

THE ENIGMA OF NATIONAL LAW IN INDONESIA: THE SUPREME COURT'S DECISIONS ON GENDER-NEUTRAL INHERITANCE

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It may not be an exaggeration to say that the law of inheritance is one of the most neglected domains in the Indonesian government's campaign for legal nationalization. Such negligence is in keeping with the state's attitude towards non-state normative orderings, which is itself a product not only of the national legal ideology enshrined in the constitution that favors unification and uniformity, but also with the fact that the state is at a loss as to how to deal with the variety of inheritance traditions existing in the society. The question is thus not simply which law should be used as the main building block of the national inheritance law (whether Islamic, *adat* or even the Western civil law traditions) but more how to unify the practices currently followed.

Gender-neutral inheritance is one of the most complicated problems faced by the state in the issue of varied inheritance practices. This is because not all contemporary legal traditions in the country have the same viewpoint with respect to gender equality among the recipients of inheritance. In this respect, the concept of gender-neutral justice, regarded as characteristic of the national legal system, has been challenged by certain traditions of inheritance that view difference in gender as a criterion for distributing the estate. Islamic inheritance law is the case that concerns us most here, especially as the tradition embodied in this religious law makes clear distinctions on the basis of sex. In the process of dividing the estate, the genders of the heirs become one of the most important factors in

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deciding whether someone will receive a portion of an estate and if so how large a portion. This is of course in stark opposition to the traditions of civil law or *adat* law which generally disregards the sexual differences of the parties in allotting shares to the estate.

That perplexity is the starting-point of the paper. The discussion will be devoted mainly to analyzing the state's behavior towards the different idea of gender justice reflected in Islamic inheritance law in Indonesia. Two decisions of the Supreme Court in 1995 in cases of Islamic inheritance touching the issue of gender-neutrality in dividing an estate will be used as the main data to analyze the current picture of the phenomenon in the country. From these two cases it will be shown that the idea of gendered justice as found either in *adat* or civil law traditions has influenced, although unconsciously, the Supreme Court judges in their mission to avoid the strict application of the teaching of gender difference in Islamic inheritance. This shows that the judges, as part of the state apparatus, may have paved the way for principles of gender equality to take effect in cases of inheritance, in order to bring all legal traditions into line with the principles of gender-neutral inheritance espoused in state legal norms.

Gendered Inheritance for Children

A person's offspring constitute one of the main groups of heirs expected to receive a share of his or her estate in any traditions of inheritance. It is often said that the existence of children is *ipso facto* the main reason for inheritance within the family. The question is, however: To what extent does this privileged position of children allow them to override other potential heirs? To answer this question, the three traditions of inheritance existing in the country seem to have developed certain arrangements in order that relatives and family members can be grouped together inasmuch as their positions in the process of inheritance can be assured. Besides, through such an arrangement one group of heirs may be said to have an ability to supersede others, especially children to supersede other heirs.

Inseparable as it is from the communal worldview of indigenous society, inheritance in *adat* law is influenced by the belief that children are a bridge for the family and community to the future. The children are a continuation not only of the family's existence but also of the identity by which the family can follow the accepted culture of the society. This is why offspring are always seen as the most important heirs when the process of inheritance gets underway within the family.

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

In some societies with a matrilineal scheme of family, such as in Minangkabau, the children will usually receive the inheritance from their mother and not their father. Hence, when the father dies, it is the sisters and brothers of the deceased who will normally receive the estate. This principle was however usually obviated by a gift by the father of all his wealth to his children before dying. In some patrilineal societies (such as in Batak, Lampung and Bali), the estate will usually be given to the male children only, since the daughters will normally be the responsibility of their husbands' families. In a slightly different way, the bilateral society of *adat* communities located mainly in Java island, will always give all the children the entire estate, taken from both parents, without any gender discrimination.¹ It seems also due to the importance of children in the family that all *adat* law circles commonly accept adopted children as having the same status as natural children, given that in the absence of natural offspring adopted children will usually have a great domestic function within the adopting family.

The elevated status of children in inheritance is also characteristic of the Dutch civil tradition as expressed in the *Burgelijk Wetboek* (BW, Civil Code). This can be seen from the fact that children are classified in the first group of heirs, sharing in the estate together with the spouse. If there are no offspring or widow or widower in the family, the estate will go to the members of the second group, i.e., parents and sisters or brothers of the deceased. Finally, when there are no persons in group two, the estate goes to the third group, consisting of grandparents and so on. Together with their surviving parent, the children are therefore first in line to receive the estate and their presence in the division of inheritance will automatically override the other heirs coming from the lower groups. This is to show very clearly that the BW, as then explained in the *Kitab Undang-Undang Hukum Perdata* (KUHP, Indonesian Civil Code) itself seems to regard inheritance as an important means for a deceased parent to continue discharging his or her responsibility towards the children.² As it is his or her wealth that provides the parent with the opportunity to extend this responsibility beyond death,

¹ On the explanation of plural inheritance practices in *adat* law as reflecting different systems of society see Hazairin (1958: 9-16).

² This is seen for instance in the fact that according to the BW, children of the deceased rank in the first group of the heirs together with the surviving spouse, thus having a right to exclude other heirs from the lower group. On the general rule of the grouping of heirs in the BW, see: BW Articles 852-861; Engelbrecht and Engelbrecht (1960: 513-515).

the estate taken from his or her inheritance should thus be used primarily for assuring the welfare of the children.

