INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

ISLAMIC LAW AND *ADAT* ENCOUNTER: THE EXPERIENCE OF INDONESIA

by

Ratno Lukito
I.D: 9548149

A Thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements
for the degree of Master of Arts
in Islamic Studies

Institute of Islamic Studies
McGill University
Montreal
Canada
1997

ACKNOWLEDGMENTS

I am pleased to have this opportunity to express my deepest gratitude to Professor Wael B. Hallaq, my thesis advisor, for his continuous advice and guidance not only in matters directly pertaining to this thesis but also in training me in the field of Islamic legal studies.

My gratitude also goes to the Canadian International Development Agency (CIDA) for enabling me to complete my course of study at the Institute of Islamic Studies, McGill University, through generous funding. The staff of Indonesia-Canada Higher Islamic Education Project, and the staff of the Islamic Studies Library, particularly Salwa Ferahian and Wayne St. Thomas, are also thanked for their patience and the assistance they rendered to me during my stay at McGill University.

My thanks are also due to Dr. A. Üner Turgay (Director of the Institute of Islamic Studies), Dr. Sajida S. Alvi, Dr. Donald P. Little, and Dr. Howard Federspiel, without whose instruction and assistance I would not have been able to further my knowledge of Islam. I am deeply grateful to Steven Millier and Reem Meshal for their enormous assistance in editing this thesis. My thanks are also due to the Minister of Religious Affairs of Indonesia and the authority of the Institute of Islamic Studies (IAIN) Sunan Kalijaga, Yogyakarta, for granting me study leave in Canada for the completion of this work.

Finally, this thesis would not have been completed without the constant moral support of my wife, Noviria Wiwik Sumintari, my daughter, Ratna Disca Sari, and my parents. Their patience and praying made my dreams come true.

ABSTRACT

AUTHOR : Ratno Lukito

TITLE : Islamic Law and *Adat* Encounter: The Experience of Indonesia

DEPARTMENT : Institute of Islamic Studies, McGill University

DEGREE : M. A.

While much has been written on the relationship between Islamic law and customary law in Muslim countries, for the most part, the literature reflects the conflict approach. To date, this methodological framework persists as most Western Islamicists continue to view the encounter between the two legal systems as conflict ridden. This thesis is an attempt to re-evaluate this entrenched paradigm.

By utilising the principles of Islamic legal methodology (*uṣūl al-fiqh*) in conjunction with legal and socio-political approaches, this study seeks to shed new analytical light on the encounter of Islamic law with adat law (customary law) in Indonesia. The two legal systems, it is argued, have a shared existence long pre-dating the intervention of the colonial powers in Indonesian legal affairs, which speaks of accommodation and coexistence. In what is both a syncretic and a purist society, Indonesians have successfully harmonized the two legal traditions such that compromise and derivative solutions, based upon elements from both legal systems, have often been attained. In post-colonial Indonesia, the dialogue between the two sets of laws persists today as the tradition of avoiding conflict in legal resolution continues uninterrupted by the flux in legal policy from colonial to national rule. Family law in particular illustrates the endurance of such a phenomenon in the current period. Three cases --conditional repudiation, common property in marriage and obligatory bequest-- are discussed as models of the two substantive legal systems working jointly to construct a new legal entity. The conciliatory exchange between Islamic and customary law in Indonesia refutes therefore the paradigm by which the two legal systems are posited as irreconcilable.

RÉSUMÉ

AUTEUR : Ratno Lukito

TITRE : La rencontre de la loi islamique et l'*Adat*: L'expérience de l'Indonésie

DÉPARTEMENT : Institut des Études Islamiques, Université McGill

DIPLÔME : M.A.

Alors que beaucoup d'ouvrages ont été écrit sur la relation existant entre la loi islamique et le droit coutumier dans les pays musulmans, la plupart de la littérature reflète une approche conflictuelle. Jusqu'à présent, cette grille méthodologique persiste toujours alors que les islamologues occidentaux continuent de percevoir la rencontre entre les deux systèmes légaux comme étant minée par des conflits. Ce mémoire tentera de réévaluer ce paradigme bien encré.

En utilisant les principes de la méthodologie légale islamique (*uṣūl al-fiqh*), en conjonction avec les approches légales et socio-politiques, cette étude tentera de donner un nouvel éclairage sur la rencontre de la loi islamique et l'*Adat* (droit coutumier) en Indonésie. Il y est soutenu que les deux systèmes légaux ont partagé une existence commune bien avant l'intervention des puissances coloniales dans les affaires légales indonésiennes qui incluent les concepts d'accomodation et de coexistance. Dans ce que qui est à la fois une société syncrétiste et puriste, les Indonésiens ont harmonisé avec succès les deux traditions légales de façon à ce que les solutions de compromis et de déduction, fondés sur des éléments issus des deux systèmes légaux, ont pu être atteints. Au sein de l'Indonésie post-coloniale, le dialogue entre les deux ensembles légaux persiste encore aujourd'hui alors que la tradition d'éviter les conflits dans la résolution légale se poursuit de façon ininterrompue par le flux des politiques du droit et ce, depuis la période coloniale jusqu'au gouvernement national. La loi de la famille illustre tout particulièrement l'endurance d'un tel phénomène dans la période actuelle. Trois cas, c'est-à-dire la répudiation conditionelle, la communauté des biens dans le mariage et le

leg obligatoire, sont abordés comme étant des modèles utilisés par les deux systèmes légaux substansifs qui contribuent conjointement à construire une nouvelle entité légale. L'échange concillié entre la loi islamique et le droit coutumier an Indonésie réfute donc le paradigme selon lequel les deux systèmes légaux sont perçus comme étant irréconcilliables.

TABLE OF CONTENT

TRANSLITERATION

Concerning the system of transliteration of Arabic words and names applied in this thesis, I follow the system used by the Institute of Islamic Studies, McGill University. However, the Indonesian names derived from the Arabic are written in the form cited in the sources, such as Hasbi Ash Shiddieqy instead of Ḥasbī al-Ṣiddīqī, or Muhammad instead of Muḥammad.

The Arabic transliterations are as follows:

ب = b	ذ = dh	ط = ṭ	ل = l
ت = t	ر = r	ظ = ẓ	م = m
ث = th	ز = z	ع = ‘	ن = n
ج = j	س = s	غ = gh	و = w
ح = ḥ	ش = sh	ف = f	ء = ’
خ = kh	ص = ṣ	ق = q	ي = y
د = d	ض = ḍ	ك = k	

Short: ـَ = a; ـِ = i; ـُ = u. Long: اَ = ā; ـِي = ī; ـُو = ū.

Diphthongs: اَي = ay; اَو = aw.

Long with *tashdīd*: ـِيّ and ـُوّ , instead of iyya and uwwa, we employ īya and ūwa respectively.

In the case of *tā’ marbūṭah* (ة) *h* is not omitted, but when it occurs within an *iḍāfah* it is written *at*.

The *hamzah* (ء) occurring in the initial position is omitted.

INTRODUCTION

In a 1956 address entitled "Reflection on Law - Natural, Divine and Positive," J.N.D. Anderson draws attention to the confrontation between customary law and Islamic law as it is found in some Muslim countries:

> " .... nor is the field of possible conflict limited to that between the new outlook which now prevails in the orient - whether regarded as 'Western' or as founded on natural law and the fundamental rights of man - and the religious or divine law. Another fertile source of conflict is between customary law and divine law, as exemplified, for instance, in those Muslim communities - whether in Africa, Malaya (Malaysia) or Indonesia."[1]

This perception of the issue is quite understandable, since many Western scholars continue to view Islamic law and customary law as separate systems which cannot be reconciled. As a consequence, they tend to adopt conflicting approaches to the subject.

Indonesia has also experienced this problem in the administration of *adat*[2] and Islamic law. Much of the discussion concerning the encounter between the two systems of law in Indonesia has been influenced by the conflicting approaches. The conflict between

---

[1] J.N.D. Anderson, "Reflection on Law-Natural, Divine and Positive," 940th *Ordinary General Meeting of the Victoria Institute*, at the Caxton Hall, Westminster, December 10, 1956, p. 1-23, as quoted in Isma'il bin Mat, "Adat and Islam in Malaysia: A Study in Legal Conflict and Resolution" (Ph.D. Dissertation: Temple University, 1985), p. 1.

[2] *Adat* is an Indonesian word, coming from the Arabic word *'ādah,* synonymous with the word *'urf.* From its Arabic origin the word *'ādah* means habit, custom, usage, or practice. Adat is usually defined as local custom which regulates the interaction of the member of a society. The Indonesian word adat itself was developed by Dutch scholars by using the term *adatrecht* i.e. adat law or customary law which came into use about 1900. See Jan Prins, "Adatlaw and Muslim Religious Law in Modern Indonesia," *Die Welt Des Islams* 1 (1951): 283-300. For the Arabic word *'ādah* see J. M. Cowan, ed., *Arabic-English Dictionary: The Hans Wehr Dictionary of Modern Written Arabic*, 3rd. edition (New York: Spoken Language Services, Inc., 1976), p. 654.

local customary law and Islamic law experienced in Minangkabau[3] is pointed to by some scholars as a clear indication of the eternal conflict between Islamic law and customary law. It is this contradiction that causes Bousquet to describe the Minangkabau case as a clear example of "a remarkable paradox in the sociology of Islam."[4]

This common belief, however, does not reflect the reality of Indonesian society, wherein Islamic law and customary law are able, for the most part, to coexist. Recent studies on the encounters of the two systems of law indicate that, historically, there have been consistent attempts to accommodate both customary law and Islamic law.[5] These attempts at reconciling the two systems, both in practice and in theory, are manifestation of the general desire to accommodate traditional Indonesian legal practice.[6] A current example of such reconciliation can be given here. In article 209 of the Compilation of Islamic law (*Kompilasi Hukum Islam*) in Indonesia the adopted child and the adoptive parents are both considered legatees of the obligatory bequest (*waṣīyah wājibah*). This

---

[3]Minangkabau is one of the most Islamized regions in Indonesia. It lies in the west coast of Sumatra.

[4]G. H. Bousquet, *Introduction a l'etude de l'islam indonesien* (Paris: Geuthner, 1938), p. 241. See also Jan Prins' views on Islamic law as being in a diametrical opposition to adat in his "Adatlaw and Muslim Religious Law in Modern Indonesia," pp. 283-300.

[5]M. B. Hooker, *Adat Law in Modern Indonesia* (Kuala Lumpur: Oxford University Press, 1978), pp. 106 ff.

[6]See Hooker, *Adat Law*, p. 98. See also Taufik Abdullah's explanation concerning adat and Islamic law in Minangkabau with regard to the character of the Minangkabau society in Taufik Abdullah, "Adat and Islam: An Examination of Conflict in Minangkabau," *Indonesia* 2 (October 1966): 1-24. Also see Nancy Tanner, "Disputing and Dispute Settlement Among the Minangkabau of Indonesia," *Indonesia* 8 (October 1969): 21-62.

enactment is different from the classical theory of Islamic law which states that the bequest is due only to close relatives who had a blood relationship with the praepositus.[7] The difference is understandable when seen from the point of view of adat law in Indonesian society, a law which does not regard adoption as a hindrance to inheritance. Here we see a clear example of Indonesian customary law influencing the Islamic law of inheritance.

Muslim jurists from the classical period considered the problem of the influence of customary law on Islamic law.[8] Although they did not recognize custom as an independent source of law, some jurists recognized the efficacy of custom in the act of interpreting the law.[9] In Islamic legal methodology (*uṣūl al-fiqh*), custom (*'urf* or *'ādah*) is accepted as one of the sources developed from *ra'y* in addition to *qiyās, istiḥsan,* and *istiṣlāḥ*. In other words, customary law has a place in Islamic law as long as it does not transgress the divine sources, i.e., *Qur'ān* and *ḥadīth*.[10]

---

[7]See, for example, 'Alī Ibn Aḥmad Ibn Ḥazm, *Al-Muḥallā* (Cairo: Idārat al-Ṭibā'ah al-Munīrīyah, 1347-1352), vol. 9, p. 312; in English see N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), pp. 10 onward.

[8]See, for example, Aḥmad ibn Idrīs al-Qarāfī, *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl fī al-Uṣūl* (Cairo and Beirut: Maktabat Wahbah, 1393/1973), p. 337.

[9]'Abd al-Raḥmān al-Ṣābūnī , Khalīfah Bābakr and Maḥmūd Ṭanṭāwī, *Al-Madkhal al-Fiqhī wa Tārīkh al-Tashrī' al-Islāmī* (Cairo: Dār al-Muslim, 1402/1982), p. 138. See also 'Abd al-Ḥamīd Abū al-Makārim Ismā'īl, *Al-Adillah al-Mukhtalaf fīhā Atharuhā fī al-Fiqh al-Islāmī* (Cairo: Dār al-Muslim, n.d.), p. 403.

[10] See Jalāl al-Dīn 'Abd al-Raḥmān al-Suyūṭī, *Al-Ashbāh wa al-Naẓā'ir* (Cairo: 'Īsā al-Bābī al-Ḥalabī wa Shurakāh, n.d.), pp. 99-103; See also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 1991), pp. 283-96; Aḥmad Fahmī Abū Sinnah, *Al-'Urf wal-'Ādah fī Ra'y al-Fuqahā'* (n.p.: Maṭba'at al-Azhār, 1947) for more detail explanation.

In the case of Indonesia, writings on the subject fall into two major groups, i.e., works dating from the time of the colonial era[11] and those written in the national era.[12] Whereas the former consistently portray the relationship of adat and Islamic law as the scene of never-ending battles, the latter depict this relationship as a harmonious encounter. Moreover, works falling into the second category fail in most cases to consider the Islamic legal viewpoint in their approach to the subject. To make matters worse, little serious work has been done on developments in Indonesia since 1980.

This thesis will, therefore, investigate the relationship between adat and Islamic law in Indonesia today. The main objective of the thesis is to offer as a hypothesis the idea that the encounter of Islamic law and customary law should be seen as a dialogue and not simply as a confrontation. To this end, the study will be devoted mainly to a discussion of the adat law system and its relationship with Islamic law in Indonesia before and after independence.

The thesis will consist of three chapters. As a general preview to the reader, the first chapter will discuss primarily the concept of adat in *uṣūl al-fiqh*. The chapter will begin with an analysis of the position of local customary law in the development of

---

[11] The works at the time were pioneered by Dutch scholars such as C. Van Vollenhoven, *Het Adatrecht van Nederlandsch-Indie* (Leiden: E. J. Brill, 1931); also B. Ter Haar, *Adat Law in Indonesia*, tr. E. Adamson Hoebel and A. Arthur Schiller, (New York: Institute of Pacific Relations, 1948); C. Snouck Hurgronje, *De Atjehers*, 2 vols (Leiden: E. J. Brill, 1893).

[12]for example the most current work of M. B. Hooker, *Adat Law in Modern Indonesia*; and the books written by Indonesian scholars such as Sajuti Thalib, *Politik Hukum Baru: Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam Dalam Pembangunan Hukum Nasional* (Bandung: Binacipta, 1987); Bushar Muhammad, *Pokok-Pokok Hukum Adat* (Jakarta: PT. Pradnya Paramita, 1991).

Prophetic legislation and in the legal practice of the Companion. It will then go on to deal with the opinions of the Islamic schools of law concerning the validity of customary law.

The second chapter will be devoted to the relationship of adat and Islamic law in the colonial era of Indonesia. This chapter will deal mainly with the behaviour of the Dutch toward adat and Islamic law as the two coexisting legal system in the archipelago. The legal situation under the Japanese occupation is also discussed in this section.

The last chapter will focus on the encounters between adat and Islamic law since Indonesian independence. The development of the legal policy since the emergence of the new nation state of Indonesia is necessarily outlined prior to the discussion of three topics which may be regarded as primary examples of the encounter of the two systems of law in modern Indonesia. These three topics are: (1) conditional repudiation (*ta'līq ṭalāq*); (2) the institution of common property in marriage; and (3) the adopted child and adoptive parents as legatees of obligatory bequests (*waṣīyah wājibah*).

CHAPTER ONE

'ĀDAH FROM THE STANDPOINT OF *UṢŪL AL-FIQH*

Custom (*'ādah*)[1] has stimulated on-going discussion since the earliest history of Islam as to whether it may be considered one of the sources of Islamic law. In legal theory, *'ādah* has not been admitted as one of the sources of Islamic jurisprudence.[2] In practice, however, *'ādah* plays a tremendous part in the operation of Islamic law in its

---

[1]In Islamic legal history, *'ādah* (synonymous with *'urf*) has had an interesting semantic history. Literally, the word *'ādah* means habit, custom, usage, or practice, while the meaning of the word *'urf* is "that which is known." Some observers, like Abū Sinnah and Muḥammad Muṣṭafā Shalabī use these definitions to make a distinction between the two words. They maintain that *'ādah* means "repetition or recurrent practice, which can be used for both individuals (*'ādah fardīyah*) and groups (*'ādah jamā'īyah*)". On the other hand, *'urf* is defined as "recurring practices which are acceptable to people of sound nature." Therefore, according to this meaning *'urf* refers more to the habits of a large number of people in society, while *'ādah* concerns the habits of a minority within a group of people. Some other *fuqahā'*, however, use the two words interchangably. Subḥī Maḥmaṣānī for example says that the words *'urf* and *'ādah* have the same meaning (*al-'urf wal-'ādah bi ma'nā wāḥid*). Finally, there seems to have been a transition from *'urf* meaning "that which is known" to "that which is acceptable to a community" i.e. usage or custom. This is the usual connotation assigned to the term. They may not be the same but for the sake of consistency in this work, the term *'ādah* is considered to be equivalent in meaning to *'urf* and both are translated here as "custom" or "usage". See in this instance Aḥmad Fahmī Abū Sinnah, *Al-'Urf wal-'Ādah fī Ra'y al-Fuqahā'*, pp. 7-13; Muḥammad Muṣṭafā Shalabī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Nahḍah al-'Arabīyah, 1406/1986), pp. 313-15; Ṣubḥī Maḥmaṣānī, *Falsafat al-Tashrī' fī al-Islām* (Beirut: Dār al-Kashshāf lil-Nashr wal-Ṭibā'ah wal-Tawzī', 1371/1952), pp. 179-81; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, pp. 283-84.

[2]See Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The Clarendon Press, 1964), p. 62. Where he says that "Islamic law ignores custom as an official source of law."

various aspects throughout the Muslim world.[3] The actual role of custom in the formation of law was infinitely more important than has been hitherto suspected.[4] Custom was often retained not only in cases where the Qur'ān and ḥadīth were silent. At times, in fact, the criterion of local custom was strong enough to override the reported practice of the Prophet himself.[5] In other words, Muslim jurists eventually recognized various kinds of customary practice and therefore incorporated them into the main body of Islamic law.

In this chapter attention will be devoted to demonstrating the importance of custom in the development of Prophetic legislation, the practice of the Companions (*ṣaḥābah*) and the theories of the founders of the four schools of law.

---

[3]Several articles can be cited here as examples of the experience of Muslims in various parts of the world concerning the role of custom in the implementation of Islamic law. For Arab countries, see Aharon Layish and Avshalom Shmueli, "Custom and *Sharī'a* in the Bedouin Family According to Legal Documents from the Judaean Desert," *BSOAS* 42 (1979): 29-45; Frank H. Stewart, "Tribal Law in the Arab World: A Review of the Literature," *International Journal of Middle East Studies* 19 (1987): 473-90. For Africa, see Noel James Coulson, "Muslim Custom and Case-Law," *Die Welt des Islam* 6/1-2 (1959): 13-24; I. Oluwole Agbede, "Conflict Between Customary and Non-Customary Systems of Law: Preliminary Observations," *Journal of Islamic and Comparative Law* 4 (1970): 48-58. For the subcontinent, see S. A. A. Rizvi, "Social Ethics of Muslims in Shurafā' in India: Customary Law in the Fatāwa of Shāh 'Abd al-'Azīz Dihlawī," *Islamic and Comparative Law Quarterly* 3/1 (1983): 1-13; David Gilmartin, "Customary Law and *Sharī'at* in British Punjab," in *Sharī'at and Ambiguity in South Asian Islam*, ed. Katherine P. Ewing (Berkeley: University of California Press, 1988), pp. 43-62. In Malaysia, Madya Othman Ishak, "*'Urf* and Customs As Being Practiced Among the Malay Community," *Arabica* 33 (1986): 352-68.

[4]Noel James Coulson, "Muslim Custom and Case-Law," p. 14.

[5]See Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: The Clarendon Press, 1975), p. 64. Here, Schacht gives as an example a passage taken from *Muwaṭṭa'* about a ḥadīth which states that the Prophet allowed the parties to a sale the right of option as long as they had not yet physically separated, an option which Mālik ibn Anas, the Medinese scholar, rejects because it was not a current practice in Medina.

1. Customary Law in the Time of the Prophet and His Companions

By the time of the Prophet Muḥammad, the people of the Arabian peninsula had adopted many different customs. The latter had, in most instances, the force of law in their communities. Although customary law was protected by neither sanction nor authority[6], its role in society was undoubtedly very important.[7] One example of this can be seen in the preservation by Muslims of the legacy of Prophet Ibrāhīm, especially those ceremonies related to the Ka'bah and circumcision (*khitān*). Such ceremonies served as the cultural basis for the establishment of social traditions.[8]

Many pre-Islamic customs continued to be practiced during the time of the Prophet Muḥammad. This fact indicates that Islam was not a legislative revolution directed against all custom known and practiced by the Arabs before its emergence.[9] On the contrary, the Prophet Muḥammad, in his capacity as legislator of the new religion, made many rulings which legalized Arabian customary law, thereby giving it a place within the new Islamic legal system.[10]

As Islam was not supposed to bring with it an altogether novel code of law, it can be argued that the Prophet had no real intention of completely abrogating pre-

---

[6]Duncan B. Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory* (London: Darf Publishers Limited, 1985), p. 68.

[7]Maḥmaṣānī, *Falsafat al-Tashrī'*, pp. 181-82.

[8]Reuben Levy, *The Social Structure of Islam* (Cambridge: The University Press, 1957), p. 251.

[9]Walī Allāh al-Dihlawī, *Ḥujjat Allāh al-Bālighah*, vol. 1 (Cairo: Dār al-Turāth, 1185 A.H.), p. 124. See also such related verses of the Qur'ān as 2: 135, 3: 67, 68.

[10]See Joseph Chelhod, "La place de la coutume dans le *fiqh* primitif et sa permanence dans les societes arabes a tradition orale," *Studia Islamica* 64 (1986): 19-37.

Islamic customary law in the first place. Macdonald points out that Muḥammad "did not draw up any twelve tables or ten commandments, or codes, or digests."[11] The concept of an exhaustive code was thus foreign to his thought. In Schacht's view, the Prophet had little reason to change the prevailing customary law since he aimed, not to create a new system of law, but rather "to teach men how to act, what to do and what to avoid, in order to pass the reckoning on the Day of Judgment and to enter Paradise."[12] With regard to the continuance of customary law, therefore, Muḥammad introduced no innovations to existing laws as long as they were compatible with his fundamental principles.[13] The concept of *sunnah taqrīrīyah*[14] itself is evidence that the Prophet left intact many of the prevailing local customs considered by him to be reasonable.[15]

Apart from a few striking innovations affecting sexual relationships and the position of women, the Prophet interfered little with the edicts of the social environment in which he found himself. Although he nurtured a Muslim community based on divinely inspired values, in essence his reforms were compatible with the tribal mode of life. In many instances the older system was not radically displaced by the

---

[11]Macdonald, *Development of Muslim Theology*, p. 69.

[12]Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, vol. 1, *Origin and Development of Islamic Law* (Washington D. C.: The Middle East Institute, 1955), p. 31.

[13]Walī Allāh, *Ḥujjat Allāh al-Bālighah*, vol. 1, p. 124-25.

[14]Besides *sunnah fi'līyah* and *sunnah qawlīyah, sunnah taqrīrīyah* is another of the well-known classes of ḥadīth, denoting something done in the presence of the Prophet and not disapproved of by him.

[15]Maḥmaṣānī, *Falsafat al-Tashrī'*, p. 181.

newer one; rather, a considerable part of the older system survived and became incorporated into the new Islamic system.[16] Thus, we find that various branches of Muslim law are replete with instances where the legal rules were based by the Prophet himself on contemporary customs. Examples of such rulings can be found in almost every area of the law.

In penal law, for instance, we see that the whole system of retaliation (*qiṣāṣ*) and the payment of blood-money (*diyah*) was adopted from the practice of pre-Islamic Arab society. The Qur'ān, as well as recorded in Prophetic practice, may have introduced some modifications to the subject, but the main idea and basic principles were current and had been in operation long before the advent of Islam.[17] The main change under Islamic law was the imposition of the principle of equality[18] into the framework of the law of retaliation.[19] In Islamic law, either one life must be taken for another or an amount of compensation must be paid to the victim's family. This rule does not take into consideration a tribe's standing or the victim's status within his own tribe as had

---

[16]Levy, *The Social Structure*, p. 242.

[17]Mohammed S. El-Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982), pp. 69-71.

[18]As can be seen from the maxim "a life for a life" derived from sūrah 5, verse 45 of the Qur'ān: "We prescribed for them (the Children of Israel) a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds retaliation..."

[19]Mohammed El-Awa, "The Place of Custom (*'urf*) in Islamic Legal Theory", *Islamic Quarterly* 17 (1973): 178.

been the practice in the pre-Islamic period, but rather operates, as Coulson has said, "in accordance with the moral standard of just and exact reparation for loss suffered."[20]

In the area of family law, the Prophet approved several practices known to the Arabs before Islam and repealed only those which seemed to him to be inconsistent with the principles of sound reason and good conscience. Since the regulations derived from pre-Islamic customs concerning marriage and the governance of gender relations as well as the legal status of the issue born of a sexual union were found to be vague and indefinite,[21] Islam tried to adapt the system to human character. For this reason, the Prophet abolished a number of practices widely indulged in by the ancient Arabs such as polyandry, illicit sexual relations, female infanticide, adoption, repeated divorces, etc., while maintaining or modifying others such as polygamy, payment of dowry, or acknowledgment (*iqrār*) in the form of affiliation.[22]

An examination of the law of succession also reveals that the Prophet did not relegate the prevailing system to oblivion. Although the Qur'ān introduced certain reforms to the law of inheritance, in no way can these reforms be said to have completely abrogated pre-Islamic customs.[23] It may be true that, except for the father,

---

[20]N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1971), p. 18.

[21]Mahomed Ullah, *The Muslim Law of Marriage* (New Delhi: Kitab Bhavan, 1986), p. iii.

[22]Abdul Rahim, *The Principles of Muhammadan Jurisprudence* (London: Luzac & Co., 1911), p. 7-12; Mahomed Ullah, *The Muslim Law*, pp. ii-xvii.

[23]M. Habibur Rahman, "The Role of Pre-Islamic Customs in the Islamic Law of Succession", *Islamic and Comparative Law Quarterly* 7 (1988): 48-64.

under pre-Islamic custom none of the Qur'anic sharers was entitled to inherit; in addition, in certain cases there is a sharp difference between the application of pre-Islamic customs[24] and Qur'anic provisions.[25] Nevertheless, the role of custom in influencing the patriarchal orientation of inheritance in Islamic law should not be neglected. It can also be argued that the new rules of inheritance were only superimposed upon prevailing customary rules, which were changed but not totally abrogated.[26]

All types of pre-Islamic commercial transactions (*buyū'*) that did not transgress the new Islamic edicts were retained and incorporated into the Islamic system. For example, the institution of *bay' al-salam* practiced in Medina before the *hijrah* was maintained during the time of the Prophet.[27] In Marghīnānī's view, the transaction is

---

[24]Basically, succession in the pre-Islamic Arab family was governed as follows: (i) male agnates inherited; (ii) cognates and females could not inherit; (iii) descendants were preferred to ascendants and ascendants to collaterals; (iv) where the agnates were equally distant, the estate was divided per capita. See Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (London: Oxford University Press, 1949), p. 333.

[25]Reforms introduced by Islam can be summarized as follows: (i) husband and wife became each other's heir; (ii) agnates and cognates were both entitled to inherit in certain cases, but agnates were preferred to cognates; (iii) descendants and ascendants simultaneously became entitled to inherit; (iv) as a general rule, a female was given one half the share of a male (*lil-dhakari mithlu ḥaẓẓi al-unthayayni*). See Fyzee, *Outlines*, p. 333.

[26]The rights of the customary heirs were left intact, and only the quantum taken by them was diminished in favour of the newly created Qur'anic heirs. Tahir Mahmood, "Custom As A Source of Law in Islam," *Journal of the Indian Law Institute* 7 (1965): 102-06.

[27]See Bukhārī, *Jāmi' al-Ṣaḥīḥ,* vol. 3 (Cairo: Maktabat 'Abd al-Ḥamīd Aḥmad Ḥanafī, n.d.), p. 85-87.

lawful "because the Prophet found the people practicing it and confirmed it therein."[28] Schacht, moreover, has argued that the Prophet accepted a major portion of the Meccan commercial custom and the customary agricultural law of Medina.[29]

Contract law was also indebted to the customary practices of pre-Islamic Arabia. Contracts were not introduced to Arabia with the advent of Islam since they already were a feature of the customary trade law prevailing in pre-Islamic Arabia and were incorporated into the system of Islamic law with the full approval of the Prophet. The main purpose of his approval was to protect the parties concerned and guarantee the consent of the parties as well as to ensure that the contracts did not lead to unlawful gain.[30]

From the evidence cited above, it is reasonable to state that in running the affairs of the Muslim community the Prophet was not averse to retaining traditions that both worked and were in keeping with the message he had delivered. As one scholar has expressed it: "The Islamic law did not profess to establish a new system of administration of justice".[31] The reason for the approval accorded by the Prophet was that such customary laws were capable of providing solutions which met the needs of

---

[28]Marghīnānī, *The Hedaya*, tr. Charles Hamilton (Lahore: Premier Book House, 1963), p. 377.

[29]Edwin R. A. Seligman and Alvin Johnson, eds., *Encyclopaedia of the Social Sciences*, vol. 7 (New York: The Macmillan Company, 1948), s. v. "Islamic Law," by Joseph Schacht.

[30]Muḥammad Muṣṭafā Shalabī, *Al-Madkhal fī al-Ta'rīf bil-Fiqh al-Islāmī wa Qawā'id al-Milkīyah wal-'Uqūd fih* (Cairo: Maṭba'at Dār al-Ta'līf, 1380/1960), pp. 451 ff.

[31]Mahomed Ullah, *The Muslim Law*, p. ii.

the community. As El-Awa explains, in Islamic legal theory customary rules must be measured against the criterion of public interest: "When the aim is *pro bono publico*, they are to be retained; when it is not, they are to be repealed."[32]

'Ādah, which as we have seen was commonly invoked by the Prophet, can be connected with the terms *ḥadīth* and *sunnah* (the Tradition of the Prophet) and may receive, in practice, an authority equal to that of the Tradition. This is reinforced by the general principle accepted by Muslim jurists to the effect that whatever the Prophet said, did, or approved forms what is known as *sunnah*, the second source of law after the Qur'ān. Thus, the *'ādah* that prevailed during the time of the Prophet may be regarded as a source for the formulation of laws.

Nor did the role of custom as a valid source of law simply fade away after the death of the Prophet Muḥammad. As the immediate successors of the Prophet, the first four Caliphs continued the policy of retaining reasonable customs. Under the reign of 'Umar ibn al-Khaṭṭāb, the second of the *Khulafā' al-Rāshidūn*, the Islamic conquest spread to new territories, expanding the world of Islam and bringing Muslims into contact with new forms of customary law. In attempting to apply Islamic law in settings where different, long-established customs were already in place, the Companions measured what they encountered by the yardstick of public interest.

Hence, we see that 'Umar continued the practice of the Byzantine emperors in his perpetuation of the *dīwāns* system, or registers. He instituted several of these,

---

[32]El-Awa, "The Place of Custom", p. 178 and the footnotes appended thereto.

including one for the army (*jund*) and another for finance (*kharāj*).[33] The language of the newly conquered territory remained the official language of each of the *dīwāns*, the officials in charge being mostly Greeks or Persians.[34] As there was no *kharāj* in the classical *fiqhī* sense of land tax, the introduction of this institution in the Muslim community indicates that the Companions did not confine their adoption of custom to that which prevailed in their own communities, but also accepted useful practices and customs from non-Muslim tradition. In the eastern provinces especially, similar Sassanid institutions were retained,[35] and the Sassanid financial bureaus, i.e., *dīwān al-kharāj* and *dīwān al-nafaqāt*, were also maintained in Iraq after the incorporation of the area into Muslim territory.[36]

Al-Māwardī (d. 450 AH) relates that 'Umar established the *dīwān* system in keeping with Persian tradition. In his well-known book, *Al-Aḥkām al-Sulṭānīyah*, he reports that when 'Umar received a large amount of *ṣadaqah* from Bahrain, he consulted the Companions on its management and distribution. Based on information about the institution of the *dīwān* from Hurmuzan, a Persian who was familiar with the *dīwān*

---

[33]Muḥammad Muṣṭafā Shalabī, *Uṣūl al-Fiqh al-Islāmī*, vol. 1, p. 319.

