

THE POSITION OF ISLAMIC LAW IN THE INDONESIAN LEGAL SYSTEM (1900-2003)

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ABSTRACT

This article examines the development of Islamic law in Indonesia in a chronological way within the contexts of the Dutch colonialism up to 1942, the Japanese occupation from 1942 to 1945, and the post-independence to date. It analyzes such development from the perspectives of continuity and change theory. This analysis is focused on three main themes, namely: (1) the laws on issues in worshiping practices, human relations, and crimes; (2) the subjects of the laws as found in the figures of kyais (Islamic scholars), prominent individuals influenced by either Wahhabism or Western education, and leaders of organizations; and (3) implementation of Islamic laws on women affairs. This study revealed that a number of changes in Indonesian Islamic law over the last one hundred years in which moderate Shafiite and Sufi domination of Indonesian Islamic discourse was seriously challenged by the most rigorous and literalist school of Islamic law as represented by Hanbalisme.

INTRODUCTION

This paper chronologically surveys the development of Islamic law in the Indonesian socio-political setting under the Dutch (-1942), Japanese (1942-1945) and post-independence (1945-to present) governments. The development will be analyzed from the perspective of continuity and change in three main areas. First of all, it underlines the continuity and change in theme from pure ritualism to human interactions and even criminal law. The second dimension of the focus is on theoretical and practical legal needs in the light of human resource development, by concentrating on the change in Indonesian Islamic legal authority from kyais (Traditionalist-Islamic boarding school graduates and Javanese-sufi style Islamic leaders) to self-educated and Wahhabite-inspired pan-Islamist legal thinkers, new intellectuals ("secular" nationalist graduates of Dutch educational system), and then new Muslim intellectuals (Muslim graduates of Dutch, and then Western, institutions of higher education); from independent legal thinkers to collections of the legal opinions of Islamic organizations; or from Shafiism to Wahhabite-inspired "pan-Islamism" (the jargon "Return to the Qur'an and the Sunna"-inspired non-madhhabism), state authorities, the House of Representatives and then the People's Consultative Assembly; from "yellow" and "white" fiqh texts to state laws ("positivism"). Finally, this study pays a great deal of attention to women's voices on the impact of implementation of Islamic law on their affairs.

RESULTS AND DISCUSSIONS

At the turn of the 20th century, the pesantren (Islamic boarding school) was the main center of Islamic learning, and especially law, in Indonesia. The pesantren offered instruction in Shafiite, ritual-oriented Arabic texts. Most Islamic legal authorities were kyais who published little that was original, since the pesantren educational system heavily depended on rote learning, while neglecting writing skills (Dhofier, 1980; Bruinessen, 1994). Indeed, the pesantren was little better than a high school. For advanced studies, graduates traveled to Mecca, Medina or Cairo (Atjeh, 1957). Their references were mostly Arabic, since they did not know Dutch or English. They followed such introductory books of Islamic law as *Fatḥ al-Mu‘īn*, *Taḥrīr aṭ-Ṭullāb* and *al-Bājūrī*. Although Shafiites, they did not refer to al-Shafi‘ī’s own works like *al-Umm* (or *al-Risālah*). Instead, they used the *Tuḥfah* of Ibn Ḥajar al-Haiṣamī (d. 1565) and the *Nihāyah* of ar-Ramlī (d. 1596), both of them commentaries on the Shafiite *Minhāj aṭ-Ṭālibīn* of Nawawi (d. 1277) (Shiddieqy, 1980; Bruneissen, 1992; and Steenbrink, 1984). Nor, according to the Reformist-oriented historian Deliar Noer, did they question the rationale of the fatwās they received (Noer, 1984). They did not allow *talfīq* (moving from one Islamic school of law to another) or *ijtihād*. Moreover, as sufioriented scholars, they indulged in popular Islamic practices like tomb-visiting and *tahlīlan* (Federspiel, 1970). Yet while these characteristics remained true until the 1970s, a new kind of Islamic legal authority had emerged in the early twentieth century. This new authority was Wahhabism, introduced by such supporters as Ahmad Dahlan (founder of the Muhammadiyah in 1912), Ahmad al-Shurkati (founder of Al-Irsyad in 1913) and A. Hassan (founder of the Persatuan Islam or Islamic Unity in 1923), who called on Indonesian Muslims to return to the Quran and the Sunna (Wahyudi, 1998). Their Wahhabite, Salafite, Puritan and Reformist orientation led them to criticize the “old” authority of the kyais, for which reason the former were called the Young Group (Kaum Muda) as compared to the latter, called the Old Group (Kaum Tua). Like kyais, they were, however, self-educated, knew only Arabic, and never attended Dutch-sponsored universities. They marked the emergence of a new genre of Islamic legal discourse, since they introduced Hanbalite authors like Ibn Taymiyya and Ibn Qayyim to a primarily Shafiite community (Shiddieqy, 1987).¹ They were committed to purging the practices of their co-religionists of non-Islamic influences, to reopening the gate of *ijtihād*, to crushing *taqlīd* and to allowing *talfīq* (moving from one school of law to another), by introducing the study of comparative Islamic law and legal theory. These reformists, according to Martin van Bruinessen, introduced not only Sayyid Sabiq’s puritan *Fiqh as-Sunnah*, but also Ibn Rushd’s comparative *Bidāyah alMujtahid* (Bruinessen, 1990), since by this date few classical Islamic texts had been translated into the vernacular. They also condemned several traditionalist practices, especially those of “T.B.C.,” standing for *takhayyul* (superstition), *bid‘ah* (“innovation” and deviating) and *churafat* [*khurafāt*] (myth).

At the political level a very significant change took place. In 1901 the Dutch Queen Wilhelmina started her Ethical Policy, designed to improve the welfare of the people of the East Indies by providing them in particular with modern education (Vlekke, 1945). This proved significant for an entire generation, including the young student and future president Sukarno, who was eventually to earn a B.A. in Architecture (on the development of Indonesia educational system, Veur, 1969). He and his colleagues would later be called “wong sekolahan” by their contemporary Indonesians for having been educated in Dutch modern schools as opposed to “wong pondokan” (graduates of the pesantren). These “new intellectuals” unsurprisingly founded a nationalist movement that was “secular” in tone. Three years after the establishment in 1924 of

¹ Al-Kalali, co-founder of the Reformist journal *Al-Imam*, lent Hasbi Ash Shiddieqy (later became the initiator of Indonesian fiqh) Ibn Taymiyya’s *Fatāwā* and *Majmu‘ al-Rasā’il*, as well as Ibn Qayyim’s *Zād al-Ma‘ād*, *Badā’i‘ al-Fawā’id* and *Syifā’ al-‘Alīl*.

the Indonesian Students Association by Muhammad Hatta (later the first Vice-President of Indonesia), Sukarno founded the Indonesian National Association, which he transferred to the National Indonesian Party the following year. Likewise in 1928, the Youth Congress in Batavia (now Jakarta) adopted the Youth Oath, which called for one single nation (Indonesia); and one national language (Indonesian language). Nationalism soon grew stronger when in 1921 Islamic Nationalism, represented by the Islamic Association (Sarekat Islam), split into a White Islamic Association (following Tjokroaminoto) and a Red Islamic Association (following Semaun). The former was Muslim, the latter Communist (Legge, 1965; Dofier, 1984; Jailani, 1959; Korver, 1982). Thus the Islamic Association's efforts to "perfect Indonesian Nationalism by adding the dimension of monotheism-religiousness-Islamism," failed (Abdulgani, 1990). It was incapable of bridging the principal conflict of the decade (Jay, 1957; Muhtarom, 1975). Unfortunately for Sukarno, however, he and his supporters were sentenced at about this time to a four-year prison term for challenging Dutch authority. In his political exile, Sukarno was sent reformist books by A. Hassan: these writings apparently had a considerable effect on Sukarno, with the result that he later emerged as the leading "new intellectual." Sukarno was neither trained as an Islamic legal scholar nor did he know Arabic, but he wrote a number of articles to criticize "narrow-minded" Islamic legal practices. In Bengkulu in 1930, for example, he protested against the Muhammadiyah's practice of separating men and women in the mosque. He also encouraged Indonesian Muslims to use soap in place of dust to cleanse their bodies of a serious uncleanness (an-najāsah al-mugallaḏah), and to use modern brush and paste in place of the siwāk (a piece of 'araq wood) to clean their teeth.