Islamic inheritance law, however, adopts a different logic in grouping the heirs, although the position of children in the process of allotting the estate is understandably strong. The discrepancy here seems to be much influenced by the particular character of this legal tradition as based ultimately on the divine ideas of law. The inheritance law is understood as God's commands to Muslims on how to divide their estates. To whom and to what extent the estate will be shared among the family members thus depends much on the divine manual of inheritance derived primarily from both the Qur'an and the Prophetic Hadith. Yet this does not mean that the influence of culture where Islam was first propagated in the Arab lands was minor. This is shown by the fact that many of its substantive aspects of inheritance were developed on the basis of patriarchal logic where male heirs are always seen as having a higher status than the female. This is what many legal scholars have indicated as the thread of patrilinealism in Arabian society that was intertwined in the substantive Islamic inheritance law. As a result, at every step of the estate allotment differences between the sexes of the heirs becomes a vital point of consideration. Even in the case of children, whose exalted position in inheritance is undeniable, males will receive a far greater share than the females.

On this premise Muslim jurists classify all the heirs in the Islamic inheritance into two general categories, namely, the *ashabah* (male agnates) and the *dhaw al-furud* (Qur'anic sharers). The first category comprises all those agnatic male relatives who have traditionally been recipients of inheritance since pre-Islamic Arabian times, i.e., son, agnatic grandson, brother, son of a brother, father, grandfather, great-grandfather, and further upwards. The second group consists of those family members mentioned specifically in the Qur'an as entitled to receive a share, namely, daughter, granddaughter, spouse (whether widow or widower, mother, grandmother, and sisters. Evidently those included in the first group are all men, while those in the second group are mostly women. The basic principle is that those defined as *asha bah* receive the entirety of the remaining estate after the shares of those defined as *dhaw al-furud* have been deducted. As a consequence, in contrast to both *adat* and civilian legal traditions, the Islamic law of inheritance is understood as the only tradition that differentiates between the sexes in the process of dividing the estate. This principle is enshrined in the verse of the Qur'an: *li-al-dhakari mithlu haz z i al-'unthayayni* ("the portion of the man is the

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

same as that of two women”).³ The children’s share of the estate will therefore differ between male and female children: they will both share the estate, but at a ratio where the males receive twice that of the females. The application of the rule is extended also to other groups of heirs: here too male parties in principle receive twice the amount of their female counterparts.

As far as the children’s rights in inheritance are concerned, the paternalistic character of Islamic law ensures that the son always receives twice the share of the daughter under any conditions; besides, his existence in the process of inheritance automatically blocks consanguine sisters and brothers from getting a share. The daughter, however, will never exceed the portion received by the son and, when there is no son, she will get a half portion of the estate or share two thirds when there is more than one. Furthermore, in contrast to the son, the daughter (at least according to all Sunni Muslim jurists), has no right to exclude any other group of heirs. Such a principle cannot be found in any other legal tradition: both *adat* and civil inheritance law (as set forth in the KUHPer) do not principally differentiate between the two children. The status of children as heirs of the first group in the civil tradition can principally override heirs from the next group, but without any distinction made between males and females. Using the same logic, *adat* law does not basically differentiate between males and females; differences in sex are considered only in relation to their “political” functions in the community and not their roles in the family (as is the case in Islamic law).

Gender difference in Islamic inheritance law is therefore seen as a fundamental starting point for division of the estate among the family members. This is unique, not only because of the gender values developed inherently in its general legal teaching but also its logical effect on the character of family law built therein. Islamic law is very conscious of the differences between the sexes (*al-ikhtila f bayna al-nisa ’ wa al-rija l*) and this is reflected in every aspect of family law. This gender principle had, of course, developed against the background of the patriarchal society of early Arabia, where Islam was first born, yet in its development it has continuously been understood as a rigid norm, from which the rule on dividing the estate is derived. This can be seen for instance in the case of a daughter or son when one of these inherits together with a consanguine sister or

³ The Qur’an 4: 11 states: “God (thus) directs you as regards your children’s (inheritance): to the male, a portion equal to that of two females...” (*Yusikumu-allahu fi awladikum, li-al-dhakari mithlu hazz al-’unthayayni*).

brother. Following the principles of Islamic inheritance, where the son is heir along with the sister or brother, he will automatically block the sister or brother from receiving any share, such that he himself receives all the remaining estate. This is not the case when the heir is only a daughter with a consanguine sister or brother. She will receive only a half share without being able to override the sister or brother since the latter will also have the right to receive a share, just as the daughter does. This is so in conjunction with the status of the daughter as included in the *dhaw al-furu d* group, to whom, according to the Qur'an, should come one half (if alone) or two thirds (if two or more)⁴ and thus have no intrinsic right to exclude the sister/brother from the share.⁵ As a direct result of the paternalism embraced by the religious law itself, the daughter is disempowered in comparison to the son. The position of the daughter in Islamic inheritance law can thus be said to be lower than what is found in *adat* law or the KUHPer, since these two secular laws declare the daughter (in such cases) equally entitled to receive all the shares and to exclude a sister or brother from the estate.

The main point of divergence thus lies in the fact that, in contrast to *adat* or the BW,⁶ Islamic law treats the daughter differently from the son in regard to their inheritance rights. On a practical level, it is this concept that occasionally leads to a conflict of interest between the two children, especially the daughter who in many cases felt unsatisfied with such discrimination. In Indonesia, the problem has become more complicated since, with the introduction of plural inheritance, the restrictive nature of Islamic inheritance leads to conflict between the children in a family, especially when one or more of the inheritors wants to comply with a different system of law. This happens particularly when the daughter, the party usually inflicted with an inferior share, refuses to comply with the law embraced by the son.