[34]The policy of Arabicization was initiated in the reign of al-Ḥajjāj in 78/697 for the *dīwāns* of Iraq, and for those of Syria by 'Abd al-Mālik in 81/700. Those of Egypt followed in 87/705 and those of Khurāsān in 124/742 under the reign of Hishām. See B. Lewis, Ch. Pellat and J. Schacht, eds. *The Encyclopaedia of Islam,* vol. 2 (Leiden: E. J. Brill, 1965), s.v. "Diwan," by A. S. Bazmee Ansari. See also Ibn Qudāmah, *Al-Kharāj* (Baghdad: Dār al-Rashīd, 1981), p. 8.

[35]Hossein Modarressi Ṭabāṭabā'ī, *Kharāj in Islamic Law* (London: Anchor Press, 1983), pp. 28-29.

[36]Michael G. Morony, *Iraq After the Muslim Conquest* (Princeton: Princeton University Press, 1984), pp. 51-52.

system practiced in his country of birth, and also from Khālid ibn al-Walīd, who told him about the *dīwān* system in Syria, 'Umar then approved the proposal to establish the *dīwān* system in Medina.[37]

It is also likely that 'Umar adopted the institution of the official postal service from the Sassanid and Byzantine Empires. Its non-Arab origin is confirmed by the foreign origin of its name, i.e., *dīwān al-barīd*, from the Latin *veredus* and Greek *beredos*.[38]

Another custom of non-Islamic origin incorporated into Islamic culture was *'ushūr*. As a traditional tax levied on merchants in non-Islamic lands, *'ushūr* was implemented by 'Umar after he was informed of its usage in other lands by Abū Mūsā al-Ash'arī.[39] One day the merchants of Manbij asked 'Umar for permission to sell their merchandise in Muslim territory, and this was granted on the condition that they pay *'ushūr*. 'Umar then chose to levy this tax throughout the Islamic lands once the other Companions gave their agreement to his proposal.

Likewise, the *Khulafā' al-Rāshidūn* retained many pre-Islamic customs and also adopted and developed some useful non-indigenous customs.[40] For instance, in terms of

---

[37]Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Aḥkām al-Sulṭānīyah* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.), pp. 344-46.

[38]*EI,* vol. 1, s.v. "Dīwān"; see also *EI,* vol. 1, s.v. "Barīd," by J. Burton-Page.

[39]Abū Yūsuf, *Kitāb al-Kharāj* (Cairo: Al-Maṭba'ah al-Salafīyah, 1352/1933) p. 135.

[40]Muhammad Y. Faruqi, "Consideration of *'Urf* in the Judgments of the *Khulafā' al-Rāshidūn* and the Early *Fuqahā'*," *The American Journal of Islamic Social Sciences* 9/4 (1992): 482-98.

weights and measures, grain (i.e., wheat, barley) continued to be regarded as *kaylī* (measured by capacity), while gold and silver were considered *waznī* (measured by weight). In his *Sunan* Al-Dārimī notes that the same customs and usages observed in commercial transactions by the Prophet were also followed by his four immediate successors.[41] However, different policies were often adopted by each of the caliphs, as different situations and conditions prevailed during their reigns. Thus, 'Umar ibn al-Khaṭṭāb did not allow the practice of *bay' al-salam* when it came to selling fruit that had not yet appeared on the tree,[42] even though 'Alī ibn Abī Ṭālib is reported to have personally engaged in this practice, especially when dealing with animals. For example, he sold his camel, 'Uṣfūr, for twenty camels on the understanding that he would be paid after a certain period of time agreed upon by both parties. The *bay' al-salam* was also adopted by 'Abd Allāh ibn 'Umar when he sold his camel for four camels, with payment deferred until a later date.[43]

Pre-Islamic customs regulating hiring and renting were also observed by the first two *Khulafā' al-Rāshidūn*, Abū Bakr and 'Umar.[44] Especially during the time of 'Umar, renting was a very common practice in Arab Muslim society. People at that time

---

[41]See Abū Dāwūd, *Ṣaḥīḥ Sunan al-Muṣṭafā*, vol. 2 (Cairo: Al-Tāzīyah li-Ṣāḥibihā 'Abd al-Waḥīd Muḥammad al-Tāzī, n.d.), p. 84.

[42]The consideration of the risk and the loss that might be suffered by the buyer is clear in 'Umar's prohibition of such a practice. See Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī bi-Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 5 (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1378/1959), pp. 338-39.

[43]Al-Sarakhsī, *Al-Mabsūṭ*, 30 vols. (Cairo: Maṭba'at al-Sa'ādah, 1324-1331/1906-1912), vol. 12, p. 122.

[44]Al-Shawkānī, *Nayl al-Awṭār*, 9 vols. (Beirut: Dār al-Jīl, 1973), vol. 6, p. 35.

frequently rented homes, land, animals, and also hired skilled workers to manufacture their necessities.

'Umar and 'Alī both considered limited partnership (*muḍārabah*) --this too derived from customary practice-- as a legal institution. It is reported that they preserved the wealth of orphans by this means.[45] Furthermore, in his capacity as a merchant, 'Uthmān ibn 'Affān participated in a *muḍārabah* agreement with 'Abd Allāh ibn 'Alī, while 'Abd Allāh ibn Mas'ūd was also involved in a similar undertaking with Zayd ibn Khulaydah.[46]

Regarding the practice of paying blood money, which as stated earlier derives from Arabian custom, the Companions showed themselves willing to adapt it to the conditions prevailing within Islamic society. Thus 'Umar's custom-based judgment made a distinction between people who used gold coin and those who used silver coin in such transactions.[47] A fine of approximately one thousand dinars was assigned for those who used gold and approximately twelve thousand dirhams had to be paid by people who used silver.[48] Mālik informs us that it was the custom of Syrians and Egyptians to use gold in their commercial transactions, whereas the Iraqis used silver.[49]

---

[45]Al Shāfi'ī, *Al-Umm,* vol. 7 (Cairo: Maktabat al-Kulliyāt al-Azhariyah, 1381/1961), p. 98.

[46]Al Shāfi'ī, *Al-Umm,* vol. 7, p. 98.

[47]Abū Dāwūd, *Sunan,* vol. 2, p. 251.

[48]Mālik, *Al-Muwaṭṭa',* vol. 2 (Cairo: Dār Iḥyā' al-Kutub al-'Arabīyah, 1951), p. 850.

[49]Mālik, *Al-Muwaṭṭa',* vol. 2, p. 850, wherein he says "fa-ahl al-dhahab ahl al-Shām wa-ahl Miṣr, wa-ahl al-wariq ahl al-'Irāq."

Mālik also explains that the payment of blood money should be made in the currency used by the people involved. For those living in rural areas where the economy is still cashless, payment can be made from real wealth, e.g. camels. In the time of the Prophet and Abū Bakr, such payments were still very common. In 'Umar's time, however, many people, mainly those living in urban centers, had begun to engage in the monetary economy. Attuned to this change, 'Umar implemented a policy of blood money payment that reflected this new reality. Those who were still part of a non-monetary economic system were allowed to continue their traditional payment system, while those who operated in a monetary system could use a "modern" method of payment.[50]

Another pre-Islamic custom sanctioned by the Companions was that of *qasāmah*. In the case of murder, this was paid by the male members of the tribe. After the establishment of the *dīwān* system, the caliph 'Umar instituted a new policy that blood money was to be paid by the people belonging to the *dīwān* in which the murderer was registered.[51]

The examples cited above illustrate that the Companions did not close the door on the adoption of foreign laws and regulations as long as they did not contravene an explicit verdict of the Qur'ān or *sunnah*. This is clearly depicted by the fact that the *Khulafā' al-Rāshidūn*, as successors to the Prophet, wisely allowed the people of the conquered lands to conduct their everyday affairs according to their own faith and local

---

[50]Faruqi, "Consideration of *'Urf*," pp. 485-86.

[51]Al-Sarakhsī, *Al-Mabsūṭ*, vol. 26, 107-09; see also Al-Shawkānī, *Nayl*, vol. 7, 183-85.

traditions.[52] In their eagerness to follow the path of the Prophet, the Companions retained many reasonable customs as Islam spread to new lands. They incorporated not only Arab practices, but also certain customary laws of the newly-absorbed countries into their legal systems.

To sum up, in the time of the Prophet and his Companions, when Islamic law was still in its early formation, the process of law-making was open to the adoption of either the pre-Islamic legal institutions of Arabia or the legal and administrative institutions of the conquered territories. As had been the case in the time of the Prophet, the technical aspects of law were still a matter of indifference to the Muslims.[53] Therefore, as long as there were no religious or moral objections to specific transactions or modes of behaviour, the influence of prevailing custom upon the body of Islamic law was in fact a positive and enriching one. This attitude of the early Muslims accounts for the widespread adoption of foreign laws during the greater part of the first century hijri,[54] when Islamic law, according to Schacht, "in the technical meaning of the term did not yet exist."[55]

---

[52]Abū 'Ubayd, *Al-Amwāl* (Cairo: Al-Maktabah al-Tijārīyah al-Kubrā, 1353/1934), p. 101-12.

[53]Schacht, "Pre-Islamic Background," in *Law in the Middle East*, p. 35; see also his "Foreign Elements in Ancient Islamic Law," *Journal of Comparative Legislation and International Law* 32 (1950): 9-17.

[54]Herbert J. Liebesny, "Stability and Change in Islamic Law," *The Middle East Journal* 21 (1967): 16-34.

[55]Schacht, "Pre-Islamic Background," p. 35.

2. *'Ādah* in the View of Muslim Jurists

Over the course of time, Islamic jurisprudence developed on the basis of scientific legal premises. It was during this period that Islamic law came to be formulated, mainly by the founders of the legal schools. Legal rules were generally derived from the four accepted pillars of legislation,[56] while custom was rendered increasingly marginal as an independent source of law. Schacht says,

> As a point of historical fact, custom contributed a great deal to the formation of Islamic law, but the classical theory of Islamic law was concerned not with its historical development but with the systematic foundation of the law, and consensus of the scholars denied conscious recognition to custom.[57]

This process is not difficult to understand if we keep in mind the orthodox Muslim view of good and evil.[58] In the view of Ash'arite theologians, good (*ḥusn*) and evil (*qubḥ*) can only be perceived and distinguished through divine revelation (*waḥy*) because "...values in action are determined exclusively by the will of God, known to man through revelation and certain legitimate extensions...."[59] In complete contrast to the view of the

---

[56]Formally and systematically, positive Islamic law is represented as having been derived from four principal sources, namely the Qur'ān, the ḥadīth, *ijmā'* and *qiyās*. The Qur'ān is the *ipsissima verba* of Allāh, while the ḥadīth are the reports of the divinely inspired practice of the Prophet. *Ijmā'* and *qiyās* can be seen as the two sources of law derived from *'aql* (reasoning). This is because *ijmā'* is the consensus of opinion of the qualified scholars (*'ulamā'*) of any one generation, while *qiyās* is the method of analogical deduction by which the principles established by the first three sources above are extended to cover new cases which might occur in society.

[57]Schacht, *An Introduction to Islamic Law*, p. 62.

[58]See Farhat J. Ziadeh, "*'Urf* and Law in Islam," in James Kritzek and R. Bayly Winder, eds., *The World of Islam: Studies in Honor of Philip K. Hitti* (London: Macmillan, 1959), pp. 60-67.

[59]George F. Hourani, *Islamic Rationalism: The Ethics of 'Abd al-Jabbār* (Oxford: Clarendon Press, 1971), p. 3.

Mu'tazilites, who held that man can differentiate between good and evil through the use of the intellect (*'aql*),[60] orthodox Islam has maintained that "God alone decides whether an act is required, recommended, neutral, disapproved, or prohibited, just as He alone decides whether an act is good or bad."[61] The logical consequence of their position was the theory of an all-embracing divine law, which had indeed been worked out by jurists prior to Ash'arī. It follows that reason or mere custom cannot be depended upon to distinguish between good and evil. Thus, when Allah said "Ye are the best of peoples, evolved for mankind, enjoining what is right (*ma'rūf*), forbidding what is wrong (*munkar*)...,"[62] He could not have meant by the word *ma'rūf* the good which custom or reason decrees to be such, but only what He enjoins.[63] This explains why *'urf* in the sense of custom or usage could not be included among the sources of law by Muslim

---

[60]As opponents of Ash'arism, the Mu'tazilites diametrically asserted the efficacy of natural reason as a source of ethical knowledge, maintaining that it was possible for man by his unaided reason to know the right and the good without the help of divine revelation. See Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press, 1992), pp. 83-86; see also Syed Muzaffar-ud-Din Nadvi, *Muslim Thought and Its Source* (Lahore: SH. Muhammad Ashraf, 1992), pp. 67-74.

[61]Weiss, *The Search for God's Law*, p. 83.

[62]Qur'ān 3: 110. Translation taken from Yusuf Ali's *The Holy Qur'an* with original Arabic words from the Qur'ān added.

[63]See, for instance, al-Ṭabarī who explains the verse 3:110 above by saying that *al-ma'rūf* means that you bid belief in God and His messenger (Muḥammad) and enforce His laws (*sharī'ah*), and that *al-munkar* means that you forbid polytheism (*al-shirk bi-Allāh*), disbelief in His messenger, and doing anything which He has forbidden. It is also reported by al-Ṭabarī that Ibn 'Abbās, in explaining the verse, says that bidding *al-ma'rūf* means believing that there is no god (*'ilāh*) but God (*Allāh*) and believing in His revelation. Thus, the Qur'anic verse of *ma'rūf* has been interpreted as faith in God and His Prophet and obedience to God's commands. Al-Ṭabarī, *Kitāb Jāmi' al-Bayān*, vol. 4 (Cairo: Al-Maṭba'ah al-Kubrā al-Amīrīyah, 1323/1905), p. 30.

jurists, who subsequently restricted themselves to deriving rules from the four sources: Qur'ān, Hadīth, Ijmā' and Qiyās.[64]

The "theistic subjectivism"[65] of orthodox Muslims in their understanding of ethical values led them to conclude that Islamic law is a divine law because it is God alone who decides whether an act or a transaction is valid or invalid. As the embodiment of the Will of Allah, the sharī'ah is the universal, eternal and all-comprehensive legal and moral code of conduct, revealed through a human being chosen as messenger of Allah for the guidance of mankind.[66] To Muslims, the Prophet is therefore the teacher *par excellence* of the Will of Allah embodied in His law. And in the process of overseeing, directing and facilitating the practice of the Sacred Law, the messenger-teacher complements the Book of Allah with his own words and normative example termed the *sunnah*. Thus, the Qur'ān, in conjunction with the sunnah of the Prophet, is the repository of the Will of Allah and the primary source of law. Loosely, they are spoken of separately as the two main sources of law in Islam. It is this understanding that leads Muslim scholars to reject the principle of custom as a source of Islamic law due to the fact that mere customary law is not a ruling taken from the "sacred" texts, al-Qur'ān and ḥadīth. This of course places them in diametrical opposition to the

---

[64]Ziadeh, "*'Urf* and Law," p. 62.

[65]This term was coined by Hourani in order to describe the theory held by Ash'arites that God is the sole categorizer of human acts, in contrast to the Mu'tazilites who held the values of "rationalistic objectivism." See Hourani, *Islamic Rationalism*, p. 3.

[66]Weiss, *The Search for God's Law*, pp. 83-84; see also S. M. Yusuf, "The Supremacy of Sharī'at Law in Islamic Society," *Islamic Quarterly* 20-22 (1978): 15-23.

rationalistic view of the Mu'tazilīs in particular, who were known to have held that basic ideas of right and wrong, good and bad, of what is obligatory and what forbidden, are innate to the human intellect,[67] so that custom may be regarded as one of many sources of law.

In practice, however, Muslim jurists continued to recognize the efficacy of custom, especially in the domain of the interpretation of laws.[68] Although legal theory as developed by the classical schools of jurisprudence regarded Islamic law as immutable religious law in which man could only interpret and explain the law without legislating it, the requirements of daily life and of expanding culture necessitated the adaptation of legal rules to new situations.[69] Thus, when facing problems which had not been confronted by the Companions, the Imāms of the law schools (*madhāhib*) made use of customary laws which were already being applied in the territories recently conquered by the Muslims.[70] This retention of custom was necessary to reconcile the space-time requirements of the sharī'ah. The acceptance of customary practices can also be seen as an opportunity to introduce flexibility into the framework of Islamic law; divine law had to be able to cope with new developments in all spheres of life.

---

[67]Bernard Weiss, "Law in Islam and in the West: Some Comparative Observations," in Wael B. Hallaq and Donald P. Little, eds., *Islamic Studies Presented to Charles J. Adams* (Leiden: E. J. Brill, 1991), pp. 239-53.

[68]Shalabī, *Uṣūl*, p. 323-25; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 284; Tahir Mahmood, "Custom as A Source of Law in Islam," p. 103.

[69]Herbert J. Liebesny, "Stability and Change in Islamic Law," p. 18.

[70]Of course, as long as customs do not transgress the basic sources of the sharī'ah and provided they benefit all people. See Shalabī, *Uṣūl*, p. 320.

Muslim jurists saw customary principles as one of the secondary sources of law, as opposed to primary, applying such principles "only when the primary sources had nothing to say about the issue in question."[71] Numerous examples in the works of Muslim jurists show that custom has served as a source of law. The decisive role of custom is clearly depicted in chapters dealing with sales, representation and agency, marriage and divorce, oath-taking, and also sharecropping contracts.[72] Hence we see, for example, Abū Ḥanīfah and his followers declaring that when natural crop damage takes place, affected farmers are exempted from paying taxes, and are even entitled to financial aid in compensation for the loss they have suffered.[73] Muḥammad ibn al-Ḥasan, one of Abū Ḥanīfah's followers who became Chief Justice in the time of Harūn al-Rashīd, always asked about the customs of various trades and professions before issuing a *fatwā* which dealt with professional practice.[74] In the case of *muḍārabah*, the costs needed for the business trip of an active partner are determined by existing customs.[75] Another example is found in the case of oath-taking. The custom prevailing in a particular area determines the meaning of the words used in such an oath.[76] These additions to the law were made only when the primary legal sources were silent in a given case.

---

[71]Faruqi, "Consideration of *'Urf*," p. 488.

[72]Faruqi, "Consideration of *'Urf*," p. 490, and sources listed there.

[73]Shalabī, *Uṣūl*, p. 320.

[74]Shalabī, *Uṣūl*, p. 321.

[75]Al-Sarakhsī, *Al-Mabsūṭ*, vol. 22, p. 62-63.

[76]Al-Sarakhsī, *Al-Mabsūṭ*, vol. 8, 135; see also *Al-Mabsūṭ*, vol. 9, p. 17.

Muslim jurists held various opinions on the incorporation of custom into Islamic law, but they all came to the same conclusion: namely, that the principles of custom are an effective means for building the law. Hence, the eponym of the Hanafite school, Abū Ḥanīfah, included custom as one of the foundations of his principle of juristic equity (*istiḥsān*).[77] Sarakhsī, in his *Mabsūṭ*, reports that Abū Ḥanīfah interpreted the actual meaning of custom as that which is commonly used in society, and yet asserted that the efficacy of custom is denied if it is in contradiction with *naṣṣ*.[78] Mālik believed that the customs of any nation had to be considered in formulating legislation, although he regarded the customs of *ahl al-Madīnah* (the people of Medina) as the most authoritative in his legal theory.[79] Unlike the Ḥanafī and Mālikī *fuqahā'* who understood the social and political significance of custom and thus stressed the importance of custom in their law-making, Shāfi'ī and Ibn Ḥanbal seem to have paid little attention to custom in their legal decisions.[80] Yet, the evidence of Shāfi'ī's *qawl jadīd* compiled after his arrival in Egypt reflects, when contrasted with his *qawl qadīm*, compiled in Iraq, the influence of the two respective customary traditions.[81] Ibn Ḥanbal's acceptance of weak reports

---

[77]Abdur Rahim, *The Principles of Muhammadan Jurisprudence*, p. 26.

[78]Al-Sarakhsī, *Al-Mabsūṭ*, vol. 9, p. 17.

[79]See in this case Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, pp. 61-69; Faruqi, "Consideration of *'Urf*," p. 492.

[80]This can be seen from the fact that Shāfi'ī in his two major works, *al-Risālah* and *al-Umm*, does not discuss the efficacy of custom as an authentic legal argument. Ibn Ḥanbal's final opinion on custom is also not clear.

[81]See Shalabī, *Uṣūl*, p. 322 where he says: "wal-imām al-Shāfi'ī lammā jā'a ilā al-miṣr ghayyara madhhabah al-qadīm wa kāna lil-'ādāt al-miṣrīya athar wāḍiḥ fī dhālik."

whenever he found that they corresponded to local custom,[82] also reveals that the principle of custom was never put aside by Muslim jurists in their efforts to construct the law.

The role assigned to custom by the aforesaid founders of Islamic jurisprudence was later on stated more explicitly by many of their followers. The views of later *fuqahā'* in each school of law need to be conveyed here in order to show the significance of local custom. Thus, we see that all of the Hanafite jurists considered custom to be a source of law. Abū Yūsuf (d. 182 AH.), for example, is reported to have said that custom was the primary consideration in Ḥanafī jurisprudence, especially when a pertinent text (*naṣṣ*) could not be founded.[83] Abū Ḥanīfah himself, according to Sarakhsī, would give up *qiyās* in preference for *'urf*.[84] Another jurist of the Ḥanafī school, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189 AH.), laid down certain theoretical rules of interpretation that show the jurisprudential importance of custom. He mentions certain legal maxims, namely: (1) evidence derived from custom is like that of the texts (*al-thābit bil-'urf kal-thābit bil-naṣṣ*); (2) custom is decisive when not otherwise prescribed in the texts (*al-'ādah taj'al ḥukm 'idhā lam yūjad al-taṣrīḥ bi-khilāfih*); (3) general theory can be

---

[82]Ibn Qudāmah, *Al-Mughnī*, vol. 6 (Cairo: Dār al-Manār, 1367/1947), p. 485.

[83]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol. 5 (Cairo: Maṭba'at Muṣṭafā Muḥammad, 1356/1937), p. 282-83.

[84]Al-Sarakhsī, *Al-Mabsūṭ*, vol. 12, p. 199. Here, Sarakhsī gives the example of a person who buys a camel-load of firewood; in this case the merchant is responsible, by custom, for transporting it to the buyer's home. Based on *qiyās*, this condition will only apply if it had been specifically mentioned in the purchase contract. In other words, if it is a custom practiced in the society the merchant should transport the firewood to the buyer's home without it having to be mentioned in the contract.

specified on the strength of custom (*al-muṭlaq min al-kalām yutaqayad bi-dalālah al-'urf*); (4) custom is valid to particularize a general rule (*al-'ādah mu'tabarah fī taqyīd muṭlaq al-kalām*); (5) to learn through custom is like prescribing in the texts (*al-ma'rūf bil-'urf kal-mashrūṭ bil-naṣṣ*).[85] From these maxims it can be seen that in the Ḥanafī school, custom can be a source of law where the texts on the case in question are silent; similarly, custom can delimit the effect of a general rule of law. These maxims were very popular and were widely adopted by other jurists.

Like their counterparts in the Hanafite school, Mālikī jurists also accepted the principle of custom as a source of decisive authority. This is indicated in Mālikī treatises such as *al-Muwaṭṭa'*, *al-Mudawwanah,* and *Fatḥ al-'Alī al-Mālik*.[86] Imām Mālik himself included custom among the various bases of his doctrine of public interest (*maṣāliḥ al-mursalah*).[87] Moreover, Mālik recognized the customary conduct of the people of Medina as a sufficient enough consensus of opinion to serve as a source of law in the absence of an explicit text.[88] Such phrases as "agreed practice with us" used by

---

[85]Muḥammad ibn al-Ḥasan al-Shaybānī, *Siyar al-Kabīr*, vol. 1: 194, 198; 2: 296; 4: 16, 23, 25 as cited in Muḥammad Ḥamidullāh, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 1945), p. 34.

[86]Faruqi, "Consideration," p. 491.

[87]See Muṣṭafā Zayd, *Al-Maṣlaḥah fī al-Tashrī' al-Islāmī wa Najm al-Dīn al-Ṭūfī* (Cairo: Dār al-Fikr al-'Arabī, 1374/1954), pp. 54-55. In the view of Malikite scholars there are three kinds of *maṣāliḥ*: (1) *al-maṣāliḥ al-ḍarūrīyah*; (2) *al-maṣāliḥ al-ḥājīyah*; and (3) *al-maṣāliḥ al-taḥsīnīyah*. Custom is included as a means to get *al-maṣāliḥ al-taḥsīnīyah*. On this matter see also S. G. Vesey Fitzgerald, "Nature and Sources of the Sharī'a," in Majid Khadduri and Herbert J. Liebesny, eds., *Law in the Middle East*, vol.1, *Origin and Development Islamic Law*, p. 109.

[88]Maḥmaṣānī, *Falsafat al-Tashrī'*, p. 181-82.

Mālik in his *al-Muwaṭṭa'* are evidence of his view that the usage of the people of Medina was one of the strongest sources of law. His followers further emphasized the practice of the people of Medina and decided that this practice could take precedence over a ḥadīth that has only one transmitter. Moreover, in Mālik's view, there are three kinds of practice that have legal force: (1) the practice of the people of Medina (*'amal ahl al-Madīnah*)[89]; (2) the practice of the scholars of Medina[90]; and (3) the practice of political authorities.[91] It is in fact on the basis of this theory that Mālik waived the application of the Qur'anic injunction which commands mothers to breast-feed their children[92] for women of noble birth, on the grounds that it was not the custom of the latter to nurse their own babies.[93] Mālik also differentiated between *'urf* and *'amal*. According to him, while the first does not command any spiritual authority, the second does. Furthermore, he also saw *'amal* as a *naṣṣ*.[94]

---

[89]Other phrases used by Mālik which have the same meaning as the practice of the people at large are *sunnat al-muslimīn* and *'amal al-nās*, see Mālik, *Al-Muwaṭṭa'*, vol. 2, pp. 690, 693, 708-09, 879.

[90]Concerning the question of funeral prayers for martyrs, Mālik was reported to have said that according to the learned people (*ahl al-'ilm*) neither are martyrs washed nor prayers are said for them. Mālik, *Al-Muwaṭṭa'*, vol. 2, p. 463.

[91]For example, on the issue of administering an oath in the case of *qasāmah* he said that the authorities (*a'immah*) in the past and in the present agreed that the process of taking oaths will begin with the plaintiffs. See Mālik, *Al-Muwaṭṭa'*, vol. 2, p. 879.

[92]The verse is al-Baqarah (II): 233.

[93]This example is cited in Shalabī, *Uṣūl*, p. 321.

[94]Faruqi, "Consideration," p. 492. In the case of *'amal ahl al-Madīnah* as a key to understanding Mālik's legal reasoning see Umar Faruq Abd-Allah, "Malik's Concept of *'Amal* on the Light of Maliki Legal Theory" (Ph.D. Dissertation: University of Chicago, 1978); also Yasin Dutton, "Sunna, Ḥadīth, and Medinan *'Amal*," *Journal of Islamic Studies* 4: 1(1993): 1-31.

A well-known Mālikī jurist, Al-Shāṭibī (d. 790 AH), held that local custom which is not opposed to the spirit of Islam could guide the application of law. He distinguished between two types of custom or usage: the first he termed *"al-'awā'id al-shar'iyah"*, consisting of the prevailing traditions that are approved by a *naṣṣ* or other *shar'ī* evidence; the second he called *"al-'awā'id al-jāriyah"*, composed of customs upon which the Sharī'ah is silent, i.e. they are neither confirmed nor rejected. While the acceptability of the first class depends upon its conformity with the sharī'ah, the latter is not binding and so is *mubāḥ* (permissible).[95] In his *Muwāfaqāt*, al-Shāṭibī also mentions the relationship between *maṣlaḥah* and *'urf*, in addition to maintaining their relationship with other sources of law. As a doctrine inherent in the general objectives of the sharī'ah, the preservation of public interest could be a factor in measuring the acceptability of a prevailing custom. Customs which strengthen the community's welfare are recognized in the doctrine of *maṣāliḥ*, and therefore play an important role in fulfilling the objectives of the sharī'ah.[96] In his view, local custom not opposed to the spirit of Islam can guide the application of sharī'ah and can also form the basis of local variations in the rules dealing with non-religious matters.[97]

Another Mālikī jurist who also discussed rulings in which custom is decisive is Ibn Farḥūn. He maintained that the role of custom in the process of law-making is unavoidable. A jurist or a mufti should consult prevailing custom before making a

---

[95]Al-Shāṭibī, *Al-Muwāfaqāt fī Uṣūl al-Aḥkām*, vol. 2 (Cairo: Maktabat wa Maṭba'at Muḥammad 'Alī Ṣabīḥ, 1969-70), pp. 209-10.

[96]Al-Shāṭibī, *Al-Muwāfaqāt*, vol. 2, pp. 220-22.

[97]Al-Shāṭibī, *Al-Muwāfaqāt*, vol. 2, p. 205.

decision. When faced with the problem of the meaning of a word, particularly in cases where they have to choose between its literal meaning and its use in common parlance, the latter meaning should take precedence.[98] Likewise, a mufti who lives in a country where different customs exist should be aware of these customs before issuing any legal opinion.[99]

Following the founder of their school, who used custom as a valid basis for argument, Shafi'ite jurists favored the principle of custom in their legal decisions. The early Shafi'ite al-Māwardī (d. 450 AH) pointed out that both custom and reason must be used in settling matters,[100] while al-Khaṭīb al-Baghdādī, like Ibn Farḥūn of the Mālikī school, maintained that muftis who make legal decisions must understand custom properly in order to avoid making inappropriate legal rulings.[101]

Al-Suyūṭī (d. 911 A.H) was another early Shafi'ite jurist to admit the impact of custom on society.[102] In a lengthy discussion, he promotes the principle of custom as a source of law and mentions its practical application to legal issues. Based on the ḥadīth "Whatever the Muslims see as good is good in the eyes of Allah,"[103] al-Suyūṭī affirms

---

[98]Ibn Farḥūn, *Kitāb Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍīyah wa Manāhij al-Aḥkām*, vol. 2 (Beirut: Dār al-Kutub al-'Ilmīyah, n.d.), pp. 67, 69-72.

[99]Ibn Farḥūn, *Tabṣirat*, pp. 68, 71.

[100]Al-Māwardī, *Adab al-Qāḍī,* vol. 1 (Baghdad: Maṭba'at al-Irshād, 1971), pp. 135-36.

[101]Al-Khaṭīb al-Baghdādī, *Al-Faqīh wal-Mutafaqqih*, vol. 2 (Riyad: Dār ibn al-Jawzī, 1996), p. 334.

[102]Faruqi, "Consideration," p. 495.

[103]Concerning this *riwāyah*, al-'Alā'ī said that it is not the saying of the Prophet but the saying of 'Abd Allah ibn Mas'ūd. See Al-Suyūṭī, *Al-Ashbāh wal-Naẓā'ir* (Cairo:

that there are countless legal issues which can be solved by referring to custom.[104] His preference for accepting the customary meaning of a word rather than its literal meaning, even when it contradicts the sharī'ah, is evidence that he implemented this reasoning in his own practice.[105] Similarly, the general meaning of the word can also be limited by prevailing custom even though the sharī'ah itself does not restrict it.

The view of Hanbalite jurists on custom can clearly be seen in Ibn Qudāmah's *Al-Mughnī*. As one of the most prominent Hanbalite jurists, Ibn Qudāmah (d. 620 AH) clearly recognized custom as a source of law and supported many of his *fiqhī* rulings by appealing to custom.[106] Similarly, following Aḥmad ibn Ḥanbal, the founder of this school who based many of his rules on the customs of the people of Hejaz, al-Ṭūfi listed general usage (custom) among the nineteen sources of law.[107]

Another major Hanbalite who speaks at length about custom is Ibn Taymīyah. Describing the different categories of words in his *Fatāwā*, he divides terms into three

---

'Īsā al-Bābī al-Ḥalabī wa Shurakāhu, n.d.), p. 99. This is also strengthened by Maḥmaṣānī in his *Falsafat al-Tashrī'*, p. 182, who states that Hanafites usually thought that this *riwāyah* was a ḥadīth from the Prophet.

[104]See Al-Suyūṭī, *Al-Ashbāh wal-Naẓā'ir*, pp. 99-100.

[105]For example in taking an oath, when someone swears that he will not eat meat, he will not break his oath by eating fish because people are not accustomed to applying the word meat to fish. This is in spite of the fact that Qur'ān itself considers fish to fall under the category of meat; see the Qur'ān 16:14. Another example is the case of transaction. Particular conditions prevailing in a certain society associated with social transactions should be considered in the event of such a transaction even if they are not mentioned in the contract. See Al-Suyūṭī, *Al-Ashbāh*, pp. 93, 95.

