah*.

which endorses resolution of disputes at the village level prior to involving the courts.²⁷⁴

(i) Dispute Resolution under Adat

Even though *adat* processes vary between, and sometimes even within districts, the basic methodology for dispute resolution is consistent throughout the province. Cases will be referred to the *geuchik*, who will first encourage the parties to discuss the matter and reach a compromise through *musyawarah*. Where this is not possible, the *geuchik* and other village elders will try to negotiate an agreement, and assist parties to reach a joint resolution. Witness statements will often be relied upon to verify facts, making the honesty of parties crucial to fair outcomes.²⁷⁵ The sub-district head (*camat*) may also play an important role. Although not involved in dispute resolution, the *camat* can provide inheritance determination letters which will often be a crucial factor in proving rights to land. Once the land owner is identified, the *geuchik* will issue a letter confirming proprietary. In theory, records of all decisions involving land ownership should be maintained at the *gampong* office. In practice, however, comprehensive record-keeping is uncommon, compounding the risk of ownership disputes in the future. Finally, it must be highlighted that, as with the *adat* settlement of guardianship and inheritance cases, the manner in which land disputes are resolved will be dependant upon the perspectives of *adat* elders and agreements which land owners and those inheriting land may make between themselves. The extraordinary positions that people have been placed in following the tsunami, their relative economic status and place of residence, also appears to affect *adat* decision-making.

Part C: The RALAS Programme

In Aceh, the primary mechanism for confirming land rights is the RALAS programme (Reconstruction of Aceh Land and Administration System) run by BPN. Through BPN, RALAS will undertake a program of systematic land titling designed to register up to 600,000 land parcels in tsunami-affected and adjacent communities.²⁷⁶ As at 21 June 2006, BPN statistics state that 2,083 land titles had been distributed to landowners; a further 7,025 titles had been signed and are waiting to be distributed; and 46,740 land parcels have been surveyed by BPN.²⁷⁷ It remains to be seen whether the planned completion date of 2008 will be met.

²⁷⁴ Art 9.

²⁷⁵ Interview with Abubakar, Imam meunasah gampong Java (2 May 2006).

²⁷⁶ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 1.

²⁷⁷ 'Multi Donor Fund for Aceh and Nias Project Update June 2006' Multi Donor Fund Secretariat (30 June 2006), 3.

1. The Basic Structure of RALAS

It is easiest to understand RALAS as a 3-step program. First, communities come to agreement on land boundaries through a process of community land mapping or Community Driven Adjudication (CDA). This is a bottom-up process that relies on community knowledge and consensus. Second, based on the community land map, BPN surveys land boundaries and verifies compliance with CDA procedures. Third, the resulting parcels of land are registered and land title certificates are issued.²⁷⁸

Stage 1: Community Driven Adjudication

With the assistance of either BPN, or facilitators from specialist NGOs such as Logica, YIPD, Merci Corps, World Vision and the Canadian Red Cross:²⁷⁹

1. Each land owner must install boundary stakes and complete a statement attesting to the location of, and their ownership over a specific land parcel. This statement must be endorsed by the owners of neighboring land and the *geuchik* (annexure 2).
2. Where the land owner is deceased, this form should be completed by the deceased's legal heirs who have previously received inheritance approval from their *geuchik* or *imeum meunasah* (annexure 4).
3. Where heirs are minors, the form should be completed by a guardian approved by the *geuchik* or *imeum meunasah* and confirmed by the *Mahkamah Syar'iyah*. As part of the RALAS programme, the *Mahkamah Syar'iyah* will come to each village and conduct such confirmation hearings free of charge (annexure 3).²⁸⁰
4. From these statements, communities then develop a map identifying the ownership and boundaries of land parcels in the village.²⁸¹

²⁷⁸ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 1, 5, 7.

²⁷⁹ *ibid* 16-17.

²⁸⁰ *id.*

²⁸¹ *ibid*, 17, 24.

Stage 2: Surveying and Mapping

5. Communities inform BPN that the CDA process is complete.²⁸²
6. Accredited BPN surveyors then come to the village to map agreed land boundaries.²⁸³
7. After surveying is complete, BPN will construct a 'community land map' which lists landowners. This map will be displayed in the village for 30 days.²⁸⁴
8. During the 30 day period, landowners may lodge an objection by completing the relevant complaint form (annexure 5). The BPN adjudication team will then investigate the objection and then, depending upon the type of dispute, may suggest resolution through a village meeting or refer the dispute to a 'complaint handling team' at the provincial level.²⁸⁵



Land Mapping facilitator with the community staking the land plots (photo courtesy of AIPRD – LOGICA)

²⁸² *ibid* 18.

²⁸³ *ibid* 19.

²⁸⁴ *ibid* 21-22.

²⁸⁵ *ibid* 22-25.

Stage 3: Issuance of Land Title Certificates

9. If no objections have been raised within the 30 day period, BPN will issue land certificates to land owners.²⁸⁶

It should be noted that:

- Where land which is jointly owned, the land certificate should be made in both the name of the husband and the name of the wife.
- Where the landowner is deceased the land certificate will be issued in the names of the heirs.
- If these heirs are minors, the 'land record' and land certificate will be made in the names of such heirs, however a guardian will be responsible for the management of such land.
- Where legal heirs have not been identified, or inheritance is contested, only a 'land record' will be made. The land certificate will only be issued when there is certainty as to the identity of the legal heirs.
- Where parcels of land are in dispute, only a 'land record' will be made and the land boundary will be recorded by BPN as a 'temporary boundary'. When ownership is clarified the owner can then register their land at the local BPN office.²⁸⁷

(i) Community Land Mapping

It is important to distinguish between 'community land mapping' and land surveying, mapping and certification conducted by BPN. Normally, all activities involving land mapping would be undertaken by BPN. However the tsunami created an unprecedented situation. Homes, roads and other public infrastructure needed to be quickly rebuilt in areas which were either previously unmapped, or whose maps had been destroyed. Before rebuilding could commence, these maps need to be replaced. Because the RALAS programme is not expected to finish surveying and registering land parcels until 2008, BPN developed a system whereby communities, assisted by specialist NGOs, agreed upon land boundaries and developed their own land maps through a process of Community Driven Adjudication (CDA). To regulate this process and ensure consistency throughout tsunami-affected Aceh,

²⁸⁶ *ibid* 23.

²⁸⁷ *ibid* 20, 27.

BPN issued Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*.

CDA is conducted either by villages themselves (often led by the *geuchik*), BPN, or facilitated by specialist NGOs such as YIPD and LOGICA, Merci Corps, World Vision and the Canadian Red Cross.²⁸⁸ As at 31 January 2006, 15,000 land parcels had been mapped through CDA.²⁸⁹ Many more have been subject to mapping by NGOs or local government officials that focused on physical data only (e.g. maps of housing, boundaries and public areas). These maps often lack comprehensive juridical data (lists of owners, determinations of inheritance and appointment of guardians for underage heirs). Where this has occurred, the RALAS programme will utilize the existing (community-agreed) data and expand on it so as to comply with CDA procedures (e.g. by adding juridical data).

It must be highlighted that community land mapping does not confer statutory titles to land. Statutory land titles can only be provided by BPN through registration and certification. This said, however, in practice community land maps have been the central mechanism for identifying land rights and boundaries for the purposes of housing reconstruction. Arguably, community land maps also constitute a form of *adat* recognition of rights to land.

2. The Relationship between Village Planning and the RALAS Programme

The disaster in Aceh and Nias submerged, contaminated and rendered unstable a large number of land parcels. It also offered an opportunity for communities to ‘build back better’. In both cases, there is usually the need to adjust land boundaries and/or reallocate land parcels to community members. This process encompasses village planning and land consolidation. How village planning and land consolidation is to be done in a legally valid manner has been the subject of considerable controversy in Aceh and Nias.

The RALAS programme verifies the rights and boundaries of pre-tsunami landowners in Aceh. Where, however, the process of village planning (and land consolidation) complies with the BRR Village Planning Guidelines (issued 12 April 2006), then the RALAS programme will record land rights and boundaries as adjusted by the community through the village planning process.

²⁸⁸ *ibid* 7, 12; Discussion with Pak Pelopor (24 July 2006).

²⁸⁹ ‘Multi Donor Fund for Aceh and Nias Project Update June 2006’ Multi Donor Fund Secretariat (30 June 2006), 3.

3. What is the Purpose of Land Mapping and Why is Land Certification Important?

There are three main reasons why land mapping and certification is important for landowners:

- Community land mapping has proved itself to be a quick mechanism for re-establishing land rights through community consensus. Land certification will provide the legal certainty necessary to confirm post-tsunami reconstruction and rebuilding.
- Certification through RALAS protects an owner's rights over land. This is particularly important for vulnerable groups such as orphans or widows who are less likely to understand and hence assert their legal rights over land, and who have less negotiating power during inheritance distribution processes.
- Certificated land can be used as capital to secure personal loans that can be reinvested in income generation projects or other livelihood activities.

4. The Risks of RALAS

The RALAS programme was designed as a rapid response to an unprecedented disaster. It records ownership rights only (both statutory and customary). It does not record the other rights the land outlined in this chapter. As such, there is a risk that RALAS will strengthen the rights of owners *vis-a-vis* the rights of secondary rights-holders. Because it converts customary ownership rights into statutory ownership, there is also the risk that the traditional community controls over private ownership (described above) will be undermined by the exclusive rights of statutory ownership, and a related risk that RALAS will undermine traditional community rights over allocation and use of communal lands.

5. Is There Any Reason to be Worried about Certification?

There are reports that some communities fear certification under the RALAS programme. They are concerned about the extension of government control over land and, in particular the possibility that certification will facilitate potential land appropriations by the State. Subject to the risks of RALAS described above, it is important to note that expropriation of land for public purposes by the State may take place in relation to certificated and uncertificated land. Generally speaking, certificated land attracts higher rates of compensation in the event that public purpose expropriation does take place.

6. Dispute Resolution Under RALAS

RALAS has developed a system for confidentially dealing with complaints and disputes concerning the land certification process. After the cadastral surveying and mapping has been completed by RALAS and displayed in the village, landowners,

or persons acting on behalf of landowners (such as guardians) have 30 days in which they may lodge a complaint. Objections can relate to technical issues, such as the location of land boundaries, or non-technical issues, such as fees charged to communities or allegations of corruption. How the RALAS adjudication committee will seek to resolve such disputes is depicted in the table below.²⁹⁰

TYPES OF COMPLAINT	DIRECTED AT	ALTERNATIVES FOR COMPLAINT SUBMISSION	RESOLUTION	WHEN NOT RESPONDED, REPORT TO
Disagreement over boundary stakes	<i>Geuchik</i>	NGO monitoring; Facilitators	<i>Geuchik</i> holds a meeting	Adjudication Committee Complaints handling team at the provincial level.
Fees charged by the village apparatus Misuse of support fund of 'community agreement'.	Adjudication team (base camp).	NGO monitoring; Facilitators.	Adjudication team checks the accuracy in the field and will request the apparatus to return the fees charged /misused funds.	Complaint handling team at the village level.
Objection to the results of the work of the adjudication team (physical and juridical data)	Adjudication team (base camp).	Complaint handling team at the provincial level; NGO monitoring; Facilitators.	Adjudication team checks the accuracy in the field and measuring if necessary.	Complaints handling team at the provincial level.
Fees charged by the BPN officials in the field.	NGO monitoring Joint forum	Complaint handling team at the national level; Facilitators.	Complaint handling team at the provincial level first checks and will request the official to return the fee charged.	Complaints handling team at the national level.

²⁹⁰ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 9-11, 24-25.

Misuse of funds by the project manager.	Compliant handling team at the provincial level.	Complaint handling team at the national level; NGO monitoring; Facilitators.	Verify and report to compliant handling team at national level.	Complaint handling team at the national level.
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7. Women and Other Vulnerable Groups Under the RALAS Programme

In an effort to protect the rights of women and other vulnerable groups, the CDA Manual contains the following guidelines:²⁹¹

- Under Indonesian law, every citizen, male and female has the same rights over land.²⁹² Male and female landowners can register their interest and obtain a land certificate in their name;²⁹³
- For land which is the joint property of a husband and wife, the land certificate ‘can be made jointly in the names of both persons, and not just the husband’;²⁹⁴
- Where inheritance is not settled, land certificates can be issued in the names of heirs ‘including those who are female and are still under-aged’;²⁹⁵
- Under *Sharia* law, widows and children have inheritance rights to land. Widows and female children who obtain such inheritance rights ‘must register their respective names’.²⁹⁶
- Under-aged heirs, including orphans, who have inherited land can have their rights registered in their respective names with the assistance of a guardian.²⁹⁷
- Guardians have custodian responsibilities over land on behalf of heirs. Guardians have the authority to handle the land registration process but may not transfer land rights to other parties. The rights over land must be transferred to the heir when they are declared to be of age.²⁹⁸

²⁹¹ *ibid* 2, 9-10.

²⁹² *ibid* 9.

²⁹³ *id.*

²⁹⁴ *id.*

²⁹⁵ *ibid* 9, 27.

²⁹⁶ *ibid* 10.

²⁹⁷ *ibid* 10, 27.

²⁹⁸ *id.*

The manual also notes that women's participation 'will strongly determine the success' of the land adjudication process, that women are expected to be present at meetings, and that women 'must' be present and participate in the actual staking of boundaries, BPN surveying and the presentation of land certificates.²⁹⁹ Such prescriptions are intended to 'raise an expectation within communities of women's presence and participation and to counter the very real impediments to this',³⁰⁰ such as cultural constraints on women mixing with unrelated men and taking part in public affairs.