⁴ The Qur'an 4: 11: "...if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half." (*Fa'in kunna nisa 'an fawqa 'ithnatayni falahunna thulutha ma taraka, wa 'inka nat wa h idatan falaha al-nishfu*). The English translation is from Ali (1946: 181).

⁵ This is in fact the consequence of a patriarchal interpretation embraced mainly by Sunni Muslim jurists, more specifically the Shafi'ite madhab followed in Indonesia.

⁶ BW, Art. 852, in which it is stated: "De kinderen of hunne afstammelingen erven van hunne ouders, grootouders, of verdere bloedverwanten in de opgaande linie, *zonder onderscheid van kunne of eerstgeboorte,....*" (italics added).

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

The gender inequality of Islamic inheritance law has indeed been thrown into greater relief by government's efforts towards legal nationalization. The bilateral-individual scheme of inheritance embraced by the state as a principle in its construction of a national inheritance law means that the rights of the children in inheritance (besides those of the surviving spouse) are recognized irrespective of their gender.⁷ As early as 1960 the state, through its statement in the Decision of the Provisional People Assembly No. II/MPRS/1960, made it clear that an estate is to be given to the children (whether sons or daughters) and the surviving spouse when they are the only existing heirs.⁸ In the same spirit, the law's architects stated unequivocally that the principle of gender equality between man and woman would be applied in any future national law of inheritance.⁹ It is not wrong to say therefore that, from the standpoint of the government, gender difference among the heirs is no longer seen as a valid criterion for estate division. It is even seen by many nationalist lawyers in the country as a mockery of the state's concern to create a system of law that recognizes men and women as having equal rights before the law. At least in theory, the inheritance norms developed by the state can thus be said to be more in parallel with the inheritance traditions of *adat* or the legacy of civil law tradition of the Dutch.

Thus, on the issue of gender equality there remains a categorical disjunction between the rules emanating from Islamic inheritance law and the state's concern to spread the values of gendered justice in the system of law. Some efforts have,

⁷ It is true that the bilateral-individual scheme of inheritance embraced by the state's idea of national inheritance law is influenced much by Hazairin's concept of bilateral inheritance (in Islamic law). See in general Hazairin 1958; also Cammack 2002.

⁸ Decision of Provisional People Assembly No. II/MPRS/1960, December 3, 1960, Article 402, Letter c, Sub 4 (a) stating that "all estates are given to all children and surviving spouse if the deceased is survived only by the children and spouse as heirs" (Thalib 1984: 155).

⁹ One of the recommendations resulting from the National Seminar of Law at Jakarta, March 12-16, 1963 stated very clearly: "The objective of Indonesian socialism as a derivation of Pancasila should become a soul in the formation of the national law of inheritance, *by paying attention to the principle of equality in the estate division between man and woman.*". (Thalib 1984: 156, italics added).

nevertheless, been made by both the agents of the state and Muslim jurists to overcome this impasse. The most important of them was effected through the promulgation of the *Compilation of Islamic Law*, on the basis of which judges in the religious courts were allowed their own autonomy in the process of making a decision. Indeed, many had a great expectation that the Compilation could help to resolve the gender inequality of the Islamic law of inheritance. This has proven however to be less than successful. The problem remains, and even in Indonesia's plural society, each legal tradition is striving to realise its own character. Hence, on the basis of the *Compilation*, the principles of gender difference in Islamic inheritance are still to a great extent applied to the resolution of problems brought before the religious courts, while the principles of gender equality in inheritance found in both *adat* and the BW are used principally to unravel inheritance cases brought before the civil courts.

The state is thus in the uncomfortable position of seeking to impose gender-blind principles in its project of uniform national law while guaranteeing gender-based regulations through its official recognition of a plurality of religious-based legal systems. It is no wonder therefore that, rather than try to resolve the complex interpersonal issues arising from this conflict of laws, it has preferred to rely on the free market approach whereby the nation's citizens faced with problems of inheritance are forced to make choices of law before bringing their cases to the courts: if they want to use Islamic law, then a case should be brought to the religious court, but if they insist on *adat* or civil law principles for resolving the case, then the civil court is the appropriate forum for litigation. What we see here also is the state's silent strategy of legal nationalization whereby the state deliberately maintains a plurality of laws in the society in the hope that resulting interpersonal conflicts will be willingly brought to the state court for adjudication, according to which the judge will then be able to issue a decision based on the state norms of inheritance.

The state can therefore solve the conflict of gender issues in inheritance by espousing the same value, namely, one which disregards gender as a basic criterion for division of the estate. This is so particularly in regard to those instances where the state codes or regulations do not yet offer a satisfactory solution. Take the example of the daughter as recipient of inheritance. Although the *Compilation* confirms the inferior position of the daughter vis-à-vis the son

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

based on the Qur'anic regulation of the male being worth two females,¹⁰ it does not specifically regulate whether the daughter will have the same share as would a son if she were to inherit without a brother but together with the sister or brother of the deceased. This silence reflects a disagreement among the Muslim jurists themselves, since the latter have different views in regard to the position of the daughter when inheriting with the sister or brother.¹¹ The controversy appears so

¹⁰As stated in Article 176 of the *Compilation of Islamic Law*: "A daughter, if she is the only one, will get half of the portion, if two or more altogether they will get two third, and if there is also a son, the portion of the son is twice the size of the daughter's." (The English version is mine.) On the original Indonesian text of the *Compilation* see Hanstein 2002: 887.

