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Nur Ahmad Fadhil Lubis

Islamic Legal Literature and Substantive Law in Indonesia

Abstraksi: *Artikel ini membahas perkembangan dan keragaman pemikiran dan praktek hukum Islam kaum Muslimin di Indonesia, khususnya dalam bidang hukum keluarga dan kewarisan. Dalam membahas hukum Islam (syari'ah atau fiqh), fokus utama tulisan ini adalah posisi dan kontribusi hukum Islam dalam konteks sistem hukum nasional. Untuk itu, pembaharuan hukum yang diusulkan dan berhasil diloloskan akan digunakan sebagai unit analisis, khususnya dua produk hukum pemerintah Orde Baru, yaitu UU Perkawinan 1974 dan Kompilasi Hukum Islam 1991.*

Perkembangan hukum Islam di Indonesia berkaitan erat dengan proses Islamisasi di kawasan ini. Proses tersebut pada umumnya berlangsung secara pelahan, bertahap dan akomodatif, yang pada akhirnya membuat Islam dominan di Indonesia. Setidaknya sejak abad 16 muncullah literatur fiqh di kawasan ini. Literatur fiqh tersebut selain merupakan eksposisi murni tentang fiqh, juga bercampur dengan hukum setempat, atau adat sejak abad 16. Pada titik ini eksistensi mazhab fiqh, khususnya mazhab Syafi'i mengalami penguatan, dan pemikiran dan praktek hukum kaum Muslimin di Indonesia berkembang sejalan dengan mazhab Syafi'i.

Menggunakan hasil penelitian klasik van den Berg, dan penelitian van Bruinessen belum lama ini, artikel ini menguraikan panjang lebar tentang literatur fiqh yang beredar di Indonesia sejak abad 19 sampai sekarang ini. Kebanyakan literatur itu adalah hasil karya ulama-ulama

terkemuka di Timur Tengah. Tetapi juga terdapat sejumlah karya fiqh yang dihasilkan para ulama Indonesia sendiri. Pertumbuhan dan penyebaran karya fiqh ini juga mempengaruhi pertumbuhan dalam bidang tafsir dan hadits, sehingga kemudian muncul pula sejumlah literatur dalam kedua bidang ini.

Terdapat dua kecenderungan pokok di antara para ahli di Indonesia dalam menangani warisan fiqh di masa lalu ini. Yang pertama adalah memelihara dan merawatnya, yang kedua mencoba mereaktualisasikan ketentuan-ketentuan fiqh tersebut dalam konteks masalah dan tantangan yang dihadapi kaum Muslimin dan, dengan demikian, perlu penetapan hukumnya.

Kelompok ahli terakhir ini pada umumnya muncul dari kalangan reformis. Tokoh pertama yang paling menonjol dari kelompok ini adalah Hazairin, yang mengemukakan gagasan "provokatif" tentang perlunya pembentukan dan pengembangan "mazhab Indonesia" atau "mazhab nasional", khususnya dalam bidang-bidang yang berkaitan erat dengan kepentingan masyarakat luas (mu'amalat). Sayangnya, gagasan Hazairin ini berlalu tanpa tanggapan serius dari para ulama selama lebih dari satu dasawarsa. Setelah itu barulah muncul Hasbi Ash-Shiddieqy yang kembali menegaskan tentang perlunya pengembangan suatu "fiqh Indonesia". Dalam masa-masa terakhir, gagasan tentang pembaharuan hukum Islam di Indonesia ini kembali menghangat dengan tampilnya Munawir Sjadzali dengan konsepnya tentang "reaktualisasi" hukum Islam.

Pada bagian selanjutnya artikel menguraikan tentang kandungan hukum Islam dalam ketentuan perundangan nasional Indonesia. Pengadopsian hukum Islam ke dalam sistem hukum nasional sebenarnya sudah bermula sejak masa kesultanan. Kebijakan ini, dalam satu dan lain hal berlanjut pada masa kolonial, dan seterusnya pada masa kemerdekaan. Hasilnya, sejumlah aspek hukum Islam telah menjadi hukum positif bagi kaum Muslimin, khususnya berkenaan dengan soal-soal perkawinan dan kewarisan.

Tetapi, penerimaan aspek-aspek hukum Islam ke dalam sistem hukum nasional bukanlah melalui proses yang mudah dan sederhana. Terdapat proses yang rumit dan komplikasi-komplikasi yang terjadi sepanjang pengusulan dan penerimaan UU Perkawinan 1974. Hal yang hampir sama juga terjadi dalam penerimaan UU Peradilan Agama 1989. Terakhir sekali, pembahasan dipusatkan pada proses dan substansi Kompilasi Hukum Islam, yang menjadi pegangan bagi hakim-hakim agama di peradilan agama.

نور فاضل لوبس

الأدب الفقهي والنظام القانوني باندونيسيا

خلاصة: تتعرض هذه المقالة لمناقشة تطور الأفكار وتنوعها فى تطبيق الشريعة الاسلامية باندونيسيا، خاصة فيما يتعلق بالأحوال الشخصية، وهي تلقى الضوء على مكانة الشريعة الاسلامية وإسهاماتها فى النظام القانوني القومى، وتحقيقا لما تستهدفه تناولت المقالة بالتحليل الأحكام الشرعية التى تم تجديدها وقبولها قانونا، خاصة القانونين اللذين أنتجهما نظام الحكم الجديد، وهما قانون الزواج لسنة ١٩٧٤م وتصنيف الأحكام الشرعية لسنة ١٩٩١م لتكون كتابا مرجعيا.

وطبقا لافتراض الكاتب ، يرتبط تطور الأحكام الشرعية باندونيسيا أشد الارتباط بتقدم الاسلام فى هذه المنطقة تقدما بطيئا متفتحا وعلى مراحل، حتى أصبح الاسلام فى النهاية سائدا على جميع الانحاء باندونيسيا، وقد ظهر الأدب الفقهى فى هذه المنطقة على الأقل منذ القرن

السادس عشر الميلادى، وكان هذا الأدب بالاضافة إلى أنه بيان فقهى فقد امتزج أيضا باتجاه القانون المحلي أو العرفى، وقد ساد الفقه خاصة الفقه الشافعى منذ هذا القرن، مما أدى إلى تطور الفكر الاندونيسى مسايرا للفقه الشافعى.

ويفصل الكاتب القول بالاعتماد على نتائج الدراسات القديمة لفان دين بيرج (van den Berg) وعلى نتائج الدراسات التى قام بها فان برونيسان (van Bruinessen) منذ عهد قريب ، فيما يتعلق بالأدب الفقهى السائد فى اندونيسيا منذ القرن التاسع عشر الميلادى حتى الآن، وكان الغالب فى هذا الأدب مؤلفات العلماء البارزين فى الشرق الأوسط، بيد أن هناك من المؤلفات ما كانت من تأليف العلماء الاندونيسيين أنفسهم، وقد أثر تطور هذه المؤلفات الفقهية وانتشارها، على علوم التفسير والحديث أيضا، مما أدى إلى ظهور آداب فى هذين المجالين.

ويرى الكاتب أن هناك نزعتين أساسيتين للعلماء الاندونيسيين فى تناول هذا التراث الفقهى، أولهما : الحفاظ عليه ورعايته، والثانى تجديد ما فيها بغية مسايرة المسائل والتحديات التى تواجه المسلمين، الأمر الذى يحتاج إلى إقرار نتائج هذا التجديد إقرارا قانونيا.

وقد ظهر الداعون إلى التجديد من اوساط المصلحين، كان أولهم وابرزهم هازايرين (Hazairin) الذى كان يطرح فكرة مثيرة عن ضرورة تكوين مذهب فقهى اندونيسي فيما يتعلق بصفة أخص بالمجالات الوثيقة الارتباط بمصالح عامة المجتمع، على أن مما يؤسف له أن الفكرة كانت تمضى أكثر من عقد دونما تجد من العلماء والفقهاء من ينصر لها، حتى

ظهر بعد ذلك حسبى الصديقى (Hasbi Ash-Shiddieqy) الذى أعاد الدعوة إلى تكوين مذهب فقهى اندونيسى، وأما فى العهود الأخيرة فقد أثيرت فكرة تجديد الأحكام الشرعية بظهور مناور شاذلى (Munawir Syadzali) مع نظريته فى تجديد الأحكام الشرعية.

وفي الأجزاء التالية من البحث تعرض الكاتب لبيان مفصل حول إدخال الأحكام الشرعية فى النظام القانونى القومى، ويرى الكاتب أن تبنى الأحكام الشرعية لتدخل فى النظام القانونى القومى قد بدأ منذ عصر السلاطين، وامتد بشكل أو بآخر فى العصر الاستعمارى ثم فى عهد الاستقلال، فكانت النتيجة أن تمثل بعض جوانب الأحكام الشرعية قانونا وضع للمسلمين فيما يتعلق خاصة بالأمور الزوجية والارث.

بيد أن العملية التى تمر بها الأحكام الشرعية لتحتل مكانتها فى النظام القانوني القومى لم تكن معبدة، وهنا تناول الكاتب التعقيدات والملابسات التى كانت تحيط بمشروع قانون الزواج لسنة ١٩٧٤م وإقراره؛ وحدث نفس الأمر بالنسبة لقانون المحاكم الشرعية لسنة ١٩٨٩م؛ وأخيرا تابع الكاتب العملية التى مر بها تدوين الأحكام الشرعية حتى صارت كتابا مرجعيا لكل قاض فى المحاكم الشرعية.

The Search for an Indonesian *Madhhab*

One of the basic goals of the Muslim struggle during the last phase of colonial occupation of Indonesia was the estab lishment of an Islamic state. Facing the stalemate of opposition, a compromised goal was to seek the application of Islamic *syari'at* (Arabic: *sharî'ah*) for the Muslim population. This latter goal was revived again at the beginning of the New Order in the late 1970s, but was soon dropped. Learning from the failure of these efforts, the prevalent theme seems to be moving toward the partial realization of Islamic law through constitutional channels and the evolutionary transformation of Islamic values and Islamic legal norms by means of formal legalization and peaceful cultural assimilation.

The inter-relatedness of religion, law and society in a Muslim community is a truism obvious to all students of Islam. What is considered to, or should, constitute a law in Islam is a reflection of the religiosity of a certain Muslim society and may be taken as a supplementary index to delineate its social progress. With this in mind, this paper will discuss the development and variety of Indonesian Muslim thought and practices, especially in the fields of family and inheritance laws. In discussing Islamic law (both in the sense of *sharî'ah* and *fiqh*) in Indonesia, the focus is on the position and contribution of Islamic law in the context of a national legal system. Legal reform, proposed and passed, will be used as units of analysis, from which some legal formulation will be elaborated to see the different views that preceded and the various interpretations and justifications that followed them. Two legal products of the New Order government will be used: the Marriage Act of 1974 and the 1991 Compilation of Islamic Law. However, an analysis of the Islamic legal literature in the country will be useful background for the latter discussion in this paper, which will conclude with an effort to identify and classify various views on legal reform.

Fiqh Literature

Law is generally considered to be a reflection of religiosity in Islam, and legal knowledge with its various disciplines is the Islamic science par excellence. It has the most concrete implications for everyday behavior for it tells the believers what things are forbidden and what actions are required. Other disciplines of knowledge in Islamic scholarly traditions have often been formulated and taught in such a way as to facilitate the legal science. This tradition has also

influenced Islamic education and scholarly activities in Indonesia, especially when the *ṣûfî* orientation was taken over and coopted by the *fiqh* discipline as the prime expression of the religion.

As a late corner to the Islamic world, Indonesian Islamic education and scholarly activities have been a continuation and adoption, but later also modification and improvement, on older Muslim civilization. Therefore, at this point it is useful to mention the main characteristics of this relationship, both in the Islamic world in general and in Indonesia. The large Muslim communities of the archipelago are situated on the periphery of the Muslim world, and consequently this is one of the least influenced by Arab Islam. However, the international networks centered in Makkah, Madinah and later also Cairo, at least from the seventeenth century onwards, have increasingly played a crucial role in transmitting a rich Islamic heritage and scholarly tradition, and later also reformism to the archipelago.[1]

Islamization in Indonesia is characterized as essentially slow, gradual and accommodative, a process that is still going on up to the present. The element of inconsistency tells us something about the temporal dimensions of this on-going process. A well-known author[2] on this subject has tried to identify this progressive process beginning with (a) the conversion of significant elements of the population effected in legal and jurisprudential terms roughly around 1200-1400, followed by (b) the introduction of philosophical and intellectual elements in about 1400-1700, and continuing hence forward with (c) the growth of a rational-religious mode of thought. This may be accepted as an ideal typology for identifying the leading characteristics of one Muslim community, as long as it is not perceived as an unilinear development with a fixed time limit.

When Islam was gradually flowering in the Indonesian archipelago, the Islamic world had entered a period of conservatism especially in the field of law. The existence of *madhhab*s had been solidified and most legal thinking and practices were carried out within the established *madhhab*. The scholarly effort of Islamic scholars and jurists was directed towards interpreting and disseminating authoritative works in the forms of elucidation and systematization of legal thought and rules within the established legal theory of the concerned school of law. Even though this period was identified with the self-imposed closure of *ijtihâd* in the sense of independent thinking and the spread of *taqlîd* (strict adherence to an established *madhhab*) doctrine, this does not mean that scholarly and legal thinking came to a halt.[3] On the con-

trary, this period was identified with the emergence of commentary and super-commentary works (*sharḥ*) and the edition of abridged condensations (*hashiyah*) of the earlier reference works. This period also produced works on the formulation and standardization of legal maxims (*qawâ'id al-fiqh*) based on the various existing legal thinking and rules within a *madhhab*, and the collection and systematization of early and contemporary legal opinions (*fatâwâ*) of leading jurisconsults (*muftîs*) and legal decisions by well-known judges (*qâḍîs*).[4]

Even though the first waves of Islam that came to Indonesia might have been in the form of *sufistic* Islam, later developments show that a new thrust of the established Muslim sultanates and the later challenge of colonial oppression put the emphasis on developing a legalistic approach that embedded some *ṣûfi* elements. *Fiqh*, the main discipline of religious law, became the main vehicle for the propagation of Islam. The formulation of religious laws came to be regarded as an important part of the religious scholars' functions, both socially and individually.[5]

This development might be observed in Aceh, one of the first regions converted to Islam in the archipelago. The sultanate of Aceh in the sixteenth century had established diplomatic and religious contacts with the Ottoman Empire and attracted a constant stream of Islamic scholars from the Indian sub-continent and Western Asia, as well as being the gateway to Southeast Asia for Muslim intellectuals travelling to the great centers of Islamic learning in the Middle-East.[6] It is from the late sixteenth century onwards that indigenous Islamic literature dates, together with translations of and commentaries upon major works of theology, sufism, and law from the earlier centers of Muslim learning. The existing Islamic literature, according to Hooker[7] falls into three classes: (a) general works on religious history and religion which provided a background or ethos for specific belief and rules of obligation; (b) legal digests which contain rules of local origin together with elements of *fiqh* in various combinations, and (c) the standard texts of Islamic legal scholasticism of Middle Eastern origin, often translated into one or another local language and usually incorporating expensive glosses. The first type was for general consumption, the second was developed and sanctioned by the ruling elites, and the last circulated more among the *'ulamâ'* and jurists. The legal digests functioned as both an affirmation of *power* and a definition of sovereignty. Deeper reading into the contents of these legal digests shows that they contained a mixture of Islam and rules

of local origin in various proportions. However, more and more digests refer to *hukum Allah* (God's Law) as one of the sources, for the laws of the sultanate.

One reaction to the type of abstract theological discussion and sufistic reflection which characterized this literature and the focus of learning of early Islam in Indonesia was the growing persistence of Islamic legal orthopraxy. In Aceh, this was initiated by the famous al-Rânîrî (d. 1658) who wrote a number of important works in both Arabic and Malay which stressed the important position of *sharî'ah* and *fiqh* as giving practical guidance for everyday life while at the same time refuting the excesses of earlier interpretation. He also condemned the reading of popular non-Muslim literature, such as *Hikayat Seri Rama* (of Hindu origin), and criticized *sûfî* oriented authors who neglected the practical legal side of religion.

A new trend of legalism based on the strictly formulated *fiqh* rules brought over from the centers of Islamic learning proceeded directly to "purify" the Muslims of alleged un-Islamic excesses since the early nineteenth century, and thereby put the *sharî'ah* jurists and their knowledge in important central roles in society. In this way, Indonesian Muslims relied mainly on a form of "adaptive legalism"[8], to face the challenge of social changes and modernization. One of the main functions of Islamic centers of learning and scholarly activities in the country was to educate cadres of Islamic scholars and leaders, and to provide public forums in which religious scholars could instruct the general population in the detailed implementation of adaptive legalism; legalism that, while maintaining Islamic principles, also implied a gradual framework for guided change through religious laws.