[106]See his *Al-Mughnī*, vol. 6, p. 485.

[107]Al-Ṭūfi, *Al-Mas'alah fī al-Tashrī' al-Islāmī*, as cited in Mahmood, "Custom," p. 104.

types: first, terms which possess only a literal meaning, like the earth, sky, sea, etc.; second, terms which are determined and explained exclusively by the sharī'ah, such as *ṣalāh*, *zakāh*, *īmān*, *kufr*, etc.; and third, terms which can only be understood within the context of custom, for example the verb *qabaḍa* in the saying of the Prophet "*man ibtā' ṭa'āman falā yabi'uhu ḥattā yaqbaḍahu.*" The sharī'ah does not confine the meanings of these terms within certain bounds.[108] His explanation of the application of custom becomes clearer when we look at the specific case of prayer while on a journey. In this case, Ibn Taymīyah asserts that, as Muslims are allowed to shorten their prayers during a trip, the definition of "travel" must be determined by custom since the sharī'ah does not specify what is meant by this term. Another example of the application of custom is the paying of the *kaffārah* (expiation) for breaking one's oath. Here, the obligation to feed ten poor people with "average food" is determined by the local custom of the people. It is according to this understanding that Hanbalite fuqahā' and the ḥadīth experts maintained that while basic consideration of *'ibādāt* is "apprehension" (*tawqīf*), based on what God has ruled, for custom, on the other hand, the basic consideration is "forgiveness" (*'afw*), meaning that there is no punishment for it unless it transgresses what has been forbidden by God.[109]

The explanations cited above make it clear that the role of custom is not restricted to taking the initiative in law where other sources are silent, for custom has

---

[108]Ibn Taymīyah, *Al-Fatāwā al-Kubrā*, vol. 3 (Beirut: Dār al-Ma'rifah lil-Ṭabā'ah wal-Nashr, n.d.), pp. 411-12. A similar theory can also be seen in Ibn Nujaym, *Al-Ashbāh wal-Naẓā'ir* (Calcutta: Maṭba'at al-Ta'līmīyah, 1260 AH), p. 130.

[109]Ibn Taymīyah, *Al-Fatāwā*, vol. 3, pp. 412-13.

also "an important part to play in the application of the standing law."[110] As El-Awa points out, although many rules in the Qur'ān and ḥadīth admit various interpretations, the only accepted method of applying the rules is with reference to the custom that prevailed in the time and place concerned.[111] We find therefore that many Qur'anic commands cannot be applied properly without taking custom into consideration. The application of the law which commands every Muslim to support his family, for example, cannot be understood without reference to the local custom of the people because the Qur'ān does not specify what portion of a man's income should be used to support his dependents.[112] Another example may be found in the case of *'adālah* (religious integrity); what establishes *'adālah* and what constitutes an infringement of it are again determined on the basis of custom due to the ambiguity of the reference in the Qur'ān. Moreover, the criterion of local custom was sometimes even strong enough to override the reported practice of the Prophet himself. Schacht for instance presents the example of Mālik ibn Anas who rejected a ḥadīth stating that the Prophet allowed the parties to a sale the right of option as long as they were not physically separated. Mālik's reason for doing so was that this was not the current practice of the people of Medina.[113]

---

[110]El-Awa, "The Place of Custom," p. 180; Joseph Schacht, "Pre-Islamic Background and Early Development of Jurisprudence," in Khadduri and Liebesny, eds., *Law in the Middle East*, vol. 1, *Origin and Development of Islamic Law*, , p. 35.

[111]El-Awa, "The Place of Custom," pp. 180-81.

[112]The verse concerned is 4: 34.

[113]Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, p. 64.

It was on the grounds outlined above that Muslim jurists subsequently formulated the Islamic legal maxim: "custom ranks as a stipulation."[114] Later lawyers then qualified the role of custom with many conditions in order to render it valid under Islamic law:[115] (1) the custom should be commonly practiced by the community if it is common to all sections of Muslim society, or by a section of that community if it is only common to a particular group in a particular area; (2) the custom should be a current practice at the time when it is to be applied in law; (3) custom should be considered void *ab initio* if it contradicts an explicit provision of the Qur'ān and ḥadīth; and (4) in cases of dispute, custom will be considered only when there is no explicit opposition to doing so by the parties involved.

Within these boundaries, Muslim jurists in all periods of Islamic legal history freely employed local custom in their legal considerations. Tahir Mahmood points out that custom "often formed the real substratum of many rules of law."[116] That differences arose between the Muslim jurists of various schools on the place of custom in Islamic law is understandable; these differences were primarily due to the changes in prevailing customs from place to place and from time to time. In consideration of this fact, all Muslim jurists agree that when customs change, legal opinions based on those customs

---

[114]Ibn Nujaym, *Al-Ashbāh wa al-Naẓā'ir*, pp. 129-31. See also Suyūṭi, *Ashbāh*, in relevant chapters.

[115]See in this case Tahir Mahmood, "Custom in Islam," pp. 104-05, and El-Awa, "The Place of Custom," pp. 181-82.

[116]Mahmood, "Custom in Islam," p. 105.

should also be changed.[117] Qarāfi clearly states that whenever customs change, jurists should implement such changes in their legal rulings. He even goes so far as to say that one would be ignorant to follow the legal manuals without regard for the customs of the people.[118]

Having acknowledged the major contribution that custom made to the development of Islamic law, we may conclude that in reality the Islamic legal system has always recognized the efficacy of custom in the process of law-making. In view of the retention of pre-Islamic custom and legal institutions in the early formation of Islamic law, and considering the adoption of the customs and practices of newly conquered lands by the Muslim legal establishment, there should be little doubt left as to the role played by custom as a source of law. This recognition of custom based on public interest has continued to be regarded as necessary for the operation of an Islamic legal system which strives to meet the needs and solve the problems of communities far removed from the birthplace of the Islamic legal system. In the later development of Islamic law, at a time when the law was being shaped by the founders of the legal schools, custom played a tremendous role in the operation of Islamic law. Although this kind of custom was not, in theory, recognized as an independent source of law, its function in the interplay between the law and the reality in which it was found and in which it operated in society, suggests that the principle of custom was never marginal in

---

[117]Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, vol. 5, p. 283.

[118]See Qarāfi, *Al-Furūq,* vol. 1 (Cairo: Dār Iḥyā' al-Kutub al-'Arabī, 1344), pp. 176-177; see also his *Al-Iḥkām fī Tamyīz al-Fatāwā 'an Aḥkām wa Taṣarrufāt al-Qāḍī wal-Imām* (Cairo: 'Izzat al-'Aṭṭār, 1325/1938), p. 68.

the process of law-making in Islam. This realistic approach on the part of the *fuqahā'* of the various schools of law was also motivated by their desire to follow the practice of the Prophet and the Companions in their legal activities. What those jurists did then (and continue to do today) was provide legal and rational grounds for the acceptance of custom. In their view, the recognition and accommodation of useful customs from the context in which it finds itself amounts to nothing more than accepting and following the wisdom of the early Muslims, whose receptiveness to custom facilitated the application of Islamic law in society.

CHAPTER TWO

ISLAMIC LAW, ADAT AND THE COLONIAL POWER IN INDONESIA

As indicated in the first chapter, ancient customary practices were generally adopted in early Islam as building blocks in the new Islamic legal order. The particular interplay between Islamic law and custom in Indonesia is the subject of this chapter. Indonesia represents an interesting case study as both Islamic law and customary practice are seen by the country's Muslim community as two functional, coexisting legal orders. In this study, an effort will be made to understand the term adat in reference to its customary usage among Indonesian people. In the language of Indonesian Muslims the word adat (sometimes with dialectal modifications), derived from the Arabic word *'ādah*, is the word generally used to denote "custom", "practice", and "use." This conceptual term is then extended to cover all that a community or an individual might become accustomed to.[1]

This chapter addresses and analyses the development of law in Indonesia in the colonial era, with special reference to the status of Islamic and customary law in Indonesian society. The following is undertaken with the aim of conveying the peculiarities of encounter between the two systems of Islamic law and adat, as the living systems of indigenous Indonesian society. In addition, the impact of the Dutch and

---

[1]H. A. R. Gibb and J. H. Kramers (eds.), *Shorter Encyclopaedia of Islam* (Leiden: E. J. Brill, 1961), s.v. "Adat Law", pp. 14-15.

Japanese colonial powers in Indonesia, from the early seventeenth to the mid-twentieth centuries will also be measured with reference to legal developments.

Here, the term "Islamic law" denotes the legal principles, derived from adherence to Islam, and generally relating to matters which, in Indonesia, are believed to possess a religious quality. By "adat" we mean those customs, practices, or uses applied with legal consequences, in Indonesian society.

1. The Dutch Era

While much has been written on the institution of customary law in Indonesia, this literature usually reflects the interests of anthropologists in this aspect of native culture. Little is known of its more practical application in the sphere of ethnopolitics.[2] This latter feature generated the most interest on the part of Indonesia's Dutch colonial administrators who were forced to grapple with the following question: To what extent should primitive laws and customs be preserved, supplemented or abolished in regard to other existing laws? Like other European colonial regimes, the Dutch in the Netherlands East Indies adopted a policy towards customary law (*adatrechtpolitiek*) which preserved what they deemed as the useful elements in native culture. In so doing, however, they relegated other conceptions of law in the country to either neglect or suppression. Such was the case with Islamic law.

I argue that the Dutch in the Netherlands East Indies adopted, during the course of their rule, a definitive policy of dualism geared towards the preservation of native laws

---

[2]The term "ethnopolitics" was first coined by Kjellen. See A. Arthur Schiller, "Native Customary Law in the Netherlands East Indies," *Pacific Affairs* 9 (1936): 254.

and customs at the expense of Islamic law. To achieve this end, the Dutch utilized what might be termed a "conflict approach" towards the relation of Islamic law with native customary law. Here, the expression "conflict approach" denotes the Dutch characterization of the two systems of law as being oppositional in nature, an encounter where there existed no possibility of one assimilating the other. Such an approach met with little success however, since, at a practical level, Indonesian society had grown adept at harmonizing the conflicts which arose from the two systems of law. Although the encounter between the two systems of law manifested itself differently in various regions, the end result was the same: a state of symbiosis wherein Islamic law and customary law worked hand in hand to create a new law.

In this study, three major lines of investigation are followed. The first examines the Dutch policy towards Islamic law, while the second addresses Dutch policy towards adat. These two lines of inquiry are crucial to our understanding of the effects of colonial policy upon the two systems of law in Indonesia. The third line of inquiry assesses the relationship of Islamic law to customary law under Dutch rule. It is this line of reasoning which will allow us to draw an accurate picture of the encounter between Islamic law and adat during the Dutch colonial era in Indonesia. It is also here that the hypothesis of this study will be proved.

A. The Dutch Policy on Islamic Law

In the evolution of Indonesian sovereignty, the conflict between the demands of everyday life and the dictates of the Islamic belief-system has played a significant role. Under Dutch rule, such conflicts were exacerbated even further by colonial policies

affecting the implementation of Islamic law. This policy was characterized by two approaches, one implemented during the first phase of Dutch rule, the other during the closing decades of the colonial administration of Indonesia. The years from the early seventeenth to the end of the eighteenth centuries were marked by Dutch tolerance of Islamic law, as the Dutch East-Indies Company (Vereenigde Oost-Indische Compagnie or VOC) busied itself with the task of expediting the extraction of agricultural commodities from the country.[3] The second period was, however, marked by a transfer of power from the VOC to the Dutch government itself, a process which led to increasingly interventionist policies in the area of Islamic law and local custom.[4]

From the outset, Dutch colonial policies impinged on the religious practices of their subjects. On December 7, 1643 a church order for the Municipality of Batavia was promulgated, stating that:

> The high official should see to it, that the Moorish circumcision and schools will be forbidden and Chinese and other pagans will be prohibited from having their services of pagan superstition and devil's worship, which they have especially in their temples and also at night in the streets. Also their devilish knowledge of fortune-telling should be forbidden, for in no Christian republic such a violation

---

[3]In a detail discussion on the political and economic background of the Vereenigde Oost-Indische Compagnie (VOC) see C.P.F. Luhulima, *Motip-Motip Ekspansi Nederland Dalam Abad Keenambelas* (Jakarta: Lembaga Research Kebudayaan Nasional, 1971), pp. 32 onward.

[4]Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," *Indonesia* 40 (October 1985): 58; Muhammad Daud Ali, *Kedudukan Hukum Islam dalam Sistem Hukum Indonesia* (Jakarta: Yayasan Risalah, 1984), pp. 10-15; Ismail Suny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia," in Eddi Rudiana Arief, ed., *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: PT. Remaja Rosdakarya, 1991), pp. 73-75.

> of God's Honor should be permitted for whatever reason it might be, for it will only give joy to non-Christians and annoy the Christians.[5]

In spite of Dutch suspicion towards non-Christian religions, the advent of Dutch rule in the late seventeenth century had, in fact, little bearing on native law. At this early juncture the colonial regime chose not to interfere with Islamic law. Muslim family law, especially the provisions concerning marriage and inheritance, was generally applied.[6] A shift however occurred when, on May 25, 1670, the VOC promulgated the Resolution of the Dutch Indies Government (Resolutie der Indische Regeering), also known as the Legal Collection of Freijher (Compendium Freijher). This was the first provision to contain a compilation of the Islamic laws of marriage and inheritance as applied by the VOC courts.[7] In Semarang (Central Java), as well, the authorities issued the Collection of Primary Javanese Law Extracted from the Islamic Law Book Mugharrar (Compendium der Voornaamste Javaansche Wetten nauwkeurig getrokken uit het Mohammedaansche Wetboek Mogharraer) for regular courts.[8] In Cirebon (West Java) the Cirbonsche Rechtboek (Pepakem Cirebon) appeared. In South Sulawesi the colonial government

---

[5]As quoted in Raden Abdulkadir Widjojoatmodjo, "Islam in the Netherlands East Indies," *Far Eastern Quarterly* 2 (1942-43): 55.

[6]Sajuti Thalib, *Receptio A Contrario* (Jakarta: Academica, 1980), pp. 15-17.

[7]See Supomo and Djokosutono, *Sejarah Politik Hukum Adat 1609-1848* (Jakarta: Djambatan, 1955), p. 26.

[8]Supomo and Djokosutono, *Sejarah*, p. 30.

promulgated the Collection of the Indies Law from Hoven van Bone in Goa (Compendium Indiansche Wetten bij de Hoven van Bone en Goa).[9]

In 1708 Governor-General Van Hoorn ordered that all criminal and civil matters concerning the native peoples of Java and Madura would be settled on the basis of customary law by the regents and their courts.[10] In spite of this, Islamic family law continued to thrive and to play an important role in the lives of Indonesian Muslims.

The beginning of the nineteenth century marked a turning point, however, with the end of VOC control and the assumption of direct rule by the Dutch government. Over the next century, the role of Islamic law was gradually curtailed by the colonial authorities. After his tour of inspection in the residency of Semarang, Governor-General Daendels (1808-1811) issued an ordinance in 1808 for the north coast of Java, stipulating that a chief of a mosque (*penghulu*) was to act as an adviser in native courts when a Muslim was a litigant.[11] Later, when Java came under British control in 1811 as a consequence of the Napoleonic Wars, Raffles, the founder of Singapore, was appointed Lieutenant-

---

[9]H. Ichtijanto, S. A., S. H., "Pengembangan Teori Berlakunya Hukum Islam di Indonesia." in Eddi Rudiana Arief, ed., *Hukum Islam di Indonesia,* pp. 119-20; Arso Sosroatmodjo and H. A. Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 1976), pp. 11-12.

[10]H. Westra, "Custom and Muslim Law in the Netherlands' East Indies," *Transactions of the Grotius Society* 25 (1939): 151-67.

[11]This ordinance was also known as the "Regulation on Court Organization and the Administration of Justice", and it applied to civil and criminal cases. Article 7 states that "In every native Court of the various regencies the penghulu or high priest shall have a seat, though he shall only act in an advisory capacity and have no casting vote." see *Nederlandsch-Indisch Plakaatboek*, Uitgave Mr. J. A. van der Chijs, Vol. XV, p. 178, Article 58; quoted in Westra, "Custom and Muslim Law in the Netherlands East Indies," p. 153.

Governor of Indonesia. He adopted Daendels' system and extended it to include Java. In his "Regulation for the more effectual administration of justice in the provincial courts of Java", promulgated in 1814, Raffles cites the *penghulu* as a constituent member of native tribunals in the capacity of adviser.

After the Dutch nation reassumed power over the archipelago from the British,[12] Raffles' successor maintained the legal tradition he found in place. The terms of a regulation issued in 1819 stipulated that native Indonesians would remain subject to their own laws while a *penghulu* would attend court hearings in the capacity of adviser. This regulation differed from earlier ones in that it decreed that customary law be applied to the native population except in the towns of Batavia, Semarang and Surabaya. Moreover, the exemption of the residents of these towns was formally rescinded in 1824,[13] so that the function of the *penghulu* as an interpreter of Islamic law was practically abolished.

Although the post-Napoleonic years engendered a more liberal attitude on the part of the Dutch with regard to the non-Christian religions of the indigenous peoples,[14] their preference for applied customary law is reflected in early Dutch vacillation over the treatment of Islam. This predilection persisted in the minds of the Dutch until the close of the nineteenth century. The threat of an Islamic religious revolt during the colonial wars

---

[12]The resumption of Dutch power over the archipelago was formalised in London on August 13, 1814.

[13]Westra, "Custom and Muslim Law," p. 155.

[14]This is demonstrated in the "Regulation for Commissaries-General" issued in 1818, wherein clause 97 stated that "the prayer meetings of all religions in the Netherlands Indies have the protection of the High Government, provided, that this prayer meeting is of no danger for public order." See Widjojoatmodjo, "Islam in the Netherlands," p. 56.

of the East Indies became an imminent reality on a number of occasions during this period.[15] Thus challenged, the Dutch were reluctant to grant Islam any extensive recognition in the legal sphere, a position clearly reflected in the paucity of Islamic legislation, especially when compared with that of local customary law.[16] It is clear that what the Dutch had done with respect to the Islamic religious court (Pengadilan Agama) was to intentionally weaken it and consequently the entire institution of Islamic law in Indonesia.

A government-administered religious court system was introduced in 1882, although, as we have seen, Islamic courts had proliferated in Indonesia since the advent of Islam to the archipelago.[17] What the Dutch were attempting to do in 1882 was to

---

[15]W. F. Wertheim, *Indonesian Society in Transition* (The Hague: W. van Hoeve, 1959), pp. 202 ff; also Harry J. Benda, "Christian Snouck Hurgronje and the Foundation of Dutch Islamic Policy in Indonesia," *The Journal of Modern History* 30 (1958): 338-47.

[16]M. B. Hooker, *Adat Law in Modern Indonesia* (Kuala Lumpur: Oxford University Press, 1978), p. 94.

[17]Zain Ahmad Noeh and Abdul Basit Adnan, *Sejarah Singkat Peradilan Agama Islam di Indonesia* (Surabaya: PT. Bina Ilmu, 1983), pp. 29-49; for an English account see Daniel S. Lev, *Islamic Courts in Indonesia* (Berkeley: University of California Press, 1972). The tradition of *taḥkīm* (appointment of an Islamic expert as an arbitrator) in Muslim societies can be seen as a form of the religious court in its early stage. This was especially true in the time prior to the establishment of monarchies. Once the power of the state grew --mainly in the form of Islamic kingdoms-- Muslim judges were appointed by a king or a ruler as religious courts became more organized. The conditions of the religious courts varied throughout the archipelago. In places like Aceh, Jambi in Sumatra, South and East Kalimantan, and South Sulawesi, religious judges were appointed by local rulers. In other areas, including parts of North Sulawesi, the North Sumatran territories of Gayo, Alas and Tapanuli, and also South Sumatra, there were no distinct religious courts, though in such places local religious leaders performed judicial services. In Java, however, religious courts existed in all regencies from about the sixteenth century onwards. See also Martin van Bruinessen, "Shari'a Court, Tarekat and Pesantren: Religious Institution in the Banten Sulatanate," *Archipel* 50 (1995): 165-99; also Zaini Ahmad Noeh, "Kepustakaan Jawa Sebagai Sumber Sejarah Perkembangan Hukum

administer Islamic law through a collegiate tribunal. Prior to that the Dutch had taken no steps to interfere in the organization of the religious courts.[18] Even Governor-General Daendels' decree of 1808 on the administration of justice on the north coast of Java contains the provision of article 73, affirming, "... the right of their high priest to decide certain differences regarding marriage and succession shall be left entirely unaltered."[19] Raffles, for his part, did not even refer to the administration of religious law in his 1814 regulation concerning the administration of justice, despite being aware of the "Court of Penghulus."[20] The Commissioners-General followed in Raffles' footsteps and refrained from direct interference in this institution.[21]

The year 1820 marks the beginning of Dutch awareness of the need for a distinct system of administration of religious justice, although at this time the duties of the *penghulu* were not as yet clearly defined. In article 13 of "Instruction for Regents" (Regenten Instructie) the Dutch conceded that disputes arising from inheritance among Muslims should be settled by the *penghulu*. The regents were thus required to "leave the

---

Islam," in Amrullah Ahmad, et al., *Prospek Hukum Islam dan Kerangka Pembangunan Hukum Nasional di Indonesia: Sebuah Kenangan 65 Tahun Prof. Dr. H. Busthanul Arifin, SH.* (Jakarta: Pengurus Pusat Ikatan Hakim Peradilan Agama, 1994), pp. 103-19.

[18]Lev, *Islamic Courts*, pp. 11-17.

[19]*Plakaatboek*, XV, p. 175. This also appears in the Instruction to Regents in the same volume, pp. 294-95, Article 12, and in the decree pertaining to the administration of the Cheribon lands; for the latter see Section V, Article 24, *Plakaatboek*, XV, pp. 177-78.

[20]Raffles, *History of Java*, 2nd ed. (London: Murray, 1830), p. 309.

[21]Westra, "Custom and Muslim Law," p. 156.

priests free to exercise their calling in accordance with the habits and customs of the Javanese in regard to marriage questions, inheritance and the like."[22]

In 1834, a difference of opinion between the Court of Justice at Semarang and the Supreme Court of the Netherlands Indies arose when the lower Court recognized the priest's judicial rights based on the provisions contained in the Instruction of 1820, while the Supreme Court refused to do so. As a remedy to this conflict, the government then tried to revise the provisions of the regulation. With the Governor-General's Order in Council of 1835 it was stipulated that the injunction should be understood to mean that "whenever differences arise between Javanese about marriage questions, inheritance and the like, *which have to be decided by Muslim law* [italics mine], it shall be the duty of the priests to attend to these."[23] Later that same year, the government promulgated *Staatsblad* 1835 No. 56 which specified that disputes arising from marriage, inheritance, or other cases of Islamic family law among the Muslims of Java and Madura should be settled by a *penghulu*, while any cases concerned with payment should be brought to the regular court.

One decade later, the jurisdiction of Muslim judges was recognized by a rather vague formula contained in a decree which stated that "civil differences between natives, which are to be decided by their priests and chiefs according to the religious laws or customs and ancient traditions, shall remain under their jurisdiction."[24] Six years later this

---

[22]As quoted in Westra, "Custom and Muslim Law," p. 156.

[23]Westra, "Custom and Muslim Law," p. 157.

[24]Westra, "Custom," p. 157.

provision found its way into the Royal Decree affecting the Government of the Netherlands East Indies. Until this time, the Dutch had not been directly involved in the institution of the religious court itself but were merely concerned with the application of justice.

Furthermore, the colonial regime formally established the "official" institution of the religious court. On January 19, 1882, the Dutch promulgated *Staatsblad* 1882 No. 152, establishing religious courts in Java and Madura (Bepaling Betreffende de Priesterraaden op Java en Madoera), but, strangely enough, making no reference to the competence of the courts. Thus, the fundamental concerns of the Islamic court official were never defined vis à vis other indigenous law courts. With this regulation the Dutch clearly intended to assume the reigns of administrative control over Islamic law. As indicated in the Dutch word *priesterraaden*, however, the Dutch courts betrayed their ignorance of the Islamic legal tradition. Equating the function of the chief of the mosque and Muslim judge (*penghulu* in Java and *kadi* in other areas) with that of a priest in the Western sense was a fundamental conceptual error since Islam precludes the emergence of a priestly class. This misunderstanding unavoidably led to the *penghulu* and other mosque officials being incorporated into the official Priesterraaden. This body, originally conceived of as "a formalization of an existing Islamic institution, ran directly counter to Islamic practice which gave to the *penghulu* a sole jurisdiction in such matters as marriage, divorce and inheritance."[25]

---

[25]Hooker, *Adat Law*, p. 94; also Lev, *Islamic Courts*, pp. 18-9.

Further complications arose as a consequence of the Islamic courts' lack of competence in the area of family and inheritance law. This was so in spite of the fact that, theoretically, they had full jurisdiction over these matters. Each verdict of the Priestarraaden had to be ratified by the regular court prior to its implementation. Thus, the formalization of Islamic law through the official court system had a negative impact on the practical implementation of Islamic law, since it was common for the advice of the *penghulu* to be ignored by the native courts. To make matters worse, legislation with similarly restrictive clauses were also common. *Staatsblad* No. 482 of 1932, for example, denies in article 4, paragraph 2B, a Muslim marriage official's right to assist in a marriage which violates the adat of Minangkabau and Batak.[26] As Hooker explains it, this condition invited Muslim resentment and provoked constant agitation against the Dutch policy towards the religious court. This agitation ranged from requests for more court effectiveness to threats of boycott of the Priesterraaden.[27]

It was against this backdrop that an attempt was made to foster mutual understanding between the colonial regime and its subjects through the formulation of an Islamic policy and the subsequent creation of the office of Native Affairs (Kantoor voor Inlandsche Zaken) in 1889.[28] The post's first occupant, Dr. Christian Snouck Hurgronje

---

[26]Hooker, *Adat Law*, p. 109.

[27]Hooker, *Adat Law*, p. 95.

[28]The work of the adviser in this office was scientific in nature. The adviser was obliged to study any religious, political or other cultural movements prevailing in native society, and to keep informed of currents in the Indonesian Arab colony and of spiritual trends in the Muslim world at home and abroad. Besides that he was also obliged to study local languages and ethnography. All of this had a practical purpose, i.e., to provide the government with all information about the religious, political, and cultural movements of

(1867-1936), arrived in Batavia in 1889, the year in which the scientific study of Islam in the Indies began in earnest. Although many books and articles had in fact appeared on the subject in previous years, they were generally speaking deficient in their understanding of the spirit of the Islamic faith.[29] Hurgronje's suggestions on matters of Islamic policy were adopted by the colonial regime and resulted in an initial accommodation between the Muslims and the colonial authorities.[30] For Hurgronje, the modernization of the East Indies could only be achieved by native adaptation to the realities of the new age, a process which neither local custom nor Islam could, on their own, help in facilitating. Hurgronje's method, based on tolerance in religious matters combined with vigilance in countering the extension of Islamic political control,[31] worked well at the grass-roots level even while, at the higher level of the judiciary, legislative initiative was lacking.[32]

---

the native and Arab elements of the population. For an account of the office see G. H. Bousquet, *A French View of the Netherlands Indies*, tr. by Philip E. Lilienthal (London and New York: Oxford University Press, 1940), pp. 11-17.

[29]Widjojoatmodjo, "Islam in the Netherlands," p. 56.

[30]Hooker, *Adat Law*, p. 95.

[31]Harry J. Benda, *The Crescent and the Rising Sun* (The Hague and Bandung: W. Van Hoeve Ltd., 1958), p. 20-6; Alfian, "Islamic Modernism in Indonesian Politics: The Muhammadijah Movement During the Dutch Colonial Period" (Ph.D. Dissertation: University of Wisconsin Madison, 1969), pp. 33-41. Hurgronje's Islamic policy was founded on three basic premises: (1) giving unlimited and real freedom to the Indonesian Muslims in practicing strictly religious rites (*'ubūdīyah*) such as prayer, fasting and pilgrimage; (2) respecting the existing social institutions in the Muslim community (*mu'āmalah*), while, at the same time, attempting to displace them with Western institutions through the penetration of Western culture; and (3) resisting and eliminating any political ambitions of the Muslims, particularly those born of the influence of Pan-Islamism.

[32]Hooker, *Adat Law*, p. 95.

In accordance with Hurgronje's suggestions a series of enactments on Islamic judicial administration were ratified into law in the period between 1929 and 1938. In spite of its success in defining Islamic legal competence, however, this legislation reduced the Islamic courts' field of jurisdiction in the face of Muslim opposition. The voices of various parties in the Muslim community were thus marginalized while the Dutch predilection for customary law continued to strengthen its authority.

The first piece of legislation to appear in the post-Hurgronje era was the Marriage Enactment of 1929 issued in *Staatsblad* No. 348 of 1929 which designated the *penghulu* as a government official subject to the regent's control. Through such regulation a fixed procedure was also established for the registration of marriage and divorce and the fees to be paid for this service.[33] Then in 1931, a second bill was introduced. This was *Staatsblad* No. 53 of 1931, a bill which impacted on Islamic law in a most serious fashion. Three new provisions were proposed in this enactment: (1) the Priesterraaden were be abolished and superseded by *penghulu* courts, wherein a single judge would preside over cases subject to Islamic law; (2) the *penghulu* would have the status and salary of a government servant; (3) a court of appeal would be established to review the decisions of the *penghulu* court.[34] This regulation never came into force, however, with financial woes being cited as the principal excuse.[35] To make up for this unsatisfactory

---

[33]Hooker, *Adat Law*, p. 96.

[34]Hooker, *Adat Law*, p. 96; see also Westra, "Custom and Muslim Law," p. 157.

[35]Westra stated at the time: "The Government informed the *Volksraad* (People's Council) on several occasions that the reason for not introducing this proposal was the financial burden involved, or to be exact, the salaries of the penghulus. That this particular difficulty should stand in the way is doubly unfortunate, as one of the

state of affairs, though too late to have any effective influence on the development of Islamic law, the Hof voor Islamietische Zaken or Mahkamah Islam Tinggi, instituted to hear appeals from the *penghulu* court, came into existence in 1937 and was supported by a rule regarding its competence taken from the decree of 1931.

The promulgation of the third piece of legislation, the *Staatsblad* No. 116 of 1937, was an actual disservice to the needs of the Muslim community. Under this new piece of legislation, the jurisdiction over inheritance was transferred from the religious courts to the native courts "where claims were to be adjudicated not according to Islamic law but to *adat* (customary law)."[36] The jurisdiction of the Priesterraaden was thus to be limited to the area of marriage and divorce only.[37] In real terms, this meant that in the struggle for supremacy, native customary law had won a victory over Muslim law, at least in the case of inheritance.

---

arguments against the Courts of priests was that their members were not to be paid, and that it could hardly be expected that in that case competent persons would be found willing to be appointed as members thereof." See his "Custom and Muslim Law," p. 157.

[36]Hooker, *Adat Law*, p. 96.

[37]Soon after the promulgation of this *Staatsblad* there was a case in Bandung (West Java) which gave rise to much resentment among Muslims. The judges of the native court (Landraad) of Bandung, in their decision concerning the claim of inheritance put forward by an adopted child against his adopting father's estate, gave all the estate to the adopted child on the grounds that the adopted child was the only heir according to adat law given that the father did not have any children, and regardless of the fact that the father had a nephew or niece. The Association of Penghulus and the Clerks (Penghimpunan Penghulu dan Pegawainya) at its congress held in Surakarta, on May 16, 1937, frankly declared that the decision of the Landraad in Bandung transgressed Islamic law. The following year, in Surabaya, the Majlis Islam A'la Indonesia (MIAI), in its capacity as the federation of all Islamic organizations, protested against *Staatsblad* No. 116 of 1397 declaring that the enactment was no more than a rape of Islamic law. See in this case Z.A. Nuh, *Sebuah Perspektif Sejarah Lembaga Islam di Indonesia* (Bandung: Al-Maarif, 1980), p. 21.

The last piece of legislation aimed at "reform" and issued by the colonial power was the "Ordinance Concerning Registered Marriages" of 1937 proposing the virtual abolition of polygamy. As indicated above, this ordinance was soon to be withdrawn due to the great opposition it evoked from Indonesian Muslims. It was, nonetheless, by the first time that Muslims in Indonesia had succeeded in halting government interference.[38] In the same year, another government provision concerning religious justice in areas outside Java and Madura was issued. With *Staatsblad* No. 638 of 1937, "Kadi" courts of first instance and of appeal were created in the Southern and Eastern divisions of the island of Borneo. Although the competence of these courts differed little from the powers vested in the religious courts of Java, their creation was regarded, nonetheless, as a great improvement on the prevailing Javanese system. With regard to the rest of the archipelago no such regulation was ever enacted. There were, however, religious courts in Palembang and Jambi on Sumatra, and in the coastal towns of the islands of Borneo and Ternate where the *kadi's* settled legal suits arising between Muslims. Their judicial powers were, however, greatly curtailed by customary law and extended only to marriage, inheritance and matters concerning endowment.[39]

In sum, the Dutch authorities grew progressively indifferent to Islamic law in the course of their rule of the archipelago. Political apprehensions of militant Islam, combined with the fact that most Indonesian Muslims did not adhere to strict Islamic law, encouraged the Dutch to relegate religious law to an inferior position, especially in its

---

[38]Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942* (Kuala Lumpur: Oxford University Press, 1973), p. 244-45.