¹¹In the views of the leading Sunni Muslim jurists of four Hanafi, Maliki, Shafi'i and Hanbali schools, unlike the son who can override all other heirs with more distant relationships to the deceased, the daughter as an heir cannot block any other heirs. A lone daughter will receive only a one-half portion of the estate and if there are more than one they will receive two-thirds. Still according to those jurists, the agnatic sisters can become *'as a bah* who will inherit together with the daughter. The jurists from Shi'ite madhab, particularly from Imamiyah branch, however, have the opinion that, when inheriting by herself, the daughter can take the whole of the estate on the basis of the calculation that one half portion comes from her right as *dhaw al-furu d* while the remaining half portion is her share as a daughter. In line with this position, the Shi'ite jurists also agree that, as long as there is a child of the deceased, either son or daughter, the sister cannot get the share. See the Shi'ite's explanation in Ayatollah Sayyed Ruhollah Mousavi Khomeini, *A Clarification of Questions: An Unbridged Translation of Resaleh Towzih al-Masa'el*, trans. by J. Borujerdi (Boulder and London: Westview Press, 1984) "2728", at 363. Such a principle is basically the consequence of the Shi'ite inheritance system applying the principle of grade in the division of estate. The first group consists of the deceased's father and mother and his/her children; the second group is the ancestors meaning the deceased's father and grandfather and further on up and his/her mother and grandmother and further on up, and sister and brother, and their children in the latter's absence; while the third group consists of paternal uncle and aunt and maternal uncle and aunt and further on up and their children and further on down. Here the first group principally can block the second group and so on. See also Lucy Carroll, "The Itsna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia," (1985) 19 *Modern Asian Studies* 85 at 86-91.

far to be rooted in a diverging view of the extent to which a daughter or daughters should inherit when she is or they are the only offspring of the deceased. The logic of different sexes might demand that the daughter should not in any circumstances have the same entitlement as the son, and that with no son, she should still have to concede the sister or brother of the deceased. This is what is mainly followed by Sunni Muslim jurists. On the other hand, the status of the daughter as offspring, thereby granting her a higher position than the consanguine sister or brother, can entitle her to exclude the sister or brother from the share. This understanding derives from the rule that the offspring of the deceased constitute the most important heirs to receive the estate, and as long as there are any offspring, the sister or brother will have no right to inherit.¹² Like the son, the daughter is understood to have the power to exclude the sister or brother from the inheritance.

As far as concerns the position of the daughter vis-à-vis the sister and brother in Islamic inheritance, the state has in practice tended to grant the daughter the same rights as it would the son. And even though this may not always happen when the problem is brought to the religious court - since the Muslim judge can still decide the case on the basis of the majority view of Muslim jurists - the case will surely be judged in the end according to national norms if it is brought to the Supreme Court on appeal. As a result, although the daughter when she inherits together with the son must accept only half of the son's share, she does have the same right as a son when she inherits only with the sister or brother. Indeed, one can see this as a compromise strategy deliberately undertaken by the state in response to plurality on the issue of gendered inheritance rules. Gender inequality in Islamic inheritance, though it contradicts national legal norms, cannot be repudiated totally, but nevertheless values of gender-free justice may be imposed in certain debatable cases in conjunction with the principles of gender equality. It may not be possible for the state to repudiate the gender values explicitly stated in the Qur'an, but it is certainly open to the state to introduce a new interpretation in cases where the Qur'an itself is silent. This is what seems to have been happening in cases where a sole daughter becomes an heir together with a consanguine sister or brother. Two specific illustrations are given in the following section.

¹²It is interesting to note that, although this follows the logic of the principle that the closer overrides the remoter, the Shi'ite jurists commonly agree that it is only the sister who can be blocked by the existence of the children. This seems then to mean that the brother cannot be blocked by the children.

The Cases of *Tati Supiati v. Patah etc.* and *Inaq Putrahimah v. Nur Said etc.*

The first of these cases took place in the early 1990s when a woman named Titi passed away leaving a sole daughter, Tati Supiati, three consanguine brothers named Patah, Uto and Wawin, and one consanguine sister named Ichi. Titi herself had married twice during her lifetime: her first husband was Marta, with Tati Supiati as their only child, while the second was H. A. Suhandu, a widower with one son named Udjang. Both Marta and Suhandu had passed away long before the death of Titi. At the time of her death, Titi left some rice fields and land with houses on it besides some money given to the only daughter Tati to pay the debts of the deceased. After her death all of those lands and houses came under the control of Tati herself, but she did not show any willingness to divide them according to the principles of inheritance law. Consequently the one sister and three brothers brought the case to the religious court of Cibadak (West Java) to seek a division of the inheritance on the basis of Islamic law. The conflict arose because Tati herself had refused to divide the estate, arguing that all of her mother's wealth had been given to her as a gift when her mother was alive, beside the fact that she was the only child and so had the right to receive the whole estate. On the other side the sister and brothers argued that they should receive shares, since according to Islamic law the sister or brother of the deceased was supposed to have rights in the estate as they were included in the group of *dhaw al-furu d*. In addition, following Islamic principles, those relatives could not accept the argument that all the deceased's wealth had been given as a gift to the daughter since it was done without their knowledge, besides having exceeded one third of the whole estate (Varia Peradilan 1998: 54-62).

As plaintiffs in the religious court, the sister and brothers argued that the judge should do justice by dividing the inheritance in accordance with the regulations of Islamic inheritance as well as the *Compilation of Islamic Law*. Their demand focused on their claim to the estate arising from their position as relatives having a close blood relationship with the deceased. In their view the only daughter had indeed a right to part of the estate but only to the extent of one half of the whole estate, as indicated clearly in the Qur'an. The remaining half should be given to the sister and brothers to be shared among them. (*Petitum* of plaintiffs, judgment of the Religious Court of Cibadak No. 316/Pdt.G/93/PA.Cbd. Varia Peradilan 1998: 65-66). The plaintiffs asked the judge to take control of the estate with a view to dividing it amongst the all the entitled heirs.