It is worthwhile to point out here the gradual syncretic peaceful penetration of Islam in the archipelago. It is fairly obvious that the non-legalistic character of early Muslims in the archipelago, particularly in Java, helped the accommodation. As Anderson[9] observes, Javanese Muslims, in the process of absorbing Islamic values, reinterpreted existing cultural symbols for the definition and promotion of Islam. However, this took place within the basic indigenous cultural and intellectual framework so far as legal digests were concerned, despite the fact that Islamic jurisprudence and *fiqh* literature were increasingly influential in Java. It can be concluded from the existing studies of this period, that the Islamic legal literature had more influence among the *'ulamâ'* and their disciples, than in society at large, and even much less influence at the royal court. However, all this

does not mean that they had isolated themselves from the changes taking place outside their *pesantrens* (Islamic boarding schools) and mosques. Those religious scholars responded to social changes by formulating a set of legal decisions reflecting a close interaction between the rich legacy of the past, as prescribed in the old law texts, and the ever-changing situation in real life. Legal maxims (*qawâ'id al-fiqh*), legal theories (*uṣûl al-fiqh*) and legal philosophies (*ḥikmah al-tashrî'*), besides the substantive legal rules (*furû' al-fiqh*) of the past were used as resources to find answers and to formulate responses to questions and problems posed to and faced by the community. Although not always providing ready satisfactory answers to ever-changing human needs, those theories and rules do provide raw materials and guidance in deriving a rule which provides somewhat of a balance between literal adherence to the scripture and the guided use of human reasoning.

This approach, however, has a serious drawback that renders it incapable of coping fully with the challenge of modernization. The drawback lies in the laws' complete lack of an adequate social framework which was needed to formulate a systematic response and guidance to the processes of change and the problems of contemporary life as manifested through these processes, let alone to determine its future course. Those laws remain casuistic and reactive in nature, relevant only to individual cases without clarifying the fundamental aspects of life affected by the accelerated progress of modernization. Consequently, this *ad-hoc* approach which used to possess a revitalizing process, as initiated and formulated by earlier creative thinkers, gradually became an inert tradition, and the resulting adaptive legalism was transformed into legal conservatism.

Due to the heavy influence of the legal literature, one way to see this development of legal thinking and practices of the great majority of "traditional" Muslims, is by finding out what textbooks were used in the centers of Islamic learning in the country and likewise to see what books were read and consulted by their learned Islamic elites. Van den Berg's pioneering study of the Javanese *pesantren* curriculum in 1886 has been useful in pointing out influential books at that time.[10] He compiled a list of major textbooks on the basis of interviews with *kiyai*'s (leaders and teachers of a *pesantren*). He listed fifty titles, a large proportion of which were in the field of law. It is also interesting that most of the textbooks in the list are still reprinted and used, alongside some other new ones, to the present day.

The *fiqh* work mentioned by Van den Berg as the most important book of reference was *Tuhfah al-Muhtaj* by Ibn Ḥajar al-Haytamî (d. 973 AH/1565 AD). Snouck Hurgronje[11] also confirmed this by observing that this book together with Shams al-Dîn al-Ramlî's work *Minhaj al-Tâlibîn*, by Abû Zakariya Yaḥya ibn Sharâf al-Nawâwî (d. 676/1277-8), were the most authoritative references for the *'ulamâ'* of the archipelago in his time. He further mentioned that in cases of differences between the two authors, Indonesians still preferred Ibn Hajar's above-mentioned book. Van Bruinessen's recent study on a similar topic shows that this is still true to the present day.[12] My own observation of the libraries of the *agama* courts and the collections of some individual *'ulamâ'* suggests that the importance and influence of this book may have been more a matter of respect, but in actual practice the judges seldom refer to it, because most of the courts and *'ulamâ'* do not have it in their collections. Most book shops specializing in Islamic literature, as also mentioned by van Bruinessen, have not stocked this book for some time which may be taken as a sign of its decreasing use and importance.

Van Bruinessen has identified three major *fiqh* works which have been widely used, especially among the traditionalist Indonesian Muslims.[13] Each work has attracted many commentaries and summaries which form a family. The most important was *Muharrar* by al-Râfi'î (d. 623/1226). This original work has been commented upon by many authors; the commentary most widely used by Indonesian Muslims being that of al-Nawâwî (d. 676/1277-8), entitled *Minhaj al-Tâlibîn*. There have been a number of authors who have written commentaries on this influential work of al-Nawâwî. The most widely used of them have been *Kanz al-Râghibîn* by al-Mahallî (d. 864/1460), *Manhaj al-Ṭullâb* by al-Ansârî (d. 926/1520), *Tuhfat al-Muhtaj* by Ibn Hajr al-Haytâmî (d. 974/1565-6), *Mughnî al-Muhtaj* by Sharbinî (d. 977/1569-70), and *Nihâyat al-Muhtaj* by al-Ramlî (d.1004/1595-6). The commentary work by al-Mahallî, *Kanz al-Râghibîn*, is usually printed on the margin of its most important super-commmentary work by al-Qalyûbî and 'Umayrah which is required reading for student specializing in Islamic Law in IAIN. Al-Ansârî has also written an elucidation edition of his own commentary, *Manhaj al-Ṭullâb*, which is called *Fatḥ al-Wahhâb* which is a textbook for secondary level students in *pesantrens* and *madrasahs*. An early Indonesian translation of this latter work, *Mir'at al-Ṭullâb* by 'Abd al-Ra'ûf of Singkel,[14] edited in part in Meursinge,[15] used to be available but is no longer in circulation. Besides these,

there are some abstract editions (*hashiyah*) of these multi-volume works which are used by beginners.

Other highly popular *fiqh* works are based on a famous *qâdî*, Abû Shujâ al-Isfahânî (d. 593/1197?), under the name of *al-Ghâyah wa al-Taqrîb*. The most widely used commentaries of this work have been that of Ibn al-Qâsim al Ghazzî (d. 918/1512), *Fatḥ al-Qarîb*, followed by *Kifâyat al-Akhyâr* by Tâqî al-Dîn al-Dimashqî (d. 829/1426. The works in this family have also been translated into some regional languages and edited by certain Dutch scholars.[16]

The last, but still popular *fiqh* books, are those based on *Fatḥ al-Mu'în* which was written by the sixteenth century south-Indian scholar Zayn al-Dîn al-Malîbârî (d. 975/1576), a student of the above-mentioned Ibn Ḥajar. This book which was an improvement of an earlier work by the same author, *Qurrât al-'Ayn*, has been translated into Malay and Javanese languages. Three commentary works on this book at least are available in the archipelago: *Nihâyat al-Zayn* by a famous Indonesian author al-Nawâwî Banten, *I'ânat al-Ṭâlibîn* by Sayyid Bakrî al-Dimyatî (d. 1893 AD.) and *Tarshih al-Mustafidîn* by 'Alwî al-Saqqâf (d. 1916).

Some of the *fiqh* books are based on the collection of *fatwâs* by a certain leading scholar or scholars. In this genre, the most widely used one is *Bughyat al-Mustarshidîn* which is a collection of legal opinions of 19th/20th-century *'ulamâ'* compiled by the *muftî* (juris consul) of Hadramawt, 'Abd al-Rahmân ibn Muḥammad ibn Ḥusayn Ba'lawî. *Al-Muhadhdhab*, by al-Nawâwî, is also consulted especially by some learned *'ulamâ'*. It is interesting to note here that these two latter works incorporate many *"al-fatâwâ al-maqtu'ât"* (authoritative legal opinions) which shows the interrelatedness between *fatâwâ* (legal opinions) of leading *faqîhs* and *furû' al-fiqh* (substantive laws), and the significance of legal precedence among *qâdis* and *muftis*.[17]

Other works related to *fiqh* that should be mentioned here are *al-Ashâbah wa al-Naẓâ'ir* which is a compendium of Islamic legal maxims in the Shâfi'î school by the prolific Jalâl al-Dîn al-Suyûṭî, and *Bidâyat al-Mujtahîd*, which compares the rulings of the four Sunni and various other *madhhab*s with their reasoning, by Ibn Rushd (1126-1198). These and similar books have gradually gained influence among Indonesian Muslim scholars, including the judges in *agama* courts. In his survey in 1886, Van den Berg mentions no work in the field of *Uṣûl al-Fiqh* and other related disciplines. It might have been the case

that the curriculum of the *pesantren* he surveyed at that time emphasized the substantive laws (*furû' al-fiqh*). However, other contemporary studies also mention that some texts on this subject were available which were probably used more among the teachers and *'ulamâ'* rather than as textbooks for regular instruction. Since the turn of the century, *uṣûl al-fiqh* has become an obligatory subject in almost all *pesantrens* and *madrasahs* at the middle and higher levels. The most popular in this field has been *Jam' al-Jawâmi'* by Tâj al-Dîn 'Abd al-Wahhâb al-Subkî and its *sharh* (commentary) by Jalâl al-Dîn al-Mahallî. This work has also been summarized by Zakariyâ al-Anṣârî in his book *Lubb al-Uṣûl*. Another important book in this category is *al-Waraqât fî Usûl al-Fiqh* by Imâm al-Ḥaramayn 'Abd al-Mâlik al-Juwaynî (d. 478/1085). The most important commentary on this that has been widely used in Indonesia especially among reformist Muslim group is that of the Indonesian reformist author Ahmad Khatîb (1860-1916), *an-Nafâhat 'alâ Sharḥ al-Waraqât*. Another short work widely used by students is *al-Luma' fî Uṣûl al-Fiqh* by Ibrâhîm ibn 'Alî al-Shirâzî al-Firûzabâdî, the author of the above-mentioned *Muhadhdhab*.

The importance of law in Islamic educational institutions has influenced the way other subjects have been taught and perceived. Al-Qur'ân and al-Sunnah are the two prime Islamic sources, and knowledge of these subjects is a preliminary requirement for a person to be considered capable of deriving legal rulings out of the sources. However, since earlier authors have formulated the rules in the books, it was these *fiqh* books that were mostly consulted and it was considered inappropriate to bypass opinions of these authoritative predecessors. Van den Berg's impression is probably generally correct that in the late nineteenth century, *tafsîr* (Qur'ânic exegesis) was not yet considered an important part of the curriculum. However, under the impact of *salâfî* and modernism movements, with the slogan of return to the Qur'ân and hadîth, the subject assumed greater importance. Van Bruinessen's recent survey, however, finds that the range of *tafsîr* studied in the Islamic schools is still very narrow. This might be true among elementary and secondary students, but students at higher levels and among the *'ulamâ'* and the judges surveyed have quite extensive reading and comprehension of *tafsîr* works. For beginners, *Tafsîr al-Jalâlayn*, which is the only *tafsîr* in Van den Berg's list, is widely used. Afterwards, those *tafsîrs* by al-Bayḍâwî and al-Qurtûbî, as well as *Tafsîr al-Munîr* by al-Nawâwî are regular refer-

ence reading. Some works by modern Muslim authors are also in wide circulation especially among modernist-influenced Muslims: *Tafsîr al-Manâr* by Muhammad 'Abduh and Rashîd Riḍâ, *Tafsîr al-Qur'ân* by al-Marâghî, and less frequently, *Fî Ẓilâl al-Qur'ân* by Sayyid Quṭb. My experience with some *'ulamâ* who have been arbitrarily grouped as traditionalists in North Sumatera, shows that they actually read and some even have, these multi-volume works in their collections. In my student days in IAIN Medan, the *ustadh* (professor) used al-Marâghî's *Tafsîr* as the basis of study and required us to read and compare it with other works, be they classical or modern. However, a more intensive study has been dedicated to limited legal verses (*'âyât al-aḥkâm*) of the Qur'ân for which two books by modern authors from al-Azhar are used as basic reading, both bearing the same title *Tafsîr Ayât al-Aḥkâm* by al-Sabûnî and 'Alî al-Sâ'is. The interest may also be seen in the emergence of original works by Indonesian writers in this field.[18]

The same trend has also been true with *ḥadîth* studies. The study of *al-hadîth* usually starts with memorizing the forty important *ḥadîth, al-Arba'în* by al-Nawâwî. Collections of acceptable *hadîth* become the next level of readings: *Bulûgh al-Marâm* by Ibn Ḥajar al-Asqallânî (d. 852/1449) which is usually read through its main commentary, *Subul al-Salâm* by Muhammad ibn Ismâ'il al-Kahlânî (d. 1182/1769) and the *Riyâḍ al-Ṣâlihîn min Kalâm Sayyid al-Mursalîn* which mainly deals with ritual subjects collected by the same author of *Arba'în* hadîth.[19] The two great collections of authentic (*saḥîḥ*) *ḥadîth* by al-Bukhârî and Muslim are mostly for advanced students and individual use by *'ulamâ'* and also *agama* court judges. In my recent trips to Indonesia, most of the courts have these multi-volume works in their libraries.

The above survey of the main legal literature used and referred to by Indonesian Muslims shows the sources of legal thought and practices of Islamic law proponents in the country. This literature, to a great extent, must have influenced their ways of finding answers and rules for the day-to-day problems of the community. Another trend that can be derived from the survey is that their sources of literature have been gradually extended not only in substantive law proper, but also in other related legal disciplines. Another recent phenomenon has been the availability and usage of works outside the Shâfi'î *madhhab*.

The sources of Islamic law are in written forms, so also are the

formulations by legal scholars as *fiqh* texts, but they are not written law proper. These materials must go through *taqnîn* (enactment) by the caliphs or Muslim rulers or by "*qadâ*" (adjudication) of a *qâdî*, or by a "*fatwâ*" (legal opinion) of a "*muftî*" (jurisconsult) to transform them into "positive law". Even though most of Islamic law has never been enacted as a positive law by the rulers, it is followed and respected as a part of religious conviction and due to moral consciousness and social sanctions.

It is obvious, even from a casual glance, that the definition of Islam and of Islamic law at any particular time and place is bound to be fluid. The structure of *fiqh* books, which contain layers of opinion, and the scholastic discipline of picking up a substantive rule from multilayered legal doctrines, have given a *faqîh* wide possibilities in responding to the ever changing demands of a community. There are no grounds for saying that, as long as they go along with the accepted boundaries, any one definition is more valid than another; one can only speak of relative utility, given the circumstance and purpose in a particular case. Indeed, an excessive relativity as well as fragmentation seems to be one of the characteristics of Indonesian Islamic law. It may well be that the classical sources of Islamic law operate in this archipelago as a series of standards for law rather than as a strict expression of law. In this sense, it is a hasty conclusion that because Indonesian Muslims share common legal texts they are identical with other adherents of the Shâfi'î *madhhab*. To what extent can *fiqh* literature be considered an accurate expression of actual legal practice? The evidence is conflicting and other determining factors should be taken into account.

Those *fiqh* texts are many and varied, not only from one *maddhab* to another, but even within the same *maddhab*. Those books are generally written in a hypothetical form with various layers of opinions. There have been so many *fiqh* texts that have been widely circulated and referred to in the archipelago which consequently are also reference texts for judges and jurisconsults that they may not only give different but sometimes contradictory decisions and opinions. This, of course, creates a legal uncertainty and speculation, as well as (as reported by some colonial officers) corruption. The Ministry of Religion tried to mitigate this condition by issuing a letter of instruction in 1953 limiting the number of texts that judges may consult in finding a decision.[20] Those texts were:

1. *Bughyât al-Mustarshidîn* by Husayn al-Ba'lawî;
2. *Al-Farâ'iḍ* by Shamsûrî;
3. *Fatḥ al-Mu'în* by al-Malîbârî (ca. 975 AH.);
4. *Fatḥ al-Wahhâb* by al-Anshârî (d. 926 AH.);
5. *Ḥashiyah Kifâyat al-Akhyâr* by al-Bajûrî (d. 1277 AH /1860 AD);
6. *Mughnî al-Muhtaj* by al-Sharbînî (d. 977 AH / 1569 AD);
7. *Qawânîn al-Shar'iyyah* by Sayyid 'Abd Allâh ibn Sadâqah San'ân;[21]
8. *Qawânîn al-Shar'iyyah lî Ahl al-Majâlis al-Hukûmiyyât wa al-Iftâ'iyyat* by Sayyid Usman ibn Yahya (1822-1913) of Batavia;
9. *Sharḥ Kanz al-Râghibîn* by al-Qalyûbî (d. 1659 AD) and 'Umayrah;
10. *Sharqâwî 'ala al-Taḥrîr* by al-Sharqâwî;
11. *Tuhfah al-Muhtaj* by Ibn Ḥajar al-Haytâmî (973 AH /1665-6 AD);
12. *Targhîb al-Mushtaqq* by Ibn Ḥajar al-Haytâmî;
13. *Kitâb al-Fiqh 'alâ al-Madhâhib al-'Arba'ah* by al-Jazîrî (1882-1941 AD).[22]

These texts generally, as mentioned above, are the popular books that have been taught and studied in Islamic religious schools since the establishment of this religion in the archipelago, especially in *pesantren* besides being widely read and generally referred to by *'ulamâ'*.[23] This may have been the principal reason why these books were selected. The selection must have been heavily influenced by the NU *'ulamâ'* who dominated the Ministry of Religion and Islamic courts in this period. It is interesting to note that except for the book by al-Jazîrî, all of the texts listed were part of the texts adopted by the NU organization which follows the Shâfi'î school while still recognizing, at least formally, the other three Sunni schools.[24]

Most of these texts were written in Arabic, except those of Sayyid Usman and Sayyid San'ân, which are written in Malay but in Arabic script, by well-known *'ulamâ* many centuries ago. With the exception of Sayyid Usman (Arabic: Sayyid 'Uthmân), all of them were Middle Eastern writers who most probably were not aware of the Muslims in the archipelago. Sayyid Usman was a well-known Islamic figure with an Arabic, probably Prophetic, descent. He was appointed by the Dutch colonial government to be honorary adviser for Arabic and Islamic affairs. He was also reported to have a friendly relationship with Snouck Hurgronje, the most influential of the colonial advisers on Islamic and native affairs. This must have influenced his ideas as reflected in the collection of his advice,[25] such as his enmity

towards the first Islamic nationalist movement, Sarekat Islam, whose leader the first Islamic affairs. He was also reported to have a friendly relationship, the most influential of the colonial advisers and native affairs. This must have influence his ideas as reflected in the collection of his advice, such as his enmity towards the first Islamic nationalist movement, Sarekat Islam whose leader, Cokroaminoto, he accused of not adhering to Islamic teachings. His "*fatwâ*" was widely used by the colonial government to suppress many Islamic organizations and movements.

