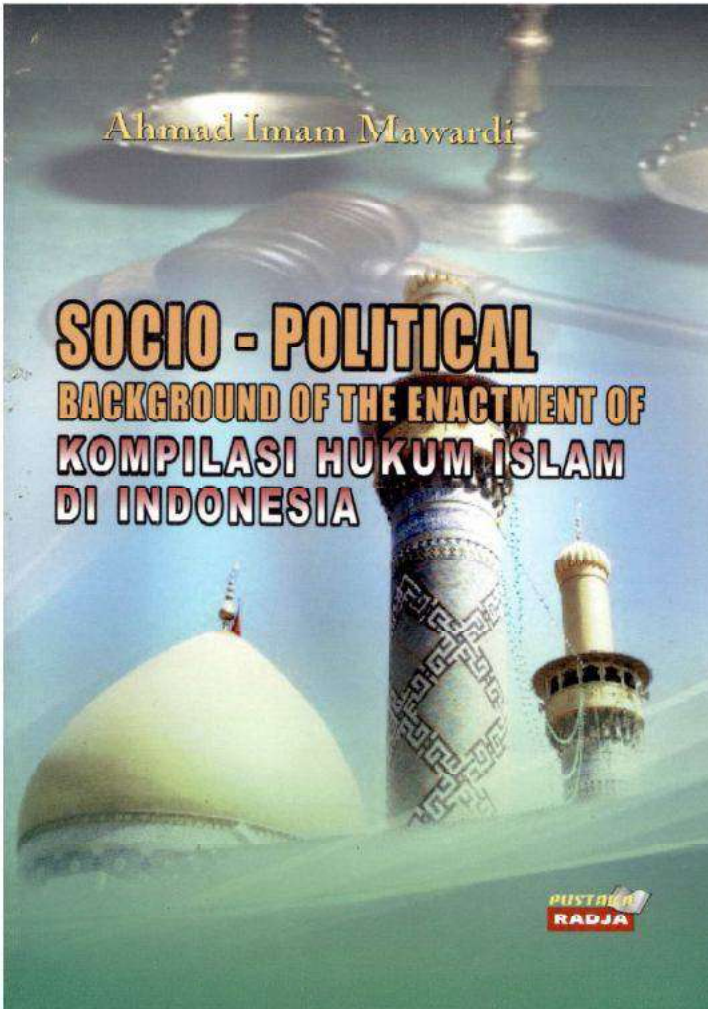
Ahmad Imam Mawardi
SOCIO - POLITICAL
BACKGROUND OF THE ENACTMENT OF
KOMPILASI HUKUM ISLAM
DI INDONESIA
PUSTAKA
RADJA

SOCIO - POLITICAL BACKGROUND OF THE ENACTMENT OF KOMPILASI HUKUM ISLAM DI INDONESIA

As a material law used in the State Islamic court, the support of the government in its enactment is a necessity. The involvement of the Supreme Court (*Mahkamah Agung [MA]*), one of whose duties is to control the legal application of the Islamic courts, and also the direct support from the President Suharto, both indicate the great interest of the government toward the KHI. The KHI offers political advantages both to the government and the Islamic courts.

(Ahmad Imam Mawardi)

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Pustaka Radja
2012

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much of the method of presentation to this study and showed me how all kinds of law interact and give Islamic law in Indonesia its particular coloration.

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TRANSLITERATION AND QUR'ANIC TRANSLATION

The system of Arabic translation used in this thesis is that of the Institute of Islamic Studies, McGill University. Indonesian terms are written according to the *Ejaan Baru Bahasa Indonesia* (1972), but personal names and the titles of books and articles are rendered accprding to the original spellings. The Qur'anic translations are based on those of 'AdullahYusuf Ali

ا = a	ز = z	ق = q
ب = b	س = s	ك = k
ت = t	ش = sh	ل = l
ث = th	ص = s	م = m
ج = j	ض = d	ن = n
ح = h	ط = t	و = w
خ = kh	ظ =	ه = h
د = d	ع = '	ي = y
ذ = dh	غ = gh	
ر = r	ف = f	