The religious court seemed to respond positively to the demands of the plaintiffs. The judge stated that it was the central teaching of Islamic inheritance law that the heirs must be given all their rights to the estate. That was why Islamic law forbade a Muslim to make a gift exceeding one third of their total wealth, so as to secure the heirs' rights of inheritance. Citing these Islamic principles, the judge then rejected the gift declared unilaterally by the deceased in excess of one third of her whole wealth. The daughter had therefore been entitled to only one third of the inheritance. The remaining two thirds would be divided among all the heirs. The court should confiscate the deceased's wealth already seized by the daughter before the process of inheritance could proceed (Varia Peradilan 1998: 71-74). In its judgment the primary religious court seemed thus to follow the opinion of the majority of Muslim jurists, according to which the daughter ought to receive a portion of one half while the remaining one half would be distributed among all the sisters and brothers. The two steps in dividing the estate were as follows: *first*, one third of the deceased's entire wealth was given as a gift to the daughter; and then *second*, the remaining wealth was divided among the heirs in such a way that the sole daughter received half and the deceased's sister and brothers the other half. Needless to say in this latter allotment the brothers inherited in a ratio of 2:1 against the sister. In the end therefore, the daughter received some two thirds of her parent's property.

The division of the estate by the primary religious court did not satisfy the daughter, who then brought the case to the higher court on appeal. Interestingly, in response to the plaintiffs, the higher court was inclined not to see the issue as a matter of estate allotment (as decided by the lower court) but more as a question of the law of procedure concerning the basis on which the case had been brought to the court. In the eyes of the higher court, the decision of the primary court could not be supported since the case was not presented for the plaintiffs in accordance with standard procedure. The delegation by the sister and brothers (as plaintiffs) of the third party to represent them was not supported by valid evidence as demanded by the regulations. Moreover, they did not express their case clearly before the court. Apart from that, the judges in the higher court decided also that the lower court had given a decision without relying on original and strong proofs. The judgment was thus presented with no legal and procedural basis (Decision of the Higher Religious Court of Bandung (West Java), case No. 64/Pdt.G/1994/PA.Bdg., Varia Peradilan 1998: 77). It was thus on the basis of procedural arguments that the higher court set aside the decision of the primary court to confiscate from the daughter the deceased's property which she had

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

seized. In sum, although it could not offer direct arguments on the process of inheritance, the higher religious court rejected the decision of the lower court. The appeal presented by the daughter was thus essentially accepted in the higher court.

The case did not, however, come to an end with this decision. The plaintiffs in the primary court could not accept the higher court's decision, and so brought an appeal to the highest appellate tribunal, the Supreme Court. They argued that the decision was unacceptable since it deprived them of their rights of inheritance. Further, according to the law of procedure, they as litigants could delegate a third party the authority to present their case at this level. The judgment of the higher religious court had been hastily made, as it was not supported by valid evidence (Plaintiffs' arguments summarised in the Supreme Court Decision No. 122 K/AG/1995, *Varia Peradilan* 1998: 83-84). Beside that the court's argument concerning the evidence was obscure since it did not refer to specific evidence.

The Supreme Court rejected the decisions made in both the primary and higher religious courts, mainly on procedural grounds, but surprisingly did not uphold the claim of the plaintiffs. In the view of the Supreme Court judges, the judgment of the higher court regarding the delegation by the plaintiffs was wrong in law. According to the law of procedure, delegation could in fact be made intermittently, so that the authorization given to certain people might be repeated a number of times. This could be seen as an affirmation of what had been decided by the lower religious court, where the plaintiffs' delegation of a third party was not seen as transgressing the law of procedure. However, it did not necessarily mean that the Supreme Court agreed with the lower court's decision concerning the division of the estate. In the end the Supreme Court decided that the daughter should be the sole recipient of the estate since her status automatically excluded the deceased's sister or brother from shares (*Varia Peradilan* 1998: 84). This meant that the deceased's property that was already under the control of the daughter could not be confiscated by the court for redistribution among the other heirs. According to the Supreme Court, the claims of the sister and brothers to a share of the estate could not be supported, and their appeal was dismissed.

A slightly different process may be seen in the case of *Inaq Putrahimah v. Nur Said etc.*, which occurred in Mataram, Lombok, West Nusatenggara in the early 1990s. A woman, Amaq Nawiyah, died leaving a huge parcel of land under the control and management of her brother, Amaq Irawan. The land had not been processed as an inheritance until Amaq Irawan himself passed away some years later, at which time the land was then given to the only daughter of Amaq

Nawiyah, i.e., Inaq Putrahimah. A conflict over the property however arose as the children and grandchildren of Amaq Itrawan, viz., Nur Said, Muslim, Ma'rif and Inaq Mas'ud, could not accept that only the daughter of the deceased could receive a share of the land as an estate. These offspring believed that, in accordance with Islamic inheritance law, they had a right to the land especially as they had a close blood relationship with the deceased. The daughter refused the demand of those relatives, claiming that she was the only heir through her entitlement to the estate of her mother, Amaq Nawiyah. The relatives brought the case to the religious court (Varia Peradilan 1996: 110-118).