As suggested by its title, *al-Qawânîn al-Shar'iyyah lî Ahl al-Majâlis al-Ḥukûmîyyah wa al-Iftâ'iyyah*, this book is intended as a handbook for Islamic judges and jurisconsults especially in Jakarta and its vicinity as well as other Malay-speaking regions. The book is divided into 11 subject areas which covered important ethico-procedural rules and some important legal subjects. The book starts with a discussion of the principles and sources of Islamic law, various levels of *mujtahid*, strategy toward differences of legal opinions (*ikhtilâf*), reliable texts and the methods to derive legal rulings out of them. This is followed by the qualifications required of a judge and ethical codes for them, and this part concluded with the pillars of faith. Substantive law begins with the methods to determine the beginning of the lunar month, important in connection with fasting and the *'îdayn* (two Islamic festival days). The second part of it deals with property laws and inheritance, and is followed by extensive rules on marriage and divorce. The last part is dedicated to regulating requirements of a valid suit, witness, decisions, and procedural ethics in the process of judicial sessions.

This book, as seen from its chapters, was intended more as an introductory handbook, rather than a comprehensive handbook of law. In this sense, the book is interesting in structuring the qualified works that must be consulted to derive a valid legal ruling. In the form of a schematic diagram, the author puts al-Qur'ân at the top accompanied by a verse (5:49) which orders judges to judge in accordance with the revelation. At the second level are the two authoritative *ḥadîth* collections of al-Bukhârî and Muslim representing the second source, i.e. al-Sunnah. At the third level, which is for the level of *Mujtahid Mutlaq* (independent thinkers), are all the books of al-Shâfi'î and his important disciple al-Buwaytî. At the fourth level, for *Mujtahid al-Madhhab*, the books of al-Ghazâlî, *al-Khulâṣah*, and al-Ḥaramayn, *al-Nihâyah*, are mentioned. At the next level of those who are called *Ahl al-Tarjîḥ* (*'ulamâ'* who can identify the strongest opinion among various views), the works of Ibn Ḥajar, al-Ramlî, and Zakariyyâ al-Anṣârî are mentioned. On the

lowest level, the author just mentions the teachings of able teachers (*ajaran guru-guru yang mengerti*) who are still divided among beginners (*al-mubtadî*), intermediate (*al-mutawassit*) and advanced students (*al-muntahî*).[26]

Another book with a similar title was also in use for some time during the colonial period. This book was based on an original work of 'Abd Allâh ibn Ṣadâqah Dahlân, a Shâfi'î *imâm* in Mecca and has been edited and elucidated by many Indonesian writers. Its full title was *Kitâb al-Qawânîn al-Shar'iyyah al-Jazâ'ir al-Indûnîsiyyah al-Musamma Irshâd Dhawâ al-Akhlâm ilâ Wâjibât al-Qudat wa al-Hukkâm* (A book of *sharî'ah* rules for the Indonesian archipelago entitled *The Guidance of Principles for the Duties Of Judges and Government Officers*). This book was ratified and accepted as a semi-official handbook for the judges of religious courts by the Colonial Adviser for Native Affairs. If 'Usmân's early version was structured in accordance with common *fiqh* texts, this latter book followed the model of colonial statutes.[27]

While the main objective of the ministerial instruction was to simplify the references for Islamic judges, the listing still produced great variation. What is interesting and novel is that the list included the *Al-Fiqh 'alâ al-Madhâhib al-Arba'ah*,[28] consisting of five volumes, which contains comparative discussions on the leading opinions of the four Sunnî schools of Islamic law. This latter book is not a prime reference work among the *pesantren* students and teachers, but it is required reading for students of IAIN (State Institute for Islamic Studies).[29] Even though the instruction did not significantly help to reduce judicial uncertainty, this has been a stepping stone for further standardization during the New Order period.

The judicial uncertainty and confusion brought about by the nature of *fiqh* texts and the *fiqh* discourse which were written more as legal scholastic dispositions and disputations, encouraged the government to standardize and legalize them. Obviously this policy has been influenced by the legal culture of the civil law system to which the national policy makers are accustomed as a legacy of Dutch colonial legal policy. Different from the common law system which emphasizes the judge-made law, the civil law stresses codification and statutes. Several efforts towards this policy in the field of Islamic law in Indonesia had been initiated as early as the seventeenth century by the Dutch colonial government, the most important of which was *Compendium Freijer*. Besides this, efforts were made to translate

some *fiqh* texts into European languages, such as that of Th. W. Juynboll,[30] as fulfilling a need to make *fiqh* texts available for the colonial judges and the government officers who could not read Arabic. The 'compendium' compiled by D. W. Freijer was accepted by the VOC (Dutch East Indies Company) in 1760 to be a guidance and reference for courts of justice in settling disputes between Muslims. The products of this effort have been taken, as rightly criticized by Snouck Hurgronje, as legal code books.

The translation of these influential *fiqh* texts, firstly into Dutch and later into Indonesian languages, marked the increasing significance and reliance on a new version of Islamic legal literature. This influence was stronger among the colonial and later on also national bureaucracy who had no access to the original texts. Their understanding of this legal literature must have been influenced by their education in the Dutch-initiated law schools and their secular legal framework of thinking. Different from the *'ulamâ'* and *pesantren* students who revere the *fiqh* texts as a collection of God's rules as formulated by early pious authors from which they may derive a legal ruling on any aspect of life, the bureaucrats take the texts, or more precisely their translations, as the legal books to which every Muslim is subject. With this in mind, Snouck Hurgronje's criticism and Islamic law proponents' complaints about the misunderstanding and mistreatment of Islamic legal texts by the government, be it colonial or national, are easier to understand.

The existence of and reliance on Indonesian versions of legal texts in the post-colonial period may be seen as leading towards the formation of an Indonesian version of Islamic law. In other words, it is a supplementary factor in establishing and disseminating Indonesian *fiqh*, which has become a theme since the early days of independence. More and more books on every subject and aspect of Islamic law are written in the national language which is used not only in Islamic schools but also in state law schools. The influence of Islamic law terminology and discourse on general law in Indonesia is greater than is usually acknowledged. However, the Islamic judiciary and traditional *'ulamâ'* have not had any great influence in the process of establishing and defining a national legal system. Their conservatism and reactionism has been noted by some authors. The progress and rejuvenation of Islamic law in independent Indonesia have come mostly from outside the Islamic judiciary.

Re-actualization of Islamic Law

While the traditionalist were busy conserving the *fiqh* legacy and elaborating their casuistic laws, several new developments took place. The inability of the traditionalists to provide a social framework that could adequately answer the backwardness of the Muslim community and respond to the challenge of changes, led to a variety of new movements. One growing movement was based on the view that Islam had to be purified from all aspects alien to its original character and purpose as a liberating religion for mankind as a whole. It had to return to its primary sources: al-Qur'ân and the Prophet's Tradition. Putting Islam on the right path meant a return to the original mission: to relive the real spirit of the golden age of the Prophet and his companions.

The simplicity of the faith should constitute the strength needed to face the onslaughts of modernization. The explicit injunction to use one's reasoning faculties should form the basic attitude toward the development of scientific knowledge and useful technology. The injunctions for equality should translate into egalitarian economic structures. The direct return to the fountainhead of religion would also transform the dominant role of the religious scholars in religious life. Guided innovation (*ijtihâd*) symbolizes the direct relation between Allâh and His worshippers, regardless of the degrees of a person's religious knowledge. The liberation from religious traditionalism means the elaboration of a new societal framework and structure that could translate the base norms into social reality in the life of Muslims. Stress on economic undertakings, pursuit of non-religious sciences, and the establishment of health services for the public, combined with charitable works for orphans, old people, and the disabled, made up the main elements in the way of life advocated by the reformist movements such as Muhammadiyah[31] and Persis.[32]

These new movements which insisted on a return to the prime sources and on the purification of alien elements, led them to disregard the strictly formulated *madhhab* and their abundant limiting texts. However, these ideals were easier to express than to actualize. The failure of the reformist movements to develop a viable response to the challenges of modernization and stagnation partly originates in their insistence on purification and partly in their own successes in social service programs. Such a strict demand for purification stipulates the total acceptance of scripture and a non-interpretive adherence to it. What emerges is a literal approach to the understanding of

religious teachings; strict scripturalism becomes unavoidable. A rejection of the established *madhhab* encourages the establishment of a quasi-*madhhab* within the movement and its national leaders, especially a commission of *Tarjih*, become their formulators. A selective use of scripture allows them to present a socio-religious alternative. The success of many of its community-based social services and its expansion into one of the largest Muslim organizations in the nation have routinized and solidified its ideals. As such, it has gradually lost its innovative edge. However, Muhammadiyah and other puritan/reform movements have liberated the Muslim intellectuals, including the proponents of traditional Islam, to new sources and ways of interpreting and defining the religiosity in an ever-changing society. At least the criticism and challenge has brought home to the traditional Muslim scholars the limitations and shortcomings of their approach and decisions.

These new movements came forward to bring new kinds of literature and revived classical works in the neglected fields. Books on Qur'ânic exegesis, the collections and commentaries on Prophetic Traditions, works on legal theories, legal maxims and philosophy came into prominence. The comparative works among not only the four surviving authoritative Sunni *madhhab*, but others, were becoming more popular. Besides, some new writers among the puritan and reform movements started to produce new works both in Arabic and later, more and more, in the Indonesian national language.

So far there has not been any systematic study of the overall development of Islamic legal thought in Indonesia, let alone of the concrete legal reform ideas among Indonesian Muslim thinkers. One easily gets the impression that Western studies on modern Islamic law have neglected and ignored the legal form in Indonesia. The same ignorance, or even cynicism, is also prevalent among Muslim scholars and activists in some Muslim countries.[33] In this study, a discussion of the legal reform ideas forwarded by several leading contemporary Muslim scholars will be presented below mainly because their ideas have survived and will influence the present debate and future course on the nature and function of Islamic law in the country.

In his academic speech in 1951, Hazairin (1905-1975) presented the provocative idea of initiating the establishment of a "national *madhhab*" (*madzhab nasional*) especially in those fields that are closely knitted with society's interest. In the fields of religious rites and norms regulating the relationship between a man and God in the strict sense

(*'ibâdat*), this reform was not needed and the universality of Islam was to be maintained. So, he focused his reform ideas on *mu'âmalât* (human relationships). He mentioned several reasons why such a new *madhhab* in this field was needed. First of all, he recognized the great contribution of earlier Muslim *mujtahids* who had successfully studied and formulated Islamic legal rules and left abundant valuable legal texts. What must be followed was not what they had formulated in legal rule, but their spirit and methodology in formulating legal rules from the sources in order to regulate their contemporary society. He believed that God's injunction and guidance is never closed, and that the gate of new *ijtihâd* is always open.[34]

Hazairin's ideas contain several fundamental points on Islamic law reform in Indonesia: (a) The need to give the national character to the development of Islamic law in Indonesia by formulating it in a national *madhhab* in order to emphasize those things that are specific to Indonesia; (b) In founding this national *madhhab*, it must differentiate between *'ibâdat* and *mu'âmalât* with a note that efforts are mostly directed to this latter field of Islamic law; (c) The Shâfi'î *madhhab* may be retained in the field of *'ibâdat*, while in the latter field, it should just function as a source; (d) In this effort, new *mujtahids* with a national perspective are needed; (e) Their effort must not be carried out individually, but more as a collective and systematic program.[35]

Hazairin's reform ideas went unnoticed for more than a decade or attracted little attention among Muslim *'ulamâ'*. This might have been caused by Hazairin's background and position. He obtained his legal education in the elite colonial law school in Jakarta and specialized in family law, in particular the various laws of inheritance existing in the country. He was later appointed as professor in Islamic and *adat* laws in the University of Indonesia in Jakarta. He is one of the radical adherents of the "new *ijtihâd*". In his opinion, Indonesian society differs sharply from Arab society within which Islamic jurisprudence developed. Since 1950 Hazairin has become more and more convinced that the Qur'ân is adverse to any unilaterally organized society, i.e. a society consisting of clans following a matrilineal or patrilineal system of kinship. The overall understanding of Qur'ânic verses pertaining to family and society are directed to establish a "bilateral-parental system". He therefore felt the need for Indonesian Muslims to be encouraged to go in that direction. Socially, his ideas should be feasible, because even though all three kinship systems-patrilineal, matrilineal, and parental- are found in Indonesia, the great majority

of people, especially the Javanese, follow a parental family system. In realizing his ideal for new *ijtihâd*, he sponsored and participated in the establishment of several Islamic universities, and for some time he was the rector of the Jakarta Islamic University. His views may be found in his many writings[36] and many of his former students, some of whom have influential positions, continue to nurture his ideals.

His reform ideas, especially on bilateral-parental kinship based on inheritance law attracted growing support among the law policy makers in the Ministry of Justice. Under the sponsorship of the National Body of Law Development (BPHN), a symposium on National Inheritance Law was held in Jakarta in 1963. Hazairin's books on the subject were nominated as the guiding reference. In this forum, many prominent Muslim scholars came forward to discuss Hazairin's views. Two well-known Muslim scholars, Thoha Yahya Omar and Mahmud Yunus came forward to criticize Hazairin's innovative, sometimes inconsistent, interpretation of the Qur'ânic verses and *ḥadîth* and his novel construction of inheritance rules which ran counter to the traditionally agreed-upon formulations. Hazairin's defense against this criticism seemed to reveal his further departure from traditional Islamic legal theory. The discussion failed to produce any consensus because both sides had a different approach and paradigm. However, most Indonesian *'ulamâ'* were convinced by the argument and the line of reasoning of these two well-respected *'ulamâ'*. Even in the later compilation of Islamic law in 1991 the influence of Hazairin's views have been minimal.

For more than ten years, Hazairin's ideas seem not to have had any positive response, either from Muslim scholars or among general law professionals. Then in 1961, Hasbi Ash-Shiddieqy, a professor in the State Institute for Islamic Studies (IAIN) in Yogyakarta in the inaugural speech of his tenure, revived the idea without mentioning Hazairin's earlier views. Hasbi Ash-Shiddieqy stated that there was a great and urgent need to carry out new *ijtihâd* of Islamic *sharî'ah*. In this effort, IAIN and other Islamic universities have a duty and strategic position for the betterment of public welfare (*kemaslahatan*) and to become pioneers in the establishment and application of law in the country. Such conscious efforts will eventually create Indonesian *fiqh*, such as has been done in Egypt and other Muslim countries. Indonesian *fiqh* is that which is formulated and applied in accordance with the nature and character of Indonesian Muslims.[37]

Why should this Indonesian *fiqh* be created? Ash-Shiddieqy men-

tions among other reasons, that the Islamic law that prevailed in Indonesia mostly came from Hijâzî *fiqh*, Islamic law which has been formulated to regulate the people and culture in the Hijaz, Egyptian *fiqh* which mainly answered the problems and needs of the people of Egypt, and also, to a lesser extent, *fiqh* of the Indian sub-continent which was based on the culture and customs of that region. These Islamic rules, as formulated in other countries had often been forced to regulate the Muslims here on the basis of *taqlîd* and the significant influence of time and place in the formulation of Islamic law.

Meanwhile, Ash-Shiddieqy also proposed several ways to achieve this goal. First, intensive study must be directed towards the prime sources of *sharî'ah* and those books which had been written during the flowering era of *ijtihâd* irrespective of their affiliation, including those of the Shi'ite and Zâhirite schools of law. By adopting this strategy, he further mentions, we would be able to get access to the brilliant ideas not only from limited Sunnî legal traditions, but also from others, even from "man-made" legal systems (*perundang-undangan buatan manusia*).[38] He seems to have been fascinated with the reform ideas of Mustafâ al-Marâghî. Rector of the prestigious al-Azhar University in Cairo, to which he referred in most of his ideas. He advocated a method of "*talfiq*" (mixing the opinions of different *madhhab*s to found a new rule). This comparative method should be used and taught in Islamic centers of learning not only of Islamic legal schools, but also of other legal systems. He later wrote and translated many books to carry out his ideas. Some of his books have been designated as reference and required reading for students in IAIN and some other Islamic educational institutions.[39]

After Hasbi Ash-Shiddieqy expressed his opinion, Hazairin changed his earlier term "*mazhab nasional*" into "*Mazhab Indonesia*" because the word "nasional" covers the whole population, some of whom are not Muslims. Just by looking at the term used by these two leading scholars, *madhhab* and *fiqh*, there was a different emphasis between them. The first emphasized the reform of the Shâfi'î *madhhab*, which in his own words "*mazhab Syafi'i yang diperbaharui*" (renewed Shâfi'î *madhhab*), while the latter stressed the importance of reforming the existing scholarly tradition and scientific discipline of Islamic legal theory and knowledge. Their ideas have revived renewed interest and scholarly debates among Muslim scholars, but they also raised more questions and problems than answers, to be tackled by new generations.