8. Joint Titling

The CDA highlights that where land is joint matrimonial property, the land certificate 'will be made jointly in both the husband's and the wife's name'.³⁰¹ However, joint titling is not mandatory and, in practice, it may not be occurring unless it is expressly requested. Research found that both NGOs facilitating community land mapping and BPN officials will provide joint registration where it is initiated by the parties but do not raise the issue.³⁰² There is also some evidence that joint registration is not occurring because staff are not aware that it is possible. With respect to community land mapping, data collected by LOGICA reveals that women listed themselves as landowners in 21% of cases (out of 13,735 parcels mapped).³⁰³ UNDP has estimated that women have been registered as the landowner in 30.2% of cases, and that joint registration has occurred in 3.9% of cases (out of 10,137 land certificates signed).³⁰⁴

Placing the onus on individual families to jointly register matrimonial property creates a significant risk that such property will be registered only in the name of a husband.³⁰⁵ First, there is widespread misunderstanding within communities and amongst village leaders regarding the possibility and benefits of joint titling. Cultural norms, including that men normally handle paperwork and that it is considered respectful to register property in the name of male breadwinners, further operate to discourage joint registration. Having jointly owned property registered as personal property (*bawaan*) of a husband places women at risk of losing their property rights during inheritance distribution. This issue is discussed in detail in Chapter 3 Inheritance: Section 5 Joint Matrimonial Property (*Harta Bersama*).

²⁹⁹ *ibid* 10, 28.

³⁰⁰ Lindsey (n 1) 30.

³⁰¹ *ibid* 9, 27.

³⁰² IDLO Mission report from Banda Aceh (23 November 2005).

³⁰³ Data on file with IDLO.

³⁰⁴ Data on file with IDLO.

³⁰⁵ Research conducted in other parts of Indonesia suggests that married women are at particular risk of losing rights to land through processes of systematic land titling, see Lindsey (n 1) 20-22.



LOGICA Land Mappers introducing the program to the community (photo courtesy of AIPRD-LOGICA)



LOGICA Land Mapping team socializing the mapping program to the villagers and local government (photo courtesy of AIPRD – LOGICA)

Part D: Post-Tsunami Land Issues

1. I Lost My House in the Tsunami. Am I Entitled to a New House?

The Bappenas Master Plan does not state that all those who lost houses in the earthquakes and tsunami are legally entitled to a new house. It does propose to contribute towards a core house of 36 square meters for each family, by providing 28 million rupiah for houses which were completely destroyed and 10 million rupiah for lightly and moderately destroyed houses.³⁰⁶

2. I've Lost all of the Documents that Proved my Rights to Land: Will I Lose my Land?

The loss of documents proving land rights is just that: a loss of proof only. The underlying right to land is not lost. Documentary proof of rights to land will be established through the RALAS programme.

3. I was Renting Prior to the Tsunami. Am I Entitled to Compensation?

Pre-tsunami house renters should negotiate with the landowner (or his/her heirs) to re-establish the rental agreement once a house is rebuilt on land. This negotiation may lead to compensation for such matters as rent paid in advance prior to the tsunami.

Alternatively, it may be possible for renters to receive land from their community through a process of village planning and land reallocation. This allocation of land would be consistent with established *adat* procedures. The community would then need to recognize the renters as (new) landowners in the RALAS CDA programme.

Renters who are unable to return to their pre-tsunami communities have a number of options. The most attractive is to obtain a free house from a NGO on land provided by BRR or the district/city government. This should either lead to ownership rights under the RALAS programme, or to *hak guna bangunan* (which may be converted to ownership on payment of a relatively small described fee).³⁰⁷ Alternatively, renters may obtain cash compensation from BRR valued at 40% of a basic 36 m² house in Banda Aceh.³⁰⁸ This cash may be used to rent, build or purchase land on the private land market. It may also be used as a down payment for subsidized credit through BRR in order to obtain ownership of BRR-provided housing.³⁰⁹

³⁰⁶ Bappenas Master Plan, VI-2.

³⁰⁷ See BRR Regulation No 23 on Land Acquisition.

³⁰⁸ Art. 3(5), BRR Regulation No 21/PER/BP-BRR/VI/2006 on Renters and Squatters.

³⁰⁹ *ibid* art. 3(9).

4. I've Lost Land and the Government Classifies me as a Squatter: What will I Receive?

The land and housing entitlements for squatters are not the same as for renters. Squatters will receive cash compensation from BRR valued at 25% of a basic 36 m² house in Banda Aceh.³¹⁰ The uses to which this money may be put are the same as for renters. As noted in Part A, some of those who are defined as squatters will view themselves as owners of customary land. The complexity of defining state land means that specialist legal assistance should be sought in this type of case.

5. I Lost my Land and House: What will I Receive?

Approximately 80,000 hectares of land were submerged as a result of the tsunami. An unknown amount of land may also be unavailable for habitation as a result of instability, contamination or spatial planning (buffer zones etc). The status of rights to land that has been destroyed or submerged in Aceh and Nias was discussed in Part A above.

The entitlement to new land for those who have lost land is set out in BRR Regulations No. 20 and 21 of 2006. As noted, renters and squatters have a range of options that include the possibility of cash compensation from BRR. Pre-tsunami landowners, in contrast, will receive basic 36 m² house on a minimum land parcel of 40 m² with an attached ownership right.³¹¹ This house should be in an appropriate location, with comprehensive access to basic services and infrastructure.³¹²

6. My Land is now Unstable and Unsuitable for Building a House

Those who owned land that is now unsuitable for habitation are entitled to the resettlement assistance discussed above.³¹³

7. My Land has been 'Reduced' for Public Needs

In some cases, village planning has led to a reduction in the size of individual land parcels. This reduction is legally valid where it was agreed by all community members through a process of village planning.³¹⁴

8. My Land is Too Small for me to get a New House?

Land parcels may be expanded to a sufficient size for housing through the process of village planning/land consolidation. Where this does not occur, landowners may be entitled to resettlement assistance (discussed above) on the basis that the land is not suitable for habitation.

³¹⁰ Ibid. (art. 3(6)).

³¹¹ Art. 3(4), BRR Regulation No 20/2006.

³¹² *ibid.*, art. 1(8).

³¹³ *ibid.*, art. 3(3).

³¹⁴ See the BRR Village Planning Guidelines (issued 12 April 2006).

9. What Happens to Land for which there are No Owners?

Under Indonesian law, where a deceased owner of land has no heirs, or such heirs cannot be located, such property, upon a decision by the Religious Court, will be placed under the management of the *Baitul Mal* for Islamic interest and general welfare.³¹⁵

A similar principle exists under customary law. However because many *gampong* have not yet established a *baitul mal*, such land is usually placed under the supervision of the *gampong* office.³¹⁶ The management of such land will be transferred to the *geuchik* or community leader and any benefits derived from such land (eg through cultivation) will be used in the interests of the local *meunasah* and community. In a number of *gampong*, particularly in Aceh Besar, the management of *baitul mal* property is vested in a person who is poor. The income derived is often shared with the local community annually in a form of *bubur kanji* (a type of porridge) during *ramadhan* to break the fast.³¹⁷

This position is supported by the MPU through Fatwa No.2/2005 (7 February 2005) and Fatwa No.3/2005 (17 April 2005), which provide that the land and property of tsunami victims who have no heirs will become the property of all Muslims through the *Baitul Mal*. It should also be noted that RALAS's Land Registration Manual states that in such cases, pending the identification of a clear owner, a land book will be published, but no certificate can be published, and the management of the land will be handed over to the *gampong's Baitul Mal*.³¹⁸

Part E: Protecting Vulnerable Groups

1. Orphans

In Aceh, the relevant mechanism for registering an orphan's rights to land is through the RALAS programme. The steps to be taken to register land interests under the RALAS programme are detailed in Part C of this Chapter. Orphans must be represented by a guardian in this process. The role of the guardian in the land certification process is like that of any other land owner. Before the guardian can register land on behalf of the orphan, however, a 'Form of the Evidence of

³¹⁵ Art 191 KHI.

³¹⁶ See art 10 of the Governor's Decree No. 18/2003.

³¹⁷ Interview with T.I. El-Hakimy (April 26, 2006); 'Pola Penguasaan Pemilikan Dan Penggunaan Tanah Secara Tradisional Propinsi Daerah Istimewa Aceh' Syamsidar and Sugiarto Dukung (eds) 1984, 66.

³¹⁸ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 31.

Inheritance Approval'³¹⁹ and 'Form of the Evidence of Guardianship Approval' must be completed (see annexure 3 and 4).

(i) *Should the Land Certificate be issued in the Orphan or the Guardian's Name?*

According to BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*:

- Minors who have inherited land, including orphans, who have inherited land can have their rights registered in their respective names with the assistance of a guardian.³²⁰
- Where inheritance is not settled, land certificates can be issued in the names of heirs 'including those who are female and are still under-aged'.³²¹

If a land certificate was issued in the name of the guardian or another relative rather than the orphan, either party can approach BPN (either through the RALAS team, or by writing a letter to the BPN office), requesting that the land certificate be reissued. If a significant period of time has passed since the certificate was issued, BPN may advise the parties to approach the *Mahkamah Syar'iyah*.

(ii) *The Appointment of Guardians*

The guardian must first complete a form provided by RALAS entitled 'Form of the Evidence of Guardianship Approval' (annexure 3). This form must be signed by the *geuchik* or *imeum meunasah* and then be validated by the *Mahkamah Syar'iyah*. Guardians do not have to travel to their district *Mahkamah Syar'iyah* to obtain validation. Instead, a 'Mobile *Mahkamah Syar'iyah*' will travel villages and judges will conduct confirmation hearings, usually in the *gampong* office or *meunasah*, free of charge.³²² Such hearings are short and normally involve only the proposed guardian and witnesses (neighbors or relatives) who can provide a statement supporting the guardian's relationship with the child.³²³

(iii) *The Obligations of Guardians*

³¹⁹ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 33. Note that under Indonesian law, where land is inherited by more than one heir, a legal inheritance document specifying the distribution of assets must be attached to the registration. Where this legal inheritance document is not available or settled, heirs will be registered as joint owners; art 42(4)-(5) PP 24/1997.

³²⁰ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 9-10, 27.

³²¹ *ibid*.

³²² *ibid* 16-17.

³²³ Interview with Rafiuddin (27 April 2006).

Under Indonesian law guardians are required to manage a ward's wealth (including land) and may be required to pay compensation for losses incurred on such wealth because of a guardian's negligence.³²⁴ Guardians are required to transfer control over a ward's assets when the ward reaches the age of 21, marries or is otherwise deemed to be independent.³²⁵ Guardians are prohibited from selling, transferring or pawning a ward's assets unless this is in the interests of the ward.³²⁶ Guardians are also prohibited from tying up, burdening or dividing a ward's assets unless such action will increase the value of the ward's assets or cannot be avoided.³²⁷ In the event that a guardian is forced to sell land belonging to a ward, permission should first be obtained from the *Mahkamah Syar'iyah*.³²⁸

BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas* specifically states that:

- Guardians have custodian responsibilities over land on behalf of heirs.
- Guardians have the authority to represent their ward in the land registration process but may not transfer land rights to other parties.
- The rights over land must be transferred to the heir when they are declared to be of age.³²⁹

2. Women

(i) Can Women Own Land?

Indonesian Law provides all citizens, both male and female, with the same opportunity to acquire land rights and to benefit from such rights for him/herself and/or his/her family.³³⁰ Customary law also recognizes that both men and women have the same rights over land/houses and its benefits for his/her needs and his/her family.³³¹ It should also be noted that the *Quran* recognizes women's right to own property, including land.³³²

³²⁴ Art 51(5) Law No. 1/1974.

³²⁵ Art 111(1) KHI.

³²⁶ Art 52 Law No. 1/1974.

³²⁷ Art 110(2) KHI.

³²⁸ Discussion with Drs H. Armia Ibrahim and Judge MS (2 June 2006). While this requirement is not yet contained with a formal regulation, it was contained within a draft *Perpu* on Land and may become law in the near future. See Chapter 3: Guardianship, Section 9 *Obligations of Guardians*.

³²⁹ BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 10, 27.

³³⁰ Art 9(2) Law No. 5/1960.

³³¹ Interview with T. Djuned (27 April 2006).

³³² Q.S. 4:7; 4:32.

(ii) If I Own Land, Can I Receive a Land Certificate in my Own Name?

Woman land owners, including those who have inherited land, those who are not married or those who have been widowed, can register such land and receive a certificate in their own name. The steps to be taken to register land interests under the RALAS programme are detailed in Part C of this Chapter.

(iii) I'm Married, Whose Name Should Appear on the Land Certificate?

If land is joint matrimonial property, the land certificate can be registered in both the husband and wife's names. Land which was purchased after a marriage is probably joint matrimonial property, even if only the husband was the only person earning an income and even if only his money was used to purchase the property.³³³ While joint registration is not mandatory, it is advisable in order to protect a wife's legal rights over that property in the future. If the land is *bawaan* property, for example land which was gifted to or inherited by a wife, such property should be registered in only the name of the wife.³³⁴

(iv) My Husband Died in the Tsunami, What Rights do I Have Over Our Land?