Surprisingly, the primary religious court did not accept the plea of these plaintiffs, holding that they had not presented valid arguments in support of their claim. They could not even give proof of the extent of the land to which they laid claim. Consequently there was no ground on which the court could decide in favor of the plaintiffs (Decision of the Primary Religious Court of Mataram No. 85/pdt.G/1992/V/PA.MTR., Varia Peradilan 1996: 118). These relatives appealed to the Higher Religious Court. Looking at the case more thoroughly, the judge in this higher court saw the main point of conflict as arising from the failure to divide the inheritance in the period immediately after Amaq Nawiyah passed away. The land was thus basically owned as a corporate property by the two heirs, i.e., the only daughter (Inaq Putrahimah) and the only brother (Amaq Itrawan). As an estate, the land should consequently have been divided between the two heirs in equal shares (Decision of the Religious Court of Appeal of Mataram No. 19/pdt.G/1993/PTA.MTR., Varia Peradilan 1996: 129). Furthermore, as the brother had also passed away, his share ought to have been divided among all his heirs, i.e., his surviving spouse and all offspring (children or grandchildren) (Varia Peradilan 1996: 129). The higher religious court saw this as the best way of rendering justice to all the heirs as well as of following the regulations on dividing the estate according to Islamic law. In sum, the daughter could not take the whole land but had to share the estate with all her surviving relatives.

The daughter appealed against the decision laid down by the Religious Court of Appeal. She argued that her uncle (Amaq Itrawan) could not occupy the same position as her in terms of rights to the inheritance since she was the child of the deceased while the uncle was a mere relative, having a weaker blood relationship with her mother. To give him a half portion of the estate would mean that someone who was not a child of a deceased person now had the same potential of inheriting as that person's legitimate offspring. The Supreme Court accepted this argument. In the opinion of the judges, the higher religious court had been mistaken to give

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

the daughter only a half portion of the state. According to the law, they held, as long as there remains a child, either male or female, the rights of other relatives are excluded, except for those of parents and a surviving spouse (Decision of the Supreme Court No. 86.K/AG/1994, July 27, 1995, *Varia Peradilan* 1996: 140-41). This meant that the child of the deceased should receive the whole estate when there were no parents or surviving spouse, irrespective of whether there were surviving sisters or brothers or their descendants. What is most interesting is that, according to the Supreme Court judges, the exclusion of those blood relatives from a share was based mainly on the interpretation of the word “child” (*walad*) used in the Qur’an 4: 176 as connoting both male and female children.¹³ The power to

¹³As described in the decision of the judges of the Supreme Court, understanding the meaning of the term *walad* as a child without any gender discrepancies has basically adopted from Ibn Abbas’ opinion (he himself was one of the earliest leading interpreters of the Qur’an) when he described the verse of the Qur’an 4: 176: “*Yastaftu naka quli-Alla hu yufti kum fi al-kala lah, in imru’un halaka laysa lahu waladun walahu ukhtun falaha nishfu ma taraka...*” (“They ask thee for a legal decision. Say: God directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no *child*, she shall have half the inheritance...” Italics mine. Translation from Ali, 1946: 235-236. See also Ibn Abbas’s opinion in *H usayn al-T aba t aba ’i* 1970: 156: Akhrajah ‘Abd al-Raza q wa ibn al-Mundzir ... ‘an ibn ‘Abba s: “Li al-binti al-nis fu wa laysa li al-ukhti shayun, wa ma baqiya fali’us batihi”). It is interesting to note here that in the view of some Indonesian Muslim scholars as well as judges in the religious courts, the Supreme judges’ reliance on Ibn ‘Abbas interpretation of the meaning of the term *walad* in the Qur’an 4: 176 as a legal basis for giving the daughter the right to override the sister or brother of the deceased may be mistaken. In their opinion the verse 4: 176 is restricted to the case of *kala < lah* (the deceased having no descendants or ascendants as heirs) so that the principle of the daughter (*walad*, interpreted as including a female child) to block the brother or sister from receiving the inheritance cannot in fact be implemented beyond the *kala lah* cases. The interpretation of the term *walad* in the Qur’an to connote not only a male but also a female child has in fact been a common view of many well-known Muslim Qur’anic exegetes in addition to Ibn ‘Abbas alone. But to use it as a pretext to allow the daughter to override the brother or sister of the deceased is baseless, since a general rule cannot in principle be deduced from a specific verse. In the view of Rachmat Syafe’i (a legal scholar from the Institute of Islamic Studies Sunan Gunung Djati, Bandung, West Java), the decision of the Supreme Court that the claim of the daughter overrides that of the brother or sister is in fact

exclude the relatives from the inheritance is thus not only held by a son but also by a daughter. On this ground the Supreme Court decided that the daughter, Inaq Putrahimah, ought to receive the entire estate from her mother, and the offspring of Awaq Irawan were not entitled to a share of the property.

Analysis: The Extent of the Postulate of National Inheritance Law

It is clear from the above two cases that the Supreme Court was inclined to see the daughter not only as an heir entitled to as much as one half of the estate but also as having rights which override those of the consanguine sister or brother of the deceased. Although it is still not clear on what basis the Supreme Court judges came to their decision, it seems obvious that they considered the daughter to have a status no lower than that of a son, at least in terms of her power to exclude the sister or brother from the share. If this is correct, it may be that the Supreme Court saw the case as a potential starting point for a more positive response to the need for gender equality in Islamic inheritance. For although the daughter would not have had the same position had there been a son in the equation, his absence meant that she could claim the whole estate given the weaker position of other relatives in inheritance. The main consideration for dividing the estate taken by the judge in the Supreme Court was therefore not the sex but the degree of proximity of the heir to the deceased.