[39]Westra, "Custom and Muslim Law," p. 159.

encounter with customary law. As a result of the administrative, legal and political hindrances imposed upon religious law by the Dutch in the second half of the nineteenth century, Islamic law in Indonesia was stunted in its future development.

B. The Dutch Policy on Adat[40]

One of the cardinal principles of Dutch colonial policy was to tolerate native societies and institutions while bending their features to a Dutch agenda.[41] Not only did this policy of non-assimilation require that colonial authorities possess an accurate knowledge of native society and culture, but also entailed that great care be taken not to allow the policy to become fragmented due to the plurality of the latter. If it were to be applied in accordance with the needs of a population composed of divergent social, economic and legal backgrounds, this confusion would necessarily proliferate with respect to the law. This logic provided the mainstay of Dutch policy towards the preservation and study of customary law.[42]

Although the subject had been addressed in the VOC period, the term "adat law" or *adatrecht*[43] first came into use around 1900 when Hurgronje used it to denote customs

---

[40]The terms adat and adat law are not differentiated here because the two words are used interchangeably in Indonesian society.

[41]Amry Vandenbosch, *The Dutch East Indies: Its Government, Problems and Politics* (Berkeley: University of California Press, 1942), p. 176.

[42]A. Arthur Schiller, "Native Customary Law in the Netherlands East Indies," pp. 254-63.

[43]A Dutch word meaning customary law. Other words used by Hurgronje were *gewoonterecht* and *adat*. The word *adatrecht* was used in an ordinance for the first time in *Staatsblad* no. 569, 19 October 1911. See Mahadi, "Sejumlah Cukilan Dari Zaman Hindia Belanda Tentang Pengertian 'Adatrecht'," *Hukum Nasional* 1 (1980): 61-91.

which have legal consequences.[44] The development of the study of adat law during the Dutch colonial period can be divided into three different periods: the first, between the years 1602 and 1800; the second, from 1800 to 1865; and the third, from 1865 to independence.

There was comparatively little study of adat law during the period of the VOC (1602-1800), excepting the work of a few individuals interested in the subject. These three pioneers were Englishmen: Marooned (1754-1836), a colonial officer who collected considerable material in Sumatra; Raffles (1781-1826), the Governor of Java during the English occupation from 1811 to 1816; and Crawford (1783-1868), one of Raffles' subordinates. The Dutchman Muntinghe (1773-1827), who served as an officer in Java even while it was under British control, was another scholar who pursued the study during this period.[45] The second phase, from 1800 to 1865, featured what van Vollenhoven characterizes as "Western reconnoitering," and although the quality of the

---

[44]Jan Prins, "Adatlaw and Muslim Religious Law in Modern Indonesia," p. 283. Concerning the meaning of adat law, there are some definitions pertaining scholars' understanding on the subject. Yet, they all seem to reflect the idea that adat law is the law which was appeared as a result of the Indonesian legal thinking and need. Since adat law is a system of law, it is also accompanied by a certain sanction to enforce its legal effectivity. See Hilman Hadikusuma, *Sejarah Hukum Adat Indonesia* (Bandung: Penerbit Alumni, 1978), pp. 106-10; Suwondo Atmodjahnawi, *Hukum Adat dan Pedoman Penghayatan dan Pengamalan Pancasila* (Surakarta: Universitas Negeri Sebelas Maret, 1981), pp. 19-25.

[45]Amry Vandenbosch, *The Dutch East Indies*, pp. 179-80; see also his "Customary Law in the Dutch East Indies," *Journal of Comparative Legislation and International Law* 14 (1932): 33-4; Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *The American Journal of Comparative Law* 11(1962): 206.

research could not rival that of the four pioneers, some important works were produced by individual colonial officials.

In the years following 1865 a convergence of circumstances prompted Dutch interest in adat law. Problems of agrarian law, which had come to dominate the discussion at the time, led the State General to begin investigating existing laws. Three figures stand out as the founders of the scientific study of adat law in this period: G. A. Wilken (d. 1891), Liefrinck (dates unknown) and C. Snouck Hurgronje. These men provided the foundations for research carried out since 1900 by students of adat law, who gradually realized that in order to understand native institutions they had to broach the subject from an Eastern point of view. Leading workers in this field during the third period included such scholars as van Ossenbruggen and C. van Vollenhoven.[46]

In the prewar period, Dutch research into indigenous Indonesian law was dominated by the ideas of C. van Vollenhoven (1874-1933), who became professor in the faculty of law at Leiden from 1901 to 1933. In his theoretical treatises,[47] van Vollenhoven successfully laid the foundations for the study of adat law as a distinctive school of thought. His work had an impact on many scholars in the field and exercised a considerable influence upon the Dutch government's legal policy with regard to adat law.[48] It was van Vollenhoven who, given the plurality of Indonesian culture, divided the

---

[46]Amry, *The Dutch,* pp. 181-88; Amry, "Customary Law," pp. 30-44.

[47]Especially in his chief work *Het Adatrecht van Nederlandsch-Indie* in 3 parts which all appeared in Leiden. Parts I and II appeared in 1918-1931, while part III appeared in 1933 with collected papers on adat law in the period 1901-1931.

[48]See also Harry J. Benda, *The Crescent and the Rising Sun*, pp. 66-67.

archipelago into nineteen distinct adat law regions, considering culture, language, customs and usages. Within each of these regions relative uniformity in adat law was to be found, with each featuring legal eccentricities not observable in the others. The nineteen regions identified by van Vollenhoven were: Aceh; Gayo and Batak lands with Nias; Minangkabau territory with the Mentawai islands; South Sumatra and Enggano; Malay territory; Bangka and Belitung; Borneo and the Phillipines; the Minahasa with the Sangai and Talaud islands; the Gorontalo sphere; Toraja territory; South Celebes; Ternate archipelago; Ambon Moluccas and Southwest islands; New Guinea; the Timor sphere; Bali and Lombok; Middle and East Java with Madura; and finally, the principalities of Java, and West Java.[49]

In van Vollenhoven's conceptual framework, the ideas of both "law area" and "autonomous community" take on particular importance.[50] For him the origin of the law area concept must be sought in linguistics. Thus, his legal/regional categories refer to groups or areas with similar languages in terms of language family, language tribe, and language area as used in his development of the classification of legal material. Thus, he put forward the theory of law families, law tribes and law areas, law districts and law dialects, each comprising groupings of similar law-systems. In other words, van

---

[49]Schiller, "Native Customary Law," p. 258.

[50]A.K.J.M. Strijbosch, "Methods and Theories of Dutch Juridical-Ethnological research in the Period 1900 to 1977," in Alison Dundes Renteln and Alan Dundes, eds., *Folk Law: Essays in the Theory and Practice of "Lex Non Scripta"*, vol. 1 (Wisconsin: The University of Wisconsin Press, 1995), p. 235. For an in dept look at van Vollenhoven's theory of the relationship between law and language see van Vollenhoven's, "Families of Language and Families of Law," *Illinois Law Review* 15 (1921): 417-23; also his "The Study of Indonesian Customary Law," *Illinois Law Review* 13 (1918-1919): 200-09.

Vollenhoven hypothesized that linguistic boundaries can be equated with legal boundaries. On the strength of this argument he divided adat law --as a legal tribe-- into nineteen legal areas each of them comprising distinctive legal districts with different legal dialects.

It was ironic, however, that as adat law became better understood theoretically, the character of the law was increasingly violated. The advantages of recording customary law in written form were many, but once committed to paper, the adat law ceased to be a living tradition.[51] Whatever their motives, the interest of the Dutch in its subsequent bureaucratization changed its role in native societies. As Lev points out: "One can no longer speak of adat law but rather only of a system developed by the Dutch on an original customary law base."[52] Moreover, as research into adat law was conducted on the basis of "Western" methodology, which tends to focus on substantive law, the fundamental importance of legal process in adat law, whereby rules are negotiated, adjusted and changed in conjunction with new circumstances, often escaped the researcher. In this way, we see that adat law was conceptually frozen the moment it was set down in print.

For these reasons Lev argues that the motivation for the study of local customary law in Indonesia's colonial history was less legal than political and economic in

---

[51]For a superb discussion of the problems arising from the change of customary law to written law see T.O. Ellias, "The Problem of Reducing Customary Law to Writing," in Alison Dundes Renteln and Alan Dundes, ed., *Folk Law*, vol. 1, pp. 319-30; also Obeid Hag Ali, "The Conversion of Customary Law to Written Law," in *Folk Law*, pp. 351-65.

[52]Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," p. 209.

inclination.[53] The Dutch policy of customary law (*adatrechtpolitiek*) was characterized by its attempts to isolate the issue of adat from the rest of colonial policy, "as if it were somehow an issue apart in the colonial environment."[54] In this environment, adat law was easily divorced from its own political and economic roots. Inevitably, the law was stripped of its integrity. While still important as a source of kinship, organization and the propagation of values, customary law had lost its capacity for internal evolution and elaboration as conditions changed.

Lev explains how adat law, as a system, grew out of the colonial governments' political strategy:

> Putatively the law of about 90 percent of the people, the adat law of Indonesia, as it has been known for nearly a century, is fundamentally a Dutch creation. By this I do not mean that substantive adat rules--of inheritance, say, or exchange--are other than Indonesian in origin, but that the understanding of adat, the myth of adat, as it were, and the relationship between adat and state authority are the result of Dutch, not Indonesian, work. How far adat law was removed from Indonesian hands is evident in the drama made of adat law policy by the famous Leiden scholar, Cornelis van Vollenhoven.[55]

A distinct political aim of Dutch *adatrechtpolitiek* is clearly illustrated in its encounter with Islam. At the time, van Vollenhoven himself admitted this fact, stating that "the destruction of adat law will not pave the way of our codified law, but for social chaos and Islam."[56] Because of "a theoretical animus against admitting alien influences

---

[53]Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," p. 63.

[54]Lev, "Colonial Law," p. 63.

[55]Lev, "Colonial Law," p. 64.

[56]J. F. Holleman, *Van Vollenhoven on Indonesian Adat Law* (The Hague: Martinus Nijhoff, 1981), p. 122. As cited also in Lev, "Colonial Law," p. 66.

into local customary law",[57] and a fear of Islamic expansion,[58] adat law scholars "spent much intellectual energy proving that Islam had made few inroads into custom."[59] In the interim, Islamic institutions were contained and subordinated by a "reception theory" which rendered Islamic laws valid only to the extent that they had been grafted onto custom.[60] This was not, in fact, a logical outcome of indigenous social or political processes but rather, of colonial policy.[61] It was neither realistic nor theoretically sound to marginalize Islam's role in the changing societies of Indonesia.[62] In spite of this, the Dutch intentionally transformed adat into an increasingly conservative symbol of local authority pitted against Islamic challenges.

C. Interrelation of Adat and Islamic Law

Scholarly opinion regarding Islamic law vis à vis customary law in the Dutch era may be classified into two arguments. One group of scholars, typified by Dutch scholars such as G. A. Wilken and C. van Vollenhoven, recognized that customary regulations had strong roots in the villages, predating the arrival of the imported religions like Islam,

---

[57]Lev, "Colonial Law," p. 66.

[58]Lev, *Islamic Courts*, p. 27. See also Karel Steenbrink, *Dutch Colonialism and Indonesian Islam: Contacts and Conflicts 1596-1950*, tr. Jan Steenbrink and Henry Jansen (The Netherlands: Editions Rodopi B.V., 1993), pp. 98-99.

[59]Lev, "Colonial Law," p. 66

[60]See C. van Vollenhoven, *Het adatrecht van Nederlandsch-Indie* (Leiden: E. J. Brill, 1931), pp. 148-02.

[61]Lev, "Colonial Law," p. 66.

[62]See for example M. Ricklefs, *A History of Modern Indonesia* (Bloomington: University of Indiana Press, 1981), pp. 29-55.

Hinduism or Buddhism. They also acknowledged that converts to these imported religions did not forsake their loyalty to custom. In line with this view, they argued that Islamic law had never, strictly speaking, found application in Indonesian society where the force of customary law prevailed.[63] They also argued that early conversions to Islam since the early period, between the twelfth and sixteenth centuries, and the establishment of Muslim monarchies, exerted only a limited influence on the role of customary law in the administration of Indonesian justice.[64] In the early nineteenth century adherents to this view, beginning with the English administrator-scholars W. Marsden (d. 1836) and T. Raffles (d. 1826), and followed by C. van Vollenhoven at the turn of the twentieth century, promoted local custom as the primary source of legislation in Indonesia. In this view, Islamic law was considered only in so far as it was accepted by one of the major systems of custom.[65]

In contrast to the aforementioned thinkers, more contemporary scholars such as B. W. Andaya (dates unknown) and A. J. Johns (b. 1930), credit Islamic doctrine with playing an important role in the life of the princely courts. This was particularly true of Aceh and Malacca during the early stages of Southeast Asian Islam. Islamic mysticism carried the Islamic ethos into Indonesian life, lending it the symbols and rationale for the

---

[63]See C. van Vollenhoven, *Het adatrecht*, passim. Also G. A. Wilken, "Het Pandrecht bij de volken van den Indisch Archipel," *BITVL* 37 (1888): 555-609.

[64]Westra, "Custom and Muslim Law," pp. 158-61.

[65]This theory, called *receptie*, influenced the basic understanding of common law developed in the Republican period, i.e. from 1945 onwards. See B. ter Haar, *Adat Law in Indonesia*, tr. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), pp. 10-14.

building of a unified, ordered kingdom. Those who adhere to the latter perspective argue that while the force of local custom was manifest in Indonesian society, Islamic law was also effective at the communal level and successfully modified certain practices, particularly in the sphere of familial and social mores.[66] In 1939 Westra noted that expert legal advice, "in regard to matters closely connected with religion, such as family law and the law of inheritance, seems to have been in demand everywhere."[67] A cluster of scholars has thus recognized the latent importance and peripheral influence of the Islamic presence in the formative years of the colonial era. In line with this group, other prominent Dutch scholars, among them Lodewijk Willem Christian van den Berg (1845-1927), recognized that Islamic law had strong support in some sectors of Southeast Asian society and occasionally challenged the authority of local custom, particularly in marriage, inheritance and land allocation.[68] Contemporary Indonesian scholars, who favour this argument, put forward the claim that Islamic law had a deep and abiding influence on the life of Muslims and was an independent factor in shaping social norms and rules.[69]

---

[66]M. Ricklefs, *A History of Modern Indonesia*, pp. 29-55; A. Johns, "Islam in Southeast Asia: Problems of Perspective," in A. Ibrahim, et al., *Readings on Islam in Southeast Asia* (Singapore: Institute for Southeast Asian Studies, 1985), pp. 20-24.

[67]Westra, "Custom and Muslim Law," p. 153.

[68]It was van den Berg who was coined as "the man who found and showed the application of Islamic law in Indonesia." See in this account Sajuti Thalib, *Receptio A Contrario*, pp. 5-7.

[69]See for example Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas Indonesia, 1982), pp. 7-10; Sajuti Thalib, "Receptio in Complexu, Theori Recepti dan Recepti A Contrario," in Panitia Penerbitan Buku untuk Memperingati Prof. Mr. Dr.

The two aforementioned groups represent the variant perspectives on the relationship of Islamic to customary law in the archipelago. As pioneers of the theory of *receptie*, members of the first group maintained that the living law in Indonesian society was not Islamic, but rather customary in nature. Conversely, those belonging to the second group proposed the theory of *receptie in complexu*[70] which argued that Islamic law existed in Indonesia and could, therefore, be applied to Indonesian Muslims. The encounter between the two systems could thus be reduced to speculation on the extent to which one system subsumed the other.

This was in fact what the Dutch intended to do through their *adatrechtpolitiek*; they showed a determination to demote Islamic law before its customary counterpart, the adat law. The evident divergence of the two systems of law was obvious at the time, convincing the Dutch of the impossibility of a harmonious solution to the encounter. In the event of a conflict between the two legal systems, colonial policy systematically favoured the adat law.[71] This was very clear in the case of the "battle" between the *kaum muda* (young generation) and the *kaum tua* (old generation) in the Padri Movement during the first half of the nineteenth century in Minangkabau.[72] In this case, the Dutch

---

Hazairin, ed., *Pembaharuan Hukum Islam di Indonesia in Memoriam Prof. Mr. Dr. Hazairin* (Jakarta: University of Indonesia Press, 1976), pp. 44-54.

[70]This theory had in fact been applied since the early nineteenth century and enjoyed the support of many Dutch lawyers, among them van den Berg.

[71]Daniel S. Lev, *Islamic Courts in Indonesia,* pp. 9-10; Noer, *Modernist Muslims Movement*, p. 216-20.

[72]Minangkabau, lies in the west coast of Sumatra, is regarded as one of the most Islamized regions in Indonesia. See Bousquet, *A French View of the Netherlands Indies*, p. 6. On the case of Padri wars and its social and political background, see Muhammad Radjab, *Perang Paderi di Sumatra Barat: 1803-1838* (Jakarta: Perpustakaan Perguruan

championed the older generation's position against that of the younger one which just happened to be in favour of a greater role for Islamic law.[73] The "conflict approach" adopted by colonial policy was a useful paradigm, enabling Dutch scholars to argue that eternal and irreconcilable conflict existed between Islamic law and adat law.[74]

Kementerian P. P. & K., 1954); Elizabeth E. Graves, *The Minangkabau Response to Dutch Colonial Rule in the Nineteenth Century* (Ithaca, New York: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell Unversity, 1981), pp. 22-25.

[73]For this account see Noer, *Modernist Muslim,* p. 216-20; Hooker, *Adat Law*, pp. 106 ff.; Nancy Tanner, "Disputing and Dispute Settlement Among the Minangkabau of Indonesia," pp. 21-62; Taufik Abdullah's explanation of the encounter between adat law and Islamic law in Minangkabau is illuminating; see his "Adat and Islam: An Examination of Conflict in Minangkabau," pp. 1-24.

[74]In this case see B. ter Haar, *Adat Law in Indonesia*, pp. 163-94; also Jan Prins' views on Islamic law as being in diametrical opposition to adat law in "Adatlaw and Muslim Religious Law in Modern Indonesia," pp. 283-300. In 1938, ter Haar published his findings on Javanese laws of inheritance which showed a clear convergence of adat law and Islamic law. His finding which I have taken from Westra's "Custom and Muslim Law", were as follows:

1. In the places where the influence of communal village law is still strong, arable land may be transmitted by succession to a single heir, and separated from the rest of the property. Islamic law on the other hand regards the estate as a whole.
2. In adat law the estate of the deceased remains undivided for a considerable period as long as there are minor children or a widow, while in the view of Islamic law next-of-kin can insist on the distribution of the estate at any time.
3. Adat law always provides for an equal share between sisters and brothers, but Islamic law rules that the men receive twice as much as the women.
4. In Java adoption occurs frequently and adopted children inherit from their adoptive parents; Islamic law does not regard adoption as a legal institution and denies the adopted child the right to inherit from his/her adopting parents.
5. In Java daughters take precedence over parents and brothers of the deceased, even if there are no sons; according to Islamic law, however, daughters, like parents and brothers, only inherit a portion of the estate.
6. Children of predeceased parent will inherit through representation, a law which is not recognized by Islamic law.
7. Half-brothers and other relatives on the father's side share and share alike with half-brothers and relatives on the mother's side; according to Islamic law a much larger share goes to the paternal relatives.

It was against this background that the colonial regime decided to resolve the problem by drawing a distinct line between the two systems of law.[75] The basic assumption on the part of the Dutch was that adat law was a working system and was clearly applied in society, whereas Islamic law was no more than a theoretical system, even though most indigenous people were nominally Muslims. The problem was far from settled, however, as native society itself had never truly separated the two systems. In emphasizing the importance of adat law and the limitations of the legal precepts of Islam, Hurgronje failed to recognize the fact that the two systems of law were, in the practical life of the indigenous people, inseparable. The Dutch policy of assigning to the religious courts jurisdiction over Islamic family law matters only when these did not encroach upon property law, which in their view fell under the jurisdiction of adat law, clearly did not take into account the fact that, for native people, Islamic law was interwoven with adat law. In the area of marriage, for example, although Muslims obeyed the rules imposed by Islamic law, the institution of marriage itself could not really be understood apart from or in isolation from property questions. Hence, on a practical level, adat law and Islamic law could not be disassociated.

---

8. Property derived from ancestors is subject to laws of inheritance which differ from those governing the inheritance of property acquired during marriage; Islamic law never distinguishes between these types of property.
9. A widow is entitled to a reasonable interest in the estate of her deceased husband; in the view of Islamic law she is entitled to only one fourth or one eighth of the estate.

[75]Hooker, *Adat Law*, p. 97.

It is true that on certain matters there are divergent views in both legal systems,[76] a situation that in making provision for decisive adjudication a conflict of law was mandatory. Yet, in Indonesian villages adat law and Islamic law were typically fluid as to their respective jurisdictions, although occasionally the two were opposed.[77] Some areas of adat law were regarded as part of Islamic law, and in the process of village administration of justice, compromise based upon elements of both systems was the common solution. Both in those areas where societies could be described as "syncretic"[78] and in those where the opposition between systems was obvious,[79] attempts to reconcile the two systems of law were both consistent and wide-ranging except when political advantages could be gained by accentuating the points of conflict. In those societies where the relationship between adat law and Islamic law was depicted as a conflict encounter there were commonly attempts to demonstrate the reverse in two ways: (1) that in the real life of the individual the theoretical possibility of conflict between the two legal systems did not in fact occur; and (2) that the two systems were not only

---

[76]See for example ter Haar's investigation of the Javanese adat law of inheritance as compared to its Islamic counterpart, cited in note 74 above.

[77]Hooker, *Adat Law*, p. 97.

[78]The people of Java were often described as such that they used to holding two or more contradictory beliefs at the same time. For more general information on Javanese society see Clifford Geertz, *The Religion of Java* (Glencoe, Ill: Free Press, 1960).

[79]As in the case of Minangkabau. For a detailed discussion of syncretism and orthodoxy in Indonesian Islam, see G. H. Bousquet, "Introduction a l'etude de l'islam indonesien," *Revue des etudes Islamiques* 2-3 (1938): 235-359.

complementary but, in fact, part of the same system, both finding their origin in God with Islam being seen as the perfection of custom.[80]

The tendency to broker a peaceful reconciliation between adat law and Islamic law led to a situation in Indonesian society wherein the two systems exerted mutual influences on one another. This was especially true under the Dutch, who appointed *penghulus* as advisers, instructing them to base their rulings on native customary law, even though they considered themselves interpreters of Islamic law. This also meant that they could only quote Islamic law in so far as it actually constituted a part of native customary law.[81] What happened, however, was that the *penghulus* followed an accommodative approach, whereby a peaceful solution could always be attained, especially when there was conflict between the two legal systems.

---

[80]In Minangkabau the expression which describes the harmonious relation between adat law and Islamic law is *"adat basandi syarak, syarak basandi adat"*, meaning custom is based upon religious law and religious law upon custom, or *"adat basandi syarak, syarak basandi kitabullah"*, meaning that custom is based upon religious law and religious law upon the Qur'ān. In Aceh, we find the expression, *"hukum ngon adat hantom cre, lagee zat ngon sifeut"*, meaning that Islamic law and custom are inseparable, like the nature and the essence of a thing. Also in Ambon (eastern Indonesia), villagers say that *"adat dibikin di mesjid"* meaning that custom is made at the mosque. See Franz and Keebet von Benda-Beckmann, "Adat and Religion in Minangkabau and Ambon," in Henri J. M. Claessen and David S. Moyer, eds., *Time Past, Time Present and Time Future* (Dordrecht, Holland: Foris, 1988), pp. 193-212; Taufik Abdullah, "Modernization in the Minangkabau World: West Sumatra in the Early Decades of the Twentieth Century," in Claire Holt, ed., *Culture and Politics in Indonesia* (Ithaca and London: Cornell University Press, 1972), pp. 190-91. See also Hooker, *Adat Law*, pp. 96-98.

[81]Westra, "Custom and Muslim Law," pp. 161-12.

The following are illustrations of the accommodation of adat law and Islamic law:[82]

1. Conditional repudiation (*ta'līq ṭalāq*) was treated in almost every marriage contract.[83] The husband had to agree that, in the event he should leave his wife for a certain number of months and fail to provide for her during that period, or make her undergo any one of a specified number of other offenses, and should his wife, being exasperated thereby, complain of his action to the religious court, she should be considered repudiated. In so far as the wife is also allowed to take the initiative in such matters, Islamic law may be said to have adapted itself to adat law.[84]
2. In the case of a divorce known as *khul'*, the wife is in certain cases entitled to make the husband accept the return of his bridal gift as the price of repudiation. If the husband refuses to do so, the judge may then decide that the husband has pronounced the *ṭalāq*, or he simply annuls the marriage.[85]
3. In the marriage ordinance for the islands other than Java and Madura, it was stipulated that in the residencies of Sumatra's west coast and Tapanuli no Islamic religious functionary could perform a marriage ceremony without a written permit from the

---

[82]These examples are as found in ter Haar's *Beginselen van het Adatrecht*, p. 183, and C. Snouck Hurgronje, *Nederland en de Islam*, p. 49; quoted in Westra, "Custom and Muslim Law," pp. 160-1; see also G. H. Bousquet, *Introduction a l'etude de l'islam indonesien*, p. 236.

[83]This sort of stipulation is in fact still valid in Indonesian family law today. See below in chapter three for the continuance of this institution after the independence.

[84]Westra, "Custom and Muslim Law," p. 160.

[85]Westra, "Custom and Muslim Law," p. 160.

> head of the native community to which the parties in question belonged. Furthermore, the permit had to establish that there were no objections based on native customary law to the persons concerned being united in wedlock.[86]

The three examples offered above depict only a few instance of the harmonious encounter between adat law and Islamic law in the colonial era of Indonesia. Such an accommodation was necessary in a society where people recognized the validity of both systems for their everyday lives.

In sum, the Dutch in the Netherlands East Indies, first through opportunism and later through conscious practice, adopted a policy of dualism in which a singular appreciation for native laws and customs was manifest. In their view the dualistic policy was motivated not by racial consideration but rather by a desire to cultivate and accommodate the legal pluralism of Indonesian society. The criterion of distinction was for the most part religious, and resulted in the formation of three separate communities: (1) the Europeans, including non-Indonesian Christians and Japanese; (2) the native Indonesians; and (3) the foreign orientals, chiefly Chinese, Hindus and Arabs.[87] This consequently led the Dutch to adopt a pluralistic approach to applying the law.

In light of this pluralism, the Dutch effort to weaken the law observed by Muslims through a promotion of local customary law was understandable. Integral to Dutch policy

---

[86]Westra, "Custom and Muslim Law," p. 160.

[87]Schiller, "Native Customary Law," pp.255-56. The work to be consulted on the Dutch colonial policy and administration in English is G. J. Renier's translation of A. D. A. de Kat Angelino's *Staatkunding Beleid en Bestuurszorg in Nederlandsch-Indie* (2 vols, 's-Gravenhage 1929-30), published under the title *Colonial Policy*, 2 vols. (The Hague: M. Nijhoff, 1931); also Amry Vandenbosch, *The Dutch East Indies*, pp. 176-97.

was the basic premise that customary law applied to the natives and those classified as natives, while Dutch law was for Europeans and those classified as Europeans. Herein lay the key impediment to the application of Islamic law.

The vigour with which native Muslims pursued a number of wars and revolts against both the adat authorities and the Dutch[88] fueled suspicion of Islam and provided the colonial regime with further reason to impede Islamic law. Muslim resistance stirred a growing concern and fear within the Dutch administration who consequently allied themselves with the forces representing local adat throughout the colony. This alliance was made possible because adat authorities, such as the Javanese *priyayi*[89], and natives in general, were mostly lukewarm Muslims.

In this environment, the Dutch employed their "conflict approach" to mediate between adat law and Islamic law. Such an approach was undertaken with intentional and cynical disregard for the presence of Islamic law in the administration of village justice. This approach failed, however, since at the practical level, in both "syncretic" and "purist" societies,[90] people had always tried to harmonize the two systems of law. Such a

---

[88]Some of these revolts included the Padri War in West Sumatra from 1821-1838, the Diponegoro War, also known as Java War, in 1825-1830, the 1988 Tjilegon Revolt in Banten (West Java), and before that, in 1873, the famous holy war waged by Acehnese *'ulamā'*. On Diponegoro see J. M. van der Kroef, "Prince Diponegoro: Progenitor of Indonesian Nationalism," *Far Eastern Quarterly* 8 (1949): 430-33; and for a good account of the Aceh War in English, see E. S. de Klerck, *History of the Netherlands East Indies*, vol. 2 (Amsterdam: B. M. Israel NV, 1975), pp. 342-73.

[89]I. e., Javanese aristocrats.

[90]For the meaning of the word "syncretic" see note 78. The word "purist" is used here as the antonym of "syncretic".

conflict did not exist in the minds of native Muslims who regarded both adat law and Islamic law as divinely inspired, i.e., rooted in God.

2. The Japanese Occupation

The Japanese conquest of Indonesia took barely two months to complete. Java fell in the space of a week by March 8, 1942. In a real sense, "Dutch rule, with all its vaunted solidity, practically, and efficiency, evaporated in a moment."[91] This shattering event marks an obvious turning point in Indonesian history, one at least as fundamental as the proclamation of independence to follow in three and a half years.[92] The swift Japanese seizure of the archipelago itself, and more generally of Southeast Asia, was a devastating blow to Western self-esteem.[93]

The change of colonial masters brought profound changes to Indonesian life. The fundamental difference between Japanese imperialism and its Western counterpart was its provisional military character. The Japanese military administration, which ruled Indonesia, subsequently took charge of all purely colonial considerations. As Reid states:

> the Japanese military (the navy to a lesser extent than the army) were aware from the beginning that they were involved in a life-and-death struggle in which the peoples of Southeast Asia had to be involved, although this might disrupt internal order. The problem of reconciling colonial control and wartime mobilization

---

[91]Anthony Reid, *The Indonesian National Revolution 1945-1950* (Connecticut: Greenwood Press, 1974), p. 10.

[92]For a more general background on the Japanese occupation, see Harry J. Benda, *The Crescent and the Rising Sun: Indonesian Islam Under the Japanese Occupation 1942-1945*, and also M. A. Aziz, *Japan's Colonialism and Indonesia* (The Hague: Martinus Nijhoff, 1955).

[93]See Leslie Palmier, review of *Some Aspects of Indonesian Politics under the Japanese Occupation: 1944-1945*, by Benedict R. O'G. Anderson, in *Journal of Southeast Asian History* 5 (1964): 215-18.

pervades the whole Japanese period, with control being increasingly sacrificed as the war turned against Japan.[94]

Consequently, the Japanese military government took on responsibility for matters of law and administration, a role not very different from that of the Dutch. The Japanese, who modified certain structural features, chose not, in the interests of administrative ease, to tamper with the bulk of existing laws and regulations.[95] Like the Dutch in the early days of their rule, the Japanese regime now maintained that "Local customs, practices, and religions shall not be interfered with for the time being,"[96] and, "in matters concerning native civil affairs, their customs and mores should be carefully respected, and particular care is necessary so as not to provoke needless animosity and discord."[97]

That aside, the Japanese, at least in theory, attempted to make a complete symbolic break with the Dutch. All symbols of sovereignty that displayed the Dutch colonial regime were abrogated, while movements active in the Dutch period were dissolved.[98] Unlike their Dutch predecessors, who had maintained a centralized authority in the archipelago, the Japanese divided Indonesia into three distinct administrative

---

[94]Reid, *The Indonesian National Revolution*, p. 11.

[95]Daniel S. Lev, "Judicial Unification in Post Colonial Indonesia," *Indonesia* 16 (October 1973): 1-37, esp. 5-12.

[96] "Outline of the Conduct of Military Administration in Occupied Areas," March 14, 1942, a Japanese Ministry of the Navy document included in Harry J. Benda, James K. Irikura, and Koichi Kishi, eds., *Japanese Military Administration in Indonesia: Selected Documents* (New Haven: Yale University, Southeast Asia Studies, 1965), p. 29

[97]"Instructions of the Superintendent-General of Military Administration," August 7, 1942, issued from the Japanese army's Singapore headquarters, in Benda, ed., *Japanese Military*, p. 188.