- Short word
  - َ = a, fathah
  - ِ = i, kasrah
  - ُ = u, dummah

- Long Word
  - اَ/ىَ = a,alif/alif maqsurah
  - ىِ = i, ya
  - وُ = u, waw

- the *ta' marbutah* (ة) is transliterated as "ah" in pause form and "at" in conjuctional form; examples: *bid'ah, kijayat al-akhyar*. In the case of *tasydid*, the letter is doubled; examples: *'asabiyyah, 'Arabiyyah*. Alif or hamzah is transliterated as an elevated comma in all positions except when it occurs at the beginning of a word; examples: *istihsan, sayyi'ah, thana'*.

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INTRODUCTION

Since its arrival in Indonesia, Islam has had a varied experience. After its relatively early spread from the seventh to the fifteenth centuries, it was obstructed by the coming of the colonialists in the sixteenth century. Thereafter, Islamic legal tradition had to struggle against the Dutch colonial policies which tended to give advantage to the civil Western and *adat* laws. Furthermore, due to their policies, Islamic law and *adat* law were branded, and are still believed by some scholars up to now, as incompatible[1].

However, the coming of Dutch legal discourse, with its Roman law tradition, should not be viewed as a purely negative development. It has left a valuable tradition or

[1] See for instance, G. H. Bousquet, *Introduction a l 'etude de l'Islam Indonesien* (Paris: Geuthner, 1938), p. 241; see also Jan Prins, "*Adat* Law in Muslim Religious Law in Modern Indonesia," *The World of Islam*, vol. 1 (Leiden: E.J. Brill, 1951), pp. 283-300; See also Daniel S. Lev, *Islamic Courts in Indonesia A Study in the Political Bases of Legal Institution* (Berkeley, Los Angeles, London: University of California Press, 1972), p. 8-10, 69.

lesson on the necessity of codification of law.[2] In the Dutch colonial era, there were efforts to codify law, particularly civil and *adat* law, although these efforts were finally not ultimately successful because the Dutch scholars and politicians disagreed in their assessment of the results. The spirit of legal codification promoted by Roman law tradition has conspicuously influenced the Islamic legal development of post-independent Indonesia.

Soon after Indonesia gained independence, the efforts to unify and codify the law, including Islamic law received the attention of the government. In the context of Islamic legal development, the issuance of Government Regulation (PP) No. 45/1957 on the establishment of Religious courts outside Java and Madura and the emergence of the Letter of the Religious Judiciary Bureau *(Swat Edaran Biro Peradilan Agama)* No. 8/1/735, dated on 18 February 1958, concerning

[2] Soetandyo Wignjosoebroto broadly discusses the outlines of Indonesian legal form in post-colonial period. He says that either the physical revolution era (1945-1950), Post-physical Revolution era (1950-1966) or New Order era (1966-up to now), Indonesian government faced difficulty to rid itself of the legal traditions instituted by the colonial government. Forming a new legal model means, for Indonesia, that it must start from zero. However, some modifications of old colonial law which allow an Indonesian coloration took place in some instances. See, Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 1994), pp. 187-246; Ahmad Imam Mawardi, "The Influence of Colonial Laws on Islamic Legal developments in Indonesia, Malaysia and Singapore: A Comparative Study," Unpublished Paper, McGill University, Montreal, 1997, p. 13.

the reference books to be used by the Islamic Courts in rendering decision, were the principal efforts. Unfortunately, the next Islamic development had to be heavily dependent on outside interests, especially those politically linked to the government. Since the Islamic Judiciary is one of National Judiciary systems, the role and the efforts of the government toward general Islamic legal development are interconnected and complicated.