The success of economic development and the spread of educa-

tional opportunities, accompanied by extensive social changes, the limiting political environment and modernization challenges has brought about the emergence of new Muslim intellectuals during the New Order government. These new Muslim intellectuals are also interested in societal responsibility for the performance of Islamic obligations, but they view those obligations from a different standpoint than the Islamic spokesmen of earlier periods. Besides the changed conditions that made the use of old arguments unproductive, or might even cause them to backfire the current generation of Muslim intellectuals who have been trained in a different educational background, some in Western countries, and have taken on wider interpretations of what the obligations of Islam are and how a modern society can respond to those obligations. While the concept of divine law is still important, it is now seen as only of one of God's obligations laid on Muslims. The new Muslim intellectuals seem to share several important common viewpoints. They view the Western world as culturally and politically dominant at the current time and Western civilization as having both positive and negative aspects; meanwhile the Muslim world is seen as culturally and politically subservient to the West and so modernization does need to take place in Muslim communities. Further, Islam has a set of values intended by God for use by mankind in all times and places which Muslims have the obligation to put into practice. To achieve these ideals, religious renewal is important to the Muslim community as a means of applying Islamic values to modern life. However these newly emerging Muslim intellectuals vary on how to define those values and how to apply them to present conditions.[40]

Many new Muslim intellectuals do not emphasize the importance of the rigid legal aspects of Islam as formulated by medieval Muslim jurists, and instead stress more the universal values and morals which Islam has brought as a blessing for all humankind. Endang Saifuddin Anshari, just to cite one of them, holds that Islamic jurisprudence (*fiqh*) is a distillation of the divine law drawn up by the early scholars of Islam. Since such a law is a human interpretation of divine law, it should not be regarded as the only possibility, but more as a reflection of permanent values interpreted at a particular time and place by certain thinkers. In the time it was assembled and applied, it might correspond with what the eternal values of Islam demand, but later through use and change it might lose that proximity. In general, then, each generation must try to make the norms and values of Islam rel-

evant to its own condition.[41]

Similar views have been expressed also by Taufik Abdullah, a well-known Muslim Indonesian historians. He noted that in Indonesian history Muslims have shown a need for different kinds of religious emphasis at different times. At first, the first Muslim Indonesians gave great attention to the cosmic-mystical relationship, which led to the adoption of Islamic mystical orders (*tarekats*). Later the growth of orthodox values convinced many Indonesian Muslims that Islamic substantive law (*fiqh*) was equally as important. By the twentieth century, reform elements in Islam called for removing both mysticism and canon law as outmoded forms of Muslim behavior. He concludes that Muslim views of what will lead them to the truth vary according to the era in which the observation is made. Islam is a religion of faith and reason. As such, Taufik Abdullah further argues, it is only through the use of both, that Muslims may build ideological bases for undertaking change that is consistent with Islamic teachings. The danger is in ceasing the effort after making some gains.[42]

This ideal to revitalize Islamic law has re-emerged again in the last decade initiated by Munawir Sjadzali, Minister of Religion in the last two consecutive cabinets of the New Order government. Sjadzali, combining his former career as a diplomat with that of a religious scholar, proposed a controversial rationalization of Islamic law which would allow jurists to interpret the law concerning 'wordly affairs' more flexibly. His "Reaktualisasi" (*Re-actualization*) of the *sharî'ah* represents a typically Indonesian urge to embed all aspects of behavior in the indigenous cultural context. Such an approach, he has claimed, not only neatly solves the problem of permitting *sharî'ah* law to co-exist within the national legal system, but also reduces the chances of friction between the various religious adherents in the country.

Sjadzali criticizes the double talk and inconsistent ambivalent attitude of many Muslim leaders on Islamic law.[43] He cited, among others, two common examples to subtantiate his point: bank interest and the son-daughter portion in inheritance. Even though al-Qur'ân has prohibited usury (*ribâ'*) and obliged that the portion of a son be twice that of a daughter, he argues, that most Indonesian Muslims, including the *'ulamâ'*, have used banking services and have taken pre-emptive action to assure equal distribution among their off-spring. This, like the action of an ostrich that puts his head in the sand hoping the problem will go away, will not solve the problem, but may have a negative impact on the Muslim community at large and on the

function of Islamic law in society. As leaders and scholars of Islam, they should not shy away from the problems but must face them by, among other things, formulating what is best for the community in accordance with the basic principles of religion.

By presenting actual practices of Muslim people in publicly known Islamic regions and by quoting legal verses from the Qur'ân, Munawir Sjadzali challenges Indonesian Muslims about the reality of Islamic law and a consistent attitude towards its re-actualization. He further says:

> From the above discussion, it is obvious that it is not me who says that the inheritance law of Islam as contained in the Qur'ân is not just, but what I have done is just looking into the social attitude which seems not to believe in the justice of *farâ'iḍ* (inheritance laws) any more.[44]

By referring to social practices, Sjadzali seeks to show the irrelevance of some formulations of Islamic legal jurists to the much-changed contemporary condition which requires an innovative formulation, not only by applying the literal injunctions of the Qur'ân and Sunnah, but by digesting its essential values and applying them to fulfill the needs of modern people. He further mentions that the literal meaning of some of the Qur'ânic verses, such as those which approve of slavery, have been outdated and some applied out of context to the present Muslim community. Islamic law, then, can only be applied today if one takes into account that present Muslims live in a complex and changing world where the values of Islam, not outmoded legal codes, must be carefully applied. In order to achieve this, contemporary scholars will need to go through a similar process to adopt a new variety of modern traditions, cultures and customs to apply the never changing principles of Islam.[45] In this sense, he differentiates between the principles of Islam which are divine and immutable and those rules to apply them which are human and bound to change.

To elaborate further his theory of the re-actualization of Islamic law, Sjadzali uses the doctrine of *naskh* (abrogation) in Islamic legal theory to argue that the replacement of a certain injunction of the Qur'ânic and Prophetic sources is possible, if not desirable, in Islam. By citing a Qur'ânic verse (2:106)[46] and quoting the views of many classical and modern Muslim authors, he maintains that even those Qur'ânic verses and Prophetic traditions which were not repealed until the end of the period of revelation, may still be replaced with

better applications if the overall spirit of the scriptures allows it and the changing condition of the community demands it. For this, slavery is presented as an example and the second Caliph, 'Umar ibn al-Khaṭṭâb as a figure who made innovative policies in his rule. He also argues that most of the legal rules in the Qur'ân beyond the limited field of ritual obligations to God, are mostly facilitative laws meaning those laws are available if the contracting parties could not come up with a mutually agreed consensus, and not as obligatory rules that must be followed in whatever situation. He maintains that peaceful settlement and consensus (*al-ṣulḥ*) is encouraged before disputing parties bring the case to court. He further argues that both individual and communal peaceful settlement should be accepted.

Sjadzali's arguments have provoked many pros and cons among Muslim leaders and scholars. His views have been rejected not only by traditionalists, but also by some reformist Muslim writers. His opinion the validity of clearly defined (*qaṭ'î al-dilâlah*) Qur'ânic verses which are considered an absolute source (*qaṭ'î al-thubût*) in Islam can be challenged is taken to go beyond the permissible improvement (*tajdîd*) and beyond acceptable independent reasoning (*ijtihâd*).[47]

The above views of Anshari, Abdullah and Sjadzali concerning the limitations of Islamic law are not universally accepted in Indonesia. However, Sjadzali's ideas appeared in a Muslim magazine in 1986 which instigated many responses and protests. This is probably because it was made by a government official responsible for the country's religious affairs and using legal discourse familiar and common among the *'ulamâ'* to challenge the traditional definition and interpretation of Islam and Islamic law. Many Muslim scholars refused Sjadzali's suggestion and questioned most of his basic proposition. Abdurrahman Wahid, the chairman of Nahdlatul Ulama who had often proposed controversial reforms of the Islamic tradition himself, criticized Sjadzali's re-actualization ideas. Indirectly in one of his writings, Wahid maintains that many proponents of modernization regard all values as relative and so question traditional values and introduce doubt about them. Such critics, he continues, question the relevance of Islamic law, Islamic institutions and the scholastic methods of learning to present conditions. If such a move is accepted without qualification, it will surely erode the core teachings of Islam, particularly the doctrines of the unity of God, divine law and morality.

The type of reactualization of Islamic law which has later gained

more acceptance among most Indonesian Muslims is that which is directed to reviving valid *ijtihâd* (independent thinking) on those dubious Qur'ânic verses (*ẓannî al-dilâlah*) and more in the field of the human interrelationships (*mu'âmalât*), rather than in ritual matters (*'ibâdât*).[48] The government itself does not want to interfere much in this latter field except when some state or public interest is at stake.[49] Some ministerial policies to standardize and rationalize several aspects of *ḥajj* (pilgrimage) rites and the decision to determine the first and last day of the fasting month (*Ramadan*) may be taken as examples of government interference in this field which are usually based on the nation of public welfare (*maṣâlih al-murṣalaḥ*) and after seeking a *fatwâ* (legal opinion) from the semi-official '*Ulamâ'* Council (Majelis Ulama Indonesia). Problems arise when the border between *'ibâdat* and *mu'âmalat* is not clear or when their division is seen from different perspectives. In this latter category, two aspects of Islamic law came into prominence: inheritance law (*farâ'iḍ/warîth*) and pious foundations (*waqf*). However, in my field trip visits to Aceh and North Sumatera, I encountered some '*ulamâ'* who still believe that the government has no right to interfere with and regulate those matters which have been regulated in the Qur'ân and Sunnah. Some of these '*ulamâ'* still perform polygamous marriage which, according to the marriage law, has seen strictly restricted to be only through the approval of the *agama* courts. Some judges and local religious officers have also mentioned and complained about this on-going "*nikah di bawah tangan*" (unofficial marriage) and about their limited authority and ability in tackling this practice.

Some well-known scholars in Islamic law who have a close and respectful relationship both with the government (partly because they teach in government universities) and with Islamic scholars in general, such as Muhammad Quraish Shihab[50] and Amir Syarifuddin,[51] seem to hold moderate opinions on the renewal of Islamic law. Shihab proposes in one of his many writings that besides textual interpretations, Qur'ânic verses as well as *ḥadîth* traditions may be interpreted contextually. By using both approaches, he argues, the actualization of Islam will not only be possible but will not go astray from its principles. Meanwhile, Syarifuddin observes that the (re)actualization of Islamic law in Indonesia lately has emphasized *fiqh*, subtantive rules, while *uṣûl al-fiqh* which is the foundation to derive it has been neglected; consequently the outcome is ad hoc, partial and even contradictory. It is high time for Muslim legal scholars to venture into

this difficult but important task so the actualization process will be based on consistent principles and in systematic way. The same line of reasoning is also expressed by Peunoh Daly who prefers that the actualization and renewal effort be carried out within the acceptable *manhaj* (method) of early authoritative *mujtahids*.[52]

To sum up it, may be inferred that even though on the surface the proponents of the application of Islamic law in Indonesia seem to have a united opinion, deeper analysis shows that they have many conflicting differences of opinion. The difference is even wider, or more ambiguous, in an Islamic state. Similar to the variants of Muslim adherents in Indonesia, their opinion on Islamic law are also not unified. One Muslim leader, hypothetically speaking, said as follows: "Of course we all want the realization of Islamic law, but supposing it is granted, which one?" He even negatively supposes that "if it is up to ourselves to arrive at solutions, the Muslim community will never reach an agreement." Boland, after interviewing many informants, mentions at least five groups of scholars concerning this matter:

a. Those who exclusively want to stick to the Shâfi'î school of law, probably a diminishing number of older *'ulamâ'*s, who, however, are still powerful, particularly in the religious courts;
b. A group of scholars who are also prepared to make use of the three other schools (Hanafî, Mâlikî, Hanbalî) when their regulations are to be preferred to those of the Shâfi'î school;
c. Those who, moreover, want to use certain opinions held by earlier (now extinct) schools of law, e.g. concerning a literal or symbolic interpretation of some verses of the Qur'ân;
d. Those who adhere to the "new *ijtihâd*", as for example Hasbi Ash-Shiddieqy and Professor Hazairin and in fact most members of the Muhammadiyah, although this association has never made an official pronouncement on the question;
e. Even more extreme is the group of those who want to go back to the Qur'ân as the only source of religious law, and leave the decision to the individual in all cases which are not provided in the Qur'ân.[53]

To this grouping, we may add many modern-educated Muslim intellectuals who de-emphasize the importance of Islamic law as formulated in *fiqh* texts to the present day Indonesian Muslims due to a variety of reasons. What is important for modern Indonesian Muslims, according to this group, is to extract the fundamental values of

Islam contained in the Qur'ân and al-ḥadîth, and to disseminate and socialize them into the world view and cultural values of the Indonesian Muslims as a modern nation-state.[54]

The variety is also great on how to achieve their respective views. One may easily see that those who maintain the revolutionary approach in applying Islamic law in the country have been diminishing to an insignificant level. What is becoming more prevalent is the view of partial and gradual realizations of Islamic law. With regard to "elements" of Islamic law which Muslims want to be applied. There has been a general consensus to include marriage, inheritance and those fields that are closely connected to the Islamic religiosity of a Muslim. In this instance, most of them agree that those aspect should be regulated as part of national law. One concrete attempt was the draft of a new marriage law which became the meeting point of clashing interests and ideas. It has become a test case and exemplary reference for both sides of the argument. This was actually initiated by the government due to the pressure of the feminist movement and modernist resolutions. Several committees had been established to study and prepare the draft and some drafts went as far as parliament but failed to become law.

After the enactment of Law no. 14/1970 in which the authority of the Supreme Court was extended to Islamic courts, there were increasing contacts and cooperation between the Supreme Court and the Ministry of Religion in supervising and developing Islamic courts in the country. Even though the Act implicitly stipulates that cases at the *agama* courts may be appealed to the Supreme court, its application was hampered by the absence of appropriate procedural laws. In the meantime, the policy in the Islamic courts and the Ministry of Religion, considering that no new law was enacted to regulate them, continued to follow the colonial regulation which stated that decisions of appeal from the High Religious Court were final.[55]

The enactment of the Marriage Law in 1974 extended the jurisdiction of the Religious Courts and increased their case dockets considerably. At the same time, more and more disputants wanted to present their cases as high as the Supreme Court. In light of this condition, the Supreme Court issued its own regulation in 1977 to regulate procedures in the examination and decision of appeal cases originating from religious courts. However, the Ministry of Religion maintained the existing law and tradition. This dualism created a debate among legal scholars and bureaucrats and only ended when the Chairman of

the Supreme Court and the Minister of Religion met and issued a common statement in 1979. This agreement has been followed by a succession of mutual cooperation between the two institutions. The cooperation was also enhanced by the establishment of a special chamber dealing with cases of religious courts, six Supreme Court justices were appointed to it, and a chair was appointed among them.[56]

Substantive Islamic Law in National Statutes

Before the coming of Western colonialism, the Muslim sultanates had received element of Islamic law in a variety of degrees and intensity. In Aceh, as discussed before, *Bustân al-Ṣalâtîn* by al-Rânîrî greatly influenced the government and positive law during the reign of Iskandar Muda (1607-1636). The *undang-undang* (laws) of Minangkabau and other sultanates also show the growing acceptance of Islamic law elements into the local legal structure. In the case of Java, one comes to a more complex and syncretic nature of its manifestations. In the early 19th century, two systems of judicial administration existed in Java: that of *penghulu* (curator of the public mosque), and that of the *jaksa* (traditional Javanese royal law officer). The former applied Islamic law especially in the matters of family and criminal laws, while the latter took care of others. The substantive laws of the two were also quite separate: one applied the so-called *hukum Allah* (God's law), and the other *yudha negara* (state legislation).[57]

Raffles drew attention to the practice of the rulers in modifying or altering rules of Islamic law as contained in *fiqh* texts by issuing royal legislation (*undang-undang*), a practice that is justified in Islamic legal theory as *siyâsah shar'iyyah* (state legislation to supplement the *sharî'ah*). The reception of this legislation in Islamic Java, which was the focus of Raffles's observation, was thus a function of the particular spheres of Islam. In the mosque and *pesantren* circles, it is manifest in the Arabic texts, in the village communities it is a partially understood religion with a locally applied culture, in the royal courts it was a theory of royal power originating in the permanent of transcendent values, which served as a fixed basis for judging man-made law. In this sense, Islamic law was more as a standard for law, rather than a set of legal prescriptions, but certainly not a reflection of what was actually practiced by the population.

In the post-colonial period, substantive elements of Islamic law continued to exist either through legislation or judicial application as

a part of the emerging national legal system. The substantive law of Islam may be valid as it is or, on other occasions, its elements have been absorbed into legal statutes or government regulations. The examples of the latter type are some articles of the Basic Agrarian Law (Law no. 5/1960) which recognized the existence and validity of *wakaf* (pious foundations) and Law no. 15/1961 on the Public Prosecutor which states that in carrying out his duty, a public prosecutor is instructed to respect religious norms.