According to Sukarno's reasoning, the Prophet Muhammad only taught Muslims to use the ancient ways of cleaning because there were no such modern tools as soap and brushes. The spirit of the law, Sukarno argued, obliged a Muslim to clean himself using the best tool available. "For me, anti-taqlidism means not only 'returning' to the Qur'an and Hadits, but also 'returning to the Qur'an and the Hadits with the help of knowledge and science.'" (Sukarno, 1963; Dahm, n.d.) The traditionalists, who were deficient in writing skills, failed to respond to Sukarno's criticism. The only reply came from the "new Muslim intellectual" Muhammad Natsir (later Prime Minister of Indonesia). He discussed Sukarno's ideas, and thereby helped create the Nationalist versus Muslim conflict before, during and after the independence of Indonesia. The young, self-educated reformist writer Mohammad Hasbi Ash Shiddieqy, like Natsir, criticized Sukarno's rational interpretation of Islam. Ash Shiddieqy even categorized Sukarno as falling into the rationalist-secularist group, which in his eyes included men like Ṭāhā Ḥusain, 'Alī 'Abd ar-Rāziq (Egypt), Nazira Zain ad-Din (Lebanon) and Mirza Ghulam Ahmad (India) (Shiddieqy, 1940a, 1940b).

The Muhammadiyah was quick to adopt the Dutch educational system, and started to produce high school graduates. These "new Muslim intellectuals" were trained in modern subjects, including Dutch and English, but received a very limited grounding in the principles of Islamic law. In 1927 the Muhammadiyah established the Majlis Tarjih to provide its members with Islamic legal solutions to their daily problems. (The choice of the name Majlis Tarjih rather than Majlis Ijtihad may well have been an indication of the Muhammadiyah's lack of confidence in the abilities of its human resources). On the other hand, the Traditionalists established Nahdlatul Ulama in 1926 to defend their interests against the criticism of such Wahhabi-inspired reformist movements as the Muhammadiyah, Al-Irsyad and Persatuan Islam. Unlike the Muhammadiyah, the Nahdlatul Ulama rejected the Dutch educational system. As a result, the graduates of pesantrens were for their part poorly grounded in modern subjects, despite their mastery of Arabic and Islamic disciplines. Like the Muhammadiyah, the Nahdlatul Ulama established a legal council called the Bahtsul Masa'il (Problem Forum). Both institutions became new legal authorities for their respective Muhammadiyah and Nahdlatul Ulama followers. In its Mu'tamar (National Congress), held in Banjarmasin (South Kalimantan) in 1935, the Nahdlatul Ulama, for example, had to answer a critical question: Were Muslims obliged to defend the Indies ("Indonesia"), which was

under a Dutch non-Muslim government, against foreign at-tack? The reply of thousands of Nahdlatul Ulama scholars in attendance at the Bahtsul Masa'il session was affirmative. It was obligatory for ["Indonesian"] Muslims to defend Dutch-controlled "Indonesia" against foreign attack. Their reasoning was that "Indonesian" Muslims were free to practice their religion, and that there had been Islamic kingdoms before the coming of the Dutch. Their fiqh argument was based on Ba 'Alawi's pesantren text Bugyah al-Mustarsyidīn. Their positive answer, according to Abdurrahman Wahid (former President of the Republic of Indonesia), reflected Ibn Taymiyyah's theory of ta'addud ala'imma i.e. being realistic and effective. Muslims are allowed to have more than one leader (or state) (Duta Masyarakat, 2003).

On January 11, 1942, i.e., only seven years after the Nahdlatul Ulama's National Congress in Banjarmasin, a number of "Indonesian" cities started falling to the Japanese army. To defend themselves against the allied forces, the Japanese established a force called Defenders of Indonesia's Homeland² and an Investigating Committee for Preparatory Work for Indonesia's Independence.³ The latter was founded on April 29, 1945, the birthday of the Japanese Emperor Hirohito, to further confirm an earlier promise to give independence to

Indonesians. The 60 members of the Preparatory Committee for Indonesia's Independence included such "new intellectuals" as Dr. Radjiman Wediodiningrat (chair), Sukarno, and Muhammad Hatta, as well as "new Muslim intellectual" like Ki Bagus Hadikusumo and the "traditionalist" K.H. Abdul Wahid Hasyim (the father of former President Abdurrahman Wahid). In a further attempt to gain Indonesian Muslim support, the Japanese established Shumubu (later to become the Ministry of Religious Affairs). On June 1, 1945, the Investigating Committee for Preparatory Work for Indonesia's Independence formed a smaller committee consisting of Sukarno, Hatta, Muhammad Yamin, Abdul Kahar Muzakir, Wahid Hasyim, Abikoesno Tjokrosoejoso, Haji Agus Salim and A.A. Maramis, the last of whom was the only non-Muslim. This smaller committee, known as the Preparatory Committee for Indonesia's Independence,⁴ replaced the Investigating Committee for Preparatory Work for Indonesia's Independence. At its first meeting on the same day, Sukarno gave a speech, in which he outlined the Pancasila (five principles), later enshrined in the Jakarta Charter or first draft of the Preamble to the 1945 Constitution. The first principle of the Pancasila in this text was Belief in God-with Obligation for Muslims to Practice Islamic law- known in Indonesian as the "seven words." However, on August 18, 1945, not long before the Preparatory Committee for Indonesia's Independence ratified the 1945 Constitution, Hatta successfully lobbied the Muslim figures Ki Bagus Hadikusumo, Kasman Singodimedjo, Wahid Hasyim and Teuku Hasan to drop the seven words.

A Japanese Admiral, whose name Hatta did not remember, had informed him that Eastern Indonesia would not join the Republic of Indonesia unless the seven words were removed. In their place, Hatta suggested the words "One God," so that the accepted formulation of the first principle of Pancasila would read "Belief in One God." The four other principles are (2) Just and Civilized Humanity, (3) the Unity of Indonesia, (4) Democracy Guided by the Inner Wisdom of Unanimity Arising from Deliberations amongst Representatives, and (5) Social Justice for all Indonesians. At an earlier meeting of the Committee Wahid Hasyim had also responded to the crucial articles 6 and 29 of the draft of the 1945 Constitution. To article 6, which stated that the "President and Vice-President of Indonesia should be native Indonesian," he added the adjective "Muslims." Wahid Hasyim suggested that the Committee furthermore replace article 29, which read "The State guarantees the freedom of all citizens to embrace and practice the religion of their choice," with "The state religion is Islam, with a guarantee for non-Muslims to practice their religions."

² Pembela Tanah Air.

³ BPUPKI or Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia.

⁴ PPKI or Panitia Persiapan Kemerdekaan Indonesia

(Anshari, 1976); Zaini, 1998; Wahyudi, 1998) His efforts to have Islam and Islamic law incorporated into the Indonesian Constitution were foiled, however, by Hatta, who not only rejected these amendments but also demanded that the word *Mukaddimah* (of Arabic etymology) be replaced with the more Indonesian term *Pembukaan* (Preamble) (Bahar, 1995). However, the 1945 Constitution was only temporary: the first general election was held on December 15, 1955 to elect representatives to the *Konstituante* whose task it would be to draft a permanent constitution. In the *Konstituante* Meetings from 1956 to 1959, Muslims and Nationalists could not reach an agreement over the state foundation: *Pancasila* or Islam. The Nationalists wanted to return to the 1945 Constitution, while the Muslims defended the Jakarta Charter. They failed to reach an agreement, since neither side could win over two-thirds of the representatives (the Muslims had 230 seats, the Nationalists 286) (Hatta, 1977; Lev, 1966). Soon another conflict was to pit Muslims and Nationalists against each other.

In August 1949, Maridjan Sekarmadji Kartosuwirjo (a graduate of a Dutch high school) (Pinardi, 1964; Boland, 1982) declared an Indonesian Islamic State. The *Qānūn Asāsī* (Constitution) of this inchoate nation stated that “Both the basic values and the law which is applied in the Indonesian Islamic State are Islamic,”⁵ (article 2) and “The highest law is that of the Qur’an and the Hadits Sahih” (article 2:2). Muslim responses to the establishment of the Indonesian Islamic State were mixed. The Congress of Indonesian Muslims, representing Traditionalist and Reformist Muslims, held a meeting on December 20-25, 1949. Congress participants, who aspired to establish an Islamic State in Indonesia but through constitutional channels, issued a policy statement to the effect that they did not officially support the rebellious Indonesian Islamic State (Shiddieqy, 1950). Many Muslims however supported Kartosuwirdjo, foremost among them Kahar Muzakkar. “Since August 1, 1953,” proclaimed Muzakkar, “South Sulawesi had become a part of the Indonesian Islamic State.” (Verveij, 1989; Bruinessen, 1992) On September 21, 1953, Daud Beureueh followed suit, by declaring Aceh as a part of the Indonesian Islamic State (Sjamsuddin, 1985). It was not however until June 4, 1962 that Kartosuwirjo was captured. His execution in August of 1962 was followed only a few months later by Beureueh’s decision to sign the Aceh Peace Accord (Sekneg, 1986) and thereby put an end to this experiment in Shari’a-based state-building.