[98]Reid, *The Indonesian National*, p. 11.

zones: one in Jakarta for Java and Madura, one in Singapore that included Sumatra, and a navy command in Makassar that administered the rest of the archipelago. As a consequence of the drastic reduction of Dutch officials in public life, changes to judicial organization had also followed. By September 1942, the military government in Java had promulgated a series of laws designed to transform the judiciary.[99] As a result, a secular judiciary was founded wherein the old Districtsgerecht (given a new Japanese name, Gun Hooin), the Regentschapsgerecht (Ken Hooin), the Landgerecht (Keizai Hooin), Landraad (Tihoo Hooin), Raad van Justitie (Kootoo Hooin), and Hooggerechtshof (Saikoo Hooin) were unified into one court serving the same clientele, while the Residentiegerecht (residence court) for Europeans disappeared.[100] Unification was also applied in the case of the office of public prosecution. The former Dutch prosecutors (*officieren van justitie*) who had served under the European procedural code, and Indonesian prosecutors (*jaksa*) working under the Landraad, were combined in the Kensatu Kyoku.[101] Needless to say, this revolution was energetically welcomed by some Muslim reformers, particularly in Sumatra, who hoped to see the heads of the adat system along with their Dutch protectors ousted from power.[102]

---

[99]See on this subject Lev, "Judicial Unification," pp. 6-8 and his citations.

[100]In the case of the legal change see Bas Pompe, "The Effects of the Japanese Administration on the Judiciary in Indonesia," *BITLV* 152-IV (1996): 575-85.

[101]Lev, "Judicial Unification," p. 7; Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional* (Jakarta: Raja Grafindo Persada, 1994), pp. 184-85.

[102]Aziz, *Japan's Colonialism*, pp. 198-99.

In Aceh, for example, and especially in north Sumatra where customary courts had been fully controlled by the Dutch-backed *uleebalang*[103] ruling class since the Aceh war of 1870-1900, the *ulama*[104] and other opponents of the authority of the *uleebalang* constituted the backbone of pro-Japanese sentiment.[105] Thanks to the general principle implemented by the Japanese military administration that executive and judicial functions were be separated, the *uleebalang*'s authority in local courts was broken, although the integrity of their administrative authority was maintained. This was accomplished through a political and judicial readjustment of the colonial machinery. Thus, we see that the distinction between directly-governed and self-governing areas, on the one hand, and government and native courts, on the other, was abolished. The jurisdiction of the *uleebalang* as sole judges in the lower courts was thus terminated and their functions absorbed. In addition, the offices of colonial magistrate and Residentiegerecht (Residence Court), set up for Europeans, were fused into a new first-instance magistrate's court termed the Ku-Hooin.[106] Moreover, another Japanese-designed court, the Tihoo-Hooin, displaced the collegial customary court controlled by the *uleebalang*, the Landraad, and the Raad van Justitie in its first instance competence. It must be said, however, that the

---

[103]I. e., territorial chiefs.

[104]This word comes from the Arabic word *'ulamā'* for individuals who specialize in the study of the Islamic religion.

[105]On this account see B. R. O'G. Anderson, "Japan: 'The Light of Asia'," in Josef Silverstein, ed., *Southeast Asia in World War II: Four Essays* (New Haven: Yale University, Southeast Asia Studies, 1966), pp. 13-31; Lev, "Judicial Unification," pp. 9-11. See also R. de Bruin, *Islam en nationalisme in door Japan bezet Indonesie 1942-1945* ('s-Gravenhage: Staatsuitgeverij, 1982), pp. 23-45.

structural patterns of previous appeals courts remained functional on the practical level as the Japanese colonial authority could not abolish altogether the ethnic jurisdiction of the older customary courts.[107] Nonetheless, the new colonial regime engendered a measure of good political will as it seemed to give the prospects of Islamic power new hope. In both institutional and political terms, the termination of *uleebalang* officials, who were only dominant in local administration, signaled hope for the recognition of Islamic law as Muslims gained control of the judiciary.

Yet, in a broader sense, the fundamental Japanese principle that "existing governmental organizations shall be utilized as much as possible, with due respect for past organizational structure and native practice,"[108] can be seen as anti-Western propaganda. On a practical level the Japanese could not dispense with the services of Dutch administrators and technicians.[109] The Japanese, who at first had cultivated the support of revolutionary elements, grew disenchanted with the latter as they consolidated

---

[106]The court's jurisdiction was limited only to minor civil and criminal cases. See Lev, "Judicial Unification," p. 9.

[107]In fact it was difficult for the Japanese to keep the *uleebalang* off the judicial bench entirely, and this was proved in the fact that the colonial government gave them a general dispensation to serve on the courts in some areas. See Lev, "Judicial Unification," p. 11; also A. J. Piekaar, *Atjeh en de oorlog met Japan* (The Hague-Bandung: N.V. Uitgeverij W. van Hoeve, 1949), pp. 265-67.

[108] "Principles Governing the Administration of Occupied Southern Areas," November 20, 1941, in Benda, ed., *Japanese Military*, p. 1.

[109]The Japanese military government grasped the fact that with the removal of Dutch officials there weren't nearly enough trained Indonesians to staff the courts and prosecutor's office.

their possession of land and people.[110] They had originally hoped to utilize their radical allies to their own advantage while seeking the support of traditional authorities.[111] Not surprisingly, therefore, they established in November 1942 a Committee for the Study of Former Customs and Political Systems (Kyuukan Seido Tyoosa Iinkai) whose aim was "to survey and study the customs and the former governmental systems of the country, and to contribute towards the administration of Java."[112]

Politically speaking, the Japanese rulers, faced with the task of placating their allies in the early days of the invasion, were forced to deprive the traditional administrators of their competence, administrators who in fact were often in conflict with Islamic law. In certain instances they allowed no interference with Islamic law or its unfettered observance by the native populace.[113] Islam was, in effect, an expedient vehicle for the consolidation of Japanese political ends in Indonesia. Islam, to them, was most effective as a means of penetration into the spiritual recesses of Indonesian life, allowing its permeation with Japanese ideas and ideals at the grassroots. The importance attached to Islam by the Japanese occupation force in Indonesia can be witnessed in the founding of a Department of Religious Affairs. The Japanese used this department to

---

[110]Aziz, *Japan's colonialism*, p. 199.

[111]Aziz, *Japan's colonialism*, p. 199.

[112]Document no. 2750, p. 58; *Kan Po* no. 7, p. 3, Nov. 1942 as cited in Aziz, *Japan's colonialism*, p. 199.

[113]For the case of Aceh in particular see further Piekaar, *Atjeh en de oorlog*, pp. 198-99, 274; Aziz, *Japan's Colonialism*, pp. 199-200.

consolidate their position in Indonesia by staffing the new institution with *kiais*[114] and *ulama*, who they hoped would serve as conductors for the transmission of Japanese ideas and aims into Indonesian idioms and popular culture.[115] Thus, Japanese interest in Islam was motivated by self interest, rather than commitment to the integrity of Islamic law or the welfare of the Muslim community.[116]

In the judicial arena, the unification of the courts, which by and large was limited only to the principle of racial integration, resulted in few changes. The administrative division of Indonesia into three segments precluded unification in the wider sense of the term as the formation of a national judicial system was not envisaged by the Japanese.[117] It should be noted that there is little information available on judicial change anywhere outside of Java. With the exception of Japanese nationals who were subject to their own military tribunals, the foundations for a unified judiciary competent in disputes involving all population groups were laid during the occupation. Significantly, however, substantive changes did not take place with regard to the institution of religious courts. In practical terms, the only action that was taken was to exchange Japanese names for Dutch ones.

---

[114]*Kiai* is a Javanese word having the same basic meaning as *ulama*; see note 104 above.

[115]For a further account of the establishment of the Department of Religious Affairs (Shuumubu in Japanese) and the political considerations of the Japanese in doing so, see Benda, *The Crescent and the Rising Sun*, pp. 111 ff.

[116]It was far precisely the same reason that Christianity was the Japanese religion of choice in the Philippines as the vehicle for ideological penetration. On the Japanese propaganda among the Islamites see The Netherlands East Indies Government, *Ten Years of Japanese Burrowing in the Netherlands East Indies* (New York: The Netherlands Information Bureau, 1944), pp. 25-26.

[117]Lev, "Judicial Unification," pp. 11-12.

This was especially true of colonial centers like Java and Madura where the Japanese authorities changed the name of the religious courts from Priesterraaden to Sooryoo Hooin and the court of appeal from Hof voor Islamietische Zaken to Kaikyoo Kootoo Hooin.[118] The religious courts possessed the same function under the Japanese occupation that they had under the Dutch. The courts in Java and Madura performed their usual duties, handling marital cases and sometimes serving as advisers on matters of inheritance, while the sultanate courts outside Java and Madura had still broader jurisdiction, including the settlement of inheritance disputes.

There was in fact an effort made to terminate the religious courts themselves in the Japanese period following Soepomo's submission of a report to the government recommending their abolition on June 1944.[119] Parallel with Soepomo's recommendation came the Japanese suggestion in April 14, 1945 that state and religion be separated in Indonesia, and that all matters relating to Muslim belief, including religious courts, be handed over to Muslim society and operated privately without state intervention.[120] These recommendations were never implemented, it may be stated, due to the fear of provoking Muslim unrest. However, it may have had more to do with the fact that Japan only occupied the archipelago for a short time. In the final analysis, the judicial system remained for Muslims under Japanese occupation what it had been under the Dutch.

---

[118]Zaini Ahmad Noeh and Abdul Basit Adnan, *Sejarah Singkat Pengadilan*, pp. 44-46.

[119]For an in-depth account of Soepomo's paper see Lev, *Islamic Courts*, pp. 35-36.

[120]Noeh and Adnan, *Sejarah Singkat Pengadilan*, pp. 45-46.

The strong presence of adat law in most regions also retained its Dutch form during the early Japanese era "even as they were incorporated into a more highly unified judicial structure."[121] Aceh, where customary courts had disappeared, was the exception while the courts in other regions remained functional. In Lev's opinion, only two scenarios could affect the position of the customary courts: (1) if control over the courts by local ruling groups was a source of social conflict; (2) and if an organized opposition to the courts was mustered. In most cases, the simultaneous unfolding of these scenarios brought about the destruction of adat courts. However, in practice, notable changes did sometimes occur under the Japanese as a consequence of two factors: namely, the replacement of Dutch advisers by Japanese ones whose interest in the courts was limited to criminal matters affecting the objectives of the occupation; and the changes wrought by Japanese insistence on dividing executive from judicial powers in the operational function of adat courts.[122]

In sum, the evidence presented above corroborates the claim that "the situation during the Japanese period was thus one of preserving the status quo."[123] The structural changes brought about by the Japanese occupation were little more than cosmetic exchanging "the color of the Dutch regime" for "the color of the Japanese one." It would thus seem that a restructured judiciary only banished the immediate symbols of

---

[121]See Lev, "Judicial Unification," p. 11.

[122]Lev, "Judicial Unification," p. 11.

[123]As noted by Deliar Noer, *The Administration of Islam in Indonesia* (Ithaca, N. Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978), p. 46.

European power from the eyes of the indigenous people, while the basic structural characteristics of society remained much the same.

CHAPTER THREE

ISLAMIC LAW AND ADAT IN POST INDEPENDENCE INDONESIA

The shift from colonial to sovereign status did not bring any direct or pervasive changes to bear on the status of law in the young Republic of Indonesia. By the time the proclamation of independence was issued on August 17, 1945, law in Indonesia had essentially changed little from the time of the Japanese occupation of Java.[1] As most of the national elite were, in the early days of independence, people who had dominated Indonesian politics during the colonial era, the revolutionary ideas of grass-root movements had not yet penetrated into common parlance. This elite did not constitute a radical, social element interested in the re-formulation of the former colonial state apparatus. On the contrary, they were quite content to fall back on the familiar. Any strategy for social revolution, or even social change is, therefore, hardly to be found at this time.[2] Symptomatic of this situation was the Transitional Provision in article 2 of the 1945 Constitution which stipulates that "All existing institutions and regulations of the state shall continue to function so long as new ones have not been set up in conformity with this Constitution."[3] Hence, to avoid creating a legal vacuum, the new government was forced to reintroduce many laws inherited from the colonial era. An example of this

---

[1]R. Subekti, *Law in Indonesia* (Jakarta: Yayasan Proklamasi, Center for Strategic and International Studies, 1982), p. 6.

[2]Daniel S. Lev, "Judicial Unification," p. 13.

[3]This English version is taken from Subekti, *Law in Indonesia*, p. 6.

is the fact that the Wetboek van Strafrecht, enacted in 1915, continued to regulate criminal law in Indonesia, except in those regions outside of Java where native courts remained operative. In the latter, only a few articles of laws inherited from the Dutch were applied through the provisions of Law No. 80 of 1932.[4]

As a continuation of the previous chapter, the discussion here will be devoted to the development of Indonesia's law in the post-independence era. In the following pages, I will try to show that the change affected both the Islamic and adat courts, in spite of the inflexibility with which both legal traditions had weathered the political upheavals of the first half of this century. The family law-making process in particular had shown itself impervious in the face of a mutable political climate. To this end, the roles of both adat and Islamic law in post-independence Indonesia will be analyzed in light of this political change. Examples of substantive family law will then be presented in support of the argument that continual attempts were always made to accommodate both legal traditions in the country.

1. Legal Issues in Independent Indonesia

Consisting of 7,900 islands, the Indonesian archipelago is inhabited by various ethnological, social, religious and cultural groups, each of which retains its own customs and ways of life.[5] Embracing this pluralism, the Republic of Indonesia has coined the official motto: *"Bhinneka tunggal ika"*, or "Unity in diversity." That diversity is evident

---

[4]Subekti, *Law in Indonesia*, p. 7.

[5]Gouwgioksiong, "The Marriage Laws of Indonesia with Special Reference to Mixed Marriages," *Rabels Zeitschrift* 28 (1964): 711-31.

in the legal dualism which exists within the unified state. In the immediate post-colonial era, several groups of laws survived the Dutch colonial government: (1) laws governing all inhabitants, e.g. the Law on Industrial Property and Patents; (2) customary laws which applied to native Indonesians; (3) Islamic law applicable to all Indonesian Muslims; (4) laws tailored to specific communities in Indonesia, such as the Marriage Law for Christian Indonesians; and (5) the Burgelijk Wetboek and the Wetboek van Koophandel, originally applied to Europeans only, but later extended to cover the Chinese. Certain provisions in the latter, however, had also been declared to apply to native Indonesians.[6]

In the wake of the demise of colonial power and the assertion of national sovereignty, the new leaders were inclined to view the law as an essentially "rational-legal" organ of the state. Limited reforms to the law were, naturally, aimed at diminishing the vagaries of colonial law as much as possible. A new legal policy was to be constructed to replace colonial legal policy.[7] However, the legal pluralism of the country rendered the zeal for legal reformation a little premature. Legal controversies unavoidably arose in two contending camps: the "pluralist" versus "uniformist" group on the one hand; and the "secular nationalist" versus "Muslim" group on the other. In the former camp, debate centered on the notion of unification of the law and of pluralism within the law in relation to adat law, while in the latter the foci of discussion was Islamic law.

---

[6]Subekti, *Law in Indonesia*, pp. 6-7.

[7]On using the word "new" vs. "old" in the debate over legal politic of Indonesia see Sajuti Thalib, *Politik Hukum Baru* (Bandung: Binacipta, 1987), pp. 52-53.

A. Pluralism *vs.* Uniformism

The concept of statehood is usually associated with the promulgation of uniform regulations for the governance of all citizens, irrespective of their ethnicity, religion or social status. While Indonesia's initial leaders may not have been inclined towards radical political or social innovation, they were, nonetheless, committed to the unification of the country. In their mind, this could only be achieved through a unification of the law. In this manner, Indonesia would, it was reasoned, hasten to modernize. In fact, intertwined with this express need to modernize Indonesia was the added desire, on the part of national leaders, to exorcise the spirit of colonial law. With "equality before the law" as its motto, the new state refrained from overturning the decision by the Japanese colonial authority to abolish the dualist composition of the legal courts. The dualism of the judicial structure, which had differentiated the European from the native, had been replaced by a single three instance hierarchy of courts using a procedural code for all Indonesians.[8] The bureaucracy, courts, and offices of prosecution, were also staffed with Indonesian officials. Thus, in theory, the colonial yoke of authority had been broken.

Yet the total abolition of colonial law and its substitution with a uniform legal code was to prove a formidable task in a heterogeneous country like Indonesia. Extant laws were so intermingled with religious beliefs and culturally specific in nature as to render these attempts futile. In addition, the instability of the immediate post-colonial political climate led Republican leaders to focus their attention on national unity rather

---

[8]Lev, "Judicial Institutions," p. 257.

than on institutional innovation.[9] As a consequence, the unification of law in the early years of Indonesian independence proved to be unworkable. Different categories of law continued to be applied to different classes of residents, a fact which betokened the tenacity of legal pluralism as inherited from the Dutch colonial administration.

Unification of the law was, in fact, the first issue raised by the new republican leaders who were preoccupied with the notion of erasing colonial law. In its stead, they proposed the promotion and development of indigenous law as the substance of future national law. What in fact occurred was that all theoretical strategies to unify the law in Indonesia were frustrated in practical application. The ensuing difficulties were a consequence, not only of the plurality of ingrained religious and cultural values, but also of the fact that the modern judicial system as defined by the colonial apparatus, had taken root in Indonesian society.[10] That aside, indigenous legal culture as propounded by Indonesian jurists, at that time, was at odds with the notion of constructing "the same law for all." This is hardly surprising given the fact that these jurists studied under Dutch teachers, and were sufficiently impressed by the Dutch understanding of law to preserve its tenets.[11] Thus, while they may have presented themselves as the exponents of Islamic or adat law, their vision of national law rarely transcended the bounds of colonial philosophy.

---

[9]See Lev, "Judicial Unification," p. 13.

[10]Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional*, pp. 176-87.

[11]See Lev, "Judicial Institutions," pp. 261-63.

Retaining the skeleton of the old legal system was in fact also an imperative if the young republic were to avoid creating a legal vacuum wherein conflicting social groups might advance competing political and legal doctrines. This explains why the Transitional Provision of the 1945 Constitution, putting faith in the pluralism of law, was a matter of necessity. As Lev points out, this "was not merely a matter of convenience... nor was it simply because no one had any ideas"; rather "...the colonial law provided an available and appropriate framework", and this law "...was a...secular neutrality between conflicting religious and social groups, ... that also kept the existing dominant elite in control of national institutions."[12]

However, as the revolution provided national impetus to the dismantling of colonial power in all its forms, the idea of a unified national law was endorsed in earnest. In some regions, this was marked by a grassroots mobilization to undermine local elites through the adoption of national institutions. The momentum from this movement facilitated the first real steps towards the unification of the law.

As one might expect, the decolonialization and nationalization of law in Indonesia had dire consequences for the institution of adat law. Outside Java especially, the demolition of customary courts proceeded gradually but persistently, as social mobilization fostered the expansion of national institutions.[13] Every effort was made to replace judicial institutions which rested on local power with a unified state judicial system. The reorganization of the judicial institution can be characterized as a political

---

[12]Lev, "Judicial Unification," p. 14.

[13]Wignjosoebroto, *Dari Hukum*, pp. 192-93; see also a brief explanation of this in Lev, "Judicial Unification," pp. 15-37.

strategy aimed at unifying the young, pluralist country under the umbrella of a centralized power. In the judicial sphere, this gave rise to the central government's unfortunate compulsion to simplify the judicial system and, moreover, to eradicate all courts backed by village power. This was in contrast to Java where the administrative apparatus was relatively accustomed to the notion of unification. Beyond Java, the political climate was such that the notion of unification proved problematic.[14] In Sumatra, for example, the nationalization of the courts and the displacement of the sultanates' authority, from which the authoritative basis of customary law was derived, led to violent uprisings.

The intentions of the government regarding the unification of law, as a means to national unification, were made clear with the promulgation of Law No. 7 on February 27, 1947. This article stipulated that the organization and powers of the Supreme Court (Mahkamah Agung) and Chief Public Prosecutor (Kejaksaan Agung) were declared retrograde as of August 17, 1945. The clarification of this law amply reflected the government's conviction that a unified court system was a prelude to a unified state. At a later date, on August 29, 1947, Law No. 23 was promulgated expressly abolishing the customary courts of the former self-governing areas of Java and Sumatra.[15] Lev notes that the clarification of this law served as strong validation for the policy of unification, and quotes the law to this effect:

> The Government of the Republic of Indonesia is not all merely the successor of the Netherlands-Indies Administration...The Republic of Indonesia is a State which we, the whole Indonesian people, have established together as a united and sovereign State. Its Government consists of our own people...The justice

---

[14]See Lev, "Judicial Unification," pp. 14-18.

[15]Koèsnodiprodjo, *Himpunan Undang2, Peraturan2, Penetapan2 Pemerintah Republik Indonesia*, as cited in Lev, "Judicial Unification," pp. 19-20.

> established throughout our State for all citizens (including those living in special regions [i.e., the former self-governing areas]) is justice "in the name of the Republic of Indonesia." Nor is that justice limited by the existence of various regions, and it would not be appropriate to divide it up into so many "sferen van rechtspraak" [areas of independent administration of justice, as in the colony]. From the beginning it has been the responsibility of the central Government to administer justice, as intended by article 24 of the Constitution.[16]

Further modifications to judicial unification were marked by the enactment of a new law in June 1948. Due to the Dutch army's reassumption of power in the country, this law never came into effect, but the idea of a unified court system had taken root.[17] Most significantly, Law No. 19 of 1948 recognized only three spheres of government justice, i.e., general, administrative, and military. With general justice, there were only three judicial levels: the Pengadilan Negeri (court of first instance), Pengadilan Tinggi (appeals court), and Mahkamah Agung (supreme court).[18] Surprisingly, one finds no mention of either adat or religious courts in these provisions. Such an omission betrays the ineptitude of the new Indonesian legal architects in grasping the complexity of the inherited conflict between the exponents of adat and Islamic law.

With regard to adat courts, article 10 of the 1948 law stipulates that the resident legal authority in a region be allowed to continue mediating certain conflicts and crimes covered under the "living law of society." In Lev's view, the vague language which denotes the institution of customary law as a "living law of society" and not as "adat

---

[16]As taken from Lev, "Judicial Unification," p. 20 (the interpolation in square brackets are Lev's)

[17]Lev, "Judicial Unification," p. 20.

[18]See articles 6 and 7 of the law. This judicial hierarchy is still in place today.

laws" implies "a number of worries beginning to burden justice officials and also some emerging political conflicts."[19] On the one hand, this legitimized the abolition of adat laws, and yet on the other it also created more problems than the simple recognition of these laws would have done. Gradually, but persistently, every venue of opportunity to marginalise the adat courts was taken by justice officials. In fact, the so called "living law of society" also camouflaged "an increasingly tense issue between those who controlled the new national government and the forces of Islam."[20] The on-going conflict between one group of people who favoured the Dutch concept of *receptie*, in which Islamic law could be recognized only to the extent that it was absorbed by adat law, and another group who acknowledged Islamic law as a living law in society, was, at least for the moment, muted. In view of the fact that the term "living law of society" could be taken to mean either Islamic or adat law, the government took the initiative by conceding this status to both Islamic and adat law, in the hope that this would remove a source of conflict.

This situation remained in effect until the emergence of the United Republic of Indonesia (Republik Indonesia Serikat) in 1949.[21] On August 17, 1950, the United Republic of Indonesia came to an end. This marked the return of the country to its earlier form as the Republic of Indonesia, as first proclaimed in August 1945. With sovereignty,

---

[19]Lev, "Judicial Unification," p. 21.

[20]Lev, "Judicial Unification," p. 22.

[21]This was the result of the Round Table conference (*Konferensi Meja Bundar*) between Indonesia and the Netherlands, held on December 27, 1949.

the effort to extend the jurisdiction of national institutions was intensified across Indonesia.[22] The dilemma of whether it would be the idea of unification, embodying the spirit of the national struggle, or that of realism-pluralism, was decided by ideological and political considerations which paved the way for the victory of the unificationists. Unification of law was in fact understood not only as a social or juridical argument, but also as the other side of the same coin of centralized political power, while adat law, which was pluralistic in nature,[23] symbolized the preservation of local autonomy; indeed, it was this symbolism that unavoidably rendered adat law a bit suspect.[24] As may be imagined, the issue of unification during this period had wide ramifications. The dispute now erupted beyond the issue of unification of law vis à vis pluralism of law *per se*, to include contending arguments in favor of the centralization of state power vis à vis its decentralization.[25] Thus, law was now interwoven with politics.

Since the 1950s, Indonesian leaders have faced the challenge of building a coherent legal system in a pluralistic country without extinguishing the diverse ethnic, cultural and social practices of its society. The emergence of the uniformists on the one hand and the pluralists on the other was, therefore, a natural outcome of efforts at unifying the law. The former group, represented by those who strove for the modernization of Indonesia, argued that the country should adapt itself to models of

---

[22]Lev, "Judicial Unification," pp. 22-23.

[23]On the pluralistic nature of adat law see M. M. Djojodigeono, *Adat Law in Indonesia* (Jakarta: Djambatan, 1952).

[24]Lev, "Judicial Unification," pp. 23-24.

[25]See Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional*, pp. 202-23.

modern nationhood if development and growth were to be encouraged. This could only be done if "...a clearly articulated legal system which as far as possible reflected the unity of Indonesia"[26] were put into place. Hence, adat law, a symbol of local autonomy for them, was perceived as "backward" and unmodern.[27] The pluralists, on the other hand, maintained that the only practical law for a society like Indonesia's was a pluralistic one. Proponents of adat law could not countenance the alteration of social conditions by the mere process of creating laws because, on a functional level, law had to accommodate itself to social conditions. More importantly, they argued, one cannot begin to unify the law when social conditions foster its fragmentation.[28] For this group, adat law continued to be regarded as a symbol of national pride which underscored the identity of indigenous Indonesian society and which deserved to be preserved. These two arguments monopolized the discussion on law in Indonesia until the end of the 1950's; indeed, as Ball states "the nature of legal developments in independent Indonesia has been largely determined by opinions (of the Indonesian lawyers) on the role of 'adat' law."[29]

---

[26]S. Takdir Alisjahbana, *Indonesia: Social and Cultural Revolution* (Kuala Lumpur: Oxford University Press, 1966), p. 67.

[27]Lev, "Judicial Unification," p. 23; see also his "Judicial Institutions," p. 255; see in addition his "Colonial Law and the Genesis of the Indonesian State," *Indonesia*, pp. 69-74.

[28]See this argument in Djojodigoeno, *Adat Law in Indonesia*, pp. 5 ff.

[29]John Ball, *Indonesian Law Commentary and Teaching Materials* (Sydney: Faculty of Law, University of Sydney, 1985), p. 202. See also his *The Struggle for National Law in Indonesia* (Sydney: Faculty of Law, University of Sydney, 1986) in some related issues.

Later developments did indeed facilitate what seemed to be the imminent recognition of adat law. Amid new outbursts of conflict between Indonesians and the Dutch concerning the liberation of West Irian, the zeal for demolishing all colonial vestiges from Indonesia gained momentum. In the legal arena, the notion of preserving adat law as a symbol of the spirit of indigenous values became suddenly credible. This shift was marked by a change in the official symbol of the Indonesian legal system. Lady Justice (*dewi yustisia*), a European symbol of justice, was replaced in 1960 by the Banyan Tree (*pohon beringin*), which in Javanese culture represents guardianship.[30] In the same year, a decree of the Provisional People's Assembly (Ketetapan Majelis Permusyawaratan Rakyat Sementara), No. II/MPRS/1960, explicitly identified adat law as a source for the development and elaboration of law in Indonesia.[31] This provision seemed to weaken the mandate of the movement for legal unification. Nonetheless, for the exponents of adat law, the battle was far from won.

---

[30]See Wignjoseobroto, *Dari Hukum*, pp. 210-11.

[31]The Provisional People's Assembly Decree No. II/MPRS/1960, Enclosure A, paragraph 402 explains the national politics of law as follows:

a) The principle of the construction of national law shall be in accordance with the state direction and based on adat law which does not hamper the development of a just and prosperous society.
b) In an effort to homogenize law, extant legal practice in Indonesian society must be considered.
c) In the process of perfecting marriage and inheritance laws, religious and adat factors should be considered.

See R. Soerojo Wignjodipoero, *Kedudukan Serta Perkembangan Hukum Adat Setelah Kemerdekaan* (Jakarta: Gunung Agung, 1982), pp. 24-30; also Soerjono Soekanto, *Kedudukan dan Peranan Hukum Adat di Indonesia* (Jakarta: Kurnia Esa, 1987), pp. 73-74.

The decree recognizing adat law is not, upon careful reading, unequivocal; it is stated therein that adat law should "not hamper the development of a just and prosperous society."[32] An ambiguous phrase, indeed, which unavoidably invites competing interpretations and proclamations from leading scholars. Mohammad Koesnoe,[33] for instance, refuses to acknowledge any such fetters upon adat law.[34] As its leading exponent, he argues that the conditions imposed upon adat law are irrelevant as the conditions are themselves an expression of the imperative character of the law. Adat law, he continues, is a dynamic law which develops in conjunction with the development of society.[35] The logical underpinnings of that condition are therefore invalidated. In his conception, adat law would serve as the basis of national law not in its substantive sense, but in its principles, postulates, and basic values. The counter argument, characterizing adat law as backward and uncertain, could therefore only result from a misreading of the law.[36] Other scholars, who did not challenge the decree openly, advanced arguments against the pro-adat group. Simorangkir, for example, argued that adat laws hampered the

---

[32]See the Decree No. II/MPRS/1960 paragraph 402 point (a) in note 31 above.

[33]He is one of leading scholars on adat, and is a graduate of Leiden university.

[34]See Mohammad Koesnoe, "Hukum Adat dan Pembangunan Hukum Nasional," *Hukum dan Keadilan* year 2, no. 3 (March/April 1970): 32-43. Also his "Menetapkan Hukum Dari Adat," *Hukum Nasional* year 2, no. 3 (January-March 1969): 3-11.

[35]Koesnoe, "Hukum Adat," pp. 40-41.

[36]Koesnoe, "Hukum Adat," pp. 36-37.

modernisation of society since, as an unwritten law, adat law engendered legal uncertainty.[37]

Whatever the pros and cons of the arguments for or against the inclusion of adat law in Indonesian public life, the ambivalence of national leaders on the question of pluralism of law vis à vis uniformity of law could not be disguised. On a basic level, they accepted notions of legal unification in keeping with the spirit of Indonesian nationalism, but remained sceptical as to whether adat laws could simply be brushed aside. In actuality, the dilemma facing the new national leaders was essentially the same as that faced by colonial policy makers one and a half centuries earlier,[38] when arguments between liberals and conservatives or universalists and particularists were the order of the day.[39] The status of law remained, therefore, unchanged in spite of the vigour with which a national law as derived from indigenous Indonesian values was pursued. Indeed, changing the symbols of national law, as in the shift from *dewi yustisia* to the *pohon beringin*, proved easier than changing the substance of the law itself.[40]

The enthusiasm with which national leaders greeted the re-construction of the law as promoted in the Decree No. II/MPRS/1960 could be seen in the enactment of the Basic Law on Agrarian Affairs in 1960. This law amply reflects the difficulties encountered by

---

[37]B. Simorangkir, "Adat Versus Emansipasi," *Sinar Harapan*, August 10, 1968.

[38]Wignjosoebroto, *Dari Hukum*, pp. 209-10.

[39]See de Kat Angelino, *Colonial Policy*, vol. 2, pp. 171-93.

[40]See Daniel S. Lev, "The Lady and the Banyan Tree: Civil Law Change in Indonesia," *American Journal of Comparative Law* 14 (1965): 282-307.

leading legal scholars attempting to construct a truly "nationally oriented law" as stipulated by the Decree. Theoretically, this law substituted the colonial law pertaining to agrarian matters contained in the Burgelijk Wetboek (book II) with adat law; this appeared to be a step towards diminishing the role of colonial law, in that the law clearly stated that it would take Indonesian adat law as its source. Yet, the law, in practice, preserved many colonial rules since rights found in the Burgelijk Wetboek could also be found in the new law. One also finds no mention of land rights based on adat law, i.e., *hak ulayat*, as all land was now subject to the imperatives of national security and unity.[41] As a consequence, Gautama stated at the time, "the western principles are adopted 'silently'... by the legislators," adapting to modern principles and operating within a modern western model of agrarian reform such that "the new statute means that the reception of western law will continue in Indonesia..."[42]

Further developments were marked by a shift in government from Soekarno to the so called "New Order" administration of 1966. With this shift in the political landscape legal patterns also changed. If the law had previously been "the law of revolution", law in the new era assumed a fresh role as "the law of development";[43] law as a vehicle to rapid development. Furthermore, as the word "development" in the New Order era had the connotation of economic progress, national law was increasingly perceived as a means to that end. At this juncture, the articulation of laws functioned as a tool of social

---

[41]See Wignjosoebroto, *Dari Hukum*, pp. 212-13.