Some aspects of Islamic law have been the positive law of the Muslim segment of the Indonesian population. Similar to other Muslim communities, the Islamic law aspects that are strongly defended and maintained are generally family and personal laws which are closely related to one's religiosity in Islam. Most of the few Qur'ânic verses which contain legal injunctions also deal with these aspects; likewise most of the *fiqh* books dedicate significant space to them. In Indonesia, these aspects developed into three different fields of law which have been claimed to be under the jurisdiction of the Islamic courts. They are: marriage law in a broad sense, inheritance law and *wakaf* law. It is the marriage law that has been the prime objective of Islamic law proponents, the important theme of Islamic law reform and the object of contention among various segments of the Indonesian population.

There have been several efforts to reform the marriage law in the country. During the colonial period, the basic policy was not to interfere with the substantive laws on marriage and family matters for the indigenous people. For the general population, Islamic law immersed in customs comprised the positive law. Only during the last part of the colonial period did the Dutch feel the need to issue legislative measures for Indonesians who had converted into the religion of the colonials, i.e. Christianity, and for foreign Orientals.[58] Some authors have commented upon the influence of both Islam and Christianity on the marital affairs of the population during the colonial period. While in Islam the validity of marriage has been generally complimentary with the *adat* ceremony which could continue unaltered, the colonial marriage law of Indonesian Christians could accept *adat* marriage and as such, "the influence of Christianity on customary marriage law is therefore far more destructive than that of Islam."[59]

Marriage affairs and most aspects related to them among the indigenous Muslim population are regulated in accordance with Islamic

law which has absorbed or integrated local customs. Substantive rules on marriage are referred to in the *fiqh* literature that has been discussed above. As a part of introducing and standardizing these substantive laws, the Dutch government encouraged some translations and extended editions of authoritative *fiqh* texts to which the Muslim judges and *'ulamâ'* refer in settling marital cases. What the colonial government sought to enforce was the registration of Muslim marriages and divorces without interfering with the substantive rules. So, the government regulation was called the *Huwelijks Ordonantie* (Marriage Regulation) of 1931 which was an improvement of Muslim marriages, divorce and reconciliation.[60]

The plurality of laws in Indonesia was compounded in the fields of marriage and family law. Before 1974, there were five different legal systems regulating the marital affairs of the population. Muslim Indonesians followed Islamic law, Christian natives in certain regions were regulated by a special State Regulation. Europeans and Chinese segments of the population were subject to the Civil code, while other foreign Orientals kept their customs of origin. This last rule was also the same for Indonesian natives who adhered to their respective *adat* customary rules which varied from one region to another. This complex plurality of laws was completed with a special law regulating mixed marriages between those who were subject to different laws.[61] Nowhere has this been more apparent than in reform of the marriage laws.

In 1950 the Ministry of Religion established a committee to draft a marriage bill. Two drafts were completed two years later, the first was aimed at the unification of marriage laws, but since this was not acceptable to the government, a second draft was prepared recognizing the diversity of laws for religious groups. Both bills were submitted and discussed in Parliament, but without any result. As soon as the New Order came to power, efforts were made to provide a uniform law of marriage but failed because they did not get support from most of the Muslim population. The basic problem regarding the marriage law was the question of whether the principle of unification of laws (one law for all different religious groups) or the diversity of laws (different laws for different groups) should be applied. Facing this reality, the government submitted two bills in 1976-8, one enacting the basic principles of marriage law applicable to all religious groups, and the other specifically to regulate the marriage of Muslim Indonesians. These bills also faced the same fate in the parliament.

Bearing this in mind, a new bill was put forward again in 1973

when the New Order government had successfully carried out radical political reform and had just won impressively in the last general elections. Massive reactions and counter-movements of all segments of the Muslim communities within and without the Parliament broke out and led to a consensus, some even called it a "giving-in" to the strong Muslim demands, in the compromised form of Law no. 1/1974. The concession to the Muslims seems to be more in favor of modernist views rather than that of traditionalists. Some authors observed that the New Order government was caught by surprise by the massive reaction and counter-movements of Indonesian Muslims. The over-confidence of the government and the political naivete of a newly installed Minister of Religion, who used to come from traditional *'ulamâ'* but had been replaced by a modernist Western-educated scholar, compounded with the growing dissatisfaction of Muslim politicians who were excluded from positions in the New Order which introduced some policies considered detrimental to Islamic and Muslim interests, made the controversy over this bill the trigger for widespread protest. The overconfidence of the New Order government was partly based on the overwhelming vote for the government sponsored ruling party Golkar, and a defeat for political Islam. However, the issue of the survival of Islamic law had united Muslims on all fronts. The consensus between the parliament members belonging to Islamic parties and those of the Armed Forces might be seen as having prevented the protest from accelerating to the point of contesting the legitimacy of the ruling elites.

The main points of the protests were centered on the subjugation of the validity of Islamic marriage to standard state registration, the continued validity of inter-religious marriage, the nomination of adopted children as legal inheritors, the prohibition of polygamy, and the extended intervention of secular civil courts on the jurisdictions of religious courts. Some other writers also protested some provisions which were not in line with the traditional interpretation of Islamic law. The draft presented a clear threat to both the Islamic courts and Islamic law. The draft would have significantly reduced the jurisdiction of the Islamic courts. The bill was intended to be applied to all Indonesians, regardless of religion, and was to be administered mostly by the civil courts. This would have meant the abrogation of significant portions of the Islamic court's jurisdiction over Muslims. The elimination of marital cases from the jurisdiction of the religious courts would sound a death knell to this institution

whose main function was in these legal aspects.

Muslim objections, conveyed by way of parliamentary and extraparliamentary actions, resulted in agreement that those provisions which were explicitly contrary to Islamic law should be deleted. These included, relevant to this study, the reaffirmation and extension of the jurisdiction of Islamic courts nation-wide. The religious courts now have extra functions in respect of permission for marriage and divorce, alimony, custody and guardianship, while the referral to religious law gives more power to the Islamic judiciary to formulate detailed substantive rules.

This marriage act which was promulgated on January 2, 1974 consists of fourteen chapters containing sixty seven articles out of seventy two articles of the proposed draft. Chapter one which consists of five articles states the basic principles of marriage. The law subsequently deals with marriage requirements (articles 6-12), prevention of marriage (13-21), annulment of marriage (22-28), marital agreement (29), the rights and responsibilities between parents and children (45-49), and marriage guardians (50-54), and is followed by a chapter on other provisions.[62] A detailed discussion article by article of the law, which has been carried out by some authors,[63] will not be done in this study. It is sufficient to pick out several controversial provisions which represent a reform of traditional *fiqh* interpretations and seek to find out the Islamic judiciaries' and Muslim scholars's reaction to and justifications of those matters. This discussion will be dealt with shortly when the latter installed compilation of Islamic law is discussed in order to give them a comparative perspective. At present, some important provisions relevant to the position of Islamic law and its substantive rules are presented to see the significance and controversy of this law.

The most important provision concerning the position of Islamic law is contained in the two articles of the first chapter on the principles of marriage. The law defines a marriage as a physical and spiritual bond between a man and a woman as husband and wife with the purpose of founding a happy and lasting family based on belief in the One God. The religious basis of a marriage is extended in the next articles which stipulate that marriage is valid when it is done in accordance with the law of the respective religion and belief; and every marriage is registered according to the valid law.[64] The most subtle reference to Islamic justice is in article 63 which maintains that "what is intended by the Court of Justice in this Law are: (a) *Agama* courts

for those who profess Islamic religion; (b) General Courts for others." Some authors go as far as claiming that the inclusive provision on the validity of marriage according to the law of religion and belief ended the primacy of *adat* law.[65] This view seems to be too hasty and simplistic. What has been more accurately stated is that the Law initiated the ceasing of "*reception theories*" which subjugated the validity of Islamic law in the country to the condition that it had to be well received by the people as part of *adat* rules, and the appearance of the opposite policy that traditional customs may only be followed when they are not contradictory to the principles of religion. As such, this latter theory is more in line with the legal theory of *'adat* and *'urf* in *Uṣûl al-Fiqh* (Islamic Legal Theory).

As observed by Hooker, the relevance of the legislation of this law to Islamic law in Indonesia is obvious and strategic in the sense that Islamic law is recognized as a valid law in the national legal system through the administrative organs of a nation-state. This law has emphasized, hence forward more than ever before, that Islamic private law is part of national law. Since Islamic law in Indonesia is largely a matter of family law, the subjugation of Islamic requirements to state regulation is equally as important as any substantive reform. While the source of Islamic law remains in *fiqh*, its implementation and some substantive provisions bearing directly on it are now inclusive as part of nation-state functions.

It is also observed that Muslim organizations were able to make their positions felt, indeed were able to impose some of their will in both aspects.[66] This marriage law marked a new era for Indonesia that now has a marriage law effective for all population groups including Muslims. However, beyond the general provisions and some compromise substantive rules, the Law leaves many important matters untouched and at most it succeeds in decreasing the pluralism of laws.[67] Therefore, it is logical that some authors have talked about the need to amend the said law.[68]

On one hand, as was said earlier, the efforts to establish an Islamic state and later to apply Islamic law for the Muslims had failed, but, on the other hand, the Muslims have been more successful in preventing any radical law reform which threatened principles of *fiqh* and traditional elements of Islamic law. In the case of Law no. 1/1974, the proponents of Islamic law not only prevented a radical reform, but also succeeded in strengthening the position and function of Islamic law and its judicial institutions. The enacted statute maintains

that the administering of the statute for Muslims is vested in Islamic courts, while civil courts are to administer it for all others.

Although the proposed bill implicitly intended just the opposite, the compromise Law actually expands the jurisdiction of Islamic courts in two ways. First, it strengthens the courts over their previously existing jurisdiction: marriage and divorce. Second, the statute included provisions regulating substantive areas not previously under the jurisdiction of Islamic courts such as marital property, spousal support and child custody, the cases of which among Muslims are to be tried and decided by Islamic courts. Some legal and administrative procedures, such as permission for polygamy and divorce, that used to be the functions of local officials of the Ministry of Religion, now are transferred to the religious courts.

The principle of unity in diversity has been referred to and revived time and again by various segments in the nation, including the New Order government, which emphasizes its ideological aim of defining and unifying a national legal system. Family law has emerged as the most difficult test case in which the persistent character of diversity rules over unity. The failure of enforcing reforms by open direct legislation has been compensated by seeking to accomplish it by indirect bureaucratic means and regulations applied at a lower level.[69] This latter tactic has produced mixed results, at least, in the field of family law.

To apply the new Marriage Law, the government issued Government Regulation no. 9/1975 and further detailed procedures are regulated in the Ministry of Religion Regulation no. 3/1975. One important purpose behind the proposed draft of the marriage bill was to curb the divorce rate and to eliminate polygamous marriages. What was achieved was the promulgation of heavy restrictions on the possibility of a husband unilateral divorcing his wife and the obligatory interference of the judiciary in this process. In the matter of polygamy the Law explicitly holds the basic principle of monogamous marriage, and polygamy is only allowed under certain strict conditions under the mandatory supervision and deliberation of the court. The stricter regulation has been enforced by the government for government employees and public servants (*pegawai negeri*) that comprises the important upper-middle and influential class in the society. The possibility of having or being a second wife for them is practically closed by Government Regulation no. 10/1983, amended in 1990. The same provision also exists and is strictly enforced for those in the Armed Forces.

Another aspect of Islamic law that has been accepted and regulated as a part of the national legal system is that of *wakaf* (pious religious foun-

dation). No one denies the important contribution of *wakaf* for religious and social purposes. While this useful Islamic institution has been curbed and mitigated in other Muslim countries, it has been gaining more acceptance as an important national asset and has been received as a part of the national legal system. Not long after the enactment of the Marriage Law, the government started to regulate and standardize the *wakaf* (Arabic, *waqf* pl. *awqâf*) institution. The legal meaning of a *waqf* is the detention of a specific thing in the ownership of the *waqîf* (*waqf* giver) and the devoting or appropriating of its profits or usufruct in charity for the general public or certain recipients.[70]

Instead of submitting it to the parliament to be officially accepted as an "*undang-undang*" (statute), this time the government just issued a Government Regulation (*Peraturan Pemerintah*) which does not have to be approved by the Parliament. Legally speaking, this is possible and appropriate because the institution of *wakaf* has been recognized by the Agrarian Basic Law of 1960 which also establishes the duty and authority of the government to regulate rules of application.

In its basic consideration, the Regulation states:

> "...that *wakaf* is a religious institution which can be utilized as one of the means to develop religious life, in particular of the Muslim community, in an overall effort to achieve material and spiritual welfare in the progress toward establishing a just and prosperous society based on Pancasila..."[71]

This statement clearly shows the formal objective in issuing the regulation. Besides, the regulation also mentions the conflicting variety, abusive practices and the lack of registration as reasons for the regulation. The regulation which consists of 18 articles, together with its detailed procedures of the Regulation of the Minister of Religion no. 1/1978 adopts the prevailing opinions on *fiqh* texts. Any disputes which are not regulated in those regulations are to be decided in accordance with "*syari'at Islam*" by the Islamic courts.[72]

There are at least two interesting aspects concerning these developments. One is connected with the approach adopted by the government to enforce reform in this aspect of Islamic law. The use of government regulation and bureaucratic channels seems to be more effective in initiating and enforcing legal reforms. The other concerns the relatively calm reaction from the Muslim leaders and community to this government interference in one of the basic sources of many Muslim activities. One way to explain this is that the *wakaf* institution is not considered as important as marriage which involves each and every

Muslim. However important the *wakaf* is for the society, it directly involves only a small number of Muslims. Besides, the community at large may have seen the abusive practices which call for a need to regulate them. Another explanation is that what is cited and adopted by the government regulations is mostly in line with the provisions in *fiqh* books and even that is only for land. Further details will be dealt with later when the compilation of Islamic law is discussed.

It may be worthwhile to mention here that Qur'ân itself does not explicitly mention this institution.[73] Rules about *wakaf* are mostly based on several Prophetic traditions which mention it in general terms, the details of which have been extrapolated by later Muslim jurists. Another possible explanation, as I observed in my field trips, is that most *'ulamâ'* and even some Islamic judges are not fully aware of this current government interference and playdown its significance. Some surveys also find that only a small fraction of *wakaf* lands have been registered and campaigns in recent years to register them with more lenient requirements and simpler procedures do not yet get wide attention. Many *'ulamâ'* have been reluctant to report and register *wakaf* under their supervision. The common reasons they give are that the procedures are complicated and costly and that *wakaf* is supposedly a religious and community matter to which government interference is inappropriate. It may also be partly caused by their reluctance to expose the existing *wakaf* which may mitigate their influence upon *wakaf* management and its usage. Most mosques, religious schools and other religiously-based public welfare activities and facilities have been greatly or partly funded by *wakaf*. Many *wakaf* presented to and managed by certain *'ulamâ'* have been considered more as the private business and property of the concerned *'ulamâ'*. There have been many cases concerning the falsification and abuse of old *wakaf* land that was formerly organized in traditional oral transactions without any written document and proper registration especially in rapidly progressing urban areas in which the value of real estate has been greatly accelerated.[74]

Actually another important jurisdiction of the *agama* courts, which is considered as an important aspect of Islamic law is that of inheritance. So far there have not yet been any promulgated statutes or government regulations in this field. However, currently there have been several government initiative programs to found a national inheritance law. As early as 1983, the National Board for Law Development (BPHN) sponsored a symposium on National Inheritance Law.[75]

However it is still too early to predict its outcome. Considering the relationship of inheritance to a Muslim individual being as close as, or even closer than, that of marriage law, what may be feasible is a kind of limited unification and codification while recognizing certain variety. This substantive law, nevertheless, has been covered by the newly promulgated compilation of Islamic law. Before going any further, a brief background on it is in order.

In the early eighties, the Supreme Court presented its opinion that one of the basic reasons for judicial uncertainty and legal confusion in the Islamic courts was the absence of judicial procedures and codified Islamic laws. Moreover, the selection, promotion and supervision of the judges were also cited as something urgently needing improvement to elevate and integrate Islamic courts into the national judicial system. In March 1985 a joint program was launched by the Supreme Court and the Ministry of Religion with a specific objective to gradually overcome these problems.[76]

A special commission was established consisting of the officers of both the Supreme Court and the Ministry of Religion. The commissions sought the cooperation of several well-known Islamic law professors and *'ulamâ'*. The program to compile Islamic law injunctions on specific fields which fall under the jurisdictions of the religious courts consisted of five steps. The first was the examination of those widely used *fiqh* texts in the country, including the 13 texts listed in the above mentioned ministerial instruction. The second step was interviews with influential *'ulamâ'*, both independent and those who were attached to certain Islamic organizations. The main purpose was to ascertain matters of Islamic injunctions that were generally accepted and practiced in society. Beside interviews, a questionnaire was distributed among the *'ulamâ'* and Muslim leaders to seek their comments and opinions. Some responded individually and others, such as those of Nahdlatul Ulama, carefully discussed the issues with their colleagues before responding to the questions in groups.