However, at the theoretical level, some prominent legal thinkers emerged. The self-educated Reformist Hasbi Ash Shiddieqy, for example, developed a notion of *fiqh* that he saw as appropriate to Indonesian society (Shiddieqy, 1961). To avoid misunderstanding, Ash Shiddieqy said that *fiqh* is part of the Shari’a, since the latter covers the laws of belief, moral and practice, whereas the former may be technically understood as “the laws of Shari’a deduced from their proofs.” (Shiddieqy, 1976) *Fiqh*, for him, is of three kinds: Quranic *fiqh* (the *fiqh* that the Quran clearly mentions), Nabawī *fiqh* (the *fiqh* clearly expressed in the *ḥadīṣ*) and *ijtihād fiqh* (the laws derived through the *ijtihād* of *mujtahids*) (Shiddieqy, 1953, 1952, 1961). *Ijtihād fiqh*, as the core of Indonesian *fiqh*, is dynamic and elastic, since it changes in response to the needs of time and space (Shiddieqy, 1953, p. 35; 1975). In addition, he felt that the local character of Indonesian *fiqh* should be backed up by case study (*dirāsāt al-waqā’iyah*) of Indonesian society and of its contemporaries from the perspective of the sociology of law and by study of law in general, other than Islamic, with a view to ascertaining their respective capacities in meeting the particular needs of their own societies (Shiddieqy, 1953, p. 1-62; 1961, p. 34; 1976, p. 16-16). Indonesian Muslims, he insisted, can use the comparative method when the legal status of the problems they are facing has been determined by the *ijtihād* of *maḏhabs*. Ash Shiddieqy divided this comparison into two steps: first to select a ruling from the four schools of law and then to select one from all schools of

⁵ Pemerintah Negara Islam Indonesia [Indonesian Islamic State Government], “Nota Rahasia [Confidential Note],” (22 Oktober 1950/10 Muharram 1370), quoted in Bolland, *The struggle of Islam*, Appendix II: 247.

law, even non-Sunni ones. Both steps are conducted for the sake of ascertaining the most suitable opinion in terms of time and place and the characteristics and interests of Indonesian Muslims. This comparative study should in turn be supported with a comparison of Islamic legal theory as developed in each school of law, which may result in reconciliation between them and perhaps even union. Such comparative studies of Islamic legal theory should, in his view, examine: (1) the fundamentals adhered to by all masters of the schools of law as well as matters about which they disagree, and to do this by investigating their causes; (2) the proofs that they hold and over which they disagree; (3) the arguments and justifications offered by the master of each school of law concerning the disputed proofs and to select the strongest of such arguments. These steps should begin with the establishment of a Faculty, or at least a Department, of Islamic Legal Theory, in some institution of higher learning (Shiddieqy, 1973).

When faced with matters whose legal status was defined by the earliest Muslim jurists as “indifferent,” Indonesian fiqh could use the method of rational deduction, i.e., “determining a ruling based on benefit, general legal maxims, and the effective cause of a ruling.” (Shiddieqy, 1980, 1971) Indonesian fiqh should use one of the following tools, depending on the situation: (1) analogy, which is conducted when necessary and only on matters that do not involve the matter of worship; (2) juristic preference (*istihsān*); (3) public interest (*istiṣlāḥ*), provided that it be of real public interest, general and not exclusive in privileging certain individuals or groups, not be a prohibited benefit, and be decided by the *ahl al-ḥall wa al-‘aqd* (legitimate representatives), always remembering that if a public interest contradicts a *naṣṣ* (Quranic or hadith text), the former specifies the latter in accordance with the tradition “No harm shall be inflicted or reciprocated in Islam” – the key objective at the end of the day; and (4) custom (*‘urf*), provided: that it does not allow prohibited items and vice-versa; that it can bring public good and avoid evil; that it does not contradict the explicit revealed text; and that it be decided by legitimate representatives. Thus Indonesian customs meeting these stipulations could, in Ash-Shiddieqy’s eyes, be considered as one of the sources of Islamic law in Indonesia (Shiddieqy, 1980, 1971, 1975, 1990). The ruling should be decided through a process of collective, independent legal reasoning in the sense of “legislation, whether based on the Quran, Sunna or reason, through consultation under instructions of the head of state.” (Shiddieqy, 1972) For the purposes of such collective *ijtihād*, the mujtahids of Indonesian fiqh should establish a board of *ahl al-ḥall wa al-‘aqd*, which should in turn be supported by two other institutions. The first of these is the political institution, whose members are elected by and from the people and represent the people’s authority. They may not meet the conditions of mujtahid, but should master the task they represent. The second is the legislative institution, consisting of two other components: the mujtahids (*ahl al-ijtiḥād*) and the specialists who are elected by and from the people and represent the people’s authority (Shiddieqy, 1969, 1971, 1980, 1975, 1990). Ash-Shiddieqy’s system as elaborated above was, however, only theoretical; unfortunately, he never provided a practical example of how his Indonesian fiqh would be applied in practice (Yafie, 1985; Hosen, 1985; Wahyudi, 1993; Wahyudi, 1995).

Like Ash Shiddieqy, the Reformist-turned-“new intellectual” Hazairin (who held a Ph.D. in Adat law from a Dutch university) put forward the idea of a “national *maḏhab*.” Like the Reformists, he was against *taqlīd*. Indonesian Muslims should, he insisted, stop importing fiqh from Arab countries, since as a periphery of the Muslim world, and had its own customs. The Arabization of Indonesian culture, typified by the Wahhabite project, had the potential to cause serious damage to the interests of Indonesian Muslims (Hazairin; (Siregar, 1981). One of the cultural differences that he points to is the fact that, while the Arab family structure is patriarchal, families in Indonesia are parental, patriarchal or even matriarchal. Yet a woman about to be married must, according to Shafiism, be represented by a guardian (*walī*). This practice is based on the Arab paternal understanding of Islamic law. It should thus not be the only option available to Indonesian Muslims, not the least because it would take away from the rich variety of Indonesian

customs. He illustrates this by pointing out that, whereas Tapanuli (North Sumatera) has the same family structure as found in Arab countries, so that the guardian must come from the father's side, the guardian in Minangkabau (West Sumatera) cannot come from the father's side, since the father's position is lower than that of the mother. Indeed, Minangkabau is matriarchal. Moreover, Indonesian Muslim jurists should be careful about applying the Shafiite interpretation of this regulation in Java, since the family structure there is parental: where the position of father and mother is equal, the guardian can come from either side. Defending his approach, Hazairin rhetorically asks: "If we in Indonesia would bring this matter of the guardian in line with our societal structures, would we cease to be followers of Muhammad?" (Hazairin, pp. 7-8) Another example of incompatibility, according to him, can be seen in the fact that the Quran does not endorse the appointment of the male agnate relatives (*'aṣābat*). At best, the appointment was based on a Prophetic-tradition or consensus. Indonesian Muslim jurists should therefore form their own consensus, since "what is sound and suitable Prophetic tradition and sound and suitable consensus to the Arabs should not always be considered suitable to Indonesian society." (Hazairin, p. 8) To this end, they should establish a national *maḏhab*, consisting in:

reformed Shafiite teachings on, among other things: a) *zakāt* (alms) and *bait al-māl* (state trust), which was to be adapted to the modern demands of the Pancasila-based Indonesian republic; b) marriage, which was in need of reform in line with the progress of time, and the formation of a society blessed by God, namely, a parental society; c) inheritance, which was to be adapted to the demands of the Temporary People's Advisory Assembly (MPRS), and made to conform to the parental system of inheritance more in line with and suitable to the demands of the Qur'an itself. (Hazairin, p. 6).

In his anticipation of the proposed changes to Indonesia's laws in the 1960s, Hazairin limited the scope of his national *maḏhab* to aspects of Islamic law not yet regulated by state. Hazairin also challenged "reception theory," stating that it did not apply to Indonesia anymore because it had acquired a new non-Dutch Constitution with its independence in 1945. The reception theory, proposed by the Dutch scholar Christian Snouck Hurgronje, proposed that *adat* (customary) law be recognized as the law historically applied in Indonesia (Supomo, 1965; Harahap, 1988). Accepted by the colonial government, the theory stipulated that Islamic law could be applied only where it was recognized by the *adat* law, since Islamic law was not originally from Indonesia but from Arabia (Thalib, 1981; Bruinessen, 2004). In this regard, Hurgronje reversed Solomon Keyzer's "reception in complexu" theory, which had maintained that Islamic law was in fact applied in Indonesia from 1600 to 1800. The Dutch government had even given Keyzer's doctrine legal recognition through articles 75, 78 and 109 of Regering Reglement Year of 1854 (Staatblad 1854 Number 2). In support of the reception theory, the Dutch scholar Cornelis van Vollenhoven put forward the idea that Indonesia had 19 regions of *adat* law (Vollenhoven, 1981; Dijk, 1982).⁶ On the other hand Lodewijk Willem Christiaan van den Berg supported Keyzer's reception in complexu, as did, apparently, Hazairin, who renamed it the reception theory out of a belief that Islam is the living tradition of Indonesia. To make his point, Hazairin contentiously referred to the reception theory as the "theory of Iblis (Satan)"! (Hazairin, 1968).