[42]Soedarto Gautama, "Law Reform in Indonesia," *Rabels Zeitschrift* 26 (1961): 535-53.

[43]See Wignjosoebroto, *Dari Hukum*, pp. 224-27.

engineering, an idea that quickly gained popularity. This idea was, in fact, first set forth by Mochtar Kusumaatmadja,[44] who argued for the need to combine sociological considerations with the study of law in developing countries in an effort to alleviate their socio-economic problems.[45] Kusumaatmadja assumed a neutral posture with respect to whether the law should be uniform or pluralist in nature, for in spite of perceiving the role of adat law as incompatible with the requirements of economic development, he also questioned the benefits of imported Western law, which he felt at the time had had "little effect on the modernization process as a whole."[46] He concluded that hasty decisions concerning the development of law in Indonesia should be avoided, i.e., that the government of the day should continue the colonial legal tradition or simply make use of adat law in national law. The distinction should be made between the areas of law in which innovations could be made and those areas in which they could not. He was of the opinion that the areas most intimately connected with the cultural and spiritual life of the people should be left undisturbed, while in other neutral areas regulated by the social intercourse of modern imperatives the government could benefit from imported legal concepts.[47] He proposed what might be termed a selective unification of the law.

---

[44]He was a professor of international law at the University of Padjadjaran, Bandung, serving from 1974-1978 as minister of justice and after that as minister of foreign affairs.

[45]Mochtar Kusumaatmadja, "The Role of Law in Development: The Need for Reform of Legal Education in Developing Countries," in the *Role of Law in Asian Society*, vol. II, *Papers for Special Congress Session in 28th International Congress of Orientalists (1973)* as cited from Wignjosoebroto, *Dari Hukum*, p. 231.

[46]Kusumaatmadja, "The Role of Law," p. 4.

[47]Kusumaatmadja, "The Role of Law," p. 8.

It was Kusumaatmadja's legal model which most contributed to the law's new role as a vehicle of modernization in the New Order era.[48] His concept of a selective unification of the law was adopted as government policy on law in modern Indonesia. Backed by the executive power, Kusumaatmadja's ideas carried enough weight to dampen the debate between pluralists and uniformists. As the main concern of the New Order was improving the economy,[49] legal institutions were accordingly geared towards the accomodation of economic development. As a consequence, the government was forced to become more vigilant in those areas where native values played a persistent role in law-making. Otherwise the wrong decision could undeniably impede the national program itself.

What is important to note about this new policy is that the law had now really become a tool of government social control. With law fully in the hands of the government, the appeals of pro-adat groups, who argued that law should not come from above (state power), but should, rather, spring forth from society,[50] went unheard. The pluralist group therefore lost its philosophical arguments. To make matters worse, the unfortunate position of adat law had been exacerbated by a shortage of qualified scholars

---

[48]See for example Sajuti Thalib, *Politik Hukum Baru*, pp. 65-67; C. F. G. Sunaryati Hartono, *Politik Hukum Menuju Satu Sistem Hukum Nasional* (Bandung: Penerbit Alumni, 1991), pp. 1-2.

[49]Wignjosoebroto, *Dari Hukum*, pp. 233-35.

[50]See for example the argument asserted by the exponent of adat law that law should not appeared in contravene with the feeling of justice of the society in Halimah A., *Kebhinnekaan dan Sifat-Sifat Khas Masyarakat Hukum Adat Indonesia* (Padang: Laboratorium PMP/IKN FPIPS Institute Keguruan Ilmu Pendidikan Padang, 1987), p. 4.

who could have provided fresh ideas on the role of adat in the modern era of Indonesia.[51] So when the debate on national law-making was reopened by the government, exponents of adat law could no longer compete with their counterparts, the exponents of national law. It follows, therefore, that at this latter stage, adat law faded as law emerged as an organ of the government apparatus of the New Order.

B. Secular Nationalist *vs.* Muslim

In contrast with adat law, which had been weakened by the process of unification of the law, the position of Islamic law in the country did not seem to have been affected in any way. While adat was, by its nature, powerful only locally,[52] Islam was powerful nationally.[53] As a result, the centralisation of power had little influence on the status of Islamic law.

In his analysis of the nexus between politics and religion in Islam, Allan Christelow argues that the point of maximum stress between the two is located in the office of the *qāḍi*, "a state-appointed religious judge."[54] This is true of the accommodations reached between the state and Islam since the emergence of the nation state in Islamic countries, the latter phenomenon a result of their encounter with western values through the colonialisation process. In Indonesia, these accommodations can be

---

[51]Wignjosoebroto, *Dari Hukum*, pp. 240-41.

[52]Theoretically, adat was weakened on a national level because it was divided by van Vollenhoven into 19 distinct areas based on shared custom or culture.

[53]Lev, "Judicial Unification," p. 22.

[54]See Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (New Jersey: Princeton University Press, 1985), p. 262.

discerned in the case of the religious courts. Since independence, the evolution of the court systems has reflected the encounter between nationalist groups, who represent state power, and Muslim groups.

In the early days of independence, the courts continued to function in their juridical capacities, as the colonial courts had done, while all efforts to extend their jurisdiction were frustrated.[55] This may have been the result of a failure to reorganize the system. The courts, which had been administered by the Ministry of Justice during the Japanese occupation, came under the jurisdiction of the Ministry of Religion in 1946.[56] Surprisingly, only two years later, the government promulgated Law No. 19,[57] which decreed that religious courts would be amalgamated under regular courts. Cases involving Muslim litigants which required resolution under Islamic law, would be decided by a Muslim judge. However, since this law was never actually put into effect by the Indonesian government, based on the Transitional Provision of the 1945 Constitution, the existence of the religious courts continued to exist in the form stipulated in *Staatsblad* 1882 No. 152, especially in Java and Madura.[58] What is important to note is that this policy represents an early official attitude toward the inherited political conflict between

---

[55]See Lev, *Islamic Courts in Indonesia*, pp. 62 ff.

[56]This was based on Government Decree No. 5/S.D. promulgated on March 25, 1946. Furthermore, based on the Second Announcement of the Ministry of Religious Affairs (Maklumat Menteri Agama II) all judges of the religious courts came under the organization of the Department of Religious Affairs. See *Kitab Himpunan Perundang-undangan R.I.*, vol. I: *Siaran Pemerintah tanggal 15 Juli 1960*, p. 1697 as cited in B. Bastian Tafal, "Pengadilan Agama," *Hukum Nasional* year 2, no. 7 (1976): 96.

[57]See a case of the same law concerning the institution of adat law on page 80.

[58]Noeh and Adnan, *Sejarah Singkat Pengadilan Agama*, p. 54.

secular nationalists and Muslim. Although the 1948 law was never implemented, the spirit and letter of this law had the effect of subordinating Muslims to the former. This situation was exacerbated with the abolition of the Sultanate Courts outside Java and Madura in 1951, which created confusion over the settlement of religious disputes.

Yet, six years later, through the issuance of government regulation (Peraturan Pemerintah) No. 45/1957, confusion over religious disputes outside Java and Madura was resolved by the government's reestablishment of religious courts for those areas. In effect, this regulation provided religious courts with more extensive jurisdiction than the courts in either Java, Madura or South Kalimantan. Until this time, therefore, the pluralism of religious law continued to define the religious courts in terms of their structure, procedure and even their designation which varied between the three regions: (1) in Java and Madura, the courts were called Pengadilan Agama and the appeals court Mahkamah Islam Tinggi; (2) in Banjarmasin (South Kalimantan), the Kerapatan Qadi or Pengadilan Qadi had Kerapatan Qadi Besar or Pengadilan Qadi Tinggi for its appellate; and (3) for the rest of Indonesia, the courts were called Mahkamah Syar'iyah, while appeals courts were called Mahkamah Syar'iyah Propinsi. The courts in the first two regions continued to apply laws inherited from the Dutch, while the government, through the regulation of 1957, acquired jurisdiction over courts in the rest of Indonesia.[59]

Later developments in the religious court system were not without difficulties. The notion of a "reception theory", inherited from the Dutch, influenced many Indonesian legal experts and led to their antagonism towards the existence of religious courts. The

---

[59]Eddy Damian and Robert N. Hornick, "Indonesia's Formal Legal System: An Introduction," *The American Journal of Comparative Law* 20 (1972): 517-18.

most prominent among these experts was Dr. Raden Soepomo, a nationalist adviser to the Justice Department, who seemed very antagonistic to Islam and who exercised great influence in the preparations for the introduction of the 1945 Constitution.[60] The fact that most officials in the Department of Justice and civil courts were graduates of Dutch law schools, which deemphasized Islamic law in their curriculum, compounded the problem. Most of them were acquainted with Islamic law only from their study of the Shafi'ite school as applied by Indonesian Muslim traditionalists. They neglected, however, to familiarize themselves with the basic tenets of Islam.[61] Consequently, they felt estranged both from Islam and from Muslims who expressed a desire to practice Islamic law.

The problem was also worsened by the fact that the Muslim judges who ran the religious courts were traditionalists whose knowledge of Islamic law was confined to the classical Shafi'ite school, and officers whose judicial knowledge was very limited. This unavoidably created a huge gap between judges or legal experts educated under the Dutch who possessed a very westernized understanding of law and Muslim judges trained along traditional lines in Islamic educational institutions.[62] These circumstances only widened the gulf between the nationalist and Muslim groups.

This polarisation came to a head in 1970 with the promulgation of Law No. 14. As a substitute for Law No. 19 of 1964, it affirmed and bolstered the standing of religious courts in Indonesia's New Order. Article 10 of the 1970 Law states that judicial power

---

[60]Deliar Noer, *The Administration of Islam in Indonesia*, p. 45.

[61]Noer, *The Administration of Islam*, pp. 45-46.

[62]Lev, "Judicial Institutions," p. 297; Noer, *The Administration*, pp. 46-47.

was to be exercised by courts of justice in the spheres of religious, military and administrative law. This law therefore ensured that the religious courts would operate within the judicial system and, indirectly, granted religious courts a status equal to that of the other two courts operating in the country.

At the practical level, however, the principle of equality among the three judicial bodies remained unrealized. Colonial regulations, stipulating that all decisions of the religious courts are to be ratified by regular courts before being officially implemented, even if decided by the High Court of Appeal, still survived. The "fiat of execution" (*executoire verklaring*) was only required if the disputants did not voluntarily abide by the court's decision. This trend was then reinforced by the Marriage Law (Law No. 1 of 1974), viewed mainly as a concession to Islamic law, stipulating that all religious court decisions were to be approved by its counterpart, the regular court. This change from specific approval to a general imperative obviously denotes the subordination of religious courts to regular courts.[63] Thus, while Islamic law had received formal recognition, nationalist lawyers continued to regard the judicial institution of religious law with disdain. Many Muslim writers opposed this "fiat of execution" by arguing that it was contradictory to the general norms of the Basic Judiciary Law.[64] The subordinate status

---

[63]Nur Ahmad Fadhil Lubis, "Institutionalization and the Unification of Islamic Courts Under the New Order," *Studia Islamika* 2/1 (1995): 22-26.

[64]See for example T. Jafizham, "Peranan Pengadilan Agama dalam Pelaksanaan Undang-Undang Perkawinan," in *Kenang-Kenangan Seabad Peradilan Agama* (Jakarta: Departemen Agama, 1985), pp. 170-72; and H. Dahlan Ranuwihardjo," Peranan Badan Peradilan Agama dalam Mewujudkan Cita-Cita Negara Hukum," in *Kenang-Kenangan*, pp. 201-12.

of the religious courts, however, continued to underline the uneasy tension between nationalists and Muslims in the early years of the New Order.

The debate among Indonesian politicians and legal experts over the existence of the religious courts continued unabated into the 1980s. This situation was indicative of the bias that existed against the position of Islam in the state. The religious courts themselves, wracked by poor administrative and work procedures, did little to improve their own image. Even Hazairin, recognized as the most outspoken critic of reception theory,[65] had at one time expressed his disagreement with the courts.[66]

Hazairin's attitude was typical of many Muslims who, while counting Islamic law as an important source of the Indonesian law-making process, were of the opinion that the practice of Islamic law was not dependent upon the existence of religious courts. Islamic law, they argued, could simply be applied in the regular courts. Other Muslims, however, argued that the religious courts were indispensable for the application of Islamic law, and warned against the danger of allowing the regular courts and their secular-trained lawyers to meddle in sacred law.[67]

In spite of these impediments, however, the religious courts were partially successful in fulfilling their role as problem-solvers in marriage disputes. For villagers in particular, the religious courts performed a vital role in this area, offering as they did

---

[65]See Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas Indonesia, 1982), pp. 7-10, wherein he calls the reception theory a "teori iblis" ("theory of the devil").

[66]See Lev, *Islamic Courts*, p. 88.

[67]Noer, *Administration of Islam*, pp. 48-49.

people could not expect to find such services in an ordinary civil court. Islamic judges on the other hand have traditionally played an advisory role in cases of marriage and divorce, particularly in areas where there was no advisory committee on marriages and settlement of divorces (Badan Penasehat Perkawinan dan Penyelesaian Perceraian= BP4).[68]

Against the background depicted above, the Indonesian government, to the surprise of many observers, issued on December 29, 1989, Law No. 7 on Religious Courts, initiating the most recent changes to religious courts as an institution. The modernist Muslim ideal of promoting religious courts in conjunction with a modern judicial system was realized with the passage of this law. In contrast to the court system devised by the Dutch, this new law gives all religious courts throughout Indonesia a uniform name, i.e., Pengadilan Agama (Religious Court), and Pengadilan Tinggi Agama (Higher Religious Court) for the courts of appeal. More importantly, the jurisdiction of the courts was expanded to include all cases of Muslim family law, namely marriage, divorce, repudiation, inheritance, bequest, gift (*hibah*) and endowment. Additionally, the religious courts now share an equal status with that of the regular courts, so that the *executoire verklaring* is no longer warranted.

Much has been written about the most recent Islamic developments in Indonesia. Most of the literature suggests that there has been a rapprochement between the state and Islam in Indonesia since the second half of the 1980s. New legal statutes, such as the Basic Law on Education, the Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law, and broad government support for Muslim intellectual organizations such as

---

[68]Noer, *Administration of Islam*, p. 50.

ICMI (Ikatan Cendekiawan Muslim Indonesia) have made clear the intention of the New Order regime under Soeharto to address the needs of Muslim society. This development would seem to mark a turning point in the relationship between Islam and Muslims, wherein they no longer see each other as enemies, but as full partners in the New Order's efforts at nation building.[69]

The regime's softened attitude towards Islam surprised many observers, given the fact that the voice of the non-Muslim factions in Indonesian political discourse was still heard well into the late of 1980s; this was illustrated during the debate over the law on religious courts in the House of Representatives (Dewan Perwakilan Rakyat). Non-Muslim and nationalist groups expressed a great opposition to the draft of the Religious Courts Act of 1989.[70] Interestingly, they suspected this step of being a prelude to Muslim efforts to revive the Jakarta Charter. In their view, the enactment of Law No. 1 of 1989 was a signal that Indonesian Muslim elements were intent on building an Islamic state.

Their suspicions seem unfounded in light of the fact that Muslim idealists promoting the notion of a state based on Islamic ideology have consistently been defeated by accommodationist Muslims over the past decade. For other Muslims the notion of an Islamic state, whatever that may mean, has been discarded. This fact, coupled with the adoption by all political parties and mass organizations of the principles of the Pancasila

---

[69]Lubis, "Institutionalization," pp. 34-35.

[70]See Ismail Saleh, "Wawasan Pembangunan Hukum Nasional," *Kompas*, June 1 and 2, 1989, as quoted in Lubis, "Institutionalization," p. 47. This article appeared during the heated debate in the Parliament as well as in public over the bill proposing reform of the Religious Courts. See also Zuffran Sabrie, ed., *Peradilan Agama Dalam Wadah Negara Pancasila: Dialog Tentang RUUPA* (Jakarta: Pustaka Antara, 1990), pp. 124-31.

as their sole ideological basis, has led more Muslim leaders to question the relevance of the debate for the republic of Indonesia. The discussion no longer revolves around the pros and cons of building an Islamic state, but rather focuses on the ways in which Islamic values are to be integrated into the national ideology. As one Islamic leader put it after 1965, "...we do not talk anymore about an Islamic State but at best about an Islamic society."[71] In other words, Islam may have declined as a political force, but its cultural strength continues to exert potent influence on contemporary Indonesian politics. This condition appears to have stimulated the enactment of the latest series of laws on the religious courts. These now retain an independent status in the Indonesian judicial system. As long as they continue to fulfill the requirements of any modern court, their status, in relation to other judicial bodies in Indonesia, cannot be undermined.

2. Current Encounter of Islamic and Adat Law

The emergence of a new pattern of legal policy-making in the country has unavoidably invited heated debate and sometimes resentment among certain Indonesian groups, over the question of instituting both adat and religious courts. Critics of this policy argue that any such courts might eventually come to be affiliated with local powers beyond the formal political powers of the central government. Nonetheless, the role of customary and Islamic law in the legislative process remains undiminished, especially in the area of family law. In this sphere, the importance of the two laws in contemporary

---

[71]See B. J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Nijhoff, 1982), p. 159.

decision-making is undeniable, since the Islamic and adat laws intermingle to exercise a mutual influence, both direct and indirect, on the formulation of new rules of law.

The symbiosis between the two legal systems has been reinforced by the arguments of some leading exponents of Islamic law who, since the early days of independence, have sought to construct a new understanding of Islamic law rooted in the local values of Indonesian society. The ideas surrounding the reformation of Islamic law set forth by Hazairin (1905-1975) and Hasbi Ash Shiddieqy (1906-1975) can be mentioned here as examples of this movement.[72] In fact, the stirrings of this movement preceded the birth of the Republic of Indonesia; as early as 1940, Hasbi Ash Shiddieqy was promoting the concept of an "Indonesian *fiqh*." Shiddieqy's work elicited no response from other Muslim scholars at the time, a fact which may be attributed to the weak formulation of his ideas.[73] After independence, it was Hazairin who first proposed creating a new school of Islamic law devoted to the particular needs of Indonesian society. Based on the belief that the door of *ijtihād* is, for the new *mujtahid*, always open,

---

[72]Although coming from different educational backgrounds, both Hazairin and Hasbi Ash Shiddieqy can be considered to have been the leaders in the field of Islamic law during the1950s and 1960s. Hazairin was educated in the secular school system eventually becoming professor of Islamic law and adat law in the University of Indonesia Jakarta. Hasbi on the other hand, a product of Islamic educational stream, was professor of Islamic law in the State Institute for Islamic Studies (Institut Agama Islam Negeri) Sunan Kalijaga in Yogyakarta. Both witnessed as well the shift of political power in the country from Soekarno to Soeharto.

[73]See Teungkoe Mohd. Hasbi [Ash Shiddieqy], "Memoedahkan Pengertian Islam I," *Pandji Islam*, Boendelan Ketoejoeh (1940): 8412 as cited in Yudian Wahyudi, "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *fiqh*" (M. A. thesis: McGill University, 1993), p. 1.

he set to building what might be termed a national Indonesian *madhhab* in 1951.[74] Legal matters more related to the resolution of problems specific to Indonesian society should not, he argued, be confined to the established Shafi'ite school of law. The school should in fact be developed in accordance with the local landscape.[75] One decade later, Shiddieqy reasserted his argument with a more coherent exposition of Indonesian *fiqh* than he had propounded twenty years earlier. Starting from the same premises as Hazairin, Shiddieqy approached the issue differently by calling upon exponents of Islamic law to improve the activities of *ijtihād* and construct an Indonesian brand of *fiqh*.[76] In Shiddieqy's view, the *fiqh* developed by Indonesian Muslims to that point was no more than *fiqh Ḥijāzī*, constructed on the basis of Ḥijāzī custom, or *fiqh Miṣrī* created on the basis of Egyptian custom, or even *fiqh Hindī* as derived from Indian custom. Thus, the distinct characteristics of Indonesian Muslim society were ignored as foreign *fiqh* was superimposed on local communities through *taqlīd* (blind imitation).[77] Shiddieqy advocated the construction of a new *fiqh* by Indonesian Muslims, which was rooted in the distinct values of local society and in the basic sources of the sharī'ah and legal logic as

---

[74]See Hazairin, *Tujuh Serangkai Tentang Hukum* (Jakarta: Tintamas, 1974), pp. 115 ff. See also his *Hukum Kekeluargaan Nasional* (Jakarta: Tinta Mas, 1982), pp. 5-6, wherein he suggest a change from the term "national" to "Indonesian" madhhab, a concept which clearly anticipates the idea of an Indonesian fiqh offered by Hasbi Ash Shiddieqy.

[75]Samsul Wahidin and Abdurrahman, *Perkembangan Ringkas Hukum Islam di Indonesia*, 1st ed. (Jakarta: Akademika Pressindo, 1984), pp. 87-88.

[76]He defined Indonesian fiqh as fiqh applied in line with the character of Indonesia. See Hasbi Ash Shiddieqy, *Syariat Islam Menjawab Tantangan Jaman* (Jakarta: Bulan Bintang, 1966), pp. 43 ff.

[77]Shiddieqy, *Syariat Islam*, p. 43.

developed in all schools of Islamic law.[78] Hence, while the two scholars articulated slightly different position, --Hazairin was of the opinion that an Indonesian *madhhab* would be fostered through a mere renewal of the Shāfiʿī school in conjunction with local conditions, while Shiddieqy was more inclined to use all madhhabs as the raw material sources for Indonesian *fiqh*-- they were both of the opinion that the adat of Indonesian Muslims must be the main consideration in the law-making process of Indonesian Islam.

It was ideas such as those expressed by Shiddieqy and Hazairin which inevitably paved the way for an interweaving of values stemming from both adat and Islamic laws into one legal entity. It is in the area of family law where the phenomenon of mutual accommodation between the two legal systems has been most notable. As the main focus of this thesis is on the continuing mutual accommodation and dialogue between the legal traditions, the following examples of legal integration are outlined below. In the three examples provided here, two rules concerning marriage law and one concerning the Islamic law of inheritance will be discussed. The two rules governing marriage law treat the issue of conditional repudiation (*taʿlīq ṭalāq*) and common property in marriage, while the rule governing the Islamic law of inheritance deals with obligatory bequest (*waṣīyah wājibah*).

A. Conditional Repudiation (*Taʿlīq Ṭalāq*)

The common method of dissolving a Muslim marriage in Indonesia is through the institution of *ṭalāq* (repudiation), by which the husband can repudiate his wife after

---

[78]Shiddieqy, *Syariat Islam*, p. 44. See also his *Sejarah Pertumbuhan dan Perkembangan Hukum Islam* (Jakarta: Bulan Bintang, 1971), pp. 285 ff.; and his *Fakta Keagungan Syariat Islam* (Jakarta: Tintamas, 1974) on some related issues.

efforts at reconciliation by the religious courts have yielded no results. Yet, other means of dissolving a marriage are not uncommon either. In article 38 of the Marriage Law (Law No. 1 of 1974), it is stated that the marriage bond may be dissolved in one of three ways: by death, divorce or court decree.[79] One finds therefore that two ways of terminating a marriage are under the auspices of the courts, i.e., by the process of *khul'* (*khulu'* in Indonesian) wherein the wife agrees to return the dowry to her husband in return for her freedom, or through the conditional repudiation commonly referred to as *taklik talak*, from the Arabic term *ta'līq ṭalāq*.[80]

In Indonesia, it is usual for the Muslim husband to pronounce *taklik talak* at the start of a marriage, whereby he submits to the condition that if he ill-treats his wife or deserts her for a specified period, her complaints to the religious court would render her repudiated.[81] Uniquely Indonesian in character, this conditional term of repudiation is customarily pronounced at each marriage immediately after the signing of the marital contract.[82] Although conditional repudiation, as a means of divorce, is not explicitly

---

[79]Department of Religious Affairs Republic of Indonesia, *The Indonesian Marriage Law* (Jakarta: Marriage Counselling Bureau, 1988). See also the Indonesian Compilation of Islamic Law chapters 113 and 114 which state the same provision. Departemen Agama RI, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Direktorat Pembinaan Badan Peradilan Agama Direktorat Jenderal Pembinaan Kelembagaan Agama Islam, 1993/1994).

[80]Henceforth, the Arabic term *ta'līq ṭalāq* will be differentiated from the Indonesian word *taklik talak*. The former word indicates Islamic law in its essence, whereas in the latter the influence of adat law is perceived.

[81]See above, chapter two on the subject.

[82]This right of suspended dissolution is also commonly found in Malaysia, Brunei and Singapore. See Ahmad bin Mohd. Ibrahim, "The Administration of Muslim Law in

acknowledged in the current Indonesian marriage law or its rule of implementation (Government Regulation no. 9 of 1975), its common practice points to the depth of its local roots. Indeed, it is not clear when this unique mode of repudiation first came into practice. The Dutch scholar, Jan Prins, claimed in 1951 that the *taklik* institution which tends to safeguard some of the wife's traditional rights originated in a decree issued by a king of Mataram in the seventeenth century.[83] If this is correct, it would, in his opinion, indicate the possibility that knowledge of Islamic law was rather superficial in the center of Muslim Java some centuries ago, as is often suggested.[84] Here, unfortunately, he fails to cite reliable sources which could lead to a decisive conclusion concerning the origin of the institution. Yet, the Arabic terminology used to describe these methods of repudiation prove that Islamic law exercised a great influence on family law from quite early in the country's history. In the Dutch era, conditional repudiation was a common practice within the Muslim community.[85] To regulate its application, the colonial government issued *Staatsblad* 1882 No. 152,[86] an ordinance which successive Indonesian governments have

---

Indonesia," *Islamic Culture* 43 (1969): 119-24; ter Haar, *Adat Law in Indonesia*, p. 178, 184.

[83]See Jan Prins, "Adatlaw and Muslim Religious Law in Modern Indonesia," pp. 283-300. Elsewhere, Prins states "The famous *ta'liḳ-ṭalāḳ*-institution of Java...is still often called by Javanese the *djandji dalem*, that is "the royal promise", because according to their tradition it was a seventeenth century king (*susuhunan*) of Mataram, who gave this order to his subjects in that way." See H.A.R. Gibb (et. al.), *The Encyclopaedia of Islam*, New Edition, vol. 1 (Leiden: Brill, 1960), s. v. "'Āda," by Jan Prins.

[84]See Jan Prins, "Adatlaw and Muslim Religious Law," p. 292.

[85]See in this regard the sources mentioned in note 82 of chapter two, above.

[86]Article 2 point 1 of this Staatsblad stipulates that the religious court has the authority to observe that the conditions made in the conditional repudiation have been met. See in this regard de Kat Angelino, *Colonial Policy*, vol. 2, pp. 338-39.

continued to maintain and modify over the years, right down to the most current Regulation of the Minister of Religious Affairs No. 2 of 1990, wherein *taklik talak* is regulated in some detail.[87]

An inquiry into the nature of the *taklik talak* institution, reveals the intermingling of elements derived from Islamic and adat law. Although the influence of Islamic law is dominant in this institution, the role of adat law in rendering *taklik talak* an effective tool in the hands of women seeking a termination of their marriage bonds is apparent. In Islamic law too, repudiation may be obtained on the basis of the fulfillment of certain conditions.[88] Muslim scholars have long debated the extent to which conditional repudiation may be practiced as a method of divorce. Pros and cons concerning this

---

[87]The current official form of the *taklik* approved by the Ministry of Religious Affairs is as follows:

"After signing the marriage contract, I.....son of..... promise sincerely that I will fulfill my duties as a husband, and I will live on friendly terms with my wife, named ..... daughter of..... as is fitting under Islamic law (*mu'āsharah bil-ma'rūf*).

Then I pronounce the following formula of *taklik* with regard to my wife, as follows:

Each time I:

(1) leave my abovenamed wife for two consecutive years,

(2) or I fail to give her the obligatory maintenance for a period of three months,

(3) or I maltreat her physically,

(4) or I neglect (ignore) her for six months,

so that my wife subsequently refuses to accept such treatment and complains to the Religious Courts or to an official delegated to handle such complaints, and should this complaint having been found justifiable and be accepted by the tribunal or the said official, and my wife has deposited Rp. 1000,- (one thousand rupiahs) as compensation for me, then the one *talak* comes into force with regard to her.

I give the judge or her representative the right to accept that sum and contribute it to the Central Committe for Mosque Prosperity as a charity."

Translated from the Indonesian text as cited in Abdul Manan, "Masalah Taklik Talak dalam Hukum Perkawinan di Indonesia," *Mimbar Hukum* year 6, no. 23 (1995): 70.

[88]Maḥmūd Shaltūt, *Al-Fatāwā* (Cairo: Dār al-Shurūq, 1408/1988), p. 300.

matter are as unavoidable here as they are concerning many other new cases of Islamic law.[89] Some jurists, such as Ibn Ḥazm, opined that all forms of *ta'līq ṭalaq* were invalid and exerted no influence on married life simply because, as an institution, it was regulated by neither the Qur'ān nor the *sunnah*.[90] Most jurists, however, are of the opinion that conditional repudiation, either *ta'līq qasamī* (done through an oath) or *ta'līq sharṭī* (done without an oath but through a common condition), is a valid method of marital dissolution because the husband, who makes his repudiation dependent on certain conditions, does not repudiate his wife upon pronunciation of the *ta'līq* but suspends the dissolution until these conditions obtain.[91]

The element drawn from adat law which is clearly at work here is the recognition of a woman's right to initiate divorce, a traditional feature of Indonesian marriage law.[92] Given the fact that *taklik talak* depends upon the wife's consent, or otherwise, to repudiation,[93] the powers allocated to a woman in this institution are formidable. The position of the female partner is given added weight by the general tendency of adat law to grant more or less equal status to the husband and wife in a marriage. As Islamic law encompasses the notion of repudiation by the wife through the institution of *khul'*, the

---

[89]Ibn Rushd, *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, vol. 2 (Cairo: Al-Maṭba'ah al-Jamāliyah, 1329/1911), pp. 69-70.

[90]Sayyid Sābiq, *Fiqh al-Sunnah*, vol. 8 (Cairo: Dār al-Kitāb al-'Arabī, 1373-84/1955-64), p. 55; Maḥmūd Shaltūt, *Al-Fatāwā*, p. 300.

[91]Sayyid Sābiq, *Fiqh Al-Sunnah*, vol. 8, pp. 54-57.

[92]See ter Haar, *Adat Law in Indonesia*, p. 184.

[93]See the wording "so that my wife subsequently refuses to accept such treatment..." in the formula of *taklik talak* in note 87.

egalitarianism asserted by adat law[94] serves as a successful compliment to the Islamic institution of *ta'līq ṭalāq*. In this manner, the wife's status has been balanced ameliorated with respect to the husband's in matters of divorce. Thus, the Islamic *ta'līq ṭalāq*, which suspends repudiation merely on the grounds pronounced in the formula of *ta'līq*, is modified by adat such that the Indonesian *taklik talak* becomes dependent upon the wife's consent.

Although the existence of conditional repudiation in Indonesian law has often been the subject of debate among scholars,[95] many of whom are influenced by the pros and cons of the arguments presented by Muslim jurists, most of them would agree that *taklik talak* remains an effective means of extending wives' protection from repression by husbands.[96] It is this very idea of protecting the wife in marriage which encourages the government to maintain the institution. In keeping with the principle of marriage, i.e., to make repudiation difficult, the Indonesian government has tried to improve upon and modify the institution in keeping with both the Islamic mission and adat law. If in the Dutch era the regulation of *taklik talak* permitted certain complications and abuses by the husband,[97] the national era has witnessed improvements to it by a government anxious to stem such misuses. Hence, we see, for example, in the reformulation of *taklik talak* in

---

[94]In this case see Jan Prins, "Adatlaw," pp. 289-93.

[95]See for example Sulaiman Rasyid, who does not agree with *taklik talak* as a method of repudiation. Sulaiman Rasyid, *Fiqh Islam* (Jakarta: At-Tahiriyah, 1976), pp. 386-87.

[96]Manan, "Masalah Taklik Talak," pp. 68-92.

[97]In the Dutch era, any version of the *taklik* formula was permitted by the Government without restrictions.

1950 that the act of beating one's wife was the only action deemed to constitute abuse, and hence grounds for divorce. Since 1956, this very specific clause has been expanded to the more general term "maltreating the wife" so that any action which leads to the wife's physical abuse is sufficient grounds for repudiation by the latter.[98] In line with the aim of the Marriage Law not to make divorce an easy solution, the Compilation of Islamic Law expediently views *taklik talak* not as an escape clause but rather as a marriage vow made by the couple. This can be evinced from the fact that conditional repudiation is categorized in the Compilation not under the chapter on divorce (chapter XVI) but rather under that pertaining to marriage vows (chapter VII). Moreover, article 46, paragraph 2 of the Compilation stipulates that repudiation is not automatic should any of the conditions in the *taklik talak* be violated, but remains incumbent upon a complaint actually being made by the wife to the religious courts.[99] In light of this provision, it may be argued that the Compilation does not in fact stand in opposition to adat law, but is rather, almost equivalent to local values of adat.[100]

B. Common Property in Marriage

In adat law, the property owned by both the wife and the husband can be separated into two general categories: (1) property acquired before marriage; and (2) the property

---

[98]Manan, "Masalah," p. 75-76.