In the early years of the New Order era, which began in 1966, and at a time many scholars saw as a period marked by poor relations between Muslims and government, the development of Islamic law, suffered somewhat.[3] In its later years, starting around 197Us, this antagonism shifted slowly toward better relations, in which the government and Islam sought mutual supports.[4] The government appreciates the

[3] See, for example, the failure to rehabilitate the Masyumi Party which was banned in 1960 by the Old Order government, the acceptance of *aliran kepercayaan* (sect of belief) in the GBHN, planning draft for the law of marriage in 1973, etc. The Muslim will to rehabilitate the Masyumi Party is described by Allan A. Samson, "Islam in Indonesian Politics," *Asian Survey*, vol. viii, December 1968, pp. 1007-17; See also, M. Dawam Rahardjo, "Islam dan Modernisasi:Catalan atas Paham Sekularisasi Nurcholish Madjid," in Nurcholish Madjid, *Islam, Kemoderman, dan Keindonesiaan* (Bandung: Mizan, 1993), pp. 11-3; See also, W. F. Wertheim, *IndonesiN van Vorstenrijk tot Neokolonie* (Meppel: Boom, 1978), p. 20.

[4] Howard M. Federspiel, "The Endurance of Muslim Traditionalist Scholarship: An Analysis of the Writings of the Indonesian Scholar Sirajuddin Abbas," in Mark Woodward (ed), *Toward a New Paradigm in Indonesian Islamic Thought* (Tempe: ASU Program for Southeast Asian Studies, 1996), p. 193.

fact that Islam is the religion of the majority in Indonesia,[5] and is allied to the state and, accordingly, recognizes its high bargaining power. And Muslim scholars, in return, realize that any advance or decline in Islamic life, including Islamic law, is also dependent on the role of government and its support. This kind of mutual appreciation and consciousness has favored Islamic legal development since 1974. The behavior demonstrated by the government in accommodating Muslim voices and ideas in enacting the Law of Marriage no. 1/1974 was the first step demonstrating this improved relationship.

The 1980s may be considered as the best years of alliance between Islam and the government so far, particularly regarding the development of Islamic law. The effort of the Islamic Judiciary to obtain a procedural law in order to gain equality with other court systems was given support by the government through the enactment of the Law of Religious Judiciary no. 7/1989. Following the emergence of this law, government then had a clear reason

[5] According to the 1980's census, the ratio percentage of Muslim to other religious followers in a total of 145,704,000 citizens are as below: Muslims 88.2%, Protestants 5.8%, Catholics 3%, Hindus 2.1%, and Buddhists 0.9%. See M. Atho Mudzhar, *Fatwas of The Council of Indonesian Ulama: A Study of Islamic Legal Thought in Indonesia 1975-1988* (Jakarta: INIS, 1993), p. 9; This data is different from that given by M. van Bruinessen when he says that according to a 1980's census, Muslims accounted of 88%, Protestants 5.5%, Catholics 2.5%, Hindus 2%, Buddhists 1% and animist 1%. See M. van Bruinessen, "State-islam Relations in Contemporary Indonesia; 1915-1990," in C. van Dijk and A. H. de Groot, *State and Islam* (Leiden: CNWS Publications, 1995), p. 96.

to proceed to a codified or compiled Islamic law to be used as the standardized reference in deciding matters of marriage, inheritance and *waqf* with official launching of the *Kompilasi Hukum Islam di Indonesia* (KHI) the Presidential Instruction no. 1/1991 on July 10,1991.

The emergence of the KHI is closely related to the accommodative relationship established between the two, Islam and the government, which is colored by a political dimension. Besides the political motivations and background, the enactment of the KHI cannot be separated from the influence of the social contexts, which has produced many heterogeneous cases in society calling for some uniformity in their solution. The decisions of Islamic judges in the past, which were mostly based on the Shafi'ite school of thought, without any account of social considerations and context, were widely regarded as unsatisfactory. Further, the appearance of new cases in the Islamic legal sphere and the conflict among various sectors of Muslim society regarding which legal opinions should prevail called for a reformation or renewal of Islamic law on the part of Muslim intellectuals.