The Reformists saw the Ministry of Religious Affairs, which was established in 1946, as a compromise between the Muslims and Nationalists, with a view to maximizing its functions. The

⁶ They are as follows: "1. Aceh (excluding the Gayo and Alaslands); 2. The Gayo, Alas, and Bataklands; 3. The Minangkabau territory; 4. South Sumatera; 5. The Malay territory, that is, the east coast of Sumatera (excluding the Batak area) together with the Riau-Lingga archipelago, of which the Malayan peninsula could be regarded as the British moiety); 6. Bangka and Bitung; 7. Borneo excluding Sarawak, North Borneo; 8. The Minahasa; 9. The territory of Gorontalo; 10. South Celebes, together with the Buginese coast of the island; 11. The Toraja territory; 12. The Ternate archipelago; 13. Ambon and Moluccas (Seram, Buru, etc.); 14. Dutch New Guinea; 15. Dutch Timor with its archipelago; 16. Bali and Lombok; 17. Central and East Java, with Madura; 18. The Central Javanese Principalities; 19. West Java (Pesundan).

Ministry managed, among other things, the Islamic Courts (later on changed into Religious Courts) and Islamic education. As far as the Religious Courts were concerned, the Indonesian government, according to the Reformists, was guilty of continuing to apply the reception theory. For although unlike the *Staatblad* of 1882 it provided allowances for the court's employees, the Indonesian Government followed the *Staatblad* by not giving the Religious Courts the same status as other courts. Moreover, the Indonesian government had decided to keep in place the *Staatblad* 1931 Number 53, which limited the jurisdiction of the Religious Courts only to marriage, divorce and reconciliation cases (Adnan, 1983). In the educational sphere, on the other hand, the Ministry of Religious Affairs established in 1960 a system of Islamic higher education centers, later on known as IAINs (State Institutes of Islamic Studies). Located in Indonesia's main cities, the IAINs began producing by the 1970s graduates B.A.s and Doctoranduses (a three year program of the B.A.) in Islamic law, education, philosophy, history and promulgation of the faith (da'wah). Little more than a decade later they began sending qualified lecturers to Western countries (in particular, Canada) to study Islam in a critical academic environment. Already by the 1980s, the IAINs had replaced the Dutch B.A. and M.A. degrees with the American B.A. and M.A. in addition to introducing Ph.D. programs at the Syarif Hidayatullah IAIN (Jakarta) and Sunan Kalijaga IAIN (Yogyakarta), which started producing Ph.D.s in 1990s. By this period IAIN lecturers with Ph.D. degrees in Islamic Studies from Western universities were returning home, where they began establishing, in the Faculties of Shari'a, Departments of Religious Courts, Islamic Civil and Criminal Law, Comparative Law (both Islamic and national), and Islamic finance (Wahyudi, 1997).

Ordinance Number 14/1970 on Justice improved the position of the Religious Courts by giving them the same status as General, Military and State-Administrative Courts. The only difference was that the General Courts dealt with both criminal and civil cases for Indonesian citizens in general, whereas the Religious, Military and State-Administrative Courts were specific in that they could only deal with certain types of cases or groups of people.⁷ To maximize the functions of the General, Religious, Military and State-Administrative Courts, the Ordinance (article 39) abolished Customary and Autonomous (Adat Swapraja) Courts. Likewise, the Minister of Justice, based on article 2 of Bill no. 1 Emergency/1951, gradually abolished Customary/Autonomous Courts in the Provinces of Bali, Sulawesi, Lombok, Sumbawa, Timor, Kalimantan, Jambi and Maluku. The Customary/Autonomous Courts in West Irian were also abolished (Presidential Regulation No. 6/1966 on the Abolition of Customary/Autonomous Courts and the Establishment of State Court in Western Irian). In this way the jurisdiction of Religious Courts were extended, even as the jurisdiction of the Adat Law was significantly reduced. In 1974 the Suharto government proposed Bill No. 1/1974 on Marriage, in an effort to revise the Bill No. 22/1946 Jo Bill No. 32/1954 on Registration of Marriage, Divorce and Reconciliation. Muslims rejected the draft on the pretext that it promoted secular concepts of marriage. Adultery was a case in point. Islam absolutely prohibits adultery between two people regardless of their marriage status, but the draft defined it as illegal sexual intercourse between two people only if one or both of them are married to another person. The Suharto government finally issued the Bill after seriously taking into consideration Muslim criticisms. Indeed, the Bill contains some innovative rulings. For instance, article 1 rules that "A marriage is only allowed when the groom is 19 years and the bride 16." (Indonesia, 1975). For Ahmad Azhar Basyir, this article is sufficiently Islamic in character. It is true that a marriage of minors is valid when conducted by their guardians because Islamic law does not specifically mention an age. With regard to maturity, it only stipulates that the partners be *balīg* (adult), an open-ended term. The fact is that the age of maturity varies from person to person, depending on their particular psychological and physiological development. Some

⁷ Lembaran Negara 1970/74; TLN No. 2971.

objectives of the marriage, according to the Quran (30:21), include looking for the calm and quiet of life, so that the feeling of loving each other and affection can emerge. Given the marriage of minors is hardly able to materialize this objective, the government is justified in regulating “age limits” for the sake of both grooms and brides. The stipulation of age as in this article is based on unrestricted public good (*maṣlahah mursalah*) (Basyir, 1983).

The second and last example is article 31(1). It reads as follows. “A divorce can only be undertaken in the Court after the Court tries, but does not succeed, to reconcile the couple.” This ruling, for Basyir, is Islamic for trying to protect the marital interest of Indonesians, the majority of whom are Muslim. Since Paternalism is the dominant family structure in this country, Indonesian women, in particular Muslims, are regularly in a weak position. To protect women’s marital rights against their husbands, who in this male-dominated society often divorced their wives arbitrarily, the government felt justified in legislating this ruling based on unrestricted public good. In this way, article 31(1) helps achieve one of the most important objectives of marriage, namely, to be sting. The article will declare invalid a divorce undertaken outside the Court. The Prophet Muhammad once said that “*abgaḍ al-ḥalāl ilā Allāh aṭ-ṭalāq*” (divorce is lawful, but it is very easy to make God angry when it is not undertaken in accordance with Islamic law). Although Islamic law does not specifically regulate whether a divorce should be undertaken in the Court or not, this article, for Basyir, will certainly decrease the rate of divorce in Indonesia (Basyir, 1983). Muslims took another step towards improving the Religious Courts. On June 12, 1989, they submitted the draft of a Bill on the Religious Court to the Plenary Session of the Indonesian Legislative Assembly, which issued it as Bill no. 7/1989 on the Religious Court on December 29, 1989 (Gazette, Indonesian Republic Number 49/1989). Before the issuance of the Bill, the Religious Courts had had to base their application on the Government Ordinance on Religious Courts in Java and Madura (Staatblad Numbers 116 and 610), the Ordinance on Judges and Great Judge Meetings for some Residencies of South and East Kalimantan (Staatblad Year 1937 Numbers 638 and 639), and the Government Ordinance Number 45 Year 1957 on the Formation of Religious Courts/Maḥkamah Syar’iyah outside Java and Madura (Staatblad Year 1957 Number 99). These three Bills had confusingly regulated the structure, jurisdiction and procedural law of the Religious Courts, but now were abrogated by Bill No. 7/1989 (Rasyid, 1991; Sjadzali, 1991; Zarkasy, 1988; Susanto, n.d.). It was therefore not surprising to see the new Muslim intellectual Muhammad Daud Ali consider the bill as a materialization of the spirit of article 29 of the 1945 Constitution (Ali, 1991). Anticipating this political success, an important intellectual actor of the Bill, Minister of Religious Affairs Munawir Sjadzali (1983-1993), encouraged Indonesian Muslims to rethink the relevance of some Islamic legal principles for their contemporary life. In 1988, he put forward the idea of the reactualization of Islamic law.