[99]Departemen Agama RI, *Kompilasi Hukum Islam di Indonesia*, p. 33.

[100]This situation can also be seen in another provision set forth by the Compilation itself concerning the equality of the husband and the wife in that article 79 of the Compilation admits the equality of husband and wife before the law in matters of family life.

obtained after or during the marriage.[101] Found in societies which are both matriarchal and patriarchal, these categories are recognized in the Marriage Law pertaining to property, specifically articles 35 to 37 of the Law No. 1 of 1974. In that regulation the term *harta bawaan* (personal property brought to the marriage) is used to denote the first type, while *harta bersama* (common property) is used for the second type. In this classification, the focus is not on the source of the property, i.e., whether it was obtained through inheritance or earnings obtained prior to the marriage, but on its relation to the contracting of the marriage bond itself. As marriage constitutes a starting point, the source of the property in the family, i.e., whether it comes from the husband or the wife, is irrelevant.

The concept of common ownership with respect to property in marriage is the product of adat law and derives from the philosophical premise of local values which assert the equality of the husband and wife in marital life. As far as their claims to property are concerned both partners are seen as two parties with equal rights before the law, since "keeping up a household is of old conceived as an equal task for equal partners."[102] Property acquired during marriage is, therefore, held jointly by both partners; it is never questioned whether the husband or the wife or the two of them together actually earned the property, for as long as the couple remain married, they retain equal property rights. Upon breach of the marriage contract, therefore, both partners will also

---

[101]Hilman Hadikusuma, *Hukum Waris Adat* (Bandung: Penerbit Alumni, 1980), pp. 70-71; see also F. D. Holleman, *Kedudukan Hukum Wanita Indonesia dan Perkembangannja di Hindia Belanda*, tr. Soegarda Poerbakawatja and Mastini H. Prakoso (Djakarta: Bhratara, 1971), pp. 55-63.

[102]Prins, "Adatlaw," pp. 290-91.

have an equal right to the property. This signifies an important contribution made by customary law to the emergence of a more egalitarian relationship between the sexes in Indonesia.

From the standpoint of Islamic law, neither Shafi'ite jurists (the ones most followed by Indonesian *'ulamā'*) nor those representing other schools have so far addressed the topic of common property in marriage as understood by adat law. Yet, seen from the technical side, the husband's and wife's joint property in marriage may be likened to another Islamic form of partnerships (*shirkāt*) commonly discussed by Muslim jurists, although in the books of *fiqh* they classify the case not under the heading of marriage (*bāb nikāḥ*) but under the heading of commerce (*bāb buyū'*).[103] As an institution which involves two parties in the transactions, *shirkāt* are condoned as a lawful economic venture by most Muslim jurists so long as no fallacious or unjust act is committed by the parties. The well-known Hanbalite jurist Ibn Taymīyah said that most jurists agree that there are two types of *shirkāt* transactions: partnership in property (*shirkah al-amlāk*) and partnership in contracts (*shirkah al-'uqūd*); but the two, in Ibn Taymīyah's mind, are in fact inseparable.[104] Although his view of the institution of partnership in property is more

---

[103]See Ibrāhīm Muḥammad Ibrāhīm al-Jamal, *Fiqh al-Muslim 'alā al-Madhāhib al-Arba'ah*, vol. 2 (Beirut: Dār al-Jīl, 1412/1992), pp. 85-90.

[104]Aḥmad ibn 'Abd al-Ḥalīm ibn Taymīyah, *Majmū' Fatāwā al-Shaykh al-Islām Aḥmad Ibn Taymīyah*, vol. 30 (Rabat: Maktabat al-Ma'arīf, 1981), pp. 74-75. In different places, Muslim jurists generally list five forms of partnership contract. These are: (1) partnership in capital and labour (*shirkah al-'inān*) in which two persons or more pool their capital and work together and share in their profits; (2) partnership in labour (*shirkah al-abdān*), where artisans and labourers jointly undertake a task and agree to distribute their earnings amongst themselves; (3) partnership in credit (*shirkah al-wujūh*), where one or more of the members procure goods on credit and sell them then distribute the profit; (4) comprehensive partnership (*shirkah al-mufāwaḍah*), in which

economic in dimension, some principles, such as rights and obligations stipulated in the partnership transaction, are in conjunction with the principles of common property in marriage upheld by adat law. The major difference between the two lies in the focus: while partnership in property as understood by Ibn Taimīyah is primarily economic in nature,[105] the institution of common property in adat cannot be separated from the social institution of marriage.

The current injunction dealing with this kind of partnership in marriage can be found in chapter XIII of the Compilation of Islamic Law on property in marriage. Efforts to improve upon the provisions on common property in the old Law of Marriage have sparked no less than 13 detailed articles (85-97) in the Compilation governing the institution of common property in marriage. They can be summarized as follows: (1) common property comes into automatic existence with the commencement of marriage, regardless of which party earns the property;[106] (2) common property is to be separated

---

the partners share in any type of previous partnership; and (5) *muḍārabah* partnership wherein capital is provided by one party and labour by the other. The Hanafite and Hanbalite jurists accept these five categories with minor differences in detail, while Shafi'ite jurists only approve of partnership in capital and labour and *muḍārabah* partnership. The Malikites are of the same opinion with the Shafi'ites in rejecting partnership in credit, but stand with the Hanafites and the Hanbalites in approving the remaining four forms of partnership. Ibrāhīm al-Jamal, *Fiqh al-Muslim*, vol. 2, pp. 85-90; Ibn Rushd, *Bidāyat*, vol. 2, pp. 210-14; Shams al-Dīn Muḥammad ibn Muḥammad Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj*, vol. 2 (Beirut: Dār al-Fikr, n.d.), pp. 211-16.

[105]Abdul Azim Islahi, *Economic Concepts of Ibn Taimīyah* (Leicester, UK.: The Islamic Foundation, 1988), pp. 155-57.

[106]See article 85 of the Compilation of Islamic Law. See also M. Yahya Harahap, "Materi Kompilasi Hukum Islam," in Moh. Mahfud, Sidik Tono and Dadan Muttaqien, eds., *Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Yogyakarta: UII Press, 1993), pp. 54-103.

from that property owned by the husband or wife prior to marriage;[107] (3) debts due to the marriage stipend shall be charged to the common property;[108] (4) in the case of polygamy, partnership in property is to be separated between the husband and each of his wives;[109] (5) in the case of divorce, common property is to be divided equally between the parties, and when one predeceases the other, half of the common property is bequeathed to the survivor;[110] (6) the husband or the wife has an equal right to petition the religious courts to confiscate the common property if one of the parties begins squandering it or does a misdeed action, such as gambling, drinking, etc.[111]

The above provisions demonstrate the efforts of exponents of Islamic law in Indonesia to accommodate adat law. Since most books on classical *fiqh* do not address the institution of common property in marriage, which is a deep-rooted and prevalent institution in local society,[112] Indonesian *'ulamā'* have set themselves the task of grafting

---

[107]Articles 86 and 87.

[108]Article 93.

[109]Article 94.

[110]Article 96 and 97.

[111]Article 95.

[112]The various terms used for the institution of common property in marriage in each society, such as *guna kaya, gono gini, tumpang kaya, campur kaya, seguna sekaya, barang sekaya, kaya reujeung, raja kaya, harta suarang* or *harta pencarian*, prove how widespread this institution truly is. This is also strengthened by the decisions which are always in conformity with adat law made by the Supreme Court (Mahkamah Agung) concerning some cases deal with the property of marriage. See for example the decision of the Supreme Court No. 545 K/Sip/1970, No. 847 K/Sip/1972, No. 261 K/Sip/1972. See Chaidir Ali, *Yurisprudensi Indonesia Tentang Hukum Adat* (Bandung: Bina Cipta, 1986), pp. 78, 153, 204. For the notion of common property in Javanese society see Hardjito Notopuro, "Tentang Barang Gono-gini dan Barang Asal Serta Hak Mewarisi

this indigenous institution onto the body of Islamic law. This attitude of compromise on the part of exponents of Islamic law towards adat law is fostered by the fact that, in everyday life, the Indonesian people have never ceased to observe customary rules. Simply abolishing common property in marriage would have been impossible therefore, and in fact would not have been in conformity with the spirit of Islamic law which itself allows adat laws to operate as long as they are not in contradiction with the basic sources of the law.[113]

C. Obligatory Bequests (*waṣīyah wājibah*)

Generally cited as "the verse of bequests", sūrah 2, verse 180 of the Qur'ān enjoins Muslims to make bequests to be distributed among their parents and close relatives. Although the majority of Muslim jurists are of the opinion that this verse was abrogated once later Qur'anic rules governing inheritance were revealed,[114] others nonetheless make the stronger argument that the verse of bequest was only partially repealed, i.e., merely in respect to close relatives who had become *ahl al-farā'iḍ* (those entitled to prescribed portions of inheritance).[115] This is due to the fact that the Qur'ān itself still recognizes the right to make testamentary disposition in the allotment of

---

Bagi Djanda, Anak/Anak Angkat," *Hukum Nasional* 2/I (1968): 48-59; for common property in Balinese custom see I Wayan Benny, *Hukum Adat dalam Undang-undang Perkawinan Indonesia (UU no. 1 th. 1974)* (Denpasar: Biro Dokumentasi & Publikasi Hukum Fakultas Hukum dan Pengabdian Masyarakat Universitas Udayana, 1978), pp. 30-32.

[113]See M. Yahya Harahap, "Materi Kompilasi," pp. 88-89.

[114]Sūrah 4 (The Women), verse 7.

[115]Abdulaziz Mohammed Zaid, *The Islamic Law of Bequest* (London: Scorpion Publishing Ltd., 1986), pp. 11-13.

inheritance where it is described as a portion of the residual estate left "after the payment of any bequests and debts."[116] Hence, bequests made in favour of other close relatives are still valid. Muslim commentators on the Qur'ān also substantiated this position by referring to the ḥadīth transmitted from the Prophet stating that "God had given to each what He deserved so that there is no bequest in favour of an heir."[117] In Ibn Ḥazm's view, the verse of bequest stipulates a definitive legal obligation for Muslims to make bequests to be distributed among near relatives who are not legal heirs. Furthermore, he argued, if the deceased had failed to meet this obligation in life the court should make it for him in death.[118] The legal logic of this opinion holds that where the deceased has failed to make a bequest in favour of those near relatives who are not his legal heirs, the court must act as though such a bequest had in fact been made.[119]

Yet, the problem arose of specifying which "close relatives" (*al-aqrabīn*) were entitled to such an obligatory bequest: "who are the close relatives mentioned in the

---

[116]See sūrah 4 (The Women), verses 11, 12 and sūrah 2 (The Cow), verse 240 which support the legality of making a bequest.

[117]"Alā inna Allāh qad a'ṭā kull dhī ḥaqq ḥaqqah falā yajūz waṣiyyah li-wārith." See this report in 'Abd Allāh ibn 'Abd al-Raḥmān al-Dārimī, *Sunan Al-Dārimī*, vol. 2 (Beirut: Dār al-Kitāb al-'Arabī, 1987), p. 511. Also, see the report from Ibn 'Abbās concerning the abrogation of the bequest to the parents in Muḥammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 1 (Delhi: Aṣaḥḥ al-Maṭābi', 1938), p. 383, chapter Waṣaya (bequest).

[118]'Alī ibn Aḥmad ibn Ḥazm, *Al-Muḥallā*, vol. 9 (Cairo: Idārat al-Ṭibā'ah al-Munīrīyah, 1347-1352 A.H.), pp. 312-16; see also 'Abd al-Majīd 'Abd al-Ḥamīd al-Dhībānī, *Aḥkām al-Mawārīth wal-Tarikāt wal-Waṣīyah fī al-Sharī'ah al-Islāmīyah* (n.p.: Al-Dār al-Jamāhīrīyah lil-Nashr wal-Tawzī' wal-I'lām, 1993), pp. 310-11.

[119]N. J. Coulson, *Succession in the Muslim Family* (Cambridge: The University Press, 1971), p. 146.

verse?" In answer to this question, interpretation (*ijtihād*) was needed, as the Qur'an and ḥadīth themselves leave the fundamental problem unanswered. A novel interpretation was forwarded for the first time by Egyptian jurists, in 1946, who specified close relatives to be orphaned grandchildren.[120] This specification rests on the premise that the children of a predeceased son or daughter are the surviving relatives to whom the praepositus is responsible. In conjunction with the disintegration of the extended family and the emergence of the nuclear family in Muslim countries, the responsibilities of the deceased towards his lineal descendants are not accomplished by merely allotting the inheritance to the first degree of his issue, because different lines of the deceased's issue, coming from his several sons, which automatically form separate families, should also be included in his responsibilities.[121] Accordingly, in the words of Coulson,

> ...the responsibilities of the deceased are not properly fulfilled if the succession rights of one family line are to be totally extinguished, because of the chance occurrence of the predecease of its immediate link with the ancestor, and are to pass to another family line where the immediate link with the ancestor happens still to survive.[122]

The reassessment which allotted a share to the orphaned grandchildren through the principle of testamentary disposition is also backed by the Islamic ideal which limits the principle of inheritance to those relatives closest in degree to oneself. In other words, the only way to reform the position of the orphaned grandchildren is through the principle of

---

[120]'Abd al-Majīd 'Abd al-Ḥamīd al-Dhībānī, *Aḥkām al-Mawārīth*, pp. 310-11; Coulson, *Succession*, pp. 144-45.

[121]Coulson, *Succession*, pp. 143-44.

[122]Coulson, *Succession*, p. 144.

testamentary disposition.[123] This consequently limits their share to a maximum of one-third of the net estate, as the bequest may not in principle consume more than one-third of latter.[124]

By providing a suitable provision in succession law for orphaned grandchildren through the institution of obligatory bequest, the Egyptian reform represented an emergent twentieth century phenomenon in the Muslim world.[125] Understandably, the reform invited much attention from other Muslim countries. In spite of some differences in detail, various Middle Eastern countries agreed, in principle, with the position taken by the Egyptian jurists, i.e., that orphaned grandchildren be allowed to claim a share in their grandparent's estate as representatives of their deceased parent. Syria[126] and Morocco[127] have passed legislation which entitles the children of a predeceased son or agnatic grandson to inherit but not the children of the deceased's daughter, either the share that their father would have received had he been alive or one-third of the net estate,

---

[123]A brief discussion of the reform can be found in J. N. D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," *International and Comparative Law Quarterly* 14 (1965): 349-65.

[124]See the report from Sa'ad bin Abī Waqqāṣ in regard to the ḥadith of the one-third bequest, wherein the Prophet has been reported to say: "Fa awṣā al-nās bil-thuluth fa-jāza dhālik lahum", in Al-Bukhārī, *Ṣaḥīḥ*, vol. 1, p. 383.

[125]J. N. Anderson, "Recent Reforms in the Islamic Law of Inheritance," pp. 354-65.

[126]The Syrian Law of Personal Status of 1953, articles 257-288 as amended by Law 34 of 1975. See Tahir Mahmood, *Personal Law in Islamic Countries* (New Delhi: Academy of Law and Religion, 1987), pp. 148-50.

[127]The Moroccon Law of Personal Status of 1957 article 266-269. Tahir Mahmood, *Personal Law*, pp. 127-28.

whichever is less. Tunisia, which also followed the Egyptian lead, made a provision allowing for the children of a predeceased son or daughter to receive the parent's share were he or she to survive the praepositus –to a maximum of one-third of the net estate.[128]

Pakistan, however, has taken a different route with respect to the issue from those taken by the Middle Eastern countries cited above. Although Pakistan departs from the opinion regarding the question of orphaned grandchildren, it has adopted a systematic and comprehensive scheme of representational succession by lineal descendants.[129] Through section 4 of the Family Laws Ordinance of 1961, the country has granted the male or female grandchild the right to receive an equivalent share of the predeceased parent's inheritance had he or she been alive at the time of opening the succession.[130]

In Indonesia, the Pakistani initiatives seem to have had some resonance. In conjunction with the discussion on the obligatory bequest, which has preoccupied Muslim jurists in many Muslim countries since the second half of the twentieth century, Indonesia has taken a proactive role with respect to these reforms by instituting provisions which stand in distinction from those of any other Muslim country. Although Indonesia would appear to have been influenced by Pakistan in allotting the share of the orphaned grandchild through representation (well-known to Indonesian legal experts by the Dutch

---

[128]The Tunisian Law of Personal Status of 1956, article 192. Tahir Mahmood, *Personal Law*, p. 163; see also Herbert J. Liebesny, *The Law of the Near & Middle East: Readings, Cases, & Materials* (Albany: State University of New York Press, 1975), pp. 187-88.

[129]Herbert J. Liebesny, *The Law of the Near & Middle East*, pp. 199-206.

[130]Tahir Mahmood, *Personal Law*, p. 245; Coulson, *Succession*, p. 145; Anderson, "Recent Reforms in the Islamic Law," pp. 356-58.

term *plaatsvervulling*),[131] the decision taken with respect to near relatives who receive a share through obligatory bequests can be viewed as totally Indonesian in character.

The reforms to the law of succession in regard to the institution of obligatory bequest can be clearly seen in article 209 of the Compilation of Islamic Law. By contrast with most Muslim jurists, who identify the orphaned grandchild as the legatee of obligatory bequest, Indonesian Muslim jurists, through the Compilation, have surprisingly used the obligatory bequest to permit the adopted child and adopting parent to claim a share in the inheritance. Article 209 of the Compilation stipulates that both adopted child and adopting parent are the legatees of obligatory bequest to a maximum limit of one-third of the net estate.[132] As both adopted child and adopting parent do not ordinarily share familial bonds with the deceased, these revolutionary reforms unavoidably upset the established principle of succession in Islam, i.e., that blood ties are what validate the passing of the estate from the praepositus to the legatees.[133] Upon what juristic basis therefore can this reform be rested? Clearly, the answer to this question depends to a large extent on the institution of adoption in adat law.

---

[131]Although the practical matter of the representation regulated in the Compilation is different from the Pakistani representation in that the article 185 point 2 of the Compilation stipulates that the orphaned grandchild who represents his parent cannot receive the amount of the estate more than the amount received by the other legatees who are in the same horizontal line with his parent, the basic principle of the representation in both countries is much the same.

[132]Departemen Agama RI, *Kompilasi Hukum Islam*, p. 96.

[133]See for example Aḥmad Muḥyi al-Dīn al-'Ajūz, *Al-Mīrāth al-'Ādil fī al-Islām: Bayna al-Mawārīth al-Qadīmah wal-Ḥadīthah wa Muqāranatuhā ma'a al-Sharā'i' al-Ukhrā* (Beirut: Mu'assasat al-Ma'ārif, 1406/1986), pp. 62-63; Moulavi M. H. Babu Sahib, *Al Fara'id: The Law of Inheritance in Islam* (Singapore: Al-Islam Publishers and Book Sellers, 1979), pp. 22-24.

In line with adat law, it is common practice for an Indonesian family to adopt a son or daughter, to be included in their family circle.[134] Backed by localized and distinct systems of adat law, adoption has long been a common legal act with shared characteristics among different native groups. In patriarchal societies like that of the Batak, in North Sumatra, or in the matriarchal society of Minangkabau, in West Sumatra, the institution of adoption was often connected to the vast "political" domination of father or mother in the family. Among the Batak, for example, indigenous adat allows a family to adopt a son, but not a daughter, in keeping with the patrilineal order of the society. After obtaining permission from the son's birth parents, the adopted son is then genealogically incorporated in his stepfather's family and granted all the legal rights of a real son. In a society wherein both parents have equal rights, like the Javanese, adoption is allowed not only with a son but also with a daughter. With moral considerations as the mainstay of adoption,[135] such as helping an orphaned child, a family can adopt a child with the legal consequence that he or she gains the same rights before the law as a biological child. While the application of adoption differs in detail from society to society in Indonesia, certain common characteristics backed by adat law systems do prevail: e.

---

[134]The name applied to an adopted child varies from place to place in Indonesia: *anak kutut* or *anak pulung* in Singaraja; *anak pupon* in Cilacap, Java; *anak akon* in Central Lombok; *napuluku* or *wungga* in Jaya Pura, Irian Jaya; *ancuk geuteung* in Aceh; and *anak angkek* in Minangkabau, Sumatra. For a brief explanation on the practice of adoption in many adat law circles see B. Bastian Tafal, *Pengangkatan Anak Menurut Hukum Adat* (Jakarta: C.V. Rajawali, 1983), pp. 37-143; Bushar Muhammad, *Pokok-Pokok Hukum Adat*, pp. 33-38.

[135]See as an example the result of observation concerning the practice of adoption in Wonogiri, Central Java, in Team Pelaksana Penelitian Fakultas Hukum Universitas Sebelas Maret, *Laporan Penelitian Studi Tentang Pengangkatan Anak di Daerah*

g., (1) that the adopted child is automatically included in the adopting parents' family circle; (2) that the legal relationship between the adopted child and his birth parents is broken; and (3) that the legal position of the adopted child in inheritance is the same as that of a biological child.[136]

It was on the basis of extant legal practices that Indonesian Muslim jurists felt compelled to bridge the gap between Islamic and adat law. Since Islamic law emphatically rejects the institution of adoption,[137] Islamic legal experts in Indonesia have tried to accommodate the two legal value systems by extracting from the institution of Islamic obligatory bequest a means of facilitating the moral imperative behind adoption in adat law. This effort is necessary in view of the fact that in all societies which practice adoption, the adopting parents are always concerned for the welfare of the adopted child in the event of their death. Hence, it is common practice for the adopted child to receive a portion of the estate of the adopting parent through a gift (*hibah*) which would assure them a foothold in life.[138] This was the idea behind the drive to reconstruct the

---

Kecamatan Jatisrono Kabupaten Wonigiri (Surakarta: Fakultas Hukum Universitas Sebelas Maret, 1985), pp. 23-27, 48.

[136]M. Yahya Harahap, *Kedudukan Janda, Duda dan Anak Angkat dalam Hukum Adat* (Bandung: P.T. Citra Aditya Bakti, 1993), pp. 100-15; Hilman Hadikusuma, *Hukum Waris Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama Hindu, Islam* (Bandung: P.T. Citra Aditya Bakti, 1991), pp. 117-23; Soerjono Soekanto, "Hak Mewarisi Bagi Janda dan Anak/Anak Angkat," *Hukum Nasional* year 7, no. 23 (1971): 73-96; Sri Soedewi Masjchun Sofwan, "Hak Mewaris Bagi Janda dan Anak/Anak Angkat," *Hukum Nasional* year 7, no. 24 (1974): 72-83.

[137]Adoption was in fact also a common practice in pre-Islamic Arabian custom, but then it was abolished with the coming of Islam since the revelation of the Qur'anic verses 4 and 5 of sūrah 33 and also verse 37 of the same sūrah. See Aḥmad Muḥyi al-Dīn al-'Ajūz, *Al-Mīrāth al-'Ādil fī al-Islām*, p. 54.

[138]See R. Supomo, *Hukum Adat Jawa Barat* (Jakarta: Jembatan, 1967), p. 31.

Compilation of Islamic Law in a manner which interprets obligatory bequest as allowing an adopted child to share legally in the estate of a deceased, adopting parent. Furthermore, as the Compilation also stipulates that the adopting parent has a legal right to be the legatee of the obligatory bequest, it therefore views the relationship between adopting parent and adopted child as being so close that the word "close relatives" (*al-aqrabīn*) in the verse of bequest can be translated to mean both adoptive parent and child. This tacit approval of the practice of adoption was reinforced by the Compilation, which recognized a new, mutual legal relationship in matters of inheritance between the adoptive child and parent through the institution of obligatory bequest;[139] a reform which is unique to Indonesia in the entire Muslim world.

The accommodation between the two different legal value systems of Islam and adat in matters of adoption is ample proof of the efforts exerted by exponents of both Islamic law and adat to avert an inevitable conflict. Although the Compilation does not equate the adopted child's legal position with that of the biological child, as does adat law, the revitalization of the close relationship between adopted child and adopting parent through the obligatory bequest represents an attempt to bridge the gap. Such a concession is, arguably, in keeping with the basic Islamic injunction concerning adoption since the obligatory bequest stipulated by the Compilation does not:[140] (1) equate the legal status of the adopted child with that of the biological child; (2) grant the adoptive child the same

---

[139]In fact, based on adat law, it was a common practice that the adopting parents could inherit the estate of their adopted child. See Team Pelaksana Penelitian Fakultas Hukum Universitas Sebelas Maret, *Laporan Penelitian Studi Tentang Pengangkatan Anak*, p. 57.

[140]Yahya Harahap, *Kedudukan Janda, Duda dan Anak Angkat*, pp. 98-99.

inheritance rights to the estate enjoyed by the *ahl al-farā'iḍ*; or (3) grant the adopted child the right to share more than one-third of the net estate of the deceased.

The above explanation demonstrates that the two systems of law can have, and indeed have long had, a harmonious encounter in Indonesian society. Although the changing political constellations of the country have had an unavoidable influence on the position of the two court systems, with the banishment of the adat courts one of the results of these changes, the family law-making process is a testament to the endurance of substantial legal precepts from both systems in the society. To most Indonesians, legal need in family matters can be satisfied by both Islamic and adat laws, and legal values derived from the two systems of law are, as such, maintained in everyday life. In view of this fact, accommodation is an imperative in the continual process towards the preservation of extant legal values and the avoidance of possible conflict between the two. Thus, accommodation can be characterized as a necessary step towards the bridging of the gap between the systems of law.

CONCLUSION

This study has shown that in the Indonesian setting, both Islamic and adat laws were able to coexist. This equilibrium was made possible by the fact that, both in theory and practice, the two sets of laws were complementary. Islamic law does, after all, acknowledge the efficacy of local custom in the legislative process, while adat law conceives of religious law as the culmination and perfection of the indigenous legal system. In practice, the role of local customary law was never marginal to the interplay between Islamic legal precepts and social realities.

The history of Indonesian legal practice underscores the fact that the two systems are inseparable. In the pre-independence era, although the colonial power exerted a considerable effort in trying to fulfill the imperative *divide et impera* and to excise the two legal traditions, the Indonesian population, either in syncretic or purist fashion, harmonized the two systems of laws by compromising when divergent judgments were rendered and by deriving new solutions based upon elements in both. This state of coexistence survived into the independence era and endured the changes to legal policy in the country as the colonial legal apparatus was converted to a national one. In this period, the strong foundations upon which this harmonious exchange was based endured as both legal systems resisted the changing political climate, a climate which featured the banishment of the adat courts as its final result. The three legal issues of conditional repudiation, common property in marriage and obligatory bequests provide excellent examples of the two substantive legal systems working hand in hand to build a new legal entity. This is most notable in the field of family law, where the two systems demonstrate

shared legal ideas and mutual influences as the logical consequence of a symbiotic legal encounter.

From the outset, the movement to facilitate peaceful dialogue between the two legal systems was sponsored by exponents of Islamic law who offered up new interpretations which brought its provisions closer to the local customary laws. The need for a reinterpretation of Islamic law and its philosophical underpinnings in consonance with the new realities compelled scholars of Islamic law to accommodate indigenous law within the religious law. It is in this light that one understands how certain injunctions in the current Compilation of Islamic law in Indonesia can so resemble the legal notions enshrined in adat.

It has also been shown that in the Indonesian case, attempts to pit the two legal systems against one another, which were in most cases motivated by political considerations, have not interrupted efforts to harmonize the two legal traditions. Hence, the conflict approach, which tends to negate the possibility of assimilation between the two, finds no support in the society. Such an approach basically arises out of a misunderstanding of the doctrinal foundations of the two laws. A study of this encounter between the substantive legal features of both legal traditions reveals the poverty of this antagonistic depiction. An appraisal of the substantive doctrinal features of both systems inform us that each is receptive to the influences of the other legal tradition.

The conclusion that the encounter between Islamic and adat law should be viewed as one of dialogue rather than confrontation entails a re-evaluation of what many Western scholars have thus far considered to be the defining feature of the relationship between

Islamic law and customary law. The continual rapprochement between Islamic and customary law, demonstrated in the case of Indonesia, suggests that the prevailing belief that the two legal systems are separate and irreconcilable is groundless. Conflict has indeed occurred between the two laws in some instances. For the most part, however, such legal disputes were resolved, except where political interference interrupted the legal resolution. Thus, as an approach, the application of conflict theory to the encounter between Islamic law and customary law is arbitrary, for only by comprehending the doctrinal underpinnings of both legal systems is it possible to reconstruct a more accurate picture of the encounter.

BIBLIOGRAPHY

1. Arabic Sources

Abū Sinnah, Aḥmad Fahmī. *Al-'Urf wal-'Ādah fī Ra'y al-Fuqahā'*. n.p.: Maṭba'at al-Azhār, 1947.

Abū 'Ubayd. *Al-Amwāl*. Cairo: Al-Maktabah al-Tijārīyah al-Kubrā, 1353/1934.

Abū Yūsuf. *Kitāb al-Kharāj*. Cairo: Maṭba'at al-Salafīyah, 1352/1933.

'Ajūz, Aḥmad Muḥyi al-Dīn al-. *Al-Mīrāth al-'Ādil fī al-Islām: Bayna al-Mawārīth al-Qadīmah wal-Ḥadīthah wa Muqāranatuhā ma'a al-Sharā'i' al-Ukhrā*. Beirut: Mu'assasat al-Ma'ārif, 1406/1986.

'Asqalānī, Ibn Ḥajar al-. *Fatḥ al-Bārī bi Sharḥ Ṣaḥīḥ al-Bukhārī*. Vol. 5. Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1378/1959.

Baghdādī, al-Khaṭīb al-, *Al-Faqīh wal-Mutafaqqih*. Vol. 2. Riyad: Dār ibn al-Jawzī, 1996.

Bukhārī, Muḥammad ibn Ismā'īl al-. *Jāmi' al-Ṣaḥīḥ*. 2 vols. Delhi: Aṣaḥḥ al-Maṭābi', 1938.

Dārimī, 'Abd Allāh ibn 'Abd al-Raḥmān. *Sunan al-Dārimī*. Vol. 2. Beirut: Dār al-Kitāb al-'Arabī, 1987.

Dhībānī, 'Abd al-Majīd 'Abd al-Ḥamīd al-. *Aḥkām al-Mawārīth wal-Tarikāt wal-Waṣīyah fī al-Sharī'ah al-Islāmīyah*. n.p.: Al-Dār al-Jamāhīrīyah lil-Nashr wal-Tawzī' wal-I'lām, 1993.

Dihlawī, Walī Allāh al-. *Ḥujjat Allāh al-Bālighah*. Vol. 1. Cairo: Dār al-Turāth, 1185 A.H.

Ibn Anas, Mālik. *Al-Muwaṭṭa'*. Vol. 2 . Cairo: Dār Iḥyā' al-Kutub al-'Arabīyah, 1951.

Ibn Farḥūn. *Kitāb Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍīyah wa Manāhij al-Aḥkām*. Vol. 2. Beirut: Dār al-Kutub al-'Ilmīyah, n. d.

Ibn Ḥazm, 'Alī ibn Aḥmad. *Al-Muḥallā*. Vol. 9. Cairo: Idārat al-Ṭibā'ah al-Munīrīyah, 1347-1352 AH.

Ibn al-Humām. *Sharḥ Fatḥ al-Qadīr*. Vol. 5. Cairo: Maṭba'at Muṣṭafā Muḥammad, 1356/1937.

Ibn Nujaym. *Al-Ashbāh wal-Naẓā'ir.* Calcutta: Maṭba'at al-Ta'līmīyah, 1260 AH.

Ibn Rushd, Abū al-Walīd Muḥammad ibn Aḥmad ibn Muḥammad Ḥāfiẓ. *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid.* Vol. 2. Cairo: Al-Maṭba'ah al-Jamālīyah, 1329/1911.

Ibn Taymīyah, Aḥmad ibn 'Abd al-Ḥalīm. *Al-Fatāwā al-Kubrā.* Vol. 3. Beirut: Dār al-Ma'rifah lil-Ṭibā'ah wal-Nashr, n. d.

--------. *Majmū' Fatāwā al-Shaykh al-Islām Aḥmad Ibn Taymīyah.* Vol. 30. Rabat: Maktabat al-Ma'arīf, 1981.

Ismā'īl, 'Abd al-Ḥamīd Abū al-Makārim. *Al-Adillah al-Mukhtalaf fihā Atharuhā fī al-fiqh al-Islāmī.* Cairo: Dār al-Muslim, n.d.