The demands for Islamic reform itself is not a new phenomena; it appeared long before Indonesia's independence. The promotion of this effort— legal purification and reformation— occurred on a large scale during the Nationalist Period (1908-1945).[6] The appearance

[6] For a discussion on the trend of Islamic thought and reform in this period, see Howard M. Federspiel, "The Importance of Islamic Law in Twentieth-Century Indonesia," Completed Research Awaiting Publication, July 1995, pp. 6-9.

of many individual figures and organizations promoting purification and reformation of Islamic law reflected the great social demands of the Muslim community. Names like A. Hassan (d.1958), Moenawar Cholil (d. 1961), Hazairin (d. 1975), T. M. Hasbi ash-Shiddieqy (1975), and organizations like *Muhammadiyah* and *Persis* are so closed to the discourse on Islamic legal renewal or reformation. Always considered as a group adhering to the historical tradition of Islam,' *Nahdlatul Ulama* offered nevertheless a new form of *istimbat al-hukm* (the methods for deciding a legal status) in its National Conference (Munas) in Lampung in 1992. This was a clear response to a social change and indicates that this association also is not adverse to taking steps to assure that Islamic law answers the needs of contemporary society.

In sum, the desire for reformation of Islamic law in its social perspective, can be understood as a response of Muslim intellectuals and leaders to the necessity for change of the social-religious mainstream. Moreover, the strong belief and application of *adat* law and traditions in the society favored the establishment of Islamic legal development that could accommodate *adat* law. These facts were very influential reasons to push the enactment of the KHI.

Unfortunately, most studies on the KHI made so far have been concerned mostly with its contents rather than the analysis from the perspective of socio-political history that lead to the enactment of the KHI.[7] Though some writers

[7] Many books have been written on the KHI. Among those used as source in this thesis are: (l)Abd. Gani Abdullah, *Pengantar Kompilasi*

and observers have been concerned with the political perspective of the compilation, their analysis tends to be very general and limited only to the position and influence of the KHI in the national legal system. This thesis, finally, attempts to offer an analysis from the socio-political history standpoint rather than the analysis on its materials or contents alone. However, some notes on the contents which

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Hukum Islam dalam Tata Hukum Indonesia (Jakarta: Gema Insani Press, 1994). This book discusses mostly the Law of Islamic Judiciary (UUPA) rather than the KHI. The analysis on the KHI is found only in chapter IV, where its status in the National Legal Order is considered; (2) Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademi Preside, 1995). This book mainly discusses the procedure of the enactment of the KHI and its content; (3) Tim Ditbinperta, *Berbagai Pandangan Terhadap Kompilasi Hukum Islam* (Jakarta: Yayasan Al-Hikmah, 1993/1994). This is an official book arranged by Tim Ditbinbapera (Team of Directorate of the Establishment of the Body of Religious Judiciary), and consists of twelve articles concerning the KHI from many perspective. Unfortunately, none of them specifically discuss its socio-political background; (4) Moh. Mahfud MD, Sidik Tono and Dadan Muttaqien (eds), *Peradilan dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Yogyakarta: Penerbit Un Press, 1993). This book consists of twelve articles and seven of which deal with the history, content and method for socializing the KHI; (5) Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 1995). This book deals mostly with the materials of the KHI; (6). Amrullah Ahmad, et.al. (eds), *Dimensi Hukum Islam dalam Sistem Hukum Nasional* (Jakarta: Gema Insani Press, 1996). Many articles included in this book, but only one by A. Hamid S. Attamimi who deals with the position of the KHI in the National Legal system; There are many other books and articles containing a short analysis of the KHI, and a lot of articles found mainly in *Mimbar Hukum*, a journal published by Yayasan al-Hikmah and Ditbinbapera, *Gema, Mimbar Ulama* etc. Again, these articles much more deal with the history and the contents of the KHI.

confirm certain assumptions on the socio-political background of the KHI is presented