On a different front, the Reformists took a political shortcut in providing the Religious Courts with standard legal texts or references, thereby reinstating Islamic law as a form of jurisprudence. Muslim judges could now refer to thirteen works by Shafiite authors when faced with legal problems. The works included: (1) *Bugyah al-Mustarsyidīn* by Husain al-Ba’lawī; (2) *Al-Farā’id* by Shamsuri; (3) *Fatḥ al-Mubīn* by al-Malibarī (ca. 975 A.H.); (4) *Fatḥ al-Wahhāb* by Ansari (d. 926 A.H.); (5) *Al-Fiqh ‘alā al-Maẓāhib al-Arba’ah* by al-Jazirī; (6) *Ḥāsiyah Kifāyah al-Akhyār* by al-Bajūrī (d. 1277 A.H./1860 A.D.); (7) *Mugnī al-Muḥtaj* by al-Sharbini (d. 977 A.H./1596 A.D.); (8) *Qawānin asy-Shar’iyah* by Sayyid Ṣadaqa Ṣan’ān; (9) *Qawānīn asy-Syar’iyah* by ‘Uthman ibn Yahya; (10) *Syarḥ Kanz ar-Rāgibīn* by Qalyubi and ‘Umayra; and (11) *Syarqawī ‘alā al-Taḥrīr* by al-Sharqawi; (12) *Targīb al-Musytaqq*; and (13) *Tuḥfah al-Muḥtaj* by Ibn Hajar al-Haiṣamī (d. 973 A.H.) (Arifin, 1985). However, these fiqh books were impractical for a number of reasons. Fewer and fewer Muslim judges, for instance, were able to read Arabic due to the increasing popularity of “new Intellectual” oriented education. It was Minister of Religious Affairs Sjadzali who said that Indonesia was undergoing a crisis of ulama. To solve this problem, he committed himself to

producing "ulama-pluses," a new kind of Muslim scholar who was expected to master both Arabic texts ("yellow books") and English texts ("white books"), by means of three new programs. In 1988, he introduced the Islamic High Schools- Special Program in Indonesian cities like Yogyakarta, Jember and Tasikmalaya. This program was designed to allow the best students of State Islamic Junior High Schools to master Islamic subjects (70% of curriculum) and modern subjects (30% of curriculum). In the same year, he started the Pre-Departure Program for Candidates of the All-Indonesia Lecturers of the State Institutes of Islamic Studies to select the best recent graduates of the State Institutes of Islamic Studies and train them in preparation to study at Western universities.⁸ Finally, he made plans for these Western-educated Muslims to teach, on their return, at a centre of excellence to be established at the Surakarta State Institute of Islamic Studies, but never managed to implement this plan due to a change in personnel and policy (Wahyudi, 1997).

Another strategy devised by Indonesian Muslims to give new life to Islamic jurisprudence was the idea of producing a legal handbook. It was hoped that Indonesian Islamic legal authorities would be able to reach a consensus on what they called the Islamic Legal Compilation. This "ordinance" was in turn expected to assure uniformity among judges of the Religious Courts. To realize this goal, a remarkable level of cooperation was achieved by the Muslim community. First of all, the "new Muslim intellectuals" agreed to leave discussion of books of fiqh to the ulama, while those involved in the Islamic Legal Compilation Program promised to consult the ulama if they faced textual problems. Secondly, these "new Muslim intellectuals" were given the responsibility to reexamine and choose the applicable decisions of the Religious Courts. They called this process a reopening of jurisprudence. Finally, the Indonesian ulama undertook a comparative study, by visiting Muslim countries with a view to perfecting their Indonesian version of Islamic Legal Compilation with the non-Indonesian experience of applying Islamic law (Arifin, 1985). On February 2-5, 1988, the supporters of the Islamic Legal Compilation held a seminar in Jakarta. As a result, the Indonesian ulama agreed on the wording of three books of the Compilation: Marriage (Book I), Inheritance (Book II) and Endowment (Book III). On June 10, 1991, President Suharto issued the Presidential Instruction No. 1/1991 on Islamic Legal Compilation (Indonesia P. R., 1992). To support the implementation of this newly issued Presidential Instruction, the Minister of Religious Affairs Sjadzali issued Decree No. 154/1991 (Indonesia M. A., 1992). The organization, administration and finance of the Religious Court were transferred from the Ministry of Religious Affairs to the Supreme Court, based on Bill no. 35/1999 on the Change of Bill no. 14/1970 on the Principal Regulations on the Authority of Ministry of Justice. However, the Religious Court remains based on Islamic law (Tempo, 2004). According to articles 2 and 4 of the Bill no. 7/1989 on Religious Court, the jurisdiction of Religious Courts was limited to family law: marriage, divorce, inheritance, gift, endowment and charity. However, Bill no. 18/2000 on Nangroe Aceh Darussalam and Bill no. 44/1999 on Aceh's Special Province, issued on Muharram 1, 1424 (April 4, 2001), extended the jurisdiction of Aceh's Religious Courts to exercise their authority on criminal and civil laws (Indonesia S.; Rakyat, 2003).⁹

The Indonesian government issued Bill No. 17/1999 on Pilgrimage Management in order to ensure that Indonesian Muslims perform hajj (pilgrimage to Mecca) safely and correctly in accordance with Islamic law. Performing hajj (pilgrimage) to Mecca is of course one of the five pillars of Islam, and falls under the category of pure worship. But in the Indonesian context it has long been a focus of political legitimacy. "Indonesian" rulers, according to Martin van Bruinessen, saw the Grand Sharif of Mecca and Medina as commanding spiritual authority over the Muslim

⁸ To celebrate the tenth anniversary of the Pre-Departure Program, nineteen graduates of its published a collection of articles entitled *The Dynamics of Islamic Civilization* (Yogyakarta: Forum Komunikasi Alumni Program Pembibitan Calon Dosen se-Indonesia, 1998).

⁹ Under the pretext of following Aceh, some provinces drafted their own regional Islamic law regulations. These provinces include South Sulawesi, Banten, Tasikmalaya (a city in West Java), Pamekasan (a city in East Java), Riau, Ternate and Gorontalo.

world. For this reason the competing rulers of Banten (West Java) and Mataram (Central Java), for example, sent their respective emissaries to Mecca in 1630 to seek his recognition and even to ask him to bestow on them the title of Sultan (Bruinessen, 1990). The Hijazi connection resurfaced two centuries later when, on their return to “Indonesia” in 1803 after undertaking the hajj, three West Sumatrans—Miskin from Pandai Sikat, Sumanik from Delapan Kota and Piobang from Lima Puluh Kota—began to spread Wahhabism while attacking local practices. After some physical clashes, the kaum adat (supporters of the West Sumatran custom) turned to the Dutch for help. This led to the bloody conflict known as the Paderi War (1821-1827) (Wertheim, 1978; Rashid, 1983; Abdullah, 1987; Abdullah, *Islam dan Masyarakat: Pantulan Sejarah Indonesia*, 1987; Dahm, *Islam in Sumatera*, 1983). At about the same time Prince Diponegoro of Central Java, inspired by his fellow Puritans, waged the Java War against the Dutch (1825- 1830) (Kroef, 1949; Steenbrink, 1993). The Wahhabis suffered heavy losses in these wars, but the number of Nusantara [“Indonesian”] hajjis soared higher and higher, to the point where, by 1860, Malay had become, in van Bruinessen’s account, the second language in Mecca and Medina just one step below Arabic. In Mecca, Malay had served as a unifying language of “Indonesia,” long before the 1928 Youth Oath. At the turn of the twentieth century, Nusantara hajjis formed 10 to 20% of all hajjis from all over the world. In just two decades, this number had tripled, so that from the 1920s onwards, Nusantara hajjis formed 40% of all hajjis (Bruinessen, 1992).

Nusantaran hajjis traditionally had to stay in Mecca and Medina for about five months due to transportation problems. Since these Holy Cities were not under European control, they could to a great extent imbue hajjis with an anti-colonial spirit. The hajj journey in turn started serving as a means of unifying “Indonesians” and of fostering anti-colonial sentiment (see also Raffles, 1930; Hurgronje, 1931). It was under the influence of some returning hajjis that the Bantenese Muslim peasants rebelled against the Dutch government in 1888 (on al-Afghani and Abduh see Pakdaman, 1965), just four years after al-Afghani and ‘Abduh had published their Pan-Islamic journal *Al-‘Urwah al-Wuṣqā* (The Indissoluble Bond) from Paris. The same, adds van Bruinessen, was true of the Sasak Muslims of Lombok, who drove the occupying Balinese Hindus out of Lombok (Pakdaman, 1965 p. 204). Anticipating further political repercussions from the hajj, the Dutch government issued the *Pelgrims Ordonantie* (Staatblad Number 698 of 1922), in the same year that Mecca and Medina regained their political significance for the Muslim World with the establishment of the Kingdom of Saudi Arabia. To monitor further the returning hajjis, the Dutch government issued the *Pelgrim Verordening* in 1938, a bill that the government of the Republic of Indonesia expanded through new regulations and Presidential decisions. Decades passed before President Habibie issued Bill No. 7/1999 on Hajj Management on May 13, 1999. His “new Muslim intellectual” orientation encouraged him to sign a bill that granted a monopoly to the Ministry of Religious Affairs. To this end, article 8 authorizes the Minister of Religious Affairs to appoint Operating Officials, consisting of teams of Hajj Supervisors, Hajj Health Officers and Hajj Guides appointed to accompany Indonesian pilgrims to Mecca (Indonesia P. R., Undang-Undang No. 17 tahun 1999 tentang Penyelenggaraan Ibadah Haji, 2004).