Jamal, Ibrāhīm Muḥammad Ibrāhīm al-. *Fiqh al-Muslim 'alā al-Madhāhib al-'Arba'ah.* Vol. 2. Beirut: Dār al-Jīl, 1412/1992.

Maḥmaṣānī, Ṣubḥī. *Falsafat al-Tashrī' fī al-Islām.* Beirut: Dār al-Kashshāf lil-Nashr wal-Ṭibā'ah wal-Tawzī', 1371/1952.

Maqdisī, Muwaffaq al-Dīn Abū Muḥammad 'Abd Allāh ibn Aḥmad ibn Muḥammad ibn Qudāmah al-. *Al-Kharāj.* Baghdad: Dār al-Rashīd, 1981.

Māwardī, Abū al-Ḥasan 'Alī ibn Muḥammad ibn Ḥabīb al-. *Al-Aḥkām al-Sulṭānīyah.* Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d.

--------. *Adab al-Qāḍī.* Vol. 1. Baghdad: Maṭba'at al-Irshād, 1971.

Qarāfī, Aḥmad ibn Idrīs al-. *Al-Furūq.* Vol. 1. Cairo: Dār Iḥyā' al-Kutub al-'Arabī, 1344 AH.

--------. *Al-Iḥkām fī Tamyīz al-Fatāwā 'an Aḥkām wa Tasarrufāt al-Qāḍī wal-Imām.* Cairo: 'Izzat al-Aṭṭār, 1375/1938.

--------. *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtiṣār al-Maḥṣūl fī al-Uṣūl.* Cairo and Beirut: Maktabat Wahbah, 1393/1973.

--------. *Al-Mughnī.* Vol. 6. Cairo: Dār al-Manār, 1367/1947.

Sābiq, al-Sayyid. *Fiqh al-Sunnah.* Vol. 8. Cairo: Dār al-Kitāb al-'Arabī, 1373-84/1955-64.

Ṣābūnī, 'Abd al-Raḥmān al-, Khalīfah Bābakr and Maḥmūd Ṭanṭāwī. *Al-Madkhal al-Fiqhī wa Tārīkh al-Tashrī' al-Islāmī.* Cairo: Dār al-Muslim, n.d.

Sarakhsī, Muḥammad ibn Aḥmad al-. *Al-Mabsūṭ.* 30 vols. Cairo: Maṭba'at al-Sa'ādah, 1324-1331/1906-1912.

Shāfi'ī, Muḥammad ibn Idrīs al-. *Al-Umm.* Vol. 7. Cairo: Maktabat al-Kulīyāt al-Azharīyah, 1381/1961.

Shalabī, Muḥammad Muṣṭafā. *Al-Madkhal fī al-Ta'rīf bil-Fiqh al-Islāmī wa Qawā'id al-Milkiyah wal-'Uqūd fih.* Cairo: Maṭba'at Dār al-Ta'līf, 1380/1960.

--------. *Uṣul al-Fiqh al-Islāmī.* Vol. 1. Beirut: Dār al-Nahḍah al-'Arabīyah, 1406/1986.

Shaltūt, Maḥmūd. *Al-Fatāwā.* Cairo and Beirut: Dār al-Shurūq, 1408/1988.

Shāṭibī, Abū Isḥāq Ibrāhīm ibn Mūsā ibn Muḥammad al-Lakhmī al-. *Al-Muwāfaqāt fī Uṣūl al-Aḥkām.* Vol. 2. Cairo: Maktabat wa Maṭba'at Muḥammad 'Alī Ṣabīḥ, 1969-70.

Shawkānī, Muḥammad ibn 'Alī al-. *Nayl al-Awṭār.* 9 vols. Beirut: Dār al-Jīl, 1973.

Shirbīnī, Muḥammad. *Mughnī al-Muḥtāj ilā Ma'rifat Ma'ānī Alfāẓ al-Minhāj.* Vol. 2. Beirut: Dār al-Fikr, n.d.

Sijistānī, Abū Dāwūd Sulaymān ibn al-Ash'ath al-. *Ṣaḥīḥ Sunan al-Muṣṭafā.* Vol. 2. Cairo: Al-Tāziyah li-Ṣāḥibihā 'Abd al-Waḥīd Muḥammad al-Tāzī, n. d.

Suyūṭī, Jalāl al-Dīn 'Abd al-Raḥmān al-. *Al-Ashbāh wal-Naẓā'ir.* Cairo: 'Īsā al-Bābī al-Ḥalabī wa Shurakāh, n. d.

Ṭabarī, Abū Ja'far Muḥammad ibn Jarīr al-. *Kitāb Jāmi' al-Bayān.* Vol. 4. Cairo: Al-Maṭba'ah al-Kubrā al-Amīrīyah, 1323/1905.

Zayd, Muṣṭafā. *Al-Maṣlaḥah fī al-Tashrī' al-Islāmī wa Najm al-Dīn al-Ṭūfī.* Cairo: Dār al-Fikr al-'Arabī, 1374/1954.

2. English Sources

Abdullah, Taufik. "Adat and Islam: An Examination of Conflict in Minangkabau." *Indonesia* 2 (October 1966): 1-24.

--------. "Modernization in the Minangkabau World: West Sumatra in the Early Decades of the Twentieth Century." In Claire Holt, ed. *Culture and Politics in Indonesia* .Ithaca an London: Cornell University Press, 1972.

Agbede, Oluwele. "Conflict Between Customary Law and Non-Customary Systems of Law: Preliminary Observations." *Journal of Islamic and Comparative Law* 4 (1970): 48-59.

Alfian. "Islamic Modernism in Indonesian Politics: The Muhammadijah Movement During the Dutch Colonial Period." Ph.D. dissertation: University of Madison, 1969.

Alisjahbana, S. Takdir. *Indonesia: Social and Cultural Revolution.* Kuala Lumpur: Oxford University Press, 1966.

Allah, Umar Faruq Abd. "Malik's Concept of *'Amal* on the Light of Maliki Legal Theory." Ph. D. dissertation: University of Chicago, 1978.

Anderson, B. R. O'G. "Japan: The Light of Asia." In Josef Silverstein, ed. *Southeast Asia in World War II: Four Essays.* New Haven: Yale University, Southeast Asia Studies, 1966.

Anderson, J. N. D. "Recent Reforms in the Islamic Law of Inheritance." *International and Comparative Law Quarterly* 14 (1965): 349-365.

Angelino, A. D. A. de Kat. *Colonial Policy.* Tr. G. J. Renier. The Hague: M. Nijhoff, 1931.

Awa, Mohammed S. El-. *Punishment in Islamic Law.* Indianapolis: American Trust Publications, 1982.

--------. "The Place of Custom (*'Urf*) in Islamic Legal Theory." *Islamic Quarterly* 17 (1973): 177-182.

Aziz, M. A. *Japan's Colonialism and Indonesia.* The Hague: Martinus Nijhoff, 1955.

Ball, John. *Indonesian Law commentary and Teaching Materials.* Sydney: Faculty of Law, University of Sydney, 1985.

--------. *The Struggle for National Law in Indonesia.* Sydney: Faculty of Law, University of Sydney, 1986.

Benda, Harry J. *The Crescent and the Rising Sun.* The Hague and Bandung: W. Van Hoeve Ltd., 1958.

--------. "Christian Snouck Hurgronje and the Foundation of Dutch Islamic Policy in Indonesia." *The Journal of Modern History* 30 (1958): 338-347.

--------. "The Pattern of Administrative Reforms in the Closing Years of Dutch Rule in Indonesia." *Journal of Asian Studies* 25/4 (1966): 589-605.

Benda, Harry J., James K. Irikura and Koichi Kishi, eds. *Japanese Military Administration in Indonesia: Selected Documents*. New Haven: Yale University, Southeast Asia Studies, 1965.

Boland, B. J. *The Struggle of Islam in Modern Indonesia*. The Hague: Nijhoff, 1982.

Bousquet, G. H. *A French View of the Netherlands Indies*. Tr. Philip E. Lilienthal. London and New York: Oxford University Press, 1940.

Bruinessen, Martin van. "Shari'a Court, Tarekat and Pesantren: Religious Institution in the Banten Sultanate." *Archipel* 50 (1995): 165-199.

Christelow, Allan. *Muslim Law Courts and the French Colonial State in Algeria*. New Jersey: Princeton University Press, 1985.

Coulson, Noel James. "Muslim Custom and Case-Law." *The World of Islam* 6/1-2 (1959): 13-24.

--------. *A History of Islamic Law*. Edinburgh: Edinburgh University Press, 1971.

--------. *Succession in the Muslim Family*. Cambridge: The University Press, 1971.

Cowan, J. M., ed. *Arabic English Dictionary: The Hans Wehr Dictionary of Modern Written Arabic*. 3rd ed. New York: Spoken Language Services, Inc., 1976.

Damian, Eddy, and Robert N. Hornick. "Indonesia's Formal Legal System: An Introduction." *The American Journal of Comparative Law* 20 (1972): 492-530.

Department of Religious Affairs Republic of Indonesia. *The Indonesian Marriage Law*. Jakarta: Marriage Counselling Bureau, 1988.

Djojodigoeno, M. M. *Adat Law in Indonesia*. Jakarta: Djambatan, 1952.

Dutton, Yasin. "Sunna, Ḥadīth, and Medinan *'Amal*." *Journal of Islamic Studies* 4/1 (1993): 1-31.

Faruqi, Muhammad Y. "Consideration of *'Urf* in the Judgments of the *Khulafā' al-Rāshidūn* and the Early *Fuqahā'*." *The American Journal of Islamic Social Sciences* 9/4 (1992): 482-498.

Fitzgerald, S. G. Vesey. "Nature and Sources of the Sharī'a." In Majid Khadduri and Herbert J. Liebesny, eds. *Law in the Middle East*. Vol.1.*Origin and Development of Islamic Law*. Washington, D. C.: The Middle East Institute, 1955.

Franz and Keebet von Benda-Beckmann. "Adat and Religion in Minangkabau and Ambon." In Henri J. M. Claessen and David S. Moyer, eds. *Time Past, Time Present and Time Future*. Dodrecht, Holland: Foris, 1988.

Fyzee, Asaf A. A. *Outlines of Muhammadan Law*. London: Oxford University Press, 1949.

Gautama, Soedargo. "Law Reform in Indonesia." *Rabels Zeitschrift* 26 (1961): 535-553.

--------. *Essays in Indonesian Law*. Bandung: Citra Aditya Bakti, 1991.

Geertz, Clifford. *The Religion of Java*. Glencoe, Ill: Free press, 1960.

Gibb, H. A. R. and J. H. Kramers, eds. *Shorter Encyclopaedia of Islam*. Leiden: E. J. Brill, 1961. S.v. "Adat Law."

Gibb, H. A. R., (et al.). *The Encyclopaedia of Islam*. New Edition. Vol. 1. Leiden: E. J. Brill, 1960. S. v. "'Āda," by Jan Prins.

Gilmartin, David. "Customary law and *Sharī'at* in British Punjab." In Katherine P. Ewing, ed. *Sharī'at and Ambiguity in South Asian Islam*. Berkeley: University of California Press, 1988.

Gouwgioksiong. "The Marriage Laws of Indonesia with Special Reference to Mixed Marriages." *Rabels Zeitschrift* 28 (1964): 711-731.

Graves, Elizabeth E. *The Minangkabau Response to Dutch Colonial Rule in the Nineteenth Century*. Ithaca, New York: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1981.

Haar, B. ter. *Adat Law in Indonesia*. Tr. E. Adamson Hoebel and A. Arthur Schiller. New York: Institute of Pacific Relations, 1948.

--------. "Western Influence on the Law for the Native Population." In B. J. O. Schrieke, ed. *The Effect of Western Influence on Native Civilizations in the Malay Archipelago*. Batavia, Java: G. Kolff & Co., 1929.

Ḥamidullah, Muḥammad. *Muslim Conduct of State*. Lahore: Sh. Muhammad Ashraf, 1945.

Holleman, J. F. *Van Vollenhoven on Indonesian Adat Law*. The Hague: Martinus Nijhoff, 1981.

Hooker, M. B. *Adat Law in Modern Indonesia*. Kuala Lumpur: Oxford University Press, 1978.

Hourani, George F. *Islamic Rationalism: The Ethics of 'Abd al-Jabbar*. Oxford: Clarendon Press, 1971.

Ibrahim, Ahmad bin Mohd. "The Administration of Muslim Law in Indonesia," *Islamic Culture* 43 (1969): 119-124.

Ishak, Madya Othman. "*'Urf* and Customs As Being Practiced Among the Malay Community." *Arabica* 33 (1986): 352-368.

Islahi, abdul Azim. *Economic Concepts of Ibn Taimīyah*. Leicester, UK.: The Islamic Foundation, 1988.

Johns, A. "Islam in Southeast Asia: Problems of Perspective." In A. Ibrahim, (et al.). *Readings on Islam in Southeast Asia*. Singapore: Institute for Southeast Asian Studies, 1985.

Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. Cambridge: Islamic Texts Society, 1991.

Klerck, E. S. de. *History of the Nederlands East Indies*. 2 vols. Amsterdam: B. M. Israel NV, 1975.

Kollewijn, R. D. "Conflicts of Western and Non-Western Law." *The International Law Quarterly* 4 (July 1951): 307-325.

Kroef, J. M. van der. "Prince Diponegore: Progenitor of Indonesian Nationalism." *Far Eastern Quarterly* 8 (1949): 430-433.

--------. "Indonesia and the Origins of Dutch Colonial Sovereignty." *The Far Eastern Quarterly* 10 (1950): 151-169.

Layish, Aharon, and Avshalom Shmueli. "Custom and *Sharī'a* in the Bedouin Family According to Legal Documents from the Judaen Desert." *BSOAS* 42 (1979): 29-45.

Lev, Daniel S. "The Supreme Court and Adat Inheritance Law in Indonesia." *The American Journal of Comparative Law* 11 (1962): 205-224.

--------. "The Lady and the Banyan Tree: Civil Law Change in Indonesia." *American Journal of Comparative Law* 14 (1965): 282-307.

--------. *Islamic Courts in Indonesia*. Berkeley: University of California Press, 1972.

--------. "Judicial Unification in Post Colonial Indonesia." *Indonesia* 16 (October 1973): 1-37.

--------. "Colonial Law and the Genesis of the Indonesian State." *Indonesia* 40 (October 1985): 57-74.

Levy, Reuben. *The Social Structure of Islam*. Cambridge: The University Press, 1957.

Lewis, B., Ch. Pellat and J. Schacht, eds. *The Encyclopaedia of Islam*. Vol. 2. Leiden: E. J. Brill, 1965. S.v. "Diwan," by A. S. Bazmee Ansari; "Barid," by Burton-Page.

Liebesny, Herbert J. "Stability and Change in Islamic Law." *The Middle East Journal* 21 (1967): 16-34.

--------. *The Law of the Near & Middle East: Readings, Cases, & Materials*. Albany: State University of New York Press, 1975.

Lubis, Nur Ahmad Fadhil. "Institutionalization and the Unification of Islamic Courts Under the New Order." *Studia Islamika* 2/1 (1995): 22-26.

Macdonald, Duncan B. *Development of Muslim Theology, Jurisprudence and Constitutional Theory*. London: Darf Publishers Limited, 1985.

Mahmood, Tahir. "Custom As A Source of Law in Islam." *Journal of the Indian Law Institute* 7 (1965): 102-106.

--------. *Personal Law in Islamic Countries*. New Delhi: Academy of Law and religion, 1987.

Marghīnānī. *The Hedaya*. Tr. Charles Hamilton. Lahore: Premier Book House, 1963.

Mat, Isma'il bin. "Adat and Islam in Malaysia: A Study in Legal Conflict and Resolution." Ph.D. Dissertation: Temple University, 1985.

Morony, Michael G. *Iraq After the Muslim Conquest*. Princeton: Princeton University Press, 1984.

Nadvi, Muzaffar-ud-Din. *Muslim Thought and Its Source*. Lahore: SH. Muhammad Ashraf, 1992.

Noer, Deliar. *The Modernist Muslim Movement in Indonesia 1900-1942*. Kuala Lumpur: Oxford University Press, 1973.

--------. *The Administration of Islam in Indonesia*. Ithaca, N. Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978.

Palmier, Leslie. Review of *Some Aspects of Indonesian Politics under the Japanese Occupation: 1944-1945*. By Benedict R. O'G Anderson. In *Journal of Southeast Asian History* 5 (1964): 215-218.

Pompe, Bas. "The Effects of the Japanese Administration on the Judiciary in Indonesia." *BITLV* 152-IV (1996): 575-585.

Prins, Jan. "Adatlaw and Muslim Religious Law in Modern Indonesia." *Die Welt Des Islams* 1 (1951): 283-300.

Raffles. *History of Java*. 2nd.ed. London: Murray, 1830.

Rahim, Abdul. *The Principles of Muhammadan Jurisprudence*. London: Luzac Co., 1911.

Rahman, M. Habibur. "The Role of Pre-Islamic Customs in the Islamic Law of Succession." *Islamic and Comparative Law Quarterly* 7 (1988): 48-64.

Reid, Anthony. *The Indonesian National Revolution 1945-1950*. Connecticut: Greenwood Press, 1974.

Renteln, Alison Dundes, and Alan Dundes, eds. *Folk Law: Essays in the Theory and Practice of "Lex Non scripta."* Vol. 1. Wisconsin: The University of Wisconsin Press, 1995.

Ricklefs, M. *A History of Modern Indonesia*. Bloomington: University of Indiana Press, 1981.

Rizvi, S. A. A. "Social Ethics of Muslim in Shurafā' in India: Customary Law in the Fatāwa of Shāh 'Abd al-'Aziz Dihlawī." *Islamic and Comparative Law Quarterly* 3/1 (1983): 1-13.

Sahib, Moulavi M. H. Babu. *Al-Fara'id: The Law of Inheritance in Islam.* Singapore: Al-Islam Publishers and Book Sellers, 1979.

Schacht, Joseph. *An Introduction to Islamic Law.* Oxford: The Clarendon Press, 1964.

--------. *The Origins of Muhammadan Jurisprudence.* Oxford: The Clarendon Press, 1975.

--------. "Pre-Islamic Background and Early Development of Jurisprudence." In Majid Khadduri and Herbert J. Liebesny. *Law in the Middle East.* Vol. 1. *Origin and Development of Islamic Law.* Washington, D. C.: The Middle East Institute, 1955.

--------. "Foreign Elements in Ancient Islamic Law." *Journal of Comparative Legislation and International Law* 32 (1950): 9-17.

Schiller, A. Arthur. "Native Customary Law in the Netherlands East Indies." *Pacific Affairs* 9 (1936): 254-263.

--------. "Conflict of Laws in Indonesia." *The Far Eastern Quarterly* 2 (1942-43): 31-47.

Seligman, Edwin R. A., and Alvin Johnson, eds. *Encyclopaedia of the Social Sciences.* Vol. 7. New York: The Macmillan Company, 1948. S. v. "Islamic Law," by Joseph Schacht.

Steenbrink, Karel. *Dutch Colonialism and Indonesian Islam: Contacts and Conflicts 1596-1950.* Tr. Jan Steenbrink and Henry Jansen. The Netherlands: Editions Rodopi B.V., 1993.

Stewart, Frank H. "Tribal Law in the Arab World: A Review of the Literature." *International Journal of Middle East Studies* 19 (1987): 472-490.

Subekti, R. *Law in Indonesia.* Jakarta: Yayasan Proklamasi, Center for Strategic and Information Studies, 1982.

Ṭabaṭabā'ī. *Kharāj in Islamic Law.* London: Anchor Press, 1983.

The Netherlands East Indies Government. *Ten Years of Japanese Burrowing in the Netherlands east Indies.* New York: The Netherlands Information Bureau, 1944.

Tanner, Nancy. "Disputing and Dispute Settlement Among the Minangkabau of Indonesia." *Indonesia* 8 (October 1969): 21-62.

Ullah, Mahomed. *The Muslim Law of Marriage.* New Delhi: Kitab Bhavan, 1986.

Vandenbosch, Amry. *The Dutch East Indies: Its Government, Problems and Politics*. Berkeley: University of California Press, 1942.

--------. "Customary Law in the Dutch East Indies," *Journal of Comparative Legislation and International Law* 14 (1932): 30-44.

Vollenhoven, Christian van. "The Study of Indonesian Customary Law." *Illinois Law Review* 13 (1918-1919): 200-209.

--------. "Families of Language and Families of Law." *Illinois Law Review* 15 (1921): 417-423.

Watson, Alan. "An Approach to Customary Law." *University of Illinois Law Review* 3 (1984): 561-576.

Weiss, Bernard G. *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī*. Salt Lake City: University of Utah Press, 1992.

--------. "Law in Islam and in the West: Some Comparative Observations." In Wael B. Hallaq and Donald P. Little, eds. *Islamic Studies Presented to Charles J. Adams*. Leiden: E. J. Brill, 1991.

Wertheim, W. F. *Indonesian Society in Transition*. The Hague: W. van Hoeve, 1959.

Westra, H. "Custom and Muslim Law in the Netherlands' East Indies." *Transactions of the Grotius Society* 25 (1939): 151-167.

Widjojoatmodjo, Raden Abdulkadir. "Islam in the Netherlands East Indies." *Far Eastern Quarterly* 2 (1941-43): 48-57.

Yusuf, Ali Abdullah. *The Holy Qur'an: Arabic Text with English Translation and Commentary*. Lahore: Shaikh Muhammad Ashraf, 1937-38.

Yusuf, S. M. "The Supremacy of Sharī'at Law in Islamic Society." *Islamic Quarterly* 20-22 (1978): 15-23.

Zaid, Abdulaziz Mohammad. *The Islamic Law of Bequest*. London: Scorpion Publishing Ltd., 1986.

Ziadeh, Farhat J. "*'Urf* and Law in Islam." In James Kritzeck and R. Bayly Winder, eds. *The World of Islam: Studies in Honor of Philip K. Hitti*. London: Macmillan, 1959.

3. Other European Sources

Chelhod, Joseph. "La place de la coutume dans le *fiqh* primitif et sa permanence dans les societes arabes a tradition orale," *Studia Islamica* 64 (1986): 19-37.

Bousquet, G. H. *Introduction a l'etude de l'islam indonesien.* Paris: Geuthner, 1938.

--------. "Introduction a l'etude de l'islam indonesien." *Revue des etudes Islamiques* 2-3 (1938): 235-359.

Bruin, R. de. *Islam en nationalism in door Japan bezet Indonesia 1942-1945.* 's-Gravenhage: Staatsuitgeverij, 1982.

Hurgronje, C. Snouck. *De Atjehers.* 2 vols. Leiden: E. J. Brill, 1893.

Korn, V. E. "Mohammedaansch Recht en Adatrecht in Britisch- en Nederlandsch-Indie." *Bijdragen Tot De Taal-, Land - en Volkenkunde van Nederlandsch-Indie* 104 (1948): 103-118.

Piekaar, A. J. *Atjeh en de oorlog met Japan.* 's-Gravenhage-Bandung: N.V. Uitgeverij W. van Hoeve, 1949.

Vollenhoven, C. van. *Het adatrecht van Nederlandsch-Indie.* Leiden: E. J. Brill, 1931.

Wilken, G. A. "Het Pandrecht bij de volken van den Indisch Archipel." *Bijdragen Tot de Taal-, Land-, En Volkenkunde* 37 (1888): 555-609.

4. Indonesian Sources

A., Halimah. *Kebhinnekaan dan Sifat-Sifat Khas Masyarakat Hukum Adat Indonesia.* Padang: Laboratorium PMP/IKN FPIPS Institute Keguruan Ilmu Pendidikan Padang, 1987.

Ali, Chaidir. *Yurisprudensi Indonesia Tentang Hukum Adat.* Bandung: Bina Cipta, 1986.

Ali, Muhammad Daud. *Kedudukan Hukum Islam dalam Sistem Hukum Indonesia.* Jakarta: Yayasan Risalah, 1984.

Arief, Eddi Rudiana, ed. *Hukum Islam di Indonesia: Perkembangan dan Pembentukan.* Bandung: PT. Remaja Rosdakarya, 1991.

Atmodjahnawi, Suwondo. *Hukum Adat dan Pedoman Penghayatan dan Pengamalan Pancasila.* Surakarta: Universitas Negeri Sebelas Maret, 1981.

Benny, I Wayan. "*Hukum Adat dalam Undang-Undang Perkawinan Indonesia (UU no. 1 th. 1974).* Denpasar: Biro Dokumentasi & Publikasi Hukum Fakultas Hukum dan Pengabdian Masyarakat Universitas Udayana, 1978.

Departemen Agama RI. *Kompilasi Hukum Islam di Indonesia.* Jakarta: Direktorat Pembinaan Badan Peradilan Agam Direktorat Jenderal Pembinaan Kelembagaan Agam Islam, 1993/1994.

Haar, B. ter, (et al). *Hukum Adat dalam Polemik Ilmiah.* Tr. Soetan Mohammad Sjah. Jakarta: Bhratara, 1973.

Hadikusuma, Hilman. *Sejarah Hukum Adat Indonesia.* Bandung: Penerbit Alumni, 1978.

--------. *Hukum Waris Adat.* Bandung: Penerbit Alumni, 1980.

--------. *Hukum Waris Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama Hindu, Islam.* Bandung: P.T. Citra Aditya Bakti, 1991.

Harahap, M. Yahya. "Materi Kompilasi Hukum Islam." In Moh. Mahfud, Sidik Tono and Dadan Muttaqien, eds. *Peradilan Agama dan Kompilasi Hukum Islam dalam Tat Hukum Indonesia.* Yogyakarta: UII Press, 1993.

--------. *Kedudukan Janda, Duda dan Anak Angkat dalam Hukum Adat.* Bandung: P.T. Citra Aditya Bakti, 1993.

Hartono, C. F. G. Sunaryati. *Politik Hukum Menuju Satu Sistem Hukum Nasional.* Bandung: Penerbit Alumni, 1991.

Hazairin. *Tujuh Serangkai Tentang Hukum.* Jakarta: Tintamas, 1974.

--------. *Hukum Keluarga Nasional.* Jakarta: Tintamas Indonesia, 1982.

--------. *Pergolakan Penyesuaian 'Adat Kepada Hukum Islam.* Djakarta: Bulan Bintang, n.d..

Holleman, F. D. *Kedudukan Hukum Wanita Indonesia dan Perkembangannja di Hindia Belanda.* Tr. Soegarda Peorbakawatja and Mastini H. Prakoso. Djakarta: Bhratara, 1971.

Jafizham, T. "Peranan Pengadilan Agama dalam Pelaksanaan Undang-Undang Perkawinan." In *Kenang-Kenangan Seabad Peradilan Agama.* Jakarta: Departemen Agama, 1985.

Koesnoe, Mohammad. "Menetapkan Hukum dari Adat." *Hukum dan Keadilan* year 2, no. 3 (January-March 1969): 3-11.

--------. "Hukum Adat dan Pembangunan Hukum Nasional." *Hukum dan Keadilan* year 2, no. 3 (March/April 1970): 32-43.

Luhulima, C. P. F. *Motip-Motip Ekspansi Nederland dalam Abad Keenambelas.* Jakarta: Lembaga Research Kebudayaan Nasional, 1971.

Mahadi. "Sejumlah Cukilan dari Zaman Hindia Belanda Tentang Pengertian 'Adatrecht'." *Hukum Nasional* 1 (1980): 61-91.

Manan, Abdul. "Masalah Taklik Talak dalam Hukum Perkawinan di Indonesia." *Mimbar Hukum* year 6, no. 23 (1995): 68-92.

Meliala, Djaja S. *Pengangkatan Anak (Adopsi) di Indonesia.* Bandung: Tarsito, 1982.

Muhammad, Bushar. *Pokok-Pokok Hukum Adat.* Jakarta: PT. Pradnya Paramita, 1991.

Noeh, Zain Ahmad, and Abdul Basit Adnan. *Sejarah Singkat Peradilan Agama Islam di Indonesia.* Surabaya: PT. Bina Ilmu, 1983.

Noeh, Zaini Ahmad. *Sebuah Perspektif Sejarah Lembaga Islam di Indonesia.* Bandung: Al-Maarif, 1980.

--------. "Kepustakaan Jawa Sebagai Sumber Sejarah Perkembangan Hukum Islam." In Amrullah Ahmad, et al. *Prospek Hukum Islam dan Kerangka Pembangunan Hukum Nasioanl di Indonesia: Sebuah Kenangan 65 Tahun Prof. Dr. H. Busthanul Arifin, SH.* Jakarta: Pengurus Pusat Ikatan Hakim Peradilan Agama, 1994.

Notopuro, Hardjito. "Tentang Barang Gono-gini dan Barang Asal Serta Hak Mewarisi Bagi Djanda, Anak/Anak Angkat." *Hukum Nasional* year 2, no. 1 (1968): 48-59.

Radjab, Muhammad. *Perang Paderi di Sumatra Barat: 1803-1838.* Jakarta: Perpustakaan Perguruan Kementerian P.P.& K., 1954.

Rasyid, Sulaiman. *Fiqh Islam.* Jakarta: At-Tahiriyah, 1976.

Sabrie, Zuffran, ed. *Peradilan Agama Dalam Wadah Negara Pancasila: Dialog Tentang RUUPA*. Jakarta: Pustaka Antara, 1990.

Saleh, Ismail. "Wawasan Pembangunan Hukum Nasional." *Kompas*. June 1 and 2, 1989.

Shiddieqy, Teungku Mohd. Hasbi Ash. "Memoedahkan Pengertian Islam I." *Pandji Islam* Boendelan Ketoejoeh (1940): 8412.

--------. *Syariat Islam Menjawab Tantangan Jaman*. Jakarta: Bulan Bintang, 1966.

--------. *Sejarah Pertumbuhan dan Perkembangan Hukum Islam*. Jakarta: Bulan Bintang, 1971.

--------. *Fakta Keagungan Syariat Islam*. Jakarta: Tintamas, 1974.

Simorangkir, B. "Adat Versus Emansipasi." *Sinar Harapan*. August 10, 1968.

Soekanto, Soerjono. *Kedudukan dan Peranan Hukum Adat di Indonesia*. Jakarta: Kurnia Esa, 1987.

--------. "Hak Mewarisi Bagi Janda dan Anak/Anak Angkat." *Hukum Nasional* year 7, no. 23 (1971): 73-96.

Sofwan, Sri Soedewi Masjchun. "Hak Mewarisi Bagi Janda dan Anak/Anak Angkat." *Hukum Nasional* year 7, no. 24 (1974): 72-83.

Sosroatmodjo, Arso, and H. A. Wasit Aulawi. *Hukum Perkawinan di Indonesia*. Jakarta: Bulan Bintang, 1976.

Subekti, R. *Law in Indonesia*. Jakarta: Yayasan Proklamasi, Center for Strategic and Information Studies, 1982.

Supomo and Djokosutono. *Sejarah Politik Hukum Adat 1609-1848*. Jakarta: Djambatan, 1955.

Supomo, R. *Hukum Adat Jawa Barat*. Jakarta: Jembatan, 1967.

Tafal, B. Bastian. *Pengangkatan Anak Menurut Hukum Adat*. Jakarta: C.V. Rajawali, 1983.

Team Pelaksana Penelitian Fakultas Hukum Universitas Sebelas Maret. *Laporan Penelitian Studi Tentang Pengangkatan Anak di Daerah Kecamatan Jatisrono Kabupaten Wonogiri*. Surakarta: Fakultas Hukum Universitas Sebelas Maret, 1985.

Thalib, Sajuti. "Receptio in Complexu, Theori Recepti dan Recepti A Contrario." in Panitia Penerbitan Buku untuk Memperingati Prof. Mr. Dr. Hazairin, ed. *Pembaharuan Hukum Islam di Indonesia in Memoriam Prof. Mr. Dr. Hazairin*. Jakarta: University of Indonesia Press, 1976.

--------. *Receptio A Contrario*. Jakarta: Academica, 1980.

--------. *Politik Hukum Baru: Mengenai Kedudukan dan Peranan Hukum Adat dan Hukum Islam Dalam Pembangunan Hukum Nasional*. Bandung: Binacipta, 1987.

Wahidin, Samsul and Abdurrahman. *Perkembangan Ringkas Hukum Islam di Indonesia*. 1st ed. Jakarta: Akademika Pressindo, 1984.

Wignjodipeoro, R. Soerojo. *Kedudukan Serta Perkembangan Hukum Adat Setelah Kemerdekaan*. Jakarta: Gunung Agung, 1982.

Wignjosoebroto, Soetandyo. *Dari Hukum Kolonial ke Hukum Nasional*. Jakarta: Raja Grafindo Persada, 1994.

Zaini, Muderis. *Adopsi (Suatu Tinjauan dari Tiga Sistem Hukum)*. Jakarta: PT. Bina Aksara, 1985.

IMAGE EVALUATION TEST TARGET (QA-3)

150mm

6″

APPLIED IMAGE . Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989