If land was joint matrimonial property, widows are entitled to 50% of that property under Indonesian law. Where inheritance has not yet been distributed, the land certificate can be issued in the name of all heirs indicating each heir's proportion of entitlement.³³⁵ If the land is *bawaan* property, this property remains the property of the widow and a land certificate can be issued in her name. If the land was the *bawaan* property of the deceased husband, then this land will be inherited by the deceased's legal heirs, including the widow. Where these legal heirs are the widow and her children, the land certificate can be issued in all these names and the widow can apply to be appointed guardian of her children. In this case the family would continue to live in the family home as the widow is responsible for managing the inherited property on behalf of her children until they are adult.

(v) I'm a Widow, Am I Entitled to a New House?

Widows have the same rights to housing as any other victim of the disaster in Aceh and Nias. Widows who own land, either directly or as a post-tsunami heir, are entitled to benefit from NGO or BRR-provided housing. Widows who own land that is now unsuitable for habitation are entitled to new housing under the BRR resettlement program.³³⁶

³³³ See Chapter 3 Inheritance, Part A, Section 5. Joint Matrimonial Property (*Harta Bersama*).

³³⁴ See Chapter 3 Inheritance, Part A, Section 4. Personal Property (*Harta Bawaan*)

³³⁵ See Chapter 3 Inheritance, Part A section 5. Joint Matrimonial Property (*Harta Bersama*).

³³⁶ See BRR Regulation No 20/2006.

ANNEXURE 1: Matrix of Relevant Guardianship, Inheritance and Land Law GUARDIANSHIP

NO	TOPIC	A. FORMAL LAW	B. NOTES	C. CUSTOMARY PRINCIPLES AND NORMS	D. NOTES	E. ISLAMIC LEGAL OPINION / PRINCIPLES
1	THE AGE FOR CHILDREN UNDER GUARDIANSHIP	<p>A child who is under 18 years or unmarried, and who is not in the custody of its parents, shall be placed under the custody of a guardian (UU 1/1974, 50:1).</p> <p>Guardianship is only applicable to those aged under 21 years of age and/or who are not married (KHI, 107:1).</p>	<p>With respect to the inconsistency between UU 1/1974 and the KHI, It should be noted that the <i>Undang Undang</i> (law) supersedes the KHI (a Presidential Instruction) and should hence be regarded as the authoritative law.</p>	<p>Customary law specifies no age range for when guardianship is applicable. Generally, guardianship will continue until a ward is married or is seen to have the requisite physical, biological, and mental maturity, and a level of independence/self sufficiency within the community.¹</p>		
2	THE SCOPE OF GURADIANSHIP	<p>Guardianship relates to the welfare of the child as well as its property (UU 1/1974, 50:2).</p> <p>Guardianship relates to the protection of the individual as well as its property (KHI, 107:2).</p>		<p>Under customary law, guardianship relates to the protection of the individual as well as its property.²</p>		

¹ T.I. El-Hakimy (Interview, 26 April 2006).

² Badruzzaman Ismail (Interview, 8 May 2006).

3	THE APPOINTMENT OF GUARDIANS	<p>A guardian may be nominated by a parent prior to their death through written will and testament or orally before 2 witnesses (UU 1/1974, 51:1).</p> <p>On the request of an interested party, the Religious Court can appoint a guardian for a person who is under 18 years of age and without parents, provided that parents did not previously appoint an alternate guardian (Penjelasan UU 7/1989, 49:2).</p> <p>In the event that a child's parents do not have legal capacity, or their place of residence or whereabouts is</p>	<p>The Dinas Syariat Islam has recommended that when an application for guardianship is submitted to the court, this application should be accompanied by a list of the property belonging to the child.⁴ UU 1/1974, 51:4 (see box 7A) makes a similar provision in this regard.</p>	<p>Under customary law, guardians will be appointed through agreement by the family. The village elders (<i>tuha peut</i>) are often advised of this appointment.⁵</p>	<p>The Dinas Syariat Islam has recommended that when an application for guardianship is submitted to the <i>gampong</i> (village), this application should be accompanied by a list of the property belonging to the child.⁶</p>	<p>According to Fatwa MPU 3/2005, an orphan with no guardian is eligible to have a guardian appointed by the <i>Mahkamah Syar'iyah</i>. If such orphans have no inheritance they shall, following a decision issued by the <i>Mahkamah Syar'iyah</i>, be maintained by <i>Baitul Mal</i> (Islamic Treasury). Such guardianship will be supervised by the <i>Mahkamah Syar'iyah</i>.⁷</p>
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³ The *Balai Harta Peninggalan* (Public Trustee) is the official trustee/receiver appointed by the court as the final choice of receiver, if the parties do not themselves nominate a receiver.

⁴ See *al-Indzar*, special publication by Dinas Syariat Islam NAD, edition number 4 (15 September 2005), p. 7.

⁵ Badruzzaman Ismail (Interview, 8 May 2006).

⁶ See *al-Indzar*, special publication by Dinas Syariat Islam NAD, edition number 4 (15 September 2005), p. 7.

⁷ Fatwa MPU No. 3/2005, 2:3.

		<p>unknown, a person or a legal body that fulfils the necessary requirements can be appointed guardian through stipulation by the court (UU 23/2002, 33:1, 33:2).</p> <p>Where the court has not yet appointed a guardian, a child's property will be administered/supervised by the <i>Balai Harta Peninggalan</i>³ or another institute with the same authority (UU 23/2002, 35:1). All such supervision of property must be approved by the court (UU 23/2002, 35:3).</p> <p>If the authority of a guardian is revoked, the court can appoint a new guardian (Penjelasan UU 7/1989, 49:2).</p>				
4	ELIGIBILITY OF GUARDIANS	<p>Preferably, a guardian will be selected from the family members of the child or be an adult</p>		<p>Wherever possible, a (male) guardian will be appointed from the father's side of the</p>	<p>It should be noted that regardless of guardianship, the day-to-day care of a</p>	

		<p>person who is of sound mind, is just, reliable and of good behavior (UU 1/1974, 51:2).</p> <p>Preferably, a guardian will be appointed from the family of the child. This person should be adult, mentally stable, fair, honest and of good character; or be a legal entity (KHI, 107:4).</p> <p>A guardian who is appointed under s33:2 UU 23/2002 (see box 3A) must be of the same religion as their ward (UU 23/2002, 33:3).</p>		<p>child's family. Where this is not possible, a (male) guardian from the mother's side of the child's family will be appointed. Where this is not possible, a female guardian (from either the father or the mother's side of the child's family) will be appointed. In such a situation, however, the female guardian will not be given the title <i>wali</i>.⁸</p>	<p>child will generally be delegated to a (female) relative on the mother's side of the child's family.⁹</p>	
5	FEMALE GUARDIANS	<p>There is nothing in the Islamic Law Compilation (KHI) which prohibits females from being appointed guardians.</p>	<p>According to the Indonesian legal scholar, Subekti, a surviving spouse will automatically 'by operation of statute' become the guardian of their own children who</p>	<p>Under customary law men are generally appointed guardians. However, in certain situations (eg where there are no male eligible to be</p>		<p>There is broad support from the MPU that mothers may – and generally should – be appointed guardian of their children</p>

⁸ T.I. El-Hakimy (Interview, 26 April 2006); Interview with Badruzzamen Ismail (8 May 2006).

⁹ See Badruzzaman Ismail, "Wali Perempuan dari Aspek Hukum Adat di Provinsi Nanggroe Aceh Darussalam", paper presented at Lokakarya Perwalian Anak held jointly by the Provincial Syar'iyah Court, Putroe Kande Foundation and UNIFEM, Banda Aceh, 9-11 September 2005, p. 4.

			<p>are under 18 years of age.¹⁰</p> <p>In practice, the <i>Mahkamah Syar'iyah</i> supports the appointment of female guardians. Post-tsunami, there have been several cases where the court has appointed maternal grandmothers as guardians of their grandchildren.</p>	<p>appointed), a female may act as guardian (over both the day-to-day care of the child and its property). However, she would not be given the title of 'wall'.¹¹</p>		<p>where their husband has died. However, with respect to the child's inherited assets, responsibility should rest with the father, the grandfather or, in their absence, the guardian or the <i>Mahkamah Syar'iyah</i>.¹²</p>
6	WILL/TESTAMENT AUTHORIZING GUARDIANSHIP	<p>Parents may make a will/testament authorizing a legal entity to have guardianship rights over their child's welfare and property (KHI, 108).</p>	<p>The <i>Mahkamah Syar'iyah</i> has stated that where parents have not nominated a guardian in their will, a guardian may be appointed by the <i>Mahkamah Syar'iyah</i>.¹³</p>	<p>Under customary law, parents may make a will/testament authorizing a legal entity or person to be appointed guardian to their child.¹⁴</p>		

¹⁰ See "Inheritance, Guardianship and Women's Legal Rights in Post-Tsunami Aceh: The Interaction of Syariah, Adat and Secular Laws", IDLO Research Paper prepared by Tim Lindsey with Robyn Philips, Cate Sumner and Cathy McWilliam, (forthcoming 2006), p. 59.

¹¹ T.I. El-Hakimy (Interview, 26 April 2006).

¹² See "Inheritance, Guardianship", p. 60; Cf. Tgk. H.M. Daud Zamzamy, "Kedudukan Wali Perempuan: Kajian Fiqh Klasik" paper presented at Lokakarya Perwalian Anak held jointly by the Provincial Syar'iyah Court, Putroe Kande Foundation and Unifem, Banda Aceh, 9-11 September 2005, p. 5.

¹³ See Armia Ibrahim, "Perwalian Anak menurut Hukum Islam dan Hukum Positif", paper presented at *Workshop Faraidh III* organized by Yayasan Lamjabat, Banda Aceh, 8-10 April 2006.

¹⁴ Badruzzaman Ismail (Interview, 8 May 2006)

		A guardian may be designated by a parent prior to their death through written will and testament or orally before 2 witnesses (UU 1/1974, 51:1).				
7	THE RESPONSIBILITIES OF A GUARDIAN	<p>A guardian is responsible for taking care of their ward and the property of their ward to the best of their ability. Guardians must respect the religion and beliefs of their ward (UU 1/1974, 51:3).</p> <p>A guardian is responsible for its ward's property and is accountable for any losses incurred because of the guardian's negligence (UU 1/1974, 51:5).</p> <p>Guardians are required to look after their ward and their ward's property, and to provide</p>	The <i>Mahkamah Syar'iyah</i> has stated that if a guardian is forced to sell land that belongs to their ward, permission must be first be granted by the <i>Mahkamah Syar'iyah</i> . ¹⁵	Under customary law, guardians have responsibilities over their ward's welfare and property. Such responsibilities extend to education, health, shelter and acting as 'marriage guardian' (see box 3D). ¹⁶	In Acehnese society, guardians are perceived to have a duty to all members of the village to execute their guardianship responsibilities properly. ¹⁷	Fatwa MPU 2/2005 (1) reiterates that under Islamic law, the protection and maintenance of orphans is <i>farđu kifayah</i> (a collective obligation) on the Muslim community.

¹⁵ Armia Ibrahim (Discussion, 2 June 2006).

¹⁶ Badruzzaman Ismail (Interview, 8 May 2006).

¹⁷ Badruzzaman Ismail (Interview, 8 May 2006).

		<p>support for religious, educational and skill development (KHI 110:1).</p> <p>Guardians are required to maintain their ward's property (UU 23/3003, 33:4).</p> <p>At the commencement of the guardianship, guardians are required to make an inventory of their ward's property, and to record all subsequent changes to such property (UU 1/1974, 51:4).</p> <p>A guardian's responsibilities should be demonstrated through annual auditing (KHI 110:4).</p> <p>A guardian who is appointed by a court [as stipulated in s.33 UU 23/2002] can represent that child in all legal matters, both within and outside the court, where this is deemed to be within the best interests of the child (UU</p>				
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		<p>23/2002:34).</p> <p>Guardians are forbidden from tying up, burdening or alienating their ward's property, except where this cannot be avoided, and except to invest such property or add to its value (KHI 110:2).</p> <p>Guardians are required to pay compensation to their ward for any loss or depreciation that may occur as a result of a guardian's neglect or misuse of their ward's property (KHI 110:3).</p> <p>Guardians are forbidden from transferring the rights over, or pawning property of their ward, except where this is deemed to be in the ward's interests (UU 1/1974, 48 and 52).</p>				
8	THE USE OF A WARD'S PROPERTY BY AN IMPOVERISHED GUARDIAN	If a guardian is poor, they may use the child's property to meet their most basic needs (KHI 112).		Under customary law, poor guardians are permitted to use the property/inheritance of their ward for their own		According to the <i>Qur'an</i> (An-Nisa: 6), ¹⁹ an impoverished guardian may only

				needs. If the guardian uses a larger amount of such property/inheritance than is necessary, other family members may request that the guardianship be transferred to another person. ¹⁸		use the property of their ward to fulfill their most basic food needs. Wealthy guardians are not permitted to derive any benefit from the property of their ward.
9	THE SUPERVISION OF GUARDIANS	The <i>Balai Harta Peninggalan</i> (Public Trustee) or another institution with similar authority (as outlined in s.1 UU 23/2002) may act 'supervisory guardian' to ensure that the child's interests are looked after (UU 23/2002, 35:2).	Dinas Syariat Islam has interpreted 'supervisory guardian' to mean the supervisor of guardians. ²⁰	Under customary law, guardians are usually supervised by the <i>geuchik</i> (<i>head of village</i>), the <i>imeum meunasah</i> (local religious leader) and the <i>luha peut</i> of the <i>gampong</i> (those responsible for managing the <i>Baitul Mal</i> in the <i>gampong</i>). ²¹	In practice, the ward's relatives and the community generally will supervise guardians. ²²	
10	REVOCAION AND REPLACEMENT OF GUARDIANS	Guardianship can be revoked where there is an abrogation of the responsibilities listed in		Where a guardian is found to be neglectful or not carrying out their obligations, the <i>geuchik</i>	In practice, if a guardian cannot manage their ward's property or misuses	

¹⁸ Badruzzaman Ismail (Interview, 8 May 2006); T.I. El-Hakimy (Interview, 26 April 2006).