After the completion of the survey, the next phase was the examination of the jurisprudence of the Islamic courts. Judicial decisions of the Islamic courts throughout the country were collected and examined to find the strongest argument for and commonest opinion on certain issues. The fourth step was a comparative study with several other Muslim countries. This was conducted by sending a team of experts and officials to Morocco, Turkey, and Egypt to see how Islamic law was applied in those countries and how the judicial proce-

dures were prepared. No reason was given why these countries were chosen instead of others, except a supposition that those countries resemble the condition of Indonesia. Finally, the fifth step was the holding of a workshop attended by *'ulamâ'*, government officers and legal scholars.[77] The prevailing opinion and consensus were later written in modern legal language by a team of experts. The final result was later called *"Kompilasi Hukum Islam"* (Islamic Law Compilation) which consists of three chapters pertaining respectively to marriage, inheritance, and religious foundations (*waqf*).

The compilation consists of 229 articles which are grouped into three chapters (*buku*). Chapter I on marriage consists of 170 articles; chapter II, articles 171 to 214, regulates inheritance while the rest forms chapter III, articles 215-228, which deals with *waqf*, and it ends with article 229 which is called "a closing regulation" (*ketentuan penutup*). The compilation also has an elucidation which is an integral part of it. This elucidation consists of a general explanation and an article by article exposition.

Being a compilation of three important fields of law, it is interesting to read the concluding article which stresses the obligation of the judges to settle disputed cases brought to them by seriously observing living legal values in the community, so their decision will reflect the legal conscience of society. The common stress of the Muslim judges is generally placed more on the application of God's will and religious injunctions as well as bringing the society closer to Islamic ideals. The influence and ideals of modernist Muslims have been obvious from this common discourse. The proponents of this compilation are fond of quoting the ideas of modernist writers, such as Fazlur Rahman, Ziauddin Sardar, Isma'il R. al-Faruqi, 'Abd al-Wahhab Khallaf and Zaki Yamani[78] from outside Indonesia, and Hasbi Ash-Shiddieqy and Hazairin among Indonesian experts on Islamic law who advocate the formation of Indonesian *fiqh*. Interesting, but also discouraging for many Islamic *'ulamâ*, is the influence of Western "orientalist" scholars, such as Gustav E. von Grunebaum and Noel J. Coulson,[79] on contemporary Indonesian legal experts and policy makers. However, it should be noted that the quotations from those writers seem partial and arbitrary, sometimes even out of overall context, and more in the sense of *ad hoc* borrowing to justify and to lend its support and materials for the foundation of an Indonesianized form of Islamic law.

One basic reasoning for the existence of this compilation is that the usual *fiqh* reference texts have failed to answer the demands of a hetero-

geneous modernizing society such as that of Indonesia. In order to maintain the dynamic utility of this compilation, according to Justice Harahap, it is necessary to comprehend the actual condition and ideal needs of the community and seek to fulfil them by observing the principles of "*maṣâliḥ al-murṣalaḥ*" (public good), "*antum a'lamu bi 'umûri dunyâkum*" (You are more knowledgeable of your worldly affairs, and "*huqûq al-'ibad*" (human rights). Besides, in other parts of this writing, he also maintains the principles of "*'urf*" (social usage) and "*al-'âdat muḥakkamah*" (custom as a source of legal rules). All these principles are part of the classical Islamic legal theory that have been used time and again to reform and rejuvenate Islamic positive legal rules. However, the explanation and reasoning of why and how these principles have been adopted and applied in the formation of the compilation are not clarified from the writings of its proponents and drafters. A deeper reading of the article gives the impression that the application of these principles are not consistent and are not intended to found a new theory. However, this compilation has been successful in deriving some reformative constructions and interpretations out of traditional conservative legal doctrine.

To discover further the formal legal perspectives and the basic reasoning of this compilation, the general explanation appended to it is quoted here at length:

General Explanation

1. For a nation and state based on Pancasila and the 1945 Constitution, it is absolutely necessary to possess a national law which guarantees religious well-being based on the Belief in One God, which at the same time is a reflection of the legal conscience of the Indonesian society and nation;
2. Based on Law no. 14 year 1970 on the Basic Regulations of Judicial Authority in conjunction with law no. 14 year 1985 on the Supreme Court, *agama* courts have equal position with other courts such as state courts;
3. Material/substantive law which is valid among the spheres of *agama* courts is Islamic law which generally covers marriage law, inheritance law, and pious religious foundation (*perwakafan*) law. Based on the Circular Letter of the *agama* Judiciary Bureau dated February 18, 1958, number B/I/735. substantive law which becomes the guidance in the those fields of law is derived from 13 texts, all of which are of the Shâfi'î school of law;
4. With the implementation of Law no. 1 year 1974 on Marriage and Government Regulation no. 28 year 1977 on the *wakaf* of land

property, social needs have grown extensively until those texts consequently also need to be extended by adding texts from other schools of law (*madhhab*), extensifying the interpretation of their rules and comparing them with the jurisprudence of *agama* courts, legal opinions (*fatwâ*) of *'ulamâ'*, as well as by comparing them with those of other countries;

5. Those substantive rules need to be compiled and placed in one legal/judicial document or a book of "*Kompilasi Hukum Islam*", so that it can become guidance for the judge in the sphere of *agama* court institutions as applied law (*hukum terapan*) in the settlement of disputes forwarded to them.[80]

The above statement clearly shows that the compilation is constructed as a part of the national legal system and places the Islamic legal sources, *fiqh* textbooks, as a source for its construction. The transformation of Islamic legal rules are framed under the provision of Pancasila and the Constitution. Following modernist legal ideas, the compilation adopts the perspectives of extending the sources not only to the Shâfi'î *madhhab*, but also legal opinions. This is partly based on the proposition that the existing reference to Islamic law, as followed by traditional *'ulamâ'*, has not been able to solve the social problems which have been brought about by rapid development. However, the elucidation does not explicitly state the need for Indonesian *fiqh*, but the overall perspectives advocate its need.

What are the purposes of this compilation? In various statements by the commission and high government officials, there are at least three objectives that are cited for this project. Firstly, the compilation is expected to complete the third of three basic pillars of a judicial authority: i.e. a legally well-organized judiciary, qualified and professional personnel and concretely formulated and positively unified legal rules. Secondly, it is intended to synchronize the perception of Islamic Law and its application in the country. Lastly, closely related with the second, is the acceleration of an integrative process among the whole Muslim community in the country, and between the Muslims with the government, and among the whole population of the country in general. However, the most important objective, as forwarded by Justice Harahap, is that this compilation has cleared the way for the transformation of Islamic law abstracts into positive national legal rules.[81]

Even though the compilation contains many new rulings which may be categorized as going beyond the traditional conservative *fiqh* formulation, the basic suppositions still hold for the *fiqh* traditions. Its significance seems to be in its adoption of modernist views to settle greatly

changed socio-cultural conditions within existing acceptable Islamic legal theory. In other words, the changes brought about by this compilation are more in the sphere of *furû' al-fiqh* (legal substantive rules) than in that of *uṣûl al-fiqh*. To prove this point, it is worth while discussing some of these new rulings, especially those which go against the literal injunctions of the Qur'ân and al-Sunnah, the two basic sources of Islamic law to which the compilation refers as its basic sources.

The first is the prohibition of intermarriage between a Muslim man and a non-Muslim woman. Article 40 of the compilation reads as follows: "A man is prohibited to marry a woman under the following conditions:... (c). A woman who does not profess the Islamic religion." This article does differentiate between women of the "*ahl al-Kitâb*" -those who profess the pre-Qur'ânic scriptures, and those of others. Meanwhile verse 5, chapter al-Mâ'idah of al-Qur'ân clearly states "[Lawful unto you in marriage] are [not only] chaste women who are believers, but also chaste women among the People of the Book..." The prophet himself is reported to have had some non-Muslim wives. The four leading Sunni schools of law also permit this kind of marriage under various conditions.

The position adopted by the compilation is a continuation of prevailing views among most Indonesian Muslim leaders and scholars. The Indonesian Council of Ulama issued a *fatwâ* as a response to the growing concern in society about the increasing incidence of inter-religious marriages. This *fatwâ* explicitly prohibits a Muslim, be it man or a woman, to marry a non-Muslim. The importance of this *fatwâ* may be discerned not only by the wide public attention and response to it, but also by the circumstances in which the *fatwâ* was issued. It was discussed and decided at a nationwide annual conference, instead of in the limited deliberation of the committee on *fatwâs* as most other *fatwâs*, and the *fatwâ* document was countersigned by the Minister of Religion, while others are mostly signed by the Chair and Secretary of the Council, or even the Committee.[82]

Qur'ânic verses and ḥadîth quotations were cited as a basis for this view, and no reference was made to any *fiqh* text. The *fatwâ* maintains four verses from al-Qur'ân: the first (2:221) concerns the prohibition of marriage between a Muslim and a *mushrik* (polytheist/idolator); the second (5:5) states the possibility for a male Muslim marrying a woman of the *ahl al-kitâb* (people of the book); the third deals with the injunction not to marry an unbeliever (*kafîr*), and the last (66-6) contains the command to keep oneself and one's family from going to hell. The ḥadîth quoted are concerned, firstly, with the doctrine that a good marriage is equal to half the faith, and secondly, with the belief that children are born pure (*fitrah*);

only the parents make them Jews, Christian, or Zoroastrians.

It is interesting to note that even though the *fatwâ* quoted the verse that permits a male Muslim to marry a woman of the *ahl al-kitâb*, which traditionally meant the Jews and the Christians, it forbids any marriage between a Muslim with a non-Muslim. This is quite a radical departure from the prevalent opinion in classical *fiqh* texts, which had so far been the points of reference for other *fatwâs*. However, it is still within a permissible realm of specific ruling as expounded in Islamic legal theory (*uṣûl al-fiqh*). The *fatwâ* itself refers to this opinion as specifically for Indonesians on the grounds that the *mafsadah* (harm) is greater than the *maṣlaḥaḥ* (benefit). Furthermore, even though authoritative Shâfi'î legal texts permit marriage between a Muslim man and a woman of the *ahl al-kitâb*, Shâfi'î legal jurists have held different opinions on who was intended as *ahl al-kitâb*. Some jurists hold that this permissibility is valid for the *ahl al-kitâb* in the Prophet's time and their descendants. The classical authors also put requirements on the Muslim man who may marry outside his fellow co-believers. This line of argument would surely exclude the Christians in Indonesia who converted much later together with the coming of Western colonialism. Furthermore, the strict requirements for the permissibility of this mixed marriage, among others that the man must be pious and confident in his faith, has full capability to bring up his children in accordance with Islamic values and the unavailability of appropriate Muslim women, must have rendered the need and the possibility of this kind of marriage to an extreme minimum. The Indonesian *'ulamâ'* may have considered that these requirements were generally absent in the present case of Indonesia.

This opinion will be understood better if the social and political environment are considered. The fear of Christianization, real or imaginary, of Indonesian Muslims has haunted Muslim leaders and society since the colonial period. Tireless efforts by the relative segments of the Indonesian population, especially among the heathen hinterland and outer island tribes. Provided with facilities and privileges, generally speaking, these Christian converts have had better opportunities than their Muslim neighbors who mostly resented, or were excluded from, western education and development as collaboration. These various factors heightened the tension, some of which even burst into open conflict, of inter-religious relationships. It is in this environment that inter marriage between Muslims and non-Muslims should be understood and this must have encouraged the *'ulamâ'* and some government officers to ban inter-faith marriage.

Many *'ulamâ'* and Islamic judges whom I interviewed, perceived recent inter-marriage between Muslims and Christians in Indonesia as a hidden Christianization. They substantiated their perceptions by citing some inter-marriage couples who either broke up because the Muslim spouse did not want to be Christian, or they both became Christians. When I asked about Christians who converted to Islam because he/she wanted to marry a Muslim, the answer was generally less than the first case. One incident got wide attention in the country when a female student of IAIN in Sumatera specializing in theology converted to Christianity before marrying the son of a Christian priest.[83]

Another reform introduced by the 1974 Marriage Act and strengthened by the Compilation is the minimal age to conclude a marriage. Article 7 paragraph (1) of the Act stipulates that "Marriage is only permitted when a man is already nineteen years old and the woman is sixteen years old." The same provision is also found in article 15 paragraph 1 of the Compilation with an additional reason "for the welfare of the family and household..." In classical *fiqh* texts, the father or grandfather may marry his (grand)-daughter to an appropriate man, but the consummation of the marriage may only take place after both reach puberty which in *fiqh* terms is called *'aqîl baligh*. The permissibility of child marriage is based on the well-known tradition that the Prophet himself had married 'Aishah, daughter of Abû Bakr, when she was around seven, and consummated the marriage two years later. The chosen view to set the minimal age for man and woman respectively at 19 and 16 is based on the welfare of the couple and the family.

Closely connected with minor marriages are forced marriages which are also prohibited by both the Marriage Law and the Compilation. Article 6 paragraph (1) states that "Marriage must be based on the mutual consent of both of the prospective couple." This clause is explained further in article 16 and 17 which stipulates as follows:

> Article 16:
> (1) Marriage is based on the consent of both bride and groom.
> (2) The consent of the bride can be in the form of written or oral explicit and clear statement or gesture, but it can also be in the form of silence in the sense that there is no explicit objection.
>
> Article:
> (1) Before the marriage is concluded, the Marriage Registration Officer asks first the consent of both prospective couple in front of two marriage witnesses.
> (2) When it turns out that the marriage is objected to by one of the prospective couple, the marriage can not be concluded.
> (3) For those prospective marriage couples who have a speaking or listening handicap, the consent can be in expressed in writing or comprehensible gesture.

In the Shâfi'î school of law, the prevalent opinion is that the father and grandfather may marry his (grand)daughter to an appropriate man even when she is a minor or without her consent. That is why they are called "*wali mujbir*" (guardian that may force). This *fiqh* provision has been left out because the following articles (19 through 23) on the marriage guardian do not mention anything about it. The Shâfi'î *fiqh* texts usually quote verses from the Qur'ân which oblige children to be loyal and respectful to their parents.[84] The great authority of the guardian is also limited because article 23 paragraph (2) stipulates that in case the guardian is reluctant without any lawful objection, a *wali hakim* (public or state-appointed guardian) will act as the marriage guardian after the *agama* court decides on the illegitimacy of his objection. In this matter, it seems the drafters of the compilation have abandoned the Shâfi'î *madhhab* and adopted the opinion of others. No explanation is explicitly mentioned on this decision.

One basic theme of the national law development is the emancipation of women. The provisions of *fiqh* texts are seen by many as giving too much authority to the man, either as father or husband. The fault-free unilateral divorce of a husband (*talaq*) is limited by the introduction of *ta'liq ṭalaq*, i.e. the statement by the husband of conditions, the violation of which are sufficient cause to justify the wife's demand for divorce. The *ta'liq ṭalaq* statement formula was later standardized by the Ministry and printed on the last pages of a Marriage Certificate. The standard formula covers the following conditions: (1) desertion for six consecutive months, (2) failing to give obligatory support for three months, (3) physical maltreatment, and (4) neglect for six consecutive months. Once a violation of one or more of these promises by the husband is proved, the *agama* court grants a divorce to the wife after paying an insignificant value of *'iwaḍ* (compensation) which will be used for social purposes. This formula has been adopted by some people, including the Justices in the Supreme Court, who decided that two full years, instead of only six months, is required.

Before enactment of the 1974 Marriage Act, this legal device was based on authoritative *fiqh* texts which specifically state: Whoever makes his *ṭalaq* dependent upon an action, then the *ṭalaq* occurs with the existence of that action, according to the original pronouncement. Some Qur'ânic verses which oblige someone to be subject to his contract and agreement were also sometimes cited. The Marriage Act has only one article concerning this marriage agreement. Article 29 of the Act says as follows:

(1) During or before the conclusion of a marriage, both parties with mutual consent can enter into written agreement which is to be approved by the Marriage Registration Officer, based on which its content is also binding for any third party as long as it involves the third party;
(2) The said agreement can not be approved whenever it violates legal, religious, and moral limitation;
(3) The said agreement begins to take effect from the conclusion of the marriage;
(4) As long as the marriage continues, the said agreement can not be changed except when both parties agree to change it, and the change will not damage a third party.

The compilation of Islamic law extends the provision of the nuptial agreement to cover not only *ta'lîq ṭalaq* but also common property and other matters beside outlining some of its basic procedures in eight long articles (45-52). In entering this mutual agreement, husband and wife are formally equal, and in this sense, this has been intended to emancipate the Indonesian woman. One legal effect of this arrangement is the growing acceptance of common marital property in which a wife shares an equal portion. In case of separation by divorce, each is entitled to half of it unless the nuptial agreement states otherwise. This half-portion of common property is also given to the survivor in the case of death, plus the legal portion of *farâ'iḍ* (Islamic inheritance shares). In the agreement, a wife may insists that a husband may not marry a second wife unless she will have the right to divorce the husband.