Likewise, article 29(3) of the Bill abolishes the *Pelgrims Ordonantie* (Staatblad the Year 1922 Number 698), with all of its modifications and appendixes—i.e., (1) Presidential Regulation No. 3/1960 on Hajj Organizing; (2) Presidential Decision No. 112/1964 on Inter-Ministerial Hajj Organizing; (3) Presidential Decision No. 22/1969 on Hajj Organizing by Government; (4) Presidential Decision No. 53/1981 on Hajj Organizing; (5) Presidential Decision No. 63/1983 on Hajj-‘Umra Organizing; (6) Presidential Decision No. 62/1995 on Hajj-‘Umra Trip Organizing; and (7) Presidential Decision No. 57/1996 on Hajj- ‘Umra Organizing. However, in 2003 the Ministry of Religious Affairs found itself unable to send 29.974 of the registered hajj applicants to Mecca. This failure triggered sharp criticisms (www.liputan6.com, 2004). Aris Munandar (spokesman for Fraction of the Indonesian Democratic Party-Struggle) (www.hidayatullah.com,

2003a), Henky Firmansyah (Chairman of Indonesian Pilgrimage Observing Committee) (www.hidayatullah.com, 2003b) and Rokib Abdul Kadir (member of the Commission VI of Indonesian House of Representatives) (www.hidayatullah.com, 2003b) demanded that the Indonesian government reduce the monopolistic role of the Ministry of Religious Affairs in managing the hajj by creating a checks-and-balances mechanism. This, they said, could be accomplished by the formation of an independent body, consisting of the Ministry of Religious Affairs, some related Ministries and private institutions. The role of Ministry of Religious Affairs should strictly be limited to supervising hajj management. No Ministry, insisted Ali As'ad (member of the Commission IX of Indonesian House of Representative), can be allowed to profit from public service. Moreover, the Ministry of Religious Affairs is not supposed to deal with passports, bags and even catering for pilgrims, since all operational costs of the Ministry are funded by the government (Republika Online, 2004). In other words, they demanded that the article 8 of the Bill No. 7/1999 on Pilgrimage Management be changed, so that the Ministry of Religious Affairs would become accountable and transparent. To give a fair chance for hajj applicants, the government would, Munandar added, allow a person who has undertaken hajj to perform a second pilgrimage only after five years had passed since his first pilgrimage (Kalteng Pos, 2004).

Zakat, like hajj, is a purely vertical dimension of Islam; hence the state, some Indonesian Muslims argue, should not intervene in its operation. Indonesia is not an Islamic state, they insist, and the obligation of paying zakat should not be regulated by state. On the contrary, some demand that the government issue a bill on zakat, which according to K.H. Ali Yafie, would encourage payers of zakat (muzakkis) to fulfill their obligations. Indonesian Muslims form 87% of the Indonesian population, so that it is ironic, Yafie insists, that they do not have a bill on zakat. They should learn from Singapore, which had just issued a bill on zakat, even though Muslims form only 15% of population in that country. The Zakat Bill, for Ramli Abdul Wahid, represents a formal, legal Basis for a massive application of zakat through the Zakat Working Body (Badan Amil Zakat) and the Zakat Working Institution (Lembaga Amil Zakat). The purpose of this Bill is to intensify the application of zakat in order to help eradicate poverty, to realize justice and to narrow the gap between the haves and the have nots (<http://www.hukumonline.com>, 2004a). The Bill was in fact supported by The Decision of Minister of Religious Affairs no. 581/1999 and Bill no. 17/2000 on The Third Change of Bill no. 7/1983 on Income Tax (www.geocities.com, 2004). Bill no. 38/1999 on Zakat Management, according to Yusuf Kalla (Coordinating Minister of Social Affairs), reduces one's tax if one has paid zakat (Waspada, 2004a). The Bill extends the meaning of zakat to include contemporary economic activities like technologically managed companies and professional services (Waspada, 2004b). However, one critic of the Bill, Fatahillah AS, laments the fact that it does not punish zakatpayers who do not meet their obligation. It is, therefore, more a moral statement than a law, since it is not binding. Article 21 of the Bill does, he admits, prescribe penalties for zakat-workers who do not register correctly zakat, donation, gift, will, inheritance and kaffārāt (as indicated by articles 8, 12 and 13), with prison term maximally three months or fine maximally Rp30.000.000. However, the Bill does not specify under which jurisdiction zakat belongs. Thus, Fatahillah recommends that the Ministry of Religious Affairs and the Ministry of Justice and Human Rights work together to decide whether the Religious Court or the General Court ought to handle zakat cases (www.hukumonline.com, 2004).

The Indonesian government has also recently issued Bill no. 18/2003 on Advocacy. This bill guarantees that Islamic legal scholars (graduates of the Shari'a Faculty) be recognized as lawyers, as is already the case with graduates of Faculties of Law. Qodri A. Azizy, Director General of Islamic Institutions and Societies of Ministry of Religious Affairs, says that article 2(1) of the Bill stipulates that "those who have legal higher educational background" are graduates of a Faculty of Law, of a Shari'a Faculty, or of Legal Academies of Military and Police" (Kompas, 2003). This Bill was issued in recognition of the problems faced by the Religious Courts in providing litigants and plaintiffs

with lawyers, which arose for a number of reasons. The average Indonesian Muslim could not afford a regular lawyer, who besides avoided legal cases in the Religious Courts because they were neither prestigious nor lucrative enough. Most lawyers had no time for domestic cases (the stock-in-trade of the Religious Courts) and their disputes over marriage, divorce, reconciliation and inheritance, preferring instead big cases like corruption and economic crime, where the payments were larger and the political recognition greater. Worse still, there was a professional problem. Most lawyers did not master Islamic law, did not read Arabic, and had no access to the thirteen Shafiite sources used in the Religious Courts before the issuance of the Islamic Legal Compilation. This Bill therefore filled a critical gap between “new intellectual” lawyers (graduates of Faculties of Law, who did not know Arabic and Islamic law) and “new Muslim intellectuals” (graduates of Faculties of Sharia, who did know Arabic and Islamic law). Ironically, however, the more bills issued in Indonesia, the more the law is becoming accessible to both categories of lawyers, who are less and less called upon to deal with Arabic (and even less with Dutch, which virtually no one knows today).

The government of Indonesia is currently faced with drafting a new Applied Religious Courts Bill on Marriage, since Bill No. 1/1974 is long out of date. Worse still, the Islamic Legal Compilation is not binding on judges of the Religious Courts, by reason of the fact (noted above) that it is only sanctioned by a Presidential Instruction. Ciciek Farha (Chairwoman of the Women’s association Rahima) has therefore called for Bill no. 1/1974 on Marriage to be revised. Farha demands first of all that the government redefine the position of husbands and wives. Article 31(3) rules that husbands are the heads of households, and wives only housewives. Wives should manage domestic affairs as well as possible, whereas husbands should protect their wives and children and provide them with material support in accordance with their capabilities. However, this private and public division between women and men often results in inequalities. Working women never enjoy incentives or enjoy lower incentives simply because they are never considered as the primary wage-earners (Kompas, 2000a). Farha also calls upon the government to reformulate the concept of polygamy. At present, if a wife disappoints her husband due to her inability to bear him a child, he is entitled to marry another woman. However, if he is unable to give her a child, she is not allowed to divorce him or marry another man. Marriage in Islam is monogamous. For whereas the pre-Islamic Arabs had allowed a man to marry as many wives as he wished, Islam came to limit this number to four, and only—the Quran says—as long as husbands can do justice to all their wives. This amounts to a ban on polygamy, given the fact that doing justice in this case is a very difficult task. Instead of justice, polygamy causes emotional and financial injustices, the second of which especially can lead to conflict among the siblings of different mothers (Kompas, 2000b). A third demand raised by Farha is that the government allow inter-religious and non-official religious marriages. The children of a Confucian couple cannot legally obtain birth certificates, since Bill no. 1/1974 prohibits marriage between members of non-official religions (like Confucianism). As a result, the children of Confucian couples are not registered as Indonesian citizens (Kompas, 2000c). A marriage, according to article 2 of the Bill No. 1/194, is valid if undertaken in accordance with the religion and beliefs of each member of a couple.

The problem, for Nursyahbani Katjasungkana (Chairwoman of the Women’s Association for Justice), is that Indonesia only recognizes 5 religions (Islam, Protestantism, Catholicism, Hinduism and Buddhism). There is no clear regulation on the marriage of religious groups other than these five official religions. This situation results in “under-the-table” marriages, which in turn hamper the achievement of marriage registration purposes (Kompas, 2000d). This same article 2, for Siti Musdah Mulia (Chairwoman of Women’s Empowerment Team of the Ministry of Religious Affairs), is neither democratic nor able to accommodate inter-religious marriage. As a result, many couples of different religions have married abroad in countries that allow inter-religious marriage (Kompas, 2014e). In spite of these objections, the government upholds article 39 of the Islamic

Legal Compilation, which prohibits a Muslim woman from marrying a non-Muslim man, and has incorporated this interpretation into articles 31 and 35 of the Draft of the Applied Religious Courts Bill on Marriage (www.gatra.com, 2004). The government of Indonesia still insists that the draft of the Applied Religious Courts Bill on Marriage is designed to protect women, by, for example, obliging a husband who wants to marry a second wife to obtain written permission from his wife, who should in turn declare her consent before court (Kompas, 2003a). If a husband marries a second wife without the consent of his first wife, he is liable to a sentenced of three months in prison and fine of three million Rupiahs. If an officer of the Office of Religious Affairs issues a marriage certificate for a husband's second marriage without the permission of his first wife, that officer can be sentenced to one year in prison and fine of three million Rupiahs. This draft is therefore seen by the government as an important revision of Bill no. 1/1974 on Marriage and Presidential Instruction no. 1/1991 on the Islamic Law Compilation, which do not specify clear punishments for polygamy (www.gatra.com, 2004). However, this article, for Mulia, is unfair towards women because the majority of Indonesian women have not been able to express their reservations before the court due to lack of education (Kompas, 2003b).