¹⁹ A phrase of this Quranic verse said "If the guardian is well-off, Let him claim no remuneration, but if he is poor, let him 'eat' for himself what is just and reasonable".

²⁰ See *al-Indzar*, special publication by Dinas Syariat Islam NAD, edition number 4 (15 September 2005), p. 7.

²¹ Hoesin, *Adat Atjeh*, pp. 103-104.

²² Hoesin, *Adat Atjeh*, p. 103.

		<p>s.49 of UU 1/1974 ie: (a) gross negligence of a guardian's obligations to their ward and (b) misconduct (UU 1/1974, 53:1). In such cases the court will appoint another guardian (UU 1/1974, 53:2).</p> <p>Upon request by concerned relatives, a guardian's rights may be revoked if the said guardian is an alcoholic, a gambler, wasteful, mad and/or neglecting or misusing their rights and authorities as guardian (KHI 109).</p> <p>In the event that a guardian loses their legal capacity or misuses their authority, their status as guardian will be revoked and another person will be appointed by way of a court determination (UU 23/2002, 36:1).</p>		<p>may revoke the guardian's powers and appoint a new guardian from amongst the adat leaders (such as the <i>tuha peut</i> or <i>teungku meunasah</i>). Alternatively the guardianship can be assumed by the <i>geuchik</i>.²³</p>	<p>such property, the <i>imam meunasah</i> of the <i>gampung</i> or other relatives of the ward may submit a request to the <i>Mahkamah Syar'iyah</i> for the guardian to be replaced. It should be noted, however, that the revocation or replacement of a guardian is rare.²⁴</p>	
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²³ Hoesin, *Adat Atjeh*, p. 103.

²⁴ Badruzzaman Ismail (Interview, 8 May 2006); T.I. El-Hakimy (Interview, 26 April 2006).

		<p>Where a guardian is found to be neglectful or incapable of executing their duties, the Religious Court may appoint another relative to act as guardian, upon the request of that relative (KHI 107:3).</p> <p>Where a guardian dies, another guardian will be appointed by way of a court determination (UU 23/2002, 36:2).</p> <p>If the authority of a guardian is revoked, the court can appoint a new guardian (Penjelasan UU 7/1989, 49:2).</p>				
11	THE TRANSFER OF PROPERTY TO THE CHILD UNDER GUARDIANSHIP	Guardians must transfer all of their ward's property and inheritance when the ward reaches the age of 21 years or enters into marriage (KHI 111:1).		Guardians must transfer all of their ward's property once the child has reached a stage in their life when they are independent and capable of organizing their own affairs, when they receive an income, or		

				when they enter into marriage. ²⁵		
12	DISPUTES BETWEEN THE GUARDIAN AND THE CHILD	The Religious Court has jurisdiction over the resolution of disputes between a guardian and their ward, including disputes concerning the transfer of inheritance property to the ward (KHI 111:2).	According to Art 49 of Law No. 7 of 1989 on the Religious Courts and Qanun No. 10 of 2002 on the Islamic <i>Syar'iyah</i> Courts, the resolution of disputes about guardianship and inheritance falls within the jurisdiction of the <i>Mahkamah Syar'iyah</i> .	Disputes (including the transferal of property/inheritance) between the guardian and child are usually resolved by way of a village meeting held by the <i>geuchik</i> and village elders. ²⁶		
13	CIVIL ACTIONS AGAINST A GUARDIAN FOR COMPENSATION	A guardian who has caused a loss to a ward's property, upon being sued by the ward or the family of the ward, and resulting in a judgment by the court, may be required to pay compensation for any losses incurred (UU 1/1974, 54). Guardians are required to pay compensation to their ward for any loss or depreciation that may				

²⁵ Badruzzaman Ismail (Interview, 8 May 2006).

²⁶ Badruzzaman Ismail (Interview, 8 May 2006).

		occur as a result of a guardian's neglect or misuse of their ward's property (KHI 110:3).				
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ANNEXURE 2: Matrix of Relevant Guardianship, Inheritance and Land Law INHERITANCE

NO	TOPIC	A. FORMAL LAW	B. NOTES	C. CUSTOMARY PRINCIPLES AND NORMS	D. NOTES	E. ISLAMIC LEGAL OPINION / PRINCIPLES
1	HEIRS	<p>An heir is a person who has a blood or marriage relationship to the deceased person, is Moslem, and has no legal barrier to be legitimate heir (KHI, 171c).</p> <p>a. Father, son, brother, uncle and grandfather (KHI 174:1a)</p> <p>b. Mother, daughter, sister and grandmother (KHI 174:1b)</p> <p>c. Widow or widower (the surviving spouse) (KHI 174:1c).</p> <p>Where all the abovementioned heirs are alive, only the sons/daughters, father, mother and the surviving spouse have a right to</p>		<p>Heirs are blood relatives or those related through marriage to the deceased who are still living at the time of the benefactor's death:</p> <p>a. Father, son, brother, uncle and grandfather;</p> <p>b. Mother, daughter, sister and grandmother;</p> <p>c. Widow or widower (the surviving spouse).</p> <p>Where all of the abovementioned heirs are alive, only the sons/daughters, father, mother and the surviving spouse have a right to inherit.</p> <p>In the event that the</p>		<p>According to a Dinas Syariat publication, heirs are required to be alive at the time that the benefactor dies. As such, when relatives, who would normally have inherited from each other, die simultaneously, the chain of inheritance is severed. The implication is that surviving heirs can only inherit from direct relatives, and cannot replace such relatives in an inheritance capacity.²⁹</p>

²⁷ T.I. El-Hakimy (Interview, 26 April 2006); Cf. Syahrizal, *Hukum Adat*, p. 275.

²⁸ Syahrizal, *Hukum Adat*, p. 229.

²⁹ See *Al-Indzar*, special publication by Dinas Syariat Islam, number 1 (1 August 2005), pp. 3-4.

		inherit (KHI 174:2).		benefactor has only daughters, other male relatives, particularly from the father's side of the family, will also become heirs. ²⁷ In situations where the only living heirs are daughters, the portion of the estate remaining after such daughters receive their inheritance, will be transferred to the <i>Baitul Mal</i> . ²⁸		
2	THE CONDITIONS FOR BEING AN HEIR	Heirs must be Muslim (KHI 171c) as evidenced by an heir's identity card, a confession, through religious practice, or by a witness (KHI 172).		Under customary law, heirs must be Muslim. In the event that a person apostates from Islam (<i>murtad</i>) s/he lose all inheritance rights. ³⁰		
3	REVOCAION OF INHERITANCE RIGHTS	If an heir is found guilty of murdering, attempting to murder or torturing the deceased (KHI 173a). If an heir is found guilty of making baseless		If an heir is found guilty of having murdered, tortured or committed a crime towards the deceased. ³¹		Under Islamic Law, a person cannot inherit where they are of a different religion to the benefactor. ³²

³⁰ Badruzzaman Ismail (Interview, 8 May 2006).

³¹ Hoesin, *Adat Atjeh*, pp. 103, 164; Syahrizal, *Hukum Adat*, p. 212.

³² Prophet's *hadith* narrated by Bukhari and Muslim that says, "a non-Muslim does not inherit anything from Muslim and otherwise". This *hadith* was cited in Syahrizal, *Hukum Adat*, p. 211.

		accusations regarding the benefactor, equivalent to accusing the benefactor of having committed a crime that carries a jail sentence of five years or more (KHI 173b).				
4	OBLIGATIONS OF HEIRS	<p>Heirs are required to:</p> <ol style="list-style-type: none"> a. Finalize all issues relating to the burial of the deceased (KHI, 175:1a). b. Pay all debts of the deceased (including debts relating to medical treatment and care received) and collect the debts of the benefactor (KHI, 175:1b). c. Execute the will of the deceased (KHI, 175:1c). d. To distribute the deceased's estate between legitimate heirs (KHI, 175:1d). <p>The responsibility of heirs regarding the debts of the deceased is limited to the value of the deceased's estate (KHI, 175:2).</p>				

5	A BENEFACTOR'S ESTATE	<p>A benefactor's estate comprises property and entitlements (KHI 171d).</p> <p>A benefactor's estate comprises the deceased's <i>bawaan</i> property (property brought into marriage) plus a half portion of any joint matrimonial property (property acquired during marriage), less accrued medical costs, burial costs, debts and gifts bestowed (KHI 171e).</p>		<p>A benefactor's estate comprises tangible (<i>bawaan</i> and joint matrimonial property) and intangible property.³³</p> <p>Prior to the distribution of inheritance, all debts will be deducted from the benefactor's estate.</p>	<p>It should be noted that in Acehese society, the payment of debts is a cultural imperative.</p>	
6	JOINT MATRIMONIAL PROPERTY	<p>Property acquired during marriage shall become joint matrimonial property (UU 1/1974, 35:1).</p> <p>Where a man has more than one wife, joint matrimonial property is divided separately for each marriage (KHI 94:1) according to the length of each marriage. (KHI 94:2).</p> <p>In cases where a spouse is</p>	<p>In practice (particularly post-tsunami), the <i>Mahkamah Syar'iyah</i> will require certainty that a spouse is dead before an estate can be divided amongst surviving heirs (a <i>mafqud</i> case).</p> <p>It is interesting to</p>	<p>Joint matrimonial property is divided equally between a husband and wife, whether they part through divorce or death. Following the death of a husband or wife, therefore, half of the joint matrimonial property is transferred to the surviving spouse and the remaining half is divided among the surviving heirs.³⁴</p>	<p>It should be noted that according to Badruzzaman Ismail, Chairman of the Aceh Adat Council, where a husband or wife dies and the surviving spouse does not remarry, all inheritance should remain under the control of the surviving spouse</p>	

³³ T.I. El-Hakimy (Interview, 26 April 2006).

³⁴ Badruzzaman Ismail (Interview, 8 May 2006); T.I. El-Hakimy (Interview, 26 April 2006).

		missing, the distribution of inheritance must be avoided until there is a definite indication of death or the Religious Court makes a ruling regarding death (KHI 96:2).	note that the court must declare a missing husband dead in order for a widow to remarry (<i>mbolehkannyanya untuk menikah lagi dengan pria lain</i>). However, for a widower to remarry, such 'legal certainty' is not required.	If a man has more than one wife, the <i>bawaan</i> property of each wife is identified and separated from joint matrimonial property. Joint matrimonial property must be calculated separately for each marriage and distributed accordingly. ³⁵	until their children become independent/self-sufficient. Only at that time, will the inheritance be distributed. ³⁶ It should also be noted that in certain districts in Aceh (such as coastal areas in Aceh Besar), joint matrimonial property is divided into three shares with 2 shares being transferred to the husband, and one share being transferred to the wife. ³⁷	
7	<i>BAWAAN</i> PROPERTY	The existence of joint matrimonial property does not necessarily deny the fact that either husband or wife may have individual		Husbands and wives have the right to own property and to exercise control over such property. ³⁸	In certain districts of Aceh, including Aceh Besar and Aceh Pidi, the custom of <i>harta</i>	

³⁵ Badruzzaman Ismail (Interview, 8 May 2006).

³⁶ Badruzzaman Ismail (Interview, 8 May 2006); Cf. Badruzzaman Ismail, "Wali Perempuan dari Aspek Hukum Adat di Provinsi Nanggroe Aceh Darussalam", a paper presented at Lokakarya Perwalian Anak, 9-11 September 2006.

³⁷ Syahrizal, *Hukum Adat*, p. 276.

³⁸ T.I. El-Hakimy (Interview, 26 April 2006); T. Djuned (Interview, 27 April 2006).

		<p>property (KHI, 85).</p> <p>Property obtained prior to marriage, by a man or woman, or property acquired through gift or inheritance shall remain their property (<i>bawaan</i>), unless a pre-nuptial agreement states otherwise (UU 1/1974, 35:2).</p> <p>The property of the wife (<i>bawaan</i>) remains her possession and her right, and the property of the husband (<i>bawaan</i>) remains his possession and his right. Each has the right to exert full control over such property (KHI, 86:2).</p> <p>Property of the husband or wife obtained prior to marriage, or after the marriage by way of gift or inheritance remains under their individual and exclusive control (KHI, 87).</p>			<p><i>peunulang</i> is common. <i>Peunulang</i> property is a gift from parents to a daughter upon marriage, generally in the form of a house and its yard.³⁹ This house often becomes the family home, however remains the <i>bawaan</i> property of the wife.</p>	
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³⁹ *Peunulang* property given to a daughter may exceed 1/3 of the testator's total estate. The rationale is that the relationship between parents and daughter is usually strong and because daughters usually provide their parents with significant assistance during the time they live with them.