It seems clear that the logic of inheritance based on closeness to the deceased can contradict the logic of gender commonly followed in Islamic inheritance. Based solely on the latter, it would seem impossible for a female to override a male

more in line with the principle of the Shi'ite inheritance law, according to which the right of the brother or sister to the estate is automatically excluded by the presence of a child, either male or female. Syafe'i understood Ibn 'Abbas merely to state that when a daughter survives together with a sister of the deceased and probably a brother or other heirs of the *'as a bah* group, the estate will be given one half to the daughter and the other half for the *'as a bah*, while the sister will get nothing. This leads to the conclusion that according to Ibn 'Abbas himself the brother will be entitled to receive the estate when he survives together with the daughter. This is different from the decision of the Supreme Court that states that the brother will be absolutely excluded from the inheritance if there is a child of the deceased. See: Syafe'i 1999: 6-8; Baidlowi 1999: 13-18; Ja'far 1996: 142-144.

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

under any circumstances. The process of dividing the Islamic estate has usually been interpreted in such a way that the male will not be denied his share as a result of the presence of a female heir. That is why most Muslim jurists are in agreement not to give the daughter the same status as that of a son when she alone has to share the estate with the deceased's sister or brother. Giving the daughter the right to exclude consanguine relatives (especially the brothers) would undermine the privileged position of the male in the system of Islamic inheritance. This makes the Supreme Court decision interesting: it appears to have disregarded, in this instance at least, the logic of gender inequality embedded in Islamic law. In the case of Tati Supiati above, her stronger position as the only daughter gave her rights, in the court's eyes, which blocked the sister and brothers from a share..

The fact that Muslim jurists do not agree concerning the status of the daughter as against the sister or brother may have been another reason for the Supreme Court decision to uphold the appeal. The controversy seems to be rooted in the premise that, beyond its clear statement on the daughter's right of inheritance, the Qur'an is obscure when it comes to such cases as the rights of a sole daughter when there are other relatives of the deceased. The Qur'an provides little guidance in this situation. Consistently with the patriarchal character already developed in Islamic inheritance, most Muslim jurists prefer to allot to the daughter only what is mentioned in the Qur'an, i.e., one half of the estate, while the remaining one half is given to the sister(s) or brother(s). This of course means that the daughter only shares equally - a strange view, given that she is the offspring of the deceased. This was what appeared to be challenged by the judges in the Supreme Court: they seemed to argue that the allotment of one half or two thirds of the estate towards the daughter(s) was indubitable, since it is clearly mentioned in the Qur'an, but this did not mean that the daughter could not block the other group of the heirs in the same way as a son. This is because the daughter is understood to have intrinsically the same position as the son (although only in the absence of a son), particularly when viewed from their relationship with the deceased. Thus, the right of the son to block other inheritors should also be extended to the daughter or daughters.

Such an interpretation was only possible because of two factors: *first*, that the divine sources of Islamic inheritance do not give an exact explanation of the position of a daughter when inheriting together with the sister or brother; and *second*, that a few Muslim jurists (especially Shi'ite) had already accepted the principle of the daughter blocking other relatives. We can say therefore that the judges had a valid Islamic justification for their decision, and took advantage of

them. Even though most Muslim jurists might not have agreed with the Supreme Court's decision, the fact that there were many different opinions in regard to the case gave the judges a reasonable basis for a decision in accordance with their own agenda. In other words, the existence of a grey area in Islamic jurisprudence gave the court a window of opportunity to introduce the notion of gender-neutral justice.

As far as the factor of the heir's distance from the deceased is concerned, it seems that the judges were much influenced by the civil law concept of the grouping of the heirs, as espoused in the KUHP. As explained, the heirs in civil law tradition are classified into four groups on the basis of their relationship with the deceased: the closer to the latter, the greater the rights to the estate and to exclude others. So Tati Supiati, as daughter, was closer to the deceased than her uncles and aunts. The logic behind this grouping is in essence the result of a tradition that sees the estate as the means for the deceased to fulfill his or her responsibility towards the family. Priority should thus be given to the persons closest in relation to the deceased. Other heirs will share only insofar as closer do not exist. This fits with the nuclear family model where the familial members are basically only father, mother and children. However, this logic is in contrast with that developed in Islamic inheritance, where the estate is seen as the means for the deceased to fulfill his or her continued responsibility towards God, resulting in a division of the estate among all persons entitled to receive the share in accordance with God's revelation. The logic of excluding more remote heirs is thus not quite so intense in Islamic inheritance since the division of the estate is not based on the heir's relationship with the deceased but on entitlement according to the divine sources. Seen from this standpoint the Supreme Court decision seems to have been derived more from the secular logic of the heir's distance from the deceased. According to this reasoning, the gender of the child is not a factor: as long as one has a closer relationship to the deceased, one will automatically exclude the remoter.

One may wonder why the Supreme Court was so persistent in deciding the case according to the logic of civilian groupings of heirs rather than following the opinions of most Sunni Muslim jurists. The answer would seem to be that the judges could in this way close even further the gender gap embedded in Islamic inheritance practice. In so doing, their main concern was thus not the share of the daughter *per se* but more how to empower her so that she might obtain the same amount as the son. And this could be done, in this case, only by giving the daughter the power to exclude the deceased's siblings to the same degree as would a son. This was only a partial solution to the gender equality problem, since the daughter would not be entitled to a share of the estate equivalent to her brother's

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT

Ratno Lukito

were there a brother entitled to inherit. Nevertheless, it represented significant progress. Although the ideal emancipation of the daughter in this case was not fully achieved, the use of civilian logic did enable the judge to deviate from the basic patriarchal character of Islamic inheritance according to which the daughter was at a considerable disadvantage.