The explicit statement is also found in the Compilation concerning the equality of husband and wife in establishing a happy marriage. Chapter XII which contains articles 77 through 84 enumerates the rights and responsibilities of both husband and wife. This article clearly states that the "rights and position of a wife are equal to the rights and position of a husband in the life of a marriage household and uncommon social life in the society; each is entitled to perform a legal action." However, the enumeration of this basic principle still follows the traditional life-style of the common Indonesian family. It says, for example, "that the husband is the head of the household that the wife is the mother of the household." (article 79 par. 1); "The husband is the guide for the wife and his household, but the important matters of the household must be decided by both husband and wife." (article 80 par. 1), "The husband is obliged to protect and provide for his wife in accordance with his ability." (article 80 par. 2), and "The chief obligation of the wife is to serve (*berbakti*) physically

and mentally the husband within the limits enjoined by Islamic law." (article 82 par. 1). After looking at these provisions, one may easily find efforts to include emancipatory principles beyond the traditionally formulated *fiqh* rules, but they have been substantiated more in the traditional structure of family life. The last few decades of economic development and educational progress have changed the family structure of most Muslim families and, it should be noted, the legal and social position of Indonesian women is higher than their fellow sisters in the Middle East, eventually giving pressure to emancipated values of equality in Islam.[85] What can be deduced from the reading of the formal legislation and its application in society is that the Islamic law as formulated and applied by Indonesian *'ulamâ'* and Muslim judges has sought to accommodate these changing conditions of Indonesian women and family life by "*melenturkan*" (bending) the strict Islamic rules as found in the scripture and *fiqh* texts. In some cases, some judges have gone an extra mile going beyond the acceptable judicial procedure to help their women clients who make up the great number of courts patrons.

Let us now consider the second book of the compilation concerning inheritance. Despite the tireless efforts of Hazairin and his followers to introduce a "bilateral-parental" basis of the family, the compilation is basically the Indonesian adaptation of selective Shâfi'î *fiqh* texts. The reform idea is that Islamic inheritance law functions more as a regulating law as long as the involved parties can agree on their own decision. Pioneering ventures are sought in some other aspects that have been debated for some time by many Muslim scholars. One is the acceptance of the principle that a child may take his parents' place who died earlier than his grandparents. In classical Islamic law, this child will be blocked by the existence of his uncle. Even though the Compilation maintains the position that adoption will not elevate one into a legal heir, for them the Compilation subscribes a "*wasiyat wajib*" (obligatory will). In this provision, even someone who did not make a will for his/her adopted child or parents, by law a will exists that is a small proportion dedicated for him/her.

Lastly the Compilation regulates the pious foundation (*wakaf*). Similar with inheritance law, the compilation is basically a patchwork (*talfiq*) of views from different classical authors and *madhhab*s. However, the compilation introduced the mandatory provision of state supervised registration and management of *wakaf* property. The object and purposes of the *wakaf* as expounded in *fiqh* texts have also

been extended to cover the new demands of modern life, such as the possibility of *wakaf* in money or any modern monetary documents.

Conclusion

After discussing the legal *texts* to which the Indonesian *'ulamâ'* and Islamic judges refer to derive legal rulings, the new efforts of the Islamic law renewal movement, and the influence and admission of Islamic law elements instate legislated substantive laws, we may discern not only the existence of an effort to define an Islamic law which caters for the needs of current Indonesian Muslims, but that their efforts have borne fruit in the statutory acts and legal applications as well as by religiously-motivated submission to the new formulation of certain aspects of Islamic law. The conflict between Islamic law and State Law has been diminishing due to a compromise consensus to adopt both the revitalization of Islamic law and the transformation of Islamic legal values and elements into national law. This process is still in its initial stage and seems to rely more on the political will of the ruling elite.

The changing perception and attitude of the ruling elites towards Muslims and Islamic institutions for the last decade has given a great opportunity for the adoption of certain aspects of modified Islamic laws as a part of the national legal system. The closer relationship between Muslim exponents and the ruling elite, irrespective of who is co-opting whom, has created favorable conditions for the redefinition and confirmation of Islamic law in the country. On one hand, one may see a nationalization of Islamic law, and on the other hand, one may argue for the Islamization of national law. Both trends may go hand in hand and it is too early to see its outcome. However, the process seems to be directed more toward *ad hoc* substantive and organizational aspects, but neglects a more theoretical legal principle which will give it a general framework. The lack of this important aspect may hamper the on-going process by becoming a partial, casuistic patch-work without any comprehensive fundaments to base them on. In this entire process, the judges of Islamic courts are both the subject and the object of the development. Their roles and contributions are essential and sought after.

End Notes

1. The most recent study on this subject is a dissertation by Azyumardi Azra, *The Transmission of Islamic Reformism to Indonesia: Networks of Middle Eastern and Malay-Indonesian 'Ulama' in the Seventeenth and Eighteenth Centuries*, Ph.D dissertation (New York: Columbia University, 1992).
2. See Naguib al-Attas, *A General Theory of the Islamization of the Malay-Indonesian Archipelago* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969). Similar efforts to identify the general characteristics of the Islamization process in Indonesia may also be found in Taufik Abdullah, *Islam dan Masyarakat: Pantulan Sejarah Indonesia* (Jakarta: LP3ES, 1987).
3. For a good discussion on this matter, see Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies*, xvi (1984), pp. 3-41.
4. On the interrelationship between *fatwâ* and *furû'* (substantive law) within the context of Islamic legal tradition, see Wael B. Hallaq, "From *Fatwâs* to *Furû'*: Growth and Change in Islamic Substantive Law", *Islamic Law and Society*, I/1 (1993), pp. 1-39.
5. See Abdurrahman Wahid, "Islam, the State and Development in Indonesia." In Asghar Ali Engineer (ed.), *Islam in South and Southeast Asia*. (Delhi Ajanta Publications, 1985), pp. 75-112.
6. See A. H. Johns, "Islam in Southeast Asia: Reflections and New Directions", *Indonesia*, 19 (1975), pp. 33-55.
7. See M. B. Hooker, *Islamic Law in South-East Asia* (Singapore: Oxford University Press, 1984), p. 4.
8. This term is aptly used by Wahid to describe the main characteristic of the religious scholastic tradition on most of the Indonesian archipelago, see Wahid, *ibid*, p. 86.
9. See B. R. O'G Anderson, "The Idea of Power in Javanese Culture", in Holt al. (eds), *Culture and Politics in Indonesia* (New York: Cornell University Press, 1972), pp. 1-70.
10. See L. W. C. van den Berg, "Het Mohammedansche godsdienstonderwijs of Java en Madoera en daarbij gebruikte Arabische booken", *Tijdschrift voor Indische Taat-, Land-, en Volkenkunde*, 31 (1886), pp. 519-555.
11. C. Snouck Hurgronje, "Muhammedansches Recht nach Schafiitischer Lehre". *Zenschrift der Deutschen Morgenlandischen Gesselschaft* 53 (1899), pp. 125-167. This article was later included in his *Verspreide Geschriften*, (Bonn Kurt Schroder & Nijhoff, 1924), vol.2, pp. 367-414.
12. See Martin van Bruinessen, "Kitab Kuning: Books in Arabic Script Used in the Pesantren Milieu", *Bijdragen tot de Taal-, Land- en Volkenkunde*, 146/2-3 (1990), pp. 226-269.
13. *Ibid*, pp. 245-250.
14. Abd al-Ra'ûf al-Sinkilî (d. 1105/1693) was one of the leading *'ulamâ'* of Aceh in the seventeenth century. He got his education in two famous centers of Islamic learning in Makkah and Madinah. He later came back to Aceh as the teacher of the *Shattariyyah* sufi order and wrote several books on sufism, *fiqh* and *tafsîr*. He was later known as *Syekh Kuala*. His name was later commerated as the name of the first State University in Aceh in 1961. See Harun Nasution, et al. (eds), *Ensiklopedi Islam Indonesia* (Jakarta, Djambatan, 1992) pp. 31-33.
15. See A. Meursinge, *Handboek van het mohammedansche regt, in de maleische taal* (Amsterdam, Muller, 1844).

16. See, for example, T. Roorda, *Kitab Toehpah, een Javaansch handboek voor het Mohammedaansche regt* (Leiden. E. J. Brill, 1874).
17. See Nawâwî, *Majmû'* vol. I, pp. 3, 5. See also Wael B. Hallaq, "From *Fatwâs* to *Furû'*, Growth and Change in Islamic Substantive Law", *Islamic Law and Society* i/I (1993), pp. 1-33.
18. For a discussion on the development of *tafsîr* in Malay-speaking regions, see A.H. Johns, "Qur'ânic exegesis in the Malay world: In search of a profile", in Andrew Rippin (ed.), *Approaches to the History of the Qur'ân* (Oxford Clarendon Press, 1988), pp. 257-287.
19. The religious, social, and political meaning of this hadîth collection and its Indonesian translation in a local context has been studied by Mark R. Woodward. See his article "Textual Exegesis as Social Commentary Religious, Social and Political Meanings of Indonesian Translations of Arabic Hadîth Texts", *The Journal of Asian Studies*, 52 (August 1993), pp. 565-583.
20. Bustanul Arifin: "Kompilasi Fiqh Dalam Bahasa Undang-Undang" *Pesantren* 24 (1985), p. 27.
21. Sayyid 'Abd Allâh ibn Sadâqah Dahlân was a Shâfi'îte *imâm* in al-Haram Mosque in Mecca. He finished writing *al-Qawânîn* in 1353/1934. This work has been translated and commented upon by many Indonesian *'ulamâ*. Its official translation is entitled *"Kitab Oendang-oendang Syara' Oentoek Tanah Indonesia: Penoenjoek Qodhi-qodhi dan Hakim-hakim pada Kewajiban-kewajibannya"* (Islamic Law Book for Indonesian Countries: A Guide for Islamic Judges and Officers on Their Duties) and had been approved by a certain colonial officer in charge of Native Affairs, so it functioned as a semi-official legal handbook. See Zaini Ahmad Noeh, "Kompilasi Ulama Betawi", *Peantren*, vii/2 (1990),pp. 102-103.
22. All of these texts and the like are known in Indonesia as *kitab kuning* (lit., "yellow book"). See van Bruinessen, "Kitab Kuning" (Note 12).
23. For further information and discussion on textbooks used in Islamic educational institutions throughout Indonesia, both traditional *pesantren* and the more modern *madrasah*, see Departemen Agama, *Buku-buku yang Dipergunakan di Pondok Pesantren* (Jakarta: Pusat Penelitian dan Pengembangan Lektur Agama, 1977) and Sudjoko Prasodjo, et al., *Profil Pesantren: Laporan Hasil Penelitian Pesantren al-Falak dan Delapan Pesantren Lain di Bogor* (Jakarta, LP3ES, 1974).
24. See Pengurus Besar Nahdlatul Ulama, *Ahkam al-Fuqaha'*, vol. 1, pp. 7-8, also Mohammad Atho Mudzhar, *Fatwâs of the Council of Indonesian Ulama: A Study of Islamic Legal Thought in Indonesia 1975-1988*, Ph.D Dissertation (Los Angeles, UCLA, 1990), p. 80.
25. Beside *Qawânîn al-Shar'iyyah*, he also wrote several other books: *Taudih al-Adillah 'alâ Shurûti Shuhûd al-Ahillah, Mengentikan Rakyat Biasa dari Bergabung dengan Syarekat Islam*. See article "Sayyid Usman", in Harun Nasution, at al. (eds) *Ensiklopedi Islam Indonesia* (Jakarta, Djambatan, 1992), pp. 847-848.
26. For further discussion of this book, see Zaini Ahmad Noeh, "Kompilasi Ulama Betawi", *Pesantren*, VII/2 (1990), pp. 99-103 See also C. Snouck Hurgronje, "Sajjid Oethman's gids voor de Priesterraden besproken", *Recht in Nederlands Indie*, LXIII (1894).
27. See Zaini Ahmad Noeh, *op cit*, p. 103.
28. See 'Abd al-Rahman al-Jazîrî (1882-1941), *Kitâb al-Fiqh 'alâ al-Madhâhib al-Arba'ah* (Cairo, Tijariyyah al-Kubra, 1964-1969), 5 vols. As is common with other reference works, this book has many editions and has been reprinted many times.

29. There have been some comments that the students of IAIN have a pooreer mastery of classical Arabic than those of the *pesantren* and the capabilities of young Islamic judges graduating from IAIN to comprehend such classical fiqh texts have been questioned. The present writer's experience and also his field observation finds that this is generally unfounded. However, this does not deny the urgent need to upgrade the teaching methods and materials in those institutes.
30. Th. W. Juynboll, *Handbuch des islamischen Geseizes nach der Lehre der schafi'istischen Schile, nebst einer allgemeinen Einleitung von Th. W. Juynboll* (Leiden, E.J. Brill, 1910).
31. Muhammadiyah has been a focus of many studies by many scholars from different perspectives. Some of them are: Alfian, *Muhammadiyah: The Political Behavior of a Muslim Modernist Organization under Dutch Colonialism* (Yogyakarta: 1989); Howard Federspiel, "The Muhammadiyah: A Study of an Orthodox Islamic Movement in Indonesia", *Indonesia*, 10 (October 1970); Mitsuo Nakamura, *The Crescent Arises Over the Banyan Tree* (Yogyakarta: Gadjah Mada Press, 1983); James L. Peacock, *Purifying the Faith: the Muhammadiyah Movement in Indonesian Islam* (Berkeley University of California Press, 1978); and M. Sirajuddin Syamsuddin, *Religion and Politics in Islam: The Case of Muhammadiyah in Indonesia's New Order*, Ph.D dissertation (UCLA, 1991). However, no study ventures to elaborate the Muhammadiyah's puritan reform ideas and practices in the field of Islamic law.
32. For a good study on Persis (Persatuan Islam), see Howard Federspiel, *Persatuan Islam: Islamic Reform in Twentieth Century Indonesia* (Ithaca, NY.: Modern Indonesia Project, Cornell University, 1970).
33. I got this impression when on several valuable occasions I had the opportunity to ask some leading Western scholars in Islamic law, such as Farhat Ziadeh and George Maksdisi when they visited UCLA. The same impression has been observed by Mitsuo Nakamura, a professor at Chiba University in Japan and an expert on Indonesian Islam. He related to me that when he asked Zaki Yamani, a leading Arabic scholar on Islamic law about Islamic law in Indonesia, the latter had maintained the insignificance of Islamic legal ideas in the largest Muslim country and said they were just late consumers of the ideas developed in the Middle East Personal communication, August 1993.
34. See Hazairin, *Tujuh Serangkai tentang Hukum* (Jakarta, Tintamas, 1974), p. 115.
35. For more extensive discussion, see Samsul Wahidin and Abdurrahman, *Perkembangan Ringkas Hukum Islam di Indonesia* (Jakarta Akademika Pressindo, 1984), pp. 83-94.
36. Hazairin is a prolific writer and respected teacher. His works include, *Hadîth Kewarisan dan Sistem Bilateral* (Jakarta, 1962), *Hendak Kemana Hukum Islam?* (Jakarta 1960), *Hukum Islam dan Masyarakat* (Jakarta, 1963), *Hukum Kekeluargaan Nasional* (1968), *Hukum Kewarisan Bilateral menurut Qur'ân dan Hadîth* (Jakarta, 1964), *Ilmu Pengetahuan Islam dan Masyarakat* (Jakarta, 1951), dan *Isa Almasih dan Ruh* (Jakarta, 1969).
37. See M. Hasby Ash-Shiddieqy, *Syari'at Islam Menjawab Tantangan Jaman* (Jakarta Bulan Bintang, 1966).
38. *Ibid*, pp. 43-44.
39. Beside the book mentioned, he also wrote many other books on various subjects of Islamic law. Even though his books consist mostly of translations and compilations of some reformist Arabic writers, he was successful more as a popularizer

and has never been able to found a systematic reform of either *usûl al-fiqh* or *fiqh* proper. Among the judges that I spoke to, I got the impression that most of them shared his view on the need to reform Islamic law in order to make it more relevant to Indonesian conditions, but do not adopt his ways to achieve it. Some of his important works are *Sejarah Pertumbuhan dan Perkembangan Hukum Islam* (Jakarta; Bulan Bintang, 1971); *Falsafah Hukum Islam* (Jakarta; Bulan Bintang, 1975); *Dinamika dan Elastisitas Hukum Islam* (Jakarta: Tintamas, 1982), Most of these books have been reprinted several times.