8	INHERITANCE PROPERTY IN THE FORM OF LIFE INSURANCE AND <i>JAMINAN KEMATIAN</i> (MOURNING PAYMENTS) ⁴⁰	<p>Life insurance [for civil servants] is paid to the family of the deceased for the period that the deceased would have been working as well as in the form of pension payments. Family is defined as the surviving spouse and children (PP 25/1981, 9:2).</p> <p><i>Jaminan Kematian</i> (mourning payments) are paid to surviving heirs (UU 40/2004, 43:2). The order of receivership for those receiving <i>Jaminan Kematian</i> is:</p> <ul style="list-style-type: none"> a. surviving spouse; b. children; c. parents; d. grandchildren; e. siblings; f. parents-in-law. (UU 3/1992, 9(B), 12-13). 	The Supreme Court has held that financial contributions to an insurance policy and life insurance payments were the property of the widow and do not form part of a deceased's estate. ⁴¹			
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⁴⁰ *Jaminan Kematian* is technically understood as ‘uang duka’ or ‘mourning payment’. Families of employees who die because of non-work related causes are entitled to *Jaminan Kematian*. *Jaminan Kematian* usually covers funeral fees and a lump sum cash payment. Jamsostek, for example, pays 1 million rupiah for funeral expenses plus a 5 million rupiah lump sum ‘mourning’ payment.

⁴¹ Decision of the Supreme Court no. 198K/AG/1992

9	<p>INHERITANCE PROPERTY IN THE FORM OF SUPERANNUATION</p>	<p>Upon death, superannuation payments or contributions are transferred to the surviving spouse or children. (UU 3/1992, 14:2).</p> <p>Those entitled to receive superannuation are:</p> <ul style="list-style-type: none"> a. A contributor who resigns from the job with pension right or resigns before his/her retirement; b. A wife/husband, children or legitimate heirs in the event that the contributor has passed away. <p>Superannuation benefits are paid once in cash at the time a contributor retires, passes away or is completely disabled (UU 40/2004, 37:1).</p> <p>If a contributor dies, the legitimate heirs are entitled to receive superannuation (UU 40/2004, 37:4).</p>				
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10	INHERITANCE PROPERTY IN THE FORM OF PENSIONS	<p>Those entitled to receive pension payments⁴² are:</p> <ul style="list-style-type: none"> b. A surviving spouse of the contributor, and surviving spouse of the receiver of the pension⁴³; or c. Surviving children of the contributor, and surviving children of the receiver of the pension.⁴⁴ d. Parent of the contributor who died without leaving a spouse or children. (PP 25/1981, 10:1). <p>Pension payments will be provided on a monthly basis to:</p> <ul style="list-style-type: none"> c. Surviving spouse: until he/she dies or remarries; d. Children who are heirs of the contributor: until they are 23 years old, 				
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⁴² Note that in Indonesia there is a difference between pension payments and payments of superannuation. Pension payments are received by the retired civil servants every month, while superannuation is paid to the retired civil servants and the retired private employee (if their workplace included them in the superannuation scheme) in the form of a lump sum payment.

⁴³ These payment will continue until the surviving spouse remarries or dies.

⁴⁴ This money will continue to be received by the surviving children until they reach 23 years old, have permanent job or have married.

		<p>permanently employed or enter into marriage; e. Parents of an unmarried contributor: the time limit specified in the regulations.⁴⁵ (UU 40/2004, 41:1).</p> <p>The right of child heirs to receive pension payments will continue until such children enter into marriage, have permanent jobs, or reach 23 years old (UU 40/2004, 41:6)</p>				
11	<p>INHERITANCE PROPERTY CONSISTING OF FARMLANDS LESS THAN 2 HECTARES IN AREA</p>	<p>If an estate includes farmlands of less than 2 hectares in area, it is preferable for such land to be kept as one parcel and cultivated in the best interests of the heirs (KHI, 189:1).</p> <p>If keeping land as one parcel is not possible (eg if one of the heirs is in need of money), that heir's portion of the farmlands can be purchased by other heirs in accordance with its size (KHI, 189:2).</p>		<p>Customary law mirrors the principles enshrined in s.189 KHI and may be extended to other types of property including houses. For example, if parents cannot afford to provide each daughter with a house upon marriage (<i>peunulang</i>), one house will be purchased and each daughter will receive one room. If one of the daughters is not willing/able to live in this house, her portion of the</p>		

⁴⁵ So far, particular stipulation in relevant regulations is not yet available that deals with this issue.

				home will become the property of another daughter, and the non-recipient daughter will be compensated. ⁴⁶		
12	INHERITANCE MADE THROUGH GIFT	<p>A gift (<i>hibah</i>) made to a child by their parent can be considered inheritance (KHI, 211).</p> <p>Where a gift (<i>hibah</i>) is bestowed at the time a testator is sick and close to death, this act must be agreed to by all heirs (KHI, 213).</p>		Gifts (<i>hibah</i>) or <i>peunulang property</i> given during the benefactor's lifetime to a daughter may be considered part of their inheritance. ⁴⁷		
13	INHERITANCE RIGHTS FOR DAUGHTERS	[In the case that there are only daughters and no sons, the following provisions apply:] if there is one daughter, this daughter will receive ½ of the total estate. If there is more than one daughter, such daughters will receive, between them, a total of 2/3 of the estate (KHI 176).	In practice, in situations where there are only daughters and no sons, the <i>Mahkamah Syar'iyah</i> are likely to transfer the remaining inheritance (be that the ½ or 1/3 of the estate) to such daughter(s), rather	Customary inheritance law largely follows Islamic law. ⁴⁹ If there are daughters and sons, then the daughter receives a half portion of the amount received by the son. In the event that there is only one daughter as heir, she will receive a half portion of the estate. If there is more than one daughter, they will	Note, however, that according to Badruzzaman Ismail, Chairman of the Aceh Adat Council, where husband or wife dies and the surviving spouse does not remarry, all inheritance should remain under the control of the	

⁴⁶ T.I. El-Hakimy (Interview, 26 April 2006); Rusydi Sufi (Interview, 27 April 2006)

⁴⁷ Syahrizal, *Hukum Adat*, pp. 219-220; Syahrizal (Discussion, 6 June 2006)

		In the case that there are daughters and sons, daughters will receive half the share received by sons (KHI 176).	than transfer such inheritance to other surviving heirs. ⁴⁸	collectively receive 2/3 of the estate. The rest of the property will be transferred to other legitimate heirs. ⁵⁰ It should be noted that it is because of such imbalances between the inheritance distributed to sons and daughters, that the custom of <i>peunulang</i> property has developed. ⁵¹ It also must be noted that heirs may agree to distribute inheritance differently from that which is prescribed above. ⁵²	surviving spouse until their children become independent/self-sufficient. Only at that time, will the inheritance be distributed. ⁵³	
14	INHERITANCE RIGHTS FOR FATHERS	If the benefactor has no children but has a husband and a mother, the testator's father will be				

⁴⁸ Rafiuddin (Interview, 26 April 2006)

⁴⁹ Hoesin, *Adat Atjeh*, p. 165.

⁵⁰ Hoesin, *Adat Atjeh*, pp. 102-103.

⁵¹ T.I. El-Hakimy (Interview, 26 April 2006)

⁵² Badruzzaman Ismail (Interview, 8 May 2006); Syahrizal, *Hukum Adat*, p. 227.

⁵³ Badruzzaman Ismail, "Wali Perempuan dari Aspek Hukum Adat di Provinsi Nanggroe Aceh Darussalam", a paper presented at Lokakarya Perwalian Anak, 9-11 September 2006; Badruzzaman Ismail (Interview, 8 May 2006); Cf. Syahrizal, *Hukum Adat*, pp. 226-227.

		<p>entitled to 1/3 of the estate (KHI, 177 and SEMA 2/1994).⁵⁴</p> <p>If the testator has children, the testator's father will be entitled to 1/6 of the estate (KHI, 177).</p>				
15	INHERITANCE RIGHTS FOR MOTHERS	<p>If the benefactor has children, and 2 or more siblings, the testator's mother will be entitled to 1/6 of the estate (KHI, 178:1).</p> <p>If the benefactor has no children and no siblings, the testator's mother will be entitled to 1/3 of the estate (KHI, 178:1).</p> <p>[If the deceased has no children], and the deceased's mother and father are alive,⁵⁵ the mother will receive 1/3 of the estate after the widow or widower has received</p>				

⁵⁴ The father receives one third not because the law grants him one third, as such, but because one third is what remains for the father as the residuary heir after the husband takes his fixed share of one half and the mother takes her one third share as there is no children and siblings.

⁵⁵ Father will be a residuary heir in this case.

		their entitlement (KHI, 178:2).				
16	INHERITANCE RIGHTS FOR WIDOWS/WIDOWERS	<p>If the testator has no children, a widower receives ½ the estate (KHI, 179).</p> <p>If the testator has children, a widower receives ¼ of the estate (KHI, 179).</p> <p>If the testator has no children, a widow receives ¼ of the estate (KHI, 180).</p> <p>If the testator has children, a widow receives 1/8 of the estate (KHI, 180).</p>			<p>Note that according to Badruzzaman Ismail, Chairman of the Aceh Adat Council, where husband or wife dies and the surviving spouse does not remarry, all inheritance will remain under the control of the surviving spouse until their children become independent/self-sufficient. Only at that time, will the inheritance be distributed.⁵⁶</p>	
17	INHERITANCE RIGHTS FOR A SURVIVING SPOUSE WITH RESPECT TO JOINT MATRIMONIAL PROPERTY	<p>In the event that one spouse dies, the surviving spouse is entitled to a half portion of all joint matrimonial property (KHI 96:1).</p>		<p>Joint matrimonial property is divided equally between a husband and wife, whether they part through divorce or death. Following the death of a husband or wife, therefore, half of the joint</p>	<p>Note however that in certain districts of Aceh (such as in the coastal areas of Aceh Besar), joint matrimonial property is divided into three shares with one</p>	

⁵⁶ Badruzzaman Ismail, “Wali Perempuan dari Aspek Hukum Adat di Provinsi Nanggroe Aceh Darussalam”, a paper presented at Lokakarya Perwalian Anak, 9-11 September 2006; Badruzzaman Ismail (Interview, 8 May 2006).

				<p>matrimonial property is transferred to the surviving spouse and the remaining half is divided among the surviving heirs.⁵⁷</p> <p>If a man has more than one wife, the <i>bawaan</i> property of each wife is identified and separated from joint matrimonial property. Joint matrimonial property is calculated separately for each marriage and distributed accordingly.⁵⁸</p>	<p>share transferred to the wife, and two shares to the husband.⁵⁹</p>	
18	<p>INHERITANCE RIGHTS FOR BIOLOGICAL BROTHERS AND SISTERS OF THE SAME MOTHER (AND DIFFERENT FATHER)</p>	<p>If a testator has no children and no father, the deceased's siblings (from the same mother) receive 1/6 of the estate (KHI, 181).</p> <p>If a testator has 2 or more siblings (from the same mother), they will (together) receive 1/3 of the estate (KHI, 181).</p>				

⁵⁷ Syahrizal, *Hukum Adat*, p. 275.

⁵⁸ T.I. El-Hakimy (Interview, 26 April 2006)

⁵⁹ Syahrizal, *Hukum Adat*, p. 276.

19	INHERTANCE RIGHTS FOR BIOLOGICAL SISTERS AND SISTERS OF THE SAME FATHER (AND DIFFERENT MOTHER)	<p>If a testator has no children and no father, a biological sister (from the same father) will receive ½ of the estate (KHI, 182).</p> <p>If the deceased has more than 1 biological sister (from the same father), those sisters will (together) receive 2/3 of the estate (KHI, 182).</p> <p>If the aforementioned sisters have biological brother/s, these brothers will receive double that which the sisters will receive (KHI, 182).</p>				
20	INHERITANCE RIGHTS FOR HEIRS WHO PRE-DECEASED THE BENEFACTOR	<p>The inheritance rights of heirs who pre-decease the testator may be transferred to their children (KHI 185:1).</p> <p>The portion transferred to the substitute heirs cannot exceed that which would have been received by the</p>	The Supreme Court has broadened the number of situations in which s.185 KHI applies to allow children to also replace a predeceased parent so as to	The inheritance rights of heirs who pre-decease the benefactor may not be transferred to their children. This custom is referred to as <i>patah tili</i> . ⁶⁰	<i>Patah tili</i> is not an Acehese concept, but is derived from the Shafi'iyya <i>mazhab</i> (one of four Sunni Islamic legal schools) that has greatly influenced Islamic inheritance practice in Aceh.	

⁶⁰ Armia Ibrahim, “Ahli Waris Pengganti Ditinjau dari Aspek Hukum dan Penerapannya dalam Praktek Peradilan”, paper presented at the Workshop on Islamic Inheritance Law, held by Lamjabat Foundation, Banda Aceh, 18-20 Oktober 2005. p.7

		original heir (KHI, 185:2).	inherit from an uncle or aunt (their parent's brother or sister). Note, however, that according to the Chief Justice Saleh, the <i>Mahkamah Syar'iyah</i> in Aceh does not follow this precedent.		Over time, this influence has translated into a local norm recognized under customary law. ⁶¹	
21	INHERITANCE RIGHTS FOR ADOPTED CHILDREN	Where an adopted child is not bequeathed a portion of an estate, a compulsory bequeathment shall be made to a maximum amount of 1/3 of the estate of their adoptive parent (KHI, 209:2). ⁶²		Adopted children do not have any inheritance rights unless a portion of the estate has been bequeathed to them through written will and testament. ⁶³	In Acehese society, if parents do not make provision in their will for an adopted child, heirs will commonly provide a portion of the estate to such a adopted child in return for his/her	According to Islamic law, an adopted child cannot inherit property from his/her adoptive parent. ⁶⁵

⁶¹ *ibid.*; T. Djuned and Badruzzaman Ismail's comments in IDLO Workshop (30 May 2006)

⁶² Compulsory bequaethment (*wasiat wajibah*) was introduced in KHI to reflect indigenous Indonesian values, especially Javanese values, which allow adoptive children to inherit property from his/her adopted parent. This concept was borrowed from Egyptian Law and served as a mechanism to provide an estate share for adopted children who has no link of entitlement (blood or marriage) to the deceased. The drafters of KHI made the bequest obligatory because the adoptive parents do not bequeath anything to the adopted child. See Syahrizal, *Hukum Adat*, pp. 282-283. Roihan A. Rasyid, "Pengganti Ahli Waris dan Wasiat Wajibah", *Mimbar Hukum* 23 (1995), pp. 54-67.