For this reason the women's organizations Dharma Wanita Persatuan DIY, Rifka Annisa Women's Crisis Center, Fatayat's Prosperity Foundation, LKPSM NU, Galang (Unite!), Yogyakarta Women's Coalition, and Yogyakarta Legal Aid Institute held a debate on the desirability of abolishing Government Regulation no. 10/1983. A few participants called for its abolition, but a majority of participants saw it as still effective in reducing polygamy, especially among civil servants. Indeed, a civil servant can marry a second wife only if he meets certain alternative conditions i.e., his first wife cannot fulfill her duty, or acquires a permanent physical handicap, or is unable to give birth. Then he must meet a series of cumulative conditions, which include his wife's permission, his own guarantee to meet her needs, and his further guarantee to deal justly with her. The participants in the debate therefore decided to defend the Regulation until the government has issued a more pro-gender regulation (Kompas, 2000). The draft of the Applied Bill on Religious Courts on Marriage, for Mulia, is gender-biased due to its being based on the Islamic Law Compilation. This draft dichotomizes the private and public sectors and allows polygamy as well (Kompas, 2003c). The logic applied, according to Lies Marcoes-Natsir's critique, result in an article stipulating that a husband is the head of family with the obligation to feed his family, while a wife is merely keeper of the household. The section is unrealistic, since women have long been active in the public sphere supporting their families (Kompas, 2003a). In fact, the Ministry of Religious Affairs has discovered that 1 out of 9 heads of family in Indonesia is a woman (Kompas, 2003b). Some non-governmental organizations, in particular the Muslimat (Nahdlatul Ulama), suggest that the draft minimize the dichotomy of the private and public sectors. Khofifah Indar Parawansa (chairwoman of the Muslimat and former Minister of Women's Empowerment) says that the Bill on Marriage and the Islamic Law Compilation effectively declare that men are the leaders of the family and its breadwinners, whereas women's responsibilities are purely domestic. The articles pertaining to these matters are therefore no longer relevant. Women's financial activities in the public sphere in Indonesia can be traced back to the 10th century, according to her, and there are more and more women entering the workforce every day (Kompas, 2003d).

Shinta Nuriyah Abdurrahman Wahid (Indonesia's former First Lady and Director of Puan Amal Hayati) likewise criticizes the principle that a husband has the right to control his wife, and that she should obey him because he is responsible for providing her with dowry and living. This principle is based on the Quran (2: 228), which rules that his control over his wife cannot be separated from his obligations to protect and feed his family. If he cannot meet these requirements, and his wife can, then it is she, Wahid insists, who has the right to control the family since the control has nothing to do with gender (Kompas, 2003e). Katjasungkana suggests that the old definition of the roles of husband and wife be made more flexible, since marriage is both their

responsibilities (Kompas, 2000). These gender-biased articles in the Bill, for Marcoes-Natsir, will inevitably result in male-female inequalities. She demands that they be revised in order to produce a Bill that is fair to both husband and wife. Article 72(4) for instance rules that a husband is obliged to guide his wife and family, but that both he and his wife should together make decisions on important matters. A husband who earns a salary is responsible for his wife's living and shelter, and for financing his family and their health and education. However, there is no sanction if the husband does not meet his responsibilities, since article 72 (6) rules "If a husband cannot meet his duties as article 72 (4) regulates, a wife can voluntarily free him from his duties." (Kompas, 2003f). If a husband is unable to finance his wife and offspring, the wife is encouraged to voluntarily exempt him from his obligations. On the other hand, if a wife commits *nusyūz*, the husband's obligations towards his wife automatically do not apply. According to section 75, a wife should totally loyal to her husband within the limits of Islam and should manage as well as possible the daily needs of her family. A wife can be considered guilty of *nusyūz* if she, without valid reason, does not fulfill her obligations, which according to article 75 include total obedience to her husband within the limits of Islamic law and managing the daily needs of the family. While the court determines the criteria for *nusyūz*, this article, for Mulia, is not realistic. Instead of defending women, it will hamper them because religious courts are in cities, while women in villages—being illiterate besides—have no access to the courts or legal resources (Kompas, 2003g).

The Constitution of 1945 was amended at the 2002 Annual Meeting of the People's Consultative Assembly. In anticipation of this historic event, the Islam's Defenders Front, the Indonesian Liberation "Party" (Hizbut Tahrir Indonesia), the Indonesian Mujahidin Council, the United and Development Party, the CrescentStar Party, and the Justice and Prosperity Party had demanded that the Meeting incorporate the seven words into the Constitution (Kompas, 2002). In this way, they sought to have the Jakarta Charter restored to its original status, by which they would have Islamic law implemented at the Constitutional level. This policy was a paradigm shift from establishing an Islamic state to applying Islamic law, as was obvious from the attitude of the Indonesian Mujahidin Council. What is more important, Irfan S. Awwas (Executive Director of the Indonesian Mujahidin Council) insisted, is not an Islamic state, but a state that implements Islamic law. Indonesia only applies certain aspects of Islamic law like pilgrimage and marriage. It should therefore apply Islamic criminal law too, (Kompas, 2003a) a demand that Deliar Noer (Chairman of the Indonesian Islamic Community Party) supported. Islamic law should be applied gradually with carefully chosen priorities, since the application of Islamic law, Noer reasoned, is a concrete solution to such serious problems as eliminating poverty and corruption (Kompas, 2003b). However, Hasyim Muzadi (Chairman of the Nahdlatul Ulama), Ahmad Syafii Maarif (Chairman of the Muhammadiyah) and Nurcholish Madjid (Rector of Paramadina University) issued a joint statement in reply. They rejected the inclusion of the Jakarta Charter in the revived 1945 Constitution. The inclusion of the seven words, they argued, would disturb Muslim-non-Muslim relations, which could disintegrate Indonesia (www.hidayatullah.com, 2004). The Nahdlatul Ulama and Muhammadiyah went on to agree that Islamic law be selectively incorporated into Indonesian positive law, but rejected the possibility of formalizing Islamic law at the constitutional level.

The relationship between the state and Islamic law in Indonesia, according to the Nahdlatul Ulama spokesman Salahuddin Wahid (a younger brother of former President Abdurrahman Wahid), operates at five different levels, as follows: (1) family law, which includes marriage, divorce and inheritance; (2) finance and banking like zakat and Islamic banking; (3) ritual like wearing veil and punishment for those who do not fast in Ramadan; (4) the application of Islamic criminal law: in particular on punishment for those who violate them; and (5) Islam as a state foundation and government system. Seven Bills, he insists, have accommodated Islamic law: (1) Bill no. 1/1974 on Marriage; (2) Government Regulation no. 28/1977 on Endowment; (3) Bill no. 7/1989 on

Religious Court; (4) Bill no. 7/1992 jo Bill no. 10/1998 and Bill no. 23/1999 on National Banking System, which allows the establishment of Shari'a banks; (5) Presidential Instruction no. 1/1991 on Islamic Legal Compilation; (6) Bill no. 17/1999 on Hajj Management; and (7) Bill no. 38/1999 on Zakat Management. This is why, Wahid concludes, even in the absence of the Jakarta Charter, Indonesian Muslims have been able to have pro-Islamic law bills issued (Kompas, 2002). Finally, the United and Development Party and Justice and Prosperity Party withdrew their demand at the 2002 Annual Meeting of People's Consultative Assembly. The Jakarta Charter was not restored to its original status due to lack of parliamentary support. However, a new development took place on a different front. In 2003, the Ministry of Justice and Human Rights revised the Indonesian Criminal Code to include adat, religious and secular criminal laws (Suara Pembaharuan, 2003). Yusril Ihza Mahendra (Minister of Justice and President of the Crescent-Star Party) asked Indonesians not to be surprised if the Draft of Criminal Code accommodates aspects of adat law taken out of Islamic law because the latter is a living law. It is our duty to incorporate people's living spirit into our positive law (www.hukumonline.com, 2004). The Draft of Criminal Code, according to Abdul Gani Abdullah (Director General of Law and Regulation of Ministry of Justice and Human Rights) is composed based on people's suggestions. It adopts much Islamic law to respond the legal needs of Indonesians. The Draft, for example, adopts the concept of *diyyat* (blood-money), which gives the family of the murdered to choose to demand death penalty, fine or forgiveness for the murderer (Suara Pembaharuan, 2003).