40. There have been some studies on the new Muslim intellectuals during the New Order period, among whom are: Howard M. Federspiel, *Muslim Intellectuals and National Development in Indonesia* (New York: Nova Sciencce Publishers, 1992), Muhammad Kamal Hassan, *Muslim Intellectual Responses to "New Order" Modernization in Indonesia* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1982); and Fachry Ali and Bachtiar Effendy, *Merambah Jalan Baru Islam: Rekonstruksi Pemikiran Islam Indonesia Masa Orde Baru* (Bandung, Mizan, 1986).
41. Endang Saifuddin Anshari was born in 1938, a son of a prominent religious-political activist, who was a primary proponent of an early form of Islamic Fundamentalism. He went to a noted fundamentalist school for his early education and attended a private law school in Bandung before getting his Masters in Islamic Studies at McGill University in Montreal, Canada. His major works are *Wawasan Islam; Pokok-Pokok Pikiran tentang Islam dan Ummatnya* (Bandung Pustaka, 1986); and *Piagam Jakarta 22 Juni 1945* (Bandung Pustaka, 1981).
42. Taufik Abdullah was born in 1936 at Bukittinggi, West Sumatra where he got his early education under the influence of the modernist Muslim movement. He attended Gadjah Mada state University in Yogyakarta, Java, and then earned his Ph.D at Cornell University. He works at the social science research institute - and for some time served as its director, besides giving lectures at several universities. He is a prolific writer and demanding but patient professor. Some of his works related to the present topic are *Islam dan Perubahan Sosial* (Jakarta; Rajawali, 1983), *Islam dan Masyarakat: Pantulan Seluruh Sejarah Indonesia* (Jakarta LP3ES, 1987), and *Sejarah dan Masyarakat: Lintasan Historis Islam di Indonesia* (Jakarta, Yayasa Obor, 1987).
43. See Munawir Sjadzali, "Reaktualisasi Ajaran Islam", in Juhaya S. Praja (ed.), *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung Remaja Rosdakarya, 1991), pp. 83-93.
44. *Ibid*, p. 86.
45. Munawir Sjadzali had presented his innovative ideas on Islamic law on many occasions before his article on the subject appeared in the well-circulated Islamic magazine *Panji Masyarakat* in 1986 which attracted public attention. This shows an interesting feature about the limitation of information channels among the Muslim audience. Another explanation might be that the earlier presentations were taken by most people just as a scholarly exercise, but once the message went to the Islamic mass media, it was perceived as the proclamation of a program.
46. The verse 2:106 says as follows: "We do not cancell any verse not let it be forgotten instead. We bring something better than it or else something similar. Do you not know that God is Capable of everything?"
47. The polemic has been very extensive in the mass media and public forums. Many *'ulamâ'* used their religious sermons and lectures to attack this view and its pro-

ponents. When the polemic had heightened to a level beyond pure academic discussion, the Minister and some influential Muslim leaders advised the people to halt the heated debates, but not without some damaging effects for both sides. Some of the writings to counter the ideas of "reaktualisasi", just to mention a few of many, are Rifyal Ka'bah and Busthami M. Said, *Reaktualisasi Ajaran Islam: Pembaharuan Agama Visi Modern & Salaf* (Jakarta, Minaret, 1978).

48. See, for example, Muhammad Daud Ali, *Asas-Asas Hukum Islam: Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta; Rajawali Pers, 1990), the resolutions of the National Seminar on the Actualization of *Mu'amalat Fiqh* held in IAIN North Sumatra, Medan, see *Hasil Seminar Nasional Aktualisasi Fiqh Mu'amalah dalam Kehidupan Dewasa Ini* (Medah; IAIN Sumatera Utara, 16-17 November 1989), the resolutions of the National Seminar on the transformation of Islamic law in National Law held in IAIN Raden Fatah Palembang, see *Hasil Seminar Nasional Transforamasi Hukum Islam dalam Hukum Nasional* (Palembang, IAIN Raden Fatah, 6-7 November 1992).
49. See, for example, Ismael Saleh (Minister of Justice) in his lecture, "Posisi dan Arah Sumbangan Hukum Islam dalam Pembentukan Hukum Nasional pad Pembangunan Jangka Panjang Tahap II" on the 28th birthday commemoration of IAIN Palembang, South Sumatra, November 2, 1992.
50. Muhammad Quraish Shihab is a Rector of IAIN Syarif Hidayatullah Jakarta besides being one of the chairmen of the Indonesian 'Ulama' Council. He got his Masters and Ph.D from Al-Azhar Universities specializing in Qur'ânic Exegesis (*tafsîr*). His ideas on the actualization of Islamic law may be discerned from his papaer, "Penetapan Hukum Islam Secara Tekstual dan Kontekstual (Tinjauan Mufassir)" at the Seminar on the reactualization of Islamic teaching organized by the Research and Development Section of the Ministry of Religion on December 26, 1991, which was later published in *Dialog: Jurnal Studi dan Informasi Keagamaan*, XVI/35 (February 1992), pp. 3-8.
51. Amir Syarifuddin is a well-known authority in Islamic law. He had just finished his second term as Rector of IAIN Imam Bonjol Padang West Sumatra, when I met and interviewed him on my field trip in September 1991. His views on the reactualization of Islamic law are expressed, among others in his, *Pembaharuan Pemikiran Hukum dalam Islam* (Padang: Angkasa Raya, 1990). His earlier work includes *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984).
52. Peunoh Daly is a professor of Islamic law and Dean of Fakultas Syari'ah, IAIN Jakarta. Like Amir Syarifuddin, he got his Ph.D degree based more on his individual work, research, and seniority, rather than on definitive course/research work, from IAIN Jakarta. The Graduate level departement which offers the Masters and Ph.D degrees was initiated only in 1981 in two leading IAIN, Jakarta and Yogyakarta. Only during the last three years, some other IAIN, Banda Aceh, Ujung Pandang, and Surabaya, have initiated a Masters Program under the supervision of either Jakarta or Yogyakarta. My observations show that there have been different characteristics and views between graduates of the loose individual program which has been terminated and those who graduated from the latter established departments concerning the definition and actualization of Islamic law.
53. B.J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1982), pp. 164-5. It is worthwhile to note here regarding Boland's find-

ing that those in the religious courts exclusively generally wanted to stick to the Shafi'i school of law, that they have answered differently in my questionnaire and interview. See further discussion in the next chapter of this dissertation.

54. See recent studies by Howard B. Federspiel, *Muslim Intellectuals and National Development in Indonesia* (New York; Nova Science Publishers, 1992), and Fachry Ali and Bachtiar Effendy, *Merambah Jalan Baru Islam: Rekonstruksi Pemikiran Islam Indonesia Masa Orde Baru* (Bandung; Mizan, 1986).
55. This was regulated in article 7 State Gazette no. 610 of 1937 in conjunction with article 15 State Gazette no. 638 of 1937, and continued to be valid based on the stipulation of chapter article 11, Government Regulation no. 45 of 1957. See, *Kenang-Kenangan Seabad Peradilan Agama di Indonesia* (Jakarta; Departemen Agama, 1985), p. 46.
56. Those Supreme Court justices who were appointed to the chamber by the Chief of the Supreme Court in 1979 were (late) Sri Widoyati Soekito, Z. Asikin Kusumah Atmadjah, B.R.M. Hanindyo Poetro Sosropranoto, Poerwoto S. Gandasubrata, Kaboel Arifin, and Bustanul Arifin. This last mentioned justice was later in 1982 officially appointed to be the chief of the chamber with the title of Junior Chief (Ketua Muda) of the Supreme Court by the President of The Republic. All six justices were Muslims and had formal education in "secular" national law schools and none, excepting the chief, can be considered 'ulamâ' in the traditional strict sense even though some of them had had some cursory basic educational background in Islamic religion. This has been a matter of contention among *agama* court judges, Ministry of Religion officials and Muslim leaders at large. Therefore, many had good reasons to feel relieved when in late 1982, three more Supreme Court Justices with some religious education, but not yet at the level of '*ulamâ*' were appointed. See H.A. Muhaimin Nur, et al. (eds.), *Kenang-Kenangan Seabad Peradilan Agama di Indonesia* (Jakarta; Departemen Agama, 1985), pp. 52-53. Special research on the sociological background and judicial behavior of these judges, or in this matter of all the supreme court justices, is essential to comprehend the judicial system.
57. See, for example, Sir Thomas Raffles, *The History of Java*, (Kuala Lumpur: Oxford Asia Historical Reprints, 1965, a reprint of original 1817 edition), vol. 1, pp. 277-281.
58. The Dutch colonial government issued a Regulation on Marriage of Indonesian Christians. *Huwelijks Ordonantie Christen Indonesiers*, State Gazette no. 74 year 1933. Meanwhile, State Gazette no. 129 year 1917 regulated that the Chinese were subject to the codified marriage law within the Civil Code, *Burgerlijk Wetboek*, which was introduced for Europeans in 1848. Furthermore, State Gazette no. 130 year 1917 included the Chinese under the jurisdiction of Civil Registry together with the Europeans and later also native Christians. For further discussion, see S. Gautama, *Essays in Indonesian Law* (Bandung; Citra Aditya Bakti, 1991), pp. 1-175. For studies on the legal status of Indonesian Christians, see H. Snellen, *De Rechttoestand der Inlandsche Christenen in Nederlandsche-Indie*, Jurist Doctor thesis (Utrecht Rijksuniversiteit te Utrecht, Netherlands, 1892).
59. See B. Ter Haar, *Adat Law in Indonesia*, trans G.C.O. Haas and Hordyk, (New York; Institute of Pacific Relations, 1948), p. 177. See also Gautama, *op. cit*, p. 25.
60. Data on this topic is mostly taken from H. Arso Sosroadmodjo and H.A. Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta; Bulan Bintang, 1981), and

Wiryono Prodjodikoro, *Hukum Perkawinan di Indonesia*, (Bandung; Sumur, 1967).

61. One of the characteristics of the pluralism of legal systems in colonial Indonesia was the existence of "*intergentiel recht*" (inter-legal system law). A Royal Decision (*Koninglijk Besluit*) of *Regelling of de gemengde huwelijken* (Regulation of mixed marriages) was issued on December 29, 1896, to regulate mixed marriages between those who belonged to different legal systems. There has been a debate on whether the stipulations in this Regulation are still valid after the enactment of Law no. 1/1974 or not.
62. See State Gazette no. 1 year 1974; The elucidation of this Law is found in Additional State Gazette no. 3019.
63. This Law has attracted many studies, the most important of which are June S. Katz and Ronald S. Katz, "The New Indonesian Marriage Law. A Mirror of Indonesia's Political, Cultural, and Legal Systems", *American Journal of Comparative Law*, 23 (1975), pp. 653-681, June S. Kantz and Ronald S. Kantz, "Legislating Social Change in a Developing Country: the New Indonesian Marriage Law Revisited", *American Journal of Comparative Law*, 26 (1978), pp., S. Hanifa, "The Law of Marriage and Divorce in Indonesia", *Islamic and Comparative Law Quarterly*, 3/1 (March 1983), pp. 14-26, and Mark Cammack, "Islamic Law in Indonesia's New Order", *International and Comparative Law Quarterly*, 38 (January 1989), pp. 53-73.
64. This is my translation. To the best of my knowledge, there is no official translation of this Law, so in any case the original Bahasa Indonesia is valid and binding. The original says: *Perkawinan ialah ikatan lahir bathin antara seorang pria dengan seorang wanita sebagai suami-istri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa* (article 1); *Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu,* and *Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku*(article2).
65. This view was expressed, among others, by Muchtar Zarkasyi, a high ranking officer in the Ministry of Religion in a symposium on the history of Islamic courts in Indonesia. See, Proyek Administrasi Hukum dan Peradilan Agama, *Laporan Hasil Symposium Sejarah Peradilan Agama* (Jakarta; Departemen Agama, 1982/3), p. 235.
66. See M. B. Hooker, *Islamic Law in South East Asia* (Singapore; Oxford University Press, 1984), p. 272. See also John Bresnan, *Managing Indonesia: The Modern Poitical Economy* (New York; Cambridge Unuversity Press, 1993), p. 235.
67. Cf. J. Prins , *De Indoeisische Huwelijkswet van 1974* (Nijmegen:, 1977), Indonesia edition *Tentang Hukum Perkawinan di Indonesia* trans G.A. Ticolau (Jakarta: Ghalia Indonesia, 1982).
68. See, for example, R. Soetojo Prawirohamidjojo, *Pluralisme dalam Perundang-undangan Perkawinan di Indonesia* (Surabaya: Airlangga University Press, 1986); and Nani Suwondo, *Kedudukan Wanita Indoesia dalam Hukuma dan Masyarakat* (Jakarta; Ghalia Indonesia, 1981).
69. Mark Cammack has been pursuing this line of argument in his article mentioned above and his presently on-going research. Personal communication December 1993.
70. *Cf.* Anwar A. Qadri, *Islamic Jurisprudence in the Modern World* (Lahore; Sh. Muhammad Ashraf, 1981), pp. 455-464.
71. See State Gazette no. 38 year 1977. For a good introduction and the application

of this law especially among Muhammadiyah members, see H. Adijani al-Alabij. *Perwaqafan Tanah di Indonesia dalam Teori dan Praktek* (Jakarta: Rajawali, 1989).

72. See article 17 of the Regulation of the Ministry of Religion no. 1/1978 which stipulates that. (1) the *agama* court which has jurisdiction over *waqaf* land is obliged to accept and decide disputed cases on *waqaf* land in accordance with *syari'at Islam*.
73. A Qur'ânic verse that is usually quated as the basis for *waqf* foundation is 3. 92 as follows "You will never attain virtue until you spend something you are fond of; while God is Aware of anything you may spend".
74. For some actual cases and discussion, see H. Rachmat Djatnika, "Waqaf dan Masyarakat serta Aplikasinya", *Mimbar Hukum*, III/7 (1992). pp. 1-17.
75. See *Simposium Hukum Waris Nasional* (Jakarta Badan Pembinaan Hukum Nasional, 1989).
76. See Arifin, "Kompilasi", *op cit*, p. 26-27. For an extensive discussion of the Islamic Law Compilation, see H. Abdurrahman , *Kompilasi Hukum Islam di Indonesia* (Jakarta; Akademika ressindo, 1992).
77. This workshop was held in February 1988 and was attended by some 13 professors of Islamic law, 46 *kiyais* (traditional Muslim leaders), 21 jurists, a number of judges of the Supreme Court, and several rectors of IAIN (State Institute for Islamic Studies). The workshop was widely reported in the mass media. See *Tempo* (February 4, 1989), pp. 76-77.
78. Partly influenced by the familiarity of Arabic to most Indonesian Muslim students and scholars and its attachment as the religious language of Islam, and that of Western languages as the language of colonials and "*kafirs*" (unbelievers), the writings of modern Muslim writers in Arabic have been widely read and relatively more warmly welcomed by Indonesian Muslims than those of Muslim writers who write in English. This latter category have been more easily available since the late seventies and circulated more widely after being translated into Bahasa Indonesia. 'Abd al-Wahhab Khallaf's book, *'Ilm Usul al-Fiqh* has been required reading in the State Institute of Islamic Studies (IAIN) since I was a student there (1973); and has been translated as *Kaidah-Kaidah Hukum Islam* (Bandung: Perisai, 1985). Ziauddin Sardar, *Islamic Futures: The Shape of Ideas to Come* (London: Mansell, 1985), has been transtated as *Masa Depan Islam* (Bandung: Pustaka, 1987); Isma'il R. Al Faruqi's article in *Islamization of Knowledge: General Principles and Work Plan* (Herndon, VA.: International Institute of Islamic Thought, 1989) as *Tanggung Jawab Akademikus Muslim dan Islamisasi Ilmu-Ilmu Sosial* (Jakarta: Minaret, 1986); Ahmad Zaki Yamani, *Al-Shari'at al-Khalidah wa Mushkilat al-'Asr* (Jeddah: Dar al-Sa'udiyyah, 1970), English version, *Islamic Law and Contemporary Issues* (Jeddah: Saudi Publishing House, 1986), has been translated into Bahasa as *Syari'at Islam yang Kekal dan Persoalan Masa Kini* (Jakarta: Lembaga Studi Ilmu-Ilmu Kemasyarakatan, 1986).
79. The writings of many Western scholars have been recently translated and widely read in the country. Justice Harahap based his quotations more on the translations than their original English version. Noel J. Coulson's book, *A History of Islamic Law* first published in 1964 (Edinburgh: Edinburgh University Press, reprint 1991); Gustave E. von Grunebaum's edited volume, *Unity and Variety in Muslim Civilization* (Chicago : University of Chicago Press, 1955) has been translated as *Islam Kesatuan dalam Keragaman* (Jakarta: Yayasan Perkhidmatan, 1980).
80. This citation is taken from the Compilation as an appendix to the *Mimbar Hukum*,

III/5 (1992), which is an official publication of the Directorate of Islamic Judiciary, Ministry of Religion, also from H. Abrurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademi Pressindo, 1992). The translation is mine.

81. These three basic objectives are cited and discussed by M. Yahya Harahap, a Supreme Court Justice, in his article, " Informasi Materi Kompilasi Hukum Islam Mempositifkan Abstraksi Hukum," *Mimbar Hukum*, III/5 (1992), pp. 25-30. Another impact of the compilation cited by Justice Harahap is the elevation and transformation of some elements of Islamic law from just a "private affair" to become an integral part of "national law." This topic will be discussed further in this chapter.
82. For an extensive study of this *fatwâ*, as well as others, of the Indonesian Council of *Ulama*, see M. Atho Mudzhar, *Fatwa-Fatwa Majelis Ulama Indonesia: Sebuah Studi tentang Pemikiran Hukum Islam di Indonesia 1975-1988 (A Study of Islamic Legal Thought in Indonesia, 1975-1988)*, bi-lingual edition (Jakarta: Indonesia-Netherlands Co-operation in Islamic Studies, 1993), pp. 84-93.
83. Personal communication with a high-ranking official in the concerned institute who declined to have his name, his institute and the name of student cited; August 1992.
84. There are several verses in the Qur'ân obliging children to treat their parents kindly, some of them are 29:8 ; *We have instructed everyman to treat his parents kindly;* 14:23 ;*our Lord has decreed that you should worship nothing except Him, and [show] kindness to your parents; whether either of them or both of them should attain old age [while they are] still with you, never say to them : Ah!, nor scold either of them. Speak to them in a generous fashion. Protect them carefully from outsiders, and say: "My Lord, show them mercy, just as they cared for me [when I was] a little child.*
85. For a study on Indonesian women, see Cora Vrede-de-Stuers, *The Indonesian Woman: Struggle and Achievements* (The Hague: Mouton, 1960), and Nani Soewondo, *Kedudukan Wanita dlaam Hukum dan Masyarakat* (Jakarta: Timun Emas, 1955).

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