⁶³ Syahrizal, *Hukum Adat*, pp. 287-288.

					services to the deceased. ⁶⁴	
22	INHERITANCE RIGHTS FOR CHILDREN BORN OUT OF WEDLOCK	Children born out of wedlock are entitled to inherit only through their mother and their mother's extended family (KHI 186).		Children born out of wedlock may only inherit through their mother. ⁶⁶	Note that in Acehnese society, if a woman becomes pregnant out of wedlock all attempts will be made to ensure that the couple marries. ⁶⁷	
23	THE PROCEDURE FOR DIVIDING INHERITANCE	Heirs, either collectively or individually may nominate an executor from among the heirs. If the heirs cannot agree upon an executor, the matter may be referred to the Religious Court (KHI, 188).		Heirs who are independent/self-sufficient or married can request for the distribution of a benefactor's estate. Where heirs are not yet independent/self-sufficient or married, their guardian will request distribution. ⁶⁸ It should be noted that the value of the portions provided to sons and daughters is not	In Aceh, inheritance distribution generally occurs 44 or 100 days after the testator's death. At the same time a <i>kenduri</i> (festive meal) is held and prayers are made asking for salvation, to ensure that the heirs will live together in peace and harmony. ⁷⁰	

⁶⁴ Syahrizal, *Hukum Adat*, p. 287.

⁶⁵ Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, (Delhi: Oxford University Press, 1974), p. 189.

⁶⁶ Badruzzaman Ismail (Interview, 8 May 2006).

⁶⁷ Hoesin, *Adat Atjeh*, pp. 184-186.

⁶⁸ Badruzzaman Ismail (Interview, 8 May 2006).

				calculated in a financial sense, but instead according to its utility value. Houses and yards will usually be inherited by daughters, while sons will receive ricefields, farmlands, livestock, shops and/or other income-yielding property. If division was calculated in financial terms, it may be the case that daughters receive larger portions than sons. ⁶⁹		
24	MODIFYING INHERITANCE DISTRIBUTION	Heirs may agree to distribute inheritance in a way that is inconsistent with their entitlements, provided that each heir is aware of their legal entitlement (KHI, 183).		It must be noted that while customary law generally mirrors the KHI, in practice share apportionment is conducted between the heirs through a process of <i>musyawarah</i> (reaching agreement through discussion and consensus) witnessed by the <i>geuchik</i> , <i>imam meunasah</i> , <i>tuha peut</i> and other figureheads in the community. Through this		

⁶⁹ Interview T.I. El-Hakimy (26 April 2006)

⁷⁰ Hoesin, *Adat Atjeh*, pp. 99, 163.

				discussion process heirs can agree to modify their respective entitlements. ⁷¹		
25	TESTATORS WITH NO HEIRS	In the event that a testator leaves no heirs, or heirs cannot be located, the deceased's property, on decision of the Religious Court will be transferred to the <i>Baitul Mal</i> (Islamic treasury) to be used for the interests of Islam and public welfare (KHI 191). ⁷²		Where a testator leaves no heirs, the estate is transferred to the <i>Baitul Mal</i> . Where this estate consists of land (referred to as <i>Meusara</i> land), the <i>Baitul Mal</i> will transfer the management of this land to a person in the village. ⁷³ Any benefit derived from this land (for example through income generated through cultivation) is generally divided amongst the community annually in the form of congee porridge for every villager during the month of <i>Ramadhan</i> . ⁷⁴	Communities in Aceh Besar call such land <i>tanah ie-bu</i> (congee porridge land).	Pursuant to Fatwa MPU 3/2005, land and property belonging to tsunami victims who have no heirs will be transferred to the Muslim community through the <i>Baitul Mal</i> (see also art 6 Fatwa 2/2005). Prior to transfer, the relevant <i>Baitul Mal</i> should obtain the agreement of the <i>Mahkamah Syar'iyah</i> . ⁷⁵

⁷¹ Badruzzaman Ismail (Interview, 8 May 2006); Cf. Syahrizal, *Hukum Adat*, pp. 227-228.

⁷² With respect to the KHI provisions, the *Baitul Mal* to which an estate is transferred is the *Baitul Mal* at the *gampong* level

⁷³ T. I. El-Hakimy (Interview, 26 April 2006); *Pola Penguasaan Pemilikan dan Penggunaan Tanah secara Tradisional Propinsi Daerah Istimewa Aceh*, edited by Syamsidah dan Sugiarto Dakung, (Jakarta: Direktorat Sejarah dan Nilai Tradisional, 1984/1985), p. 66; Cf. also Hoesin, *Adat Atjeh*, pp. 104.

⁷⁴ T. I. El-Hakimy (Interview, 26 April 2006); Cf. *Pola Penguasaan*, p. 66.

26	THE ESTATE OF A POLYGOMOUS MAN	<p>Where a man has more than one wife, joint matrimonial property is divided separately for each marriage according to the length of each marriage. (KHI 94:1-2).</p> <p>A husband's share of joint matrimonial property will be distributed amongst his heirs [including surviving wives] (KHI, 190).</p>		<p>Polygamy is recognized under customary law. Where the husband dies, the <i>bawaan</i> property of each wife is identified and separated from joint matrimonial property. The husband's <i>bawaan</i> property is identified divided between his wives and other heirs. Joint matrimonial property is calculated separately for each marriage and distributed accordingly.</p>		
27	BESTOWING INHERITANCE PROPERTY THROUGH WRITTEN WILL AND TESTAMENT	<p>The maximum amount of property that can be bequeathed according to a will is 1/3 of the combined property of the individual. If the amount of bequeathed property is more than 1/3, all heirs must demonstrate their agreements (KHI, 195:2).</p> <p>If the amount of property</p>		<p>Testators may bequeath up to 1/3 of their estate through written will and testament provided that all heirs are in agreement.⁷⁶</p>	<p>In practice, where a testator bequeaths part of their estate through written will (including to an heir or for the public interest), it is unlikely that heirs would contest such distribution.⁷⁷ In Acehnese society, respecting the</p>	

⁷⁵ According to the Governor's decision 18/2003 no. 10 the *Teungku Imam* or *imam meunsah* is the head of the *Baitul Mal* at the village level. In practice, not all villages have a *Baitul Mal*. An estate for which there are no heirs is hence looked after by village elders who serve an interim *Baitul Mal* role.

⁷⁶ Hoesin, *Adat Atjeh*, p. 162; Badruzzaman Ismail (Interview, 8 May 2006).

⁷⁷ Hoesin, *Adat Atjeh*, p. 162; Badruzzaman Ismail (Interview, 8 May 2006).

		<p>bequeathed according to a will exceeds 1/3 of the estate, and the heirs object, the amount bequeathed in the will shall be reduced to 1/3 of the estate (KHI, 201).</p> <p>A bequeathal of inheritance property made to an heir is valid only with the agreement of all other heirs (KHI, 195:3). A statement of agreement between heirs must be made orally, in writing in front of two witnesses, or in the presence of a notary (KHI, 195:4).</p>			wishes of the testator is considered a cultural imperative. ⁷⁸	
28	GIFTS AND GRANTS	<p>Those who have reached the age of 21 years, are in sound health and who are not under duress, may bestow a gift (<i>hibah</i>) provided that this gift does not exceed 1/3 of their total estate. Gifting must be done in the presence of two witnesses (KHI, 210:1).</p>				

⁷⁸ Hoesin, *Adat Atjeh*, pp. 162-163.

29	DISPUTES INVOLVING INHERITANCE IN THE POST-TSUNAMI CONTEXT	<p>According to article 49 of Law No. 7 of 1989 on the Religious Courts and Qanun No. 10 of 2002 on the Islamic Syar'iyah Courts, the resolution of inheritance fall within the jurisdiction of the <i>Mahkamah Syar'iyah</i>.</p> <p>All legal actions (relating to both property and people) have an expiry limit of 30 years. As such, if a person occupies property or is in possession for longer than 30 years, he/she does not have to prove entitlement (KUH Perdata, Buku Keempat, 1967).⁷⁹</p> <p>The 30 year expiry period does not apply to children who have not reached adulthood and for those under guardianship, except in a number of exceptional cases as outlined in the law (KUHPerdata, Buku Keempat, 1987).</p>	<p>Fatwa MPU 3/2005 (1:3) states that a matter brought in relation to land ownership disputes and land inheritance can be referred to the <i>Mahkamah Syar'iyah</i> with official evidence.</p> <p>However, Fatwa MPU 2/2005 (9) requires the <i>Mahkamah Syar'iyah</i> to give the <i>geuchik</i> and the <i>mukim</i> (together with the <i>tuha peut</i> and others) the opportunity to resolve disputes peacefully before they are referred to the <i>Mahkamah Syar'iyah</i>.</p> <p>Fatwa MPU 2/2005 (8) states that matters regarding</p>			
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⁷⁹ A decision in the appeal division of the *Mahkamah Syar'iyah* provincial level (37/Pdt.G/2004/MS Prov.) rejected an action brought claiming inheritance after 33 years had passed. This decision, however, was based on a classical Islamic legal book (*Al-Nasyiah*, vol. 7:485).

		<p>The 30 year expiry period applies to unmanaged (abandoned) inheritance property, except for that which is under guardianship (KUH Perdata, Buku Keempat, 1991).</p> <p>The 30 year expiry period applies to all heirs who are still in the process of negotiating their inheritance (KUH Perdata, Buku Keempat, 1992).</p>	<p>entitlement to inheritance and land can only be brought before the courts within a period of 5 years after the tsunami. Cases involving children, however, may be brought before the courts until such children reach the age of 19 years.</p>			
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ANNEXURE 3: Matrix of Relevant Guardianship, Inheritance and Land Law LAND AFFAIRS

NO.	TOPIC	A. FORMAL LAW	B. NOTES	C. CUSTOMARY PRINCIPLES AND NORMS	D. NOTES	E. ISLAMIC LEGAL OPINION / PRINCIPLES
1	THE RIGHT TO OWN LAND	<p>Each and every Indonesian citizen, both male and female has the same opportunity to acquire land rights and to benefit from such rights for him/herself and/or his/her family (UU 5/1960, 9:2).</p> <p>Every Indonesian citizen living in Aceh has the right to own the land according to existing laws (UU 11/2006, 213:1).</p> <p>Ownership is a right that can be passed on from generation to generation and is the strongest and the fullest right any person can have over land (UU 5/1960, 20:1).</p>		<p>Customary law recognizes that both men and women can hold the same rights over land and houses and the right to benefit from such property for him/herself and/or his/her family.ⁱ</p>		
2	TRANSFER OF LAND RIGHTS	<p>Ownership rights can be transferred to another party (UU 5/1960, 20:2).</p> <p>All transactions, exchanges, bequests, inheritances and gifts made under customary laws and other acts made</p>		<p>Under customary law, ownership rights can be transferred through: (a) Inheritance (b) Agreement (e.g. sale), or (c) Gift.ⁱⁱ</p>		

		with the intention of transferring ownership rights are regulated by Government Regulations [<i>Peraturan Pemerintah</i>] (UU 5/1960, 26:1).				
3	TRANSFER OF LAND TITLE THROUGH INHERITANCE	<p>Land title will be transferred to an heir(s) according to a legal inheritance document. (PP 24/1997, 42:4).</p> <p>Inheritance in the from of ownership rights over a building or <i>soho</i> (apartment) which:</p> <p>(a) According to a legal inheritance document, is to be divided among more than one heir, or</p> <p>(b) For which there is no legal inheritance document identifying heirs;</p> <p>Shall be registered as having joint-owners (PP 24/1997, 42:5).</p>				
4	THE LOSS/ EXPIRATION OF LAND RIGHTS	<p>Land ownership rights will be lost if:</p> <p>(a) Land is acquired by the State:</p> <p>(i) For public needs with compensation;</p> <p>(ii) Voluntarily given to</p>		<p>Ownership rights over land can be revoked or lost due to:</p> <p>(a) Abandonment;</p> <p>(b) Water erosion;</p> <p>(c) When land boundary markings disappear because of neglect or through lack of</p>		