However, the incorporation of Islamic law into the Draft of Criminal Code, for Katjasungkana, is inappropriate because Indonesia is multi-religious. It will not work until social justice is met. "It is unjust if poor stealers to be punished by Islamic criminal law, since they have to steal due to lack of social justice and prosperity." (www.glorianet.org, 2004) Adultery, she quoted another example, is private. It should not be included in the Draft of Criminal Code as long as it results neither in violence and nor in harm to those involved. It becomes increasingly irrelevant since it is put under the category of *delik aduan* (offence that warrants complaint). The section on *samenlaven* (living together without legal marriage) will even pave the way for sexual deviation since the phrase "society's norm" is relative (Gatra, 2003). Achmad Ali (a law professor at Hasanuddin University) in turn said the adoption of Islamic law by the Draft of Criminal Code is in line with Indonesian culture and morality. Adultery, according to section 284 of the draft, is a crime since it contradicts Indonesian religious moral values. Law cannot be separated from morality. All religions prohibit adultery. It makes sense that Indonesian positive law adopts Islamic legal values, as long as they do not contradict values of other religions, since Muslims form the majority of Indonesia (Fajar, 2003a). The adoption of Islamic values by the Draft of Criminal Code, says Abdul Muin Salim (Rector of the Alauddin IAIN), is a progress. The punishment of moral crimes has not yet been fully in line with Islamic law. Adultery, according to Islamic law, should be stoned, but in this draft is sentenced to imprisonment. The draft does not adopt 100% Islamic law, but Muslims should keep trying to improve it (Fajar, 2003b). The Draft, according to Loebby Loqman (a law professor at the University of Indonesia) and Andi Hamzah (a law professor at Trisaksi University), improves women's protection. Article 421, for example, toughens punishment for men who break their promise to marry women with whom they had slept. The draft also considers *permukahan* (sexual inter-course with a married person) as *delik aduan* to give chance for the couple (whose husband or wife sleeps with a third party) to file law suit or no (Kompas, 2003a). However, almost all articles on women, for Thamrin A. Tomagola (a sociology professor at the University of Indonesia) and Katjasungkana, are against women's interests because the articles perpetuate gender inequality. Moral articles are positivistic for regulating privacy. Privacy is moral and not legal domain. They are also patriarchal. They are dangerous because they do not recognize women's independence (Kompas, 2003b).

The Draft of Criminal Code, in Farha's point of view, is gender-bias for prohibiting the incompetent from dealing with sex related aspects. "If this draft is passed into law," she criticizes, "an advocacy workshop on family planning or on the health of the pregnant by [such non-governmental organizations] as Rahima can be sentenced for a three year imprisonment on the pretext that it is incompetent." In other words, this draft reduces the advocacy for human reproduction rights, while the state does not resources to provide women with justly-gender services (Kompas, 2003). The Indonesian concept of rape, Achmad Ali insists, has long been out of date. It is too narrow because it is only defined as act where a man has vaginal intercourse with a woman. This definition has now been extended to other forms of intercourse (Fajar, 2003c). Despite this improvement, however, Katjasungkana still has a number of reservations because the sections on rape only prescribe preventive and repressive solutions without saying anything about rehabilitative actions. Section 423, for example, contains eight categories of rape, like sexual intercourse without consent of the other party, sexual intercourse under threat, sexual intercourse with unconscious woman, anal and oral sexes (www.glorianet.org, 2004). Moral punishments (*delik-delik kesusilaan*) as proposed in the Draft of Criminal Code are patriarchal. Morality reduced to sex related actions. This draft is anti-pluralism. She demands that these moral sections be dropped from the draft, since section 1365 of the Indonesian Civil Code has guaranteed everybody to file a lawsuit to defend his or her rights. This section, she says, is enough to overcome the problems of adultery and *samenlaven* (Pikiran Rakyat, 2003). The Dutch-based Criminal Code was individualist and liberal, but the Draft of Indonesian Criminal Code is a unification of all Indonesian legal aspects. It is thus individualist and collectivist. It does not separate law form morality (Pikiran Rakyat, 2003). However, article 434 of the Draft prohibits the street prostitutions only. If it is done quietly, the prostitution is not prohibited. This lacuna, Neng Djubaedah (a law professor at the University of Indonesia) criticizes, will encourage institutionalized prostitutions (Lampung online, 2003).

CONCLUSION

This study has revealed a number of changes in Indonesian Islamic law over the last one hundred years. The moderate Shafiite and Sufi domination of Indonesian Islamic discourse was seriously challenged by the most rigorous and literalist school of Islamic law, i.e., Hanbalism. Under the pretext of calling for a return to the Qur'an and the Sunna, Hanbalite-inspired Wahhabism attacked Shafiite/Sufisanctioned popular practices. The Wahhabite-fiqh (as represented by the Muhammadiyah, Islamic Unity and Al-Irsyad) widely condemned indigenous Indonesian Islamic practices as un-Islamic. However, this anti-'urf (tradition) Islamic legal reform underwent radical transformation with the emergence of calls for an Indonesian fiqh and an Indonesian *maẓhab* by such scholars as Ash Shiddieqy and Hazairin, who calmly critiqued the puritan project of their former mentors. Instead of defending the Arabization of fiqh, both promoted the richness of Indonesian cultures and traditions as valid sources for the implementation of Islamic law in their newly established country. In this way, both came closer to Sukarno in his efforts to modernize the application of Islamic law with the help of modern knowledge and science. These developments had repercussions for the political sphere as well. Many Muslims were committed to establishing an Islamic State to ensure the comprehensive implementation of Islamic law. Constitutionally, they negotiated with "Secular" Nationalists to declare the newly proclaimed state to be an Indonesian Islamic State, but the Nationalists did not agree. Muslims did not even succeed in making Islam the state religion of Indonesia. Instead, Reformist efforts were directed towards the establishment of an Indonesian Islamic State/Indonesian Islamic Army, which maintained a resistance movement in parts of Java, Sulawesi, Kalimantan and Sumatra for a total of 13 years (1949-1962).

The second level of the relationship between the state and Islamic law can be seen in the politics of implementation of Islamic law. The Nationalist legal thinker Hazairin did not aspire to establish an Islamic state, but was very eager to have Islamic law incorporated into the Constitution. He not only revived Keyzer's "reception in complexu" theory, which had maintained that Islamic law was the living law of Indonesia, but also disregarded Hurgronje's "reception" theory. Hazairin's "reception theory exit" strongly inspired his students at the University of Indonesia. It was not surprising to see that the "Hazairin link" was behind the Islamization of Indonesian law, since Bustanul Arifin, Ali, Muladi, Mahendra and Abdullah actively promoted the implementation of Islamic law. They were even among the intellectual actors behind the process of drafting the New Indonesian Criminal Code. On the other hand, Reformist-oriented New Muslim Intellectuals underwent radical change. Muhammad Amin Rais, former Chairman of the Muhammadiyah, a graduate of the University of Chicago, became more moderate upon becoming Chair-man of the National Trusted Party and Chairman of the Indonesian People's Consultative Assembly. He did not support the restoration of the Jakarta Charter to its original status in the 1945 Constitution. Syafii Maarif (Rais' successor as Chairman of the Muhammadiyah since 1999), became more moderate upon graduating in his turn from the University of Chicago. Like Rais, he did not agree to the formalization of Islamic law at the constitutional level. As a final example, Nurcholish Madjid, who has never been a member of the Muhammadiyah, had long ago anticipated the effect of his University of Chicago degree by consistently promoting a "non-Shari'a" Islam since 1970.

The Muhammadiyah, as the symbol of Reformism, tended to be conservative under the direction of its Western-educated leaders, but soon a more assertive Reformism emerged. The Indonesian Mujahidin Council, the Indonesian Liberation "Party" and the Islam's Defenders Front straightforwardly demanded that Islamic law be comprehensively implemented in Indonesia. However, the Traditionalist Nahdlatul Ulama did not support this appeal because it opposed the main characteristics of indigenous and popular Islamic practices that had long been a focus of the Traditionalists. While such new Muslim intellectuals as Rais, Maarif and Madjid returned to the Traditionalist understanding of Islamic law, Wahid changed his mind not long after being elected President of the Republic of Indonesia. Instead of defending his 1988 project of the indigenization of Islam, he issued Bill no. 18/2000 on Nangroe Aceh Darussalam and extended the jurisdiction of Aceh's Religious Courts to exercise their authority over criminal and civil laws. On a different front, female legal thinkers started to emerge. Mrs. Wahid, Parawansa and Mulia on the one hand and Farha and Markoes on the other represented their respective Traditionalist and Reformist trends of Islamic legal "feminism," criticizing the misinterpretation of Quranic teaching on the fair and equal relationship between husbands and wives in the Indonesian context. The "Hazairin" feminists Katjasungkata and Zubaidah, on the other hand, represented two different trends: while Katjasungkana exhibited a Liberal Nationalist approach in calling for the privatizing of moral "crimes," Zubaedah, a Conservative Nationalist, called for their criminalization.

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