The preference of the Supreme Court for the civilian model, in which the closest heir trumps remoter ones, was not without reason. As well as representing an attempt to bridge the gap between Islamic inheritance and other traditions, the Supreme Court's judgment was aimed at spreading national ideals of inheritance. According to national legal norms, gender-neutral justice is one of the most important criteria in the just division of estates. This principle can be realized only if the Supreme Court judges willingly bring Islamic inheritance practice into line with national norms. Thus the decision to grant the daughter the right to exclude the sister and brothers of the deceased was taken primarily in the hope of creating just such a precedent. Hence, although a uniform law of inheritance has yet to be achieved, the judgment of the Supreme Court can be seen as part of the effort to realize such a project. By reducing (where possible) the gender bias embedded in Islamic inheritance, a rapprochement between Islamic law and state legal norms became a more realistic goal.

Conclusion

The two cases presented above show that the Supreme Court judges seemed to be more convinced that the principle of equality and justice for all heirs in inheritance (irrespective of their gender identity) ought to be the primary basis of any resolution in this area. The rights of the female heirs to receive the estate in Muslim inheritance just like their male counterparts should thus be maintained. In this case, such a principle appears to coincide very well with the unwritten national norm of inheritance in the country which appoints the living spouse and children as the primary heirs to an estate, regardless of the sex of the family members. The decision of the judges thus only corroborates the state's position that close family proximity to the deceased outweighs other variables. However, the judges interestingly seemed particularly concerned not to challenge the sacred authority of the basic sources of Islamic law in the case concerned. The decision avoided challenging the question of gender inequality by searching for a precedent in Islamic law that would allow the daughter to inherit fairly and in accordance with the norms imposed in national law. Despite this indirect method of equalizing the

positions of the daughter and the son, the judge has at least successfully infused the idea of gender-neutral justice into the teachings of Islamic inheritance, according to which such contradictions may be reduced.

Seen from the perspective of the encounter between legal traditions in Indonesia, the decision of the Supreme Court in favor of the daughter represents another example of the state's attitude towards non-state normative orderings. In this case, the state's position is clear, namely, that as much as possible those orderings will be brought into line with the spirit of state legal postulates. If a uniform law is still a distant possibility, nevertheless existing state legal norms will be used as a catalyst when accepting those non-state orderings. It is here that we see the persistence of the state in bringing non-state orderings within the scope of the state's interpretation, especially where the state regulations do not yet cover the resolution of the cases. This phenomenon is commonly found in cases brought before the Supreme Court for an appellate judgment. The point is clearly expressed in the inheritance cases explained above: the position of the Supreme Court obviously reflects a trend whereby the teachings of Islamic inheritance will be interpreted in such a way as to correspond positively with state legal norms, even though in so doing the judgment may contradict the opinions of most Muslim jurists in the country. It is certainly through such a strategy that efforts can be made, especially in judicial decisions, to reduce the gender bias entrenched in Islamic inheritance and to push it in the direction of state norms. It is also the case that whenever there is a legal problem as a consequence of substantive contradiction among traditions living in the country, the preference will always be towards aligning those traditions with state legal norms.

References

- ALI, Abdullah Yusuf
1946 *The Holy Qur-an: Text, Translation & Commentary*. Washington, D.C.: American International Print Co.
- BAIDLOWI
1999 'Ketentuan Hak Waris Saudara dalam Konteks Hukum Islam.' *Mimbar Hukum* 44: 12.
- CAMMACK, Mark
2002 'Islamic Inheritance Law in Indonesia: The Influence of Hazairin's Theory of Bilateral Inheritance.' *Australian Journal of Asian Law* 4: 295.

GENDER-NEUTRAL INHERITANCE IN INDONESIAN SUPREME COURT
Ratno Lukito

ENGELBRECHT, W.A. and E.M.L. ENGELBRECHT

1960 *Kitab-Kitab Undang-Undang dan Peraturan-Peraturan serta Undang-Undang Dasar 1945 Republik Indonesia. De Wetboeken Wetten en Verordeningen Benevens de Grondwet van 1945 van de Republiek Indonesië.* Brussels and Leiden: Les Editions A. Manteau S.A. and A. W. Sijthoff's Uitgeversmaatschappij N.V.

HANSTEIN, Thoralf

2002 *Islamisches Recht und Nationales Recht: Eine Untersuchung zum Einfluß des Islamischen Rechts auf die Entwicklung des modernen Familienrechts am Beispiel Indonesiens, Part 2.* Frankfurt am Main: Peter Lang.

HAZAIRIN

1958 *Hukum Kewarisan Bilateral menurut Al-Qur'an.* Jakarta: Tintamas.

JA'FAR, Gapuri

1996 'Masalah Anak dan Saudara dalam Kewarisan Islam.' 134 *Varia Peradilan* 134: 141.

SYAFE'I, Rachmat

1999 'Kajian terhadap Putusan Mahkamah Agung tentang Kewarisan Saudara Kandung dengan Anak Perempuan.' *Mimbar Hukum* 44: 5.

TABATABA'I, Muhammad Husayn al-

1970 *Al-Mi za n fi Tafsir al-Qur'a n*, Vol. 5. Beirut, Lebanon: Mu'assasah al-'alami lil-mat bu 'a t.

THALIB, Sajuti

1984 *Hukum Kewarisan Islam di Indonesia*, 2nd ed. Jakarta: Bina Aksara.

VARIA PERADILAN

1996 *Year XI*, No. 130, July.

1998 *Year XIII*. No. 150, March.