		<p>the state by the owner; (iii) Abandoned land; (iv) Through the regulation in Article 21:3 (land owned by foreigners)</p> <p>(b) Land 'perishes'. (UU 5/1960, 27).</p> <p>Land which is reclaimed by the sea, lakes or rivers will immediately come under the control of the State (PP 16/2004, 12).</p> <p>The status of rights to submerged and destroyed land in Aceh and Nias requires further regulation.</p> <p>Where a landowner does not use land in accordance with the title held (whether that be private ownership rights, commercial usage rights or building usage rights), such land can be deemed abandoned (PP 36/1998,3). Ownership rights over land which has been declared abandoned are transferred to the State (PP 36/1998, 15:1).</p>		<p>use.ⁱⁱⁱ</p> <p>Ownership rights will be lost where land 'perishes' (usually through change of status and condition eg water erosion).^{iv} If land reappears (eg through reverse water erosion), ownership rights will be automatically restored, even if the land's original position has moved.^v</p>		
5	LAND RIGHTS DERIVED FROM	The acquisition of ownership rights according to customary		Land rights may be acquired by way of (i) land clearing, (ii)		

	CUSTOMARY TITLE	law is recognized pending (as yet un-issued) Government regulations (UU 5/1960, 22:1, 56). ^{vi}		gift or <i>peunulang</i> , (iii) inheritance and (iv) agreement (e.g. sale and purchase). ^{vii}		
6	LAND RIGHTS DERIVED FROM THE CUSTOMARY PRACTICE OF 'LAND CLEARING'	Land entitlement can be derived by way of customary law through land clearings. This form of land acquisition will be regulated so as not to inflict any loss on the community and state (Explanation Law No. 5/1960, 22).		Customary law recognizes ownership rights derived from land clearing where (a) 'hard plants' (long-living plants) have been planted on the land; (b) clear boundaries have been marked; and (c) the land has been occupied from generation to generation. ^{viii}	Under customary law, 'land clearing' should be performed by marking land with a fence that consists of 3 poles placed vertically within a fathom from 5 diagonal poles. ^{ix}	
7	REVENUE SHARING ON MANAGED LANDS	How revenue will be shared between workers and owners is to be determined by the regent or mayor in each district, after taking into consideration the type of plants farmed, the soil condition, population, the amount of <i>zakat</i> (Islamic alms) paid and other economical factors and customary rules (UU 2/1960, 7:1).		<i>Mawath</i> rights (revenue sharing rights) vary between districts. Division is usually based upon soil fertility, generally with 2:1 or 3:1 share division in favor of the worker. ^x		
8	ADAT LAND	<i>Adat</i> land (<i>Tanah Ulayat</i>) is a piece of land from which specific community rights can be derived (Ministry of Land		<i>Adat</i> land (<i>Tanoh Hak Kullah</i> in Acehnese) is land in a <i>gampong</i> or <i>mukim</i> which has not been transferred to an	Communal title may apply to the following types of land: ^{xii}	

		<p>Affairs Regulation No. 5/1999, 1:2).</p>		<p>individual. The boundaries of <i>adat</i> land can be no longer than it takes for one person to travel in one day by foot. Natural landmarks such as a mountaintop, cliff, river or border agreement between different <i>gampong</i> or <i>mukim</i> can constitute land boundaries.^{xi}</p>	<p>(a) <i>Tanoh Rimba</i>: Uncultivated forest land. (b) <i>Tanoh Uteuer</i>: Forest land with specific types of plant life. (c) <i>Tanoh tamah</i>: Cultivated forest with specific types of plant life including <i>bluka</i> or <i>beuluka</i> (shrubs). (d) <i>Tanoh Padang</i>: Grasslands often used for grazing animals. (e) <i>Tanoh Paya</i> or <i>tanoh bueng</i>: Lowlands covered by a permanent source of water. Where located close to a beach, such land is referred to as <i>tanoh suwek</i> (swamp). (f) <i>Sarah</i>: Fertile land located close to a stream. (g) <i>Sawang</i>: Land located at the mouth of a river. (h) <i>Tanoh jeued</i>: Land created by mud which is carried</p>	
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					by a river (including an island or land mounds at the side of a river)	
9	TITLE OVER ADAT LAND (COMMUNAL LAND TITLE)	<p>Customary rights to land will only be recognized when such rights are in accordance with national and state interests, and insofar as such rights do not contradict any superior law or regulation (UU 5/1960,3).</p> <p>Communal entitlement and other similar forms of title derived from customary law give authority to a community to own land. Such land will generally be an area of environmental importance to the community and be land from which the community can derive benefit (in the form of natural resources, or livelihood). This form of title arises from a community's unbroken spiritual and physical connection to land (Ministry of Land Affairs Regulation no. 5/1999, 1:1).</p> <p>Customary or communal rights are considered valid only if:</p> <p>(a) A group of people feel</p>		<p>Communal rights over <i>adat</i> land (also known as public rights) belong to a <i>gampong</i> or <i>mukim</i>. <i>Adat</i> land is generally managed by the <i>geuchik/mukim</i> (community leader) who also has the authority to transfer rights over such land to a community member for their use, or to 'outsiders'. Certain types of rights over <i>adat</i> land can be purchased by 'outsiders'.^{xiii}</p>	<p>In practice, individual rights to communal land can be acquired by a <i>gampong</i> or <i>mukim</i> member through various methods, including continued use land for an extended period.</p>	

		<p>bonded to such land through customary law, and such customary law is recognized and applied in the daily lives of such people.</p> <p>(b) There is specific <i>adat</i> land which a community inhabits and from which their daily needs are derived.</p> <p>(c) There is specific customary law which regulates the management, control and use of <i>adat</i> land and which is respected by the community (Ministry of Land Affairs Regulation No. 5/1999,2:2).</p> <p>The abovementioned rights do not extend to land which:</p> <p>(a) Is owned by individuals or legal bodies whose land rights are regulated by the National Agrarian Law;</p> <p>(b) Was received or 'freed' by government agencies, legal body or individuals according to existing laws (Ministry of Land Affairs Regulation No. 5/1999,3).</p> <p>Possession of a portion of <i>adat</i> land held under communal title can be obtained by:</p> <p>(a) A member of the <i>adat</i></p>				
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		<p>community who has a right to possess land in accordance with the applicable <i>adat</i> law, and who also wants to have his/her land entitlement registered according to Agrarian Law [UU 5/1960].</p> <p>(b) A government institution, legal body or individual who does not belong to the <i>adat</i> community, but who acquired land rights pursuant to the relevant <i>adat</i> law that applies in that community, and which is recognized under the Agrarian Law UU 5/1960. (Ministry of Land Affairs Regulation no. 5/1999, 4:1).</p>				
10	TANAH WAKAF (PROPERTY DONATED FOR RELIGIOUS OR COMMUNITY USE)	<p><i>Wakaf</i> is a legal act whereby part of an individual's wealth is donated either permanently or for a specified period to be used for religious purposes and/or for the welfare of the community according to Islamic law (UU 41/2004, 1:1).</p> <p><i>Wakaf</i> is a legal act performed by an individual or a legal body that has donated part of their wealth (including land) for religious and community use according to Islamic teachings (PP</p>		<p><i>Wakaf</i> land (or <i>Tanoh Wakeueh</i> in Acehnese) is land which has been donated to an individual or a community in accordance with Islamic principles.^{xiv} Such donations are usually witnessed by the <i>geuchik</i> and the <i>imam meunasah</i>. <i>Wakaf</i> land in the <i>gampong</i> is often managed by these village leaders.^{xv}</p>	<p>In Aceh Besar, <i>wakaf</i> may be performed by an individual or by a <i>gampong</i>. In the latter situation, community members buy a piece of land close to the <i>meunasah</i> and donate it to the <i>gampong</i> to be used as a place where religious teachings can be conducted.^{xvi}</p>	

		28/1977,1; KHI 215).				
11	CHANGE OF STATUS ON WAKAF LAND	<p>Land donated in the form of <i>wakaf</i> cannot usually have its status changed or be used for any other purpose than that specified in the <i>Ikrar Wakaf</i> (document detailing the terms of the <i>wakaḥ</i>^{xvii} (KHI, 225:1).</p> <p>A derivation can only occur with the written agreement of the Head of the Religious Affairs Office at the <i>Kecamatan</i> level, upon recommendation by the <i>Majelis Ulama</i> at the <i>Kecamatan</i> level and <i>camat</i>, and only in the following circumstances:</p> <p>(a) Where the land can no longer be used for the objective outlined in the <i>Ikrar Wakaf</i>.</p> <p>(b) Where change in status is deemed to be in the public interest (KHI 225:2).</p> <p><i>Wakaf</i>land cannot be:</p> <p>(a) Used as collateral; (b) Confiscated; (c) Bequest; (d) Sold; (e) Inherited; (f) Exchanged (except in the</p>				<p>Pursuant to Fatwa MPU 7/2005, <i>Wakaf</i> lands which, because of natural disaster, can no longer be used for their intended purpose can be sold and bought based on the Islamic legal maxim <i>dharurat syar'iyah</i> (necessity)^{xviii} and <i>maslahat</i> (the interests of the community).</p>

		<p>public interest in accordance with the city plan provided that such exchange does not contradict <i>syar'iyah</i> Law No. 41/2004,41:1); (g) Transferred into any other forms of title. (Law No.41/2004,40).</p> <p>The government of Aceh and/or district government authorities are obliged to protect <i>wakaf</i> lands and religious properties (UU 11/2006, 213:4).</p>				
12	LAND WHICH HAS NO OWNER OR FOR WHICH THERE ARE NO HEIRS	<p>Land for which there is no heirs, or the whereabouts of such heirs are not known, will, upon a decision of the Religious Court, be placed under the management of the <i>Baitul Mal</i> to be used for Islamic interest and general community welfare (KHI, 191).</p>		<p>The use and management of land for which there is no heirs (or where the location of heirs is unknown), will be transferred to the <i>geuchik</i>. The benefits derived from such land will be used in the interests of the local <i>meunasah</i>. Such land is referred to as <i>baitul mal</i> property.^{xix}</p>		<p>Pursuant to Fatwa MPU No. 2/2005 and 3/2005, land and property that was affected by the earthquake and tsunami for which there is no heirs will, upon decision by the <i>Mahkamah Syar'iyah</i>, become the property of the Muslim community through the <i>Baitul Mal</i>.^{xx}</p>
13	RE-DEMARCATON OF LAND (FOLLOWING A	<p>Land owned by way of an unregistered right, land which has been registered without a map, or land which has been</p>				

	NATURAL DISASTER)	<p>registered with an invalid map, will be re-registered by an Adjudicating Committee or by the head of Land Matters' Office. Registration will be based on the boundaries made the owner and, to the greatest extent possible, with the approval of neighboring land owners (PP 24/1997, 18:1).</p> <p>Where an agreement cannot be reached between the land owner and the owner of the neighboring land regarding land boundaries, the measurement of the land will be based upon existing land marks (PP 24/1997,19:1).</p>				
14	JURISDICTION OF THE MAHKAMAH SYAR'YAH IN POST-TSUNAMI LAND DISPUTES	<p>Disputes involving [land] ownership which arise in accordance with UU 3/2006, 50 section (1), and to which parties are both Muslim, will be settled by the religious court (UU 3/2006, 50:2).</p>				<p>Fatwa MPU No 3/2005 states that tsunami-related disputes involving land titling, inheritance of land, hereditary status and missing persons can be referred to the <i>Mahkamah Syar'iyah</i> with valid evidence (Fatwa MPU No 3/2005 art I(3) and art V).</p> <p>Fatwa MPU 2/2005</p>

					<p>states that matters regarding entitlement to inheritance and land can only be brought before the courts within a period of 5 years following the tsunami. Cases involving children, however, may be brought before the courts until such children reach the age of 19 years (Fatwa MPU 2/2005 art 8).</p> <p>Fatwa MPU 2/2005 (7) suggests that the Government or the Supreme Court should instruct land registrars not to facilitate the transfer of land titles which belong to tsunami victims where the existence of such land and boundaries is unclear, or where the evidence presented is insufficient or invalid.</p> <p>Fatwa MPU 2/2005 (9) requires the <i>Mahkamah Syar'iyah</i> to give the <i>geuchik</i> and the <i>mukim</i> (together with the <i>tuha peut</i> and others) the</p>
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						opportunity to resolve disputes peacefully before they are referred to the <i>Mahkamah Syar'iyah</i> .
15.	RIGHTS OF PRE-TSUNAMI RENTERS	Renters who are unable to return to their pre-tsunami communities have a number of options. The most attractive is to obtain a free house from a NGO on land provided by BRR or the district/city government. Alternatively renters may obtain cash compensation from BRR valued at approximately 40% of a basic 40m2 house in Banda Aceh. ^{xxi}				
16.	RIGHTS OF PRE-TSUNAMI SQUATTERS	Squatters will receive cash compensation from BRR valued at 25% of a basic 36m2 house in Banda Aceh. ^{xxii}				

ⁱ T. Djuned (Interview, 27 March 2006); T.I. El-Hakimy (Interview, 26 March 2006).

ⁱⁱ *Pola Penguasaan Pemilikan dan Penggunaan Tanah secara Tradisional Propinsi Daerah Istimewa Aceh*, edited by Syamsidah dan Sugiarto Dakung, (Jakarta: Direktorat Sejarah dan Nilai Tradisional, 1984/1985), pp. 55, 63.

ⁱⁱⁱ *Ibid.*, pp. 56, 75; T.I. El-Hakimy (Interview, 26 April 2006).

^{iv} T.I. El-Hakimy (Interview, 26 April 2006).

^v *Pola Penguasaan Pemilikan*, p. 53; T.I. El-Hakimy (Interview, 26 April 2006).

^{vi} After 46 years, the government regulation contemplated by Article 22 of the Agrarian Law has not been issued.

^{vii} *Pola Penguasaan Pemilikan*, p. 34.

^{viii} Rusdi Sufi (Interview, 27 April 2006); Cf. *Pola Penguasaan Pemilikan*, pp. 30-32, 34-35.

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- ^{ix} *Pola Penguasaan Pemilikan*, p. 30.
- ^x *Ibid*, pp. 67-71, 76; Moehammad Hoesin, *Adat Atjeh*, (Banda Aceh: P&K Daerah Istimewa Aceh, 1970), p. 176.
- ^{xi} T.I. El-Hakimy (Interview, 26 April 2006)
- ^{xii} *Pola Penguasaan Pemilikan*, pp. 25-26.
- ^{xiii} *Ibid*, pp. 53-54; T. Djuned (Interview, 27 March 2006).
- ^{xiv} *Pola Penguasaan Pemilikan*, p. 46; T.I. El-Hakimy (Interview, 26 April 2006).
- ^{xv} *Pola Penguasaan Pemilikan*, p. 66; Hoesin, *Adat Atjeh*, p. 144.
- ^{xvi} T.I. El-Hakimy, “Tentang Penguasaan Tanah pada Masyarakat Pedesaan di Aceh”, dalam Herman Slaats dan A.A. Trouwborst (eds.), *Tiga Model Pendekatan Studi Hukum Adat: Suatu Laporan Penataran*, (Banda Aceh: Syiah Kuala University Press, 1993), pp. 84-85.
- ^{xvii} A statement given by *wakif* (donor) about his/her purpose to donate the land.
- ^{xviii} This doctrine of ‘necessity’ (*darurat*) justifies an act which would otherwise have dubious legal basis or no such basis at all in Islam.
- ^{xix} *Pola Penguasaan Pemilikan*, p. 66; Cf. Hoesin, *Adat Atjeh*, p. 104.
- ^{xx} Fatwa MPU 2/2005 Art 6; Fatwa MPU 3/2005 Art 1:2.
- ^{xxi} Art.3(5) BRR Regulation No.21 on Renters and Squatters.
- ^{xxii} Art.3(6) BRR Regulation No. 21 on Renters and Squatters.

ANNEXURE 2: Letter of Statement of the Installment of Boundary Stakes and the Physical Ownership of a Parcel of Land

Attachment 4-2

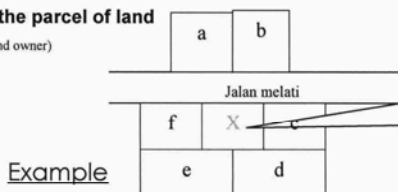
THE LETTER OF STATEMENT OF THE INSTALLMENT OF BOUNDARY STAKES AND THE PHYSICAL OWNERSHIP OF A PARCEL OF LAND	Regency/Municipality:	Code/No
	District :
	Village :	
	Neighbourhood (RT/RW) :	(the same as the code in the map)
Street/Block/Jurong:		

DATA OF TRUSTEE/GUARDIAN (filled in by those acting as trustee/guardian/representative)	
Name	:
Place/Date of Birth (age)	:
Address	:
Occupation	:
Acting on behalf of	: Trustee/guardian of
	(as filled in as follows)

DATA OF LAND OWNER[S]: (According to the ID, if any)		IF THERE IS NO ID CARD, THIS PART MUST BE FILLED IN
Name	:	
Place/Date of Birth (age)	:	<div style="border: 1px solid black; padding: 5px; display: inline-block;"> <p style="text-align: center; margin: 0;">II. Thumb mar</p> </div> <p>Thumb marking is done in presence of geucik</p>
Identity No	:	
Status	: Married/unmarried/widow/widower	
Name of husband/wife	:	
Present/temporary address	:	
Address before Tsunami	:	
Past occupation	:	
Present occupation	:	
Status of land	: HM/HGB/HGU/HP	
Certificate	: with/without certificate	
<i>Hak tanggungan</i>	: as collateral/not collateral	
This land is owned since	:	
Obtained from	: purchase/hibah/inheritance/right extension	
This land will be certified in the names of		(.....Name of Geucik/the head of village.....)
1.		
2.		
3.		

Sketch of the parcel of land

(made by the land owner)



Example

This land is owned by the undersigned and the marking of its boundaries have been witnessed by all neighbors still alive.

The undersigned are responsible in the court of law on the accuracy of their claims in this document		
Legal land owner/their/guardian	Neighbouring land owner witnesses	Village institution witnesses:
Full Name(signature)	a. signature	• Imam Menasah signature
Family witness:	b.	• Tuhapeut
1) husband/wife2)	c.	• Geucik
.....	d.	
	e.	
	f.	

ANNEXURE 3: Form of the Evidence of Guardianship Approval

Attachment 4.4

Code:

FORM OF THE EVIDENCE OF GUARDIANSHIP APPROVAL

As recorded in the form of inheritance code..... (enclosed)

We, the family(deceased) and the community,
 Village
 District.....
 Regency.....

Herewith declare to acknowledge, approve, agree and will jointly monitor the implementation of the guardianship of the land inheritance in the names of:

- 1).....
- 2).....
- 3).....

Due to the fact that the heirs are still under-aged, the persons concerned will be under the guardianship of:

Name :.....

Age :

Address :

Relation with the heirs:

The guardian appointed above is given the authority to take care of the property in the form of land in on behalf of the children whose names are under his/her guardianship and to arrange the process of the land adjudication as needed. The certificate of the land made in the names of the children under his/her guardianship, and the land will be given to the heirs when the children concerned are considered mature. Therefore, the right to this land cannot be transferred until the heirs come mature.

Witnesses and the parties that will jointly monitor this agreement of guardianship

Family	Acknowledged by,	Validated by
1	Geucik/head of village	Sharia Court
2	(name and signature)	
3	Imam Meunasah	
4		
5	(name and signature)	

ANNEXURE 4: Form of the Evidence of Inheritance Approval

Attachment 4-3.

Code:

FORM OF THE EVIDENCE OF INHERITANCE APPROVAL

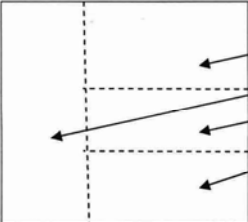
Inheritance of law in the name of:(deceased),
 Village
 District
 Regency

The undersigned, we

NAME	RELATION WITH THE DECEASED
1.	
2.	
3.	
4.	
5.	
6.	

Herewith state that on the date..... there has been an agreement on the land owned by the deceased located in the village..... district....., Regency.....the area of m² which has been inherited to :

Name	Relation with the deceased	area (m ²)
1.		
2.		
3.		
4.		

Sketch of the parcel of land and its distribution (example) 	Total area:m ²
	Part area:.....m ²
	Part area:.....m ²
	Part area:.....m ²
	Part area:.....m ²

- This land will be registered to be..... the parcel of land as stated above
- This land will be registered in the name of all owners above
- This land will be registered.....

As witnesses and parties that will jointly monitor the implementation of the inheritance, we herewith declare that the statement above is true and will be performed as the family wish.

.....

Acknowledged by,

Kecik:

Imam Meunasah/.....

signature

signature

(Kecik desa.....)

(Imam)

ANNEXURE 5: Form of Rebuttals/Objections

Attachment 4-14

FORM OF REBUTTALS/OBJECTIONS

To

.....

The undersigned,

Name :

Address :

Herewith puts forward a rebuttal[s]/an objection[s] as follows:

Write your rebuttals/objections or complaints clearly and concisely

I declare that this rebuttal/objection is written truly and accurately.

....., date

signature

(full name)

Having been resolved and agreed upon by both parties	
.....	
(the party that claims objection)	(adjudication team)

ANNEXURE 6: Directory of Courts in Aceh

<i>Mahkamah Syar'iyah</i>	<i>Pengadilan Negeri</i>
NAD Jln Tgk. Syech Mudawali No. 4 Post Code: 23242 Tel: (0651) 22427 Fax: (0651) 23151	NAD Jln S. Alaididdin Mahmudsyah No. 10 Tel: 0651 22101
Banda Aceh Jln Tgk. Syech Mudawali No. 2 Post Code: 23242 Tel: (0651) 22431 Fax: (0651) 22431	Banda Aceh Jln Cut Meutia No. 23 Tel: (0651) 22141
Sabang Jln. Agussalim No. 5 Post Code: 21301 Tel: (0652) 21294 Fax: (0652)21294	Sabang Jln Ahmad Yani Tel: (0652) 21305
Sigli Jln. Mahkamah/Pertemuan Tel: (0653) 21301	Sigli Jln Tgk. Chik Di Toro No. 48 Tel: (0653) 21309
Meureudu Jln Banda Aceh-Medan Km 158 Post Code: 24186 Tel: (0653) 51107	
Bireuen Jln Letkol Alamsyah 11 No. 1 Post Code: 24211 Tel: (0644) 324 598	Bireuen Jln Pengadilan I Tel: (0644) 323040/21040
Takengon Jln Sentosa Tel: (0643) 21597 Fax: (0643) 21597	Takengon Jln Kplk L. Yos Sudarso No. 154 Tel: (0643) 21606/21968
Lhoksemawe Jln Malahayati No. 22 Post Code: 24313 Tel: (0645) 43925 Fax: (0645) 41809	Lhoksemawe Jln Iskandar Muda Post Code: 23315 Tel: (0645) 43049/45355
Lhoksukon Jln Imam Bonjol No. 1 Post Code: 24382 Tel: (0645) 31198 Fax: (0645) 31198	Lhoksukon Jln Pamglima Polen No. 3 Post Code: 24382 Tel: (0645) 31025
Idi Jln Sultan Iskandar Muda Post Code: 24454 Tel: (0646) 21270	Idi Jln Petua Husin Post Code: 24454 Tel: (0646) 21843/21144

<p>Langsa Jln Prof. A. Majid Ibrahim Tel: (0641) 21507 Fax: (0641) 21507</p>	<p>Langsa Jln WR. Supratman No. 10 Tel: (0641) 21449/21114</p>
<p>Kualasimpang Jln Ir. H. Juanda Karang Baru (0641) 31517</p>	<p>Kualasimpang Ir. H. Juanda Tel: (0641) 31128/21023</p>
<p>Blangkejeren Jln Kuta Panjang No. 83 (0642) 21083 Fax: (0642) 21083</p>	<p>Blangkejeren Jln Kong Bur No. 52 Post Code: 24653</p>
<p>Singkil Jln Utama No. 44 Post Code: 23785 Tel: (0658) 21155</p>	<p>Singkel Jln Merdeka Tel: (0658) 21024</p>
<p>Kutacane Jln T. Badussamad No. 259 Tel: (0629) 21202 Fax: (0629) 21202</p>	<p>Kutacane Jln Cut Nya Din No. 174 Tel: (0629) 21105/21563</p>
<p>Tapakuan Jln T. Ben Mahmud No.20A Post Code: 23717 Tel: (0656) 21092</p>	<p>Tapaktuan Jln Letjen Supratman No.11 Post Code: 23714 Tel: (0656) 21248/21015</p>
<p>Meulaboh Jln Gajah Mada No.33 Post Code: 23617 Tel: (0655) 7006 140 Fax: (0655) 7551021</p>	<p>Meulaboh Jln Dr. Sutomo No. 5 Tel: (0655) 21010</p>
<p>Sinabang Jln Baru Air Dingin Tel: (0650) 7000487 Fax: (0650) 7000487</p>	<p>Sinanbang Jln T. Jiujung No. 406 Post Code: 23691 Tel: (0650) 21042/21043</p>
<p>Calang Jln Mon Tujoeh Tel: (0654) 700 6903</p>	<p>Calang Jln Pelabuhan No. 3 Tel: (0654) 21008/21069</p>
<p>Jantho Jln T. Bachtiar Panglima Polem Tel: (0651) 92417 Fax: (0651) 92417</p>	<p>Jantho Jln T. Bachtiar Panglima Polem SH. 3 Tel: (0651) 92121/92147</p>

Where Can I Get Help?

There are several NGOs operating in Aceh which provide legal assistance to individuals free of charge. These include:

KKTGA: Kelompok Kerja Transformasi Gender Aceh is a gender, justice and civil society organization based in Banda Aceh, and with close connections to other NGO's throughout Aceh. KKTGA provides free legal and counseling services to women, with a focus on domestic violence, marriage law, land matters, inheritance and guardianship. Telephone: 0651 - 740 8922.

LBH Banda Aceh: is a local branch of the national Legal Aid Institute network located in Leung Bata. Its program areas are the provision of legal services (litigious and non-litigious), legal public education, policy research, network development as well as public Telephone: 0651 22940

LBH APIK: Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan is the branch of the national Legal Aid Institute devoted to women's legal issues. The organization's primary goal is to strive for gender equality and justice in Indonesia. LBH APIK gives direct legal aid to women who are victims of violence and discrimination, conducts legal advocacy and training and initiates research. LBH Apik is based in Lhokseumawe, and can be contacted on 0645 - 43 150

LBH Anak: Lembaga Bantuan Hukum Anak is the branch of the national Legal Aid Institute devoted to defending children and their legal rights. LBH Anak provides legal services to children and represents children in litigious matters. They also work on advocacy of children's legal rights and conduct community training. LBH Anak is located in Banda Aceh and can be contacted on 0651 7411587.



International Development Law Organization
Organisation Internationale de Droit du Développement



Additional Copies of this Guidebook
(In English and Bahasa Indonesia)
can be obtained from IDLO at:
Jalan Bhakti No. 1 Geuceu Komplek 23239
Banda Aceh
Nanggroe Aceh Darussalam
aceh@idlo.int

Illustrations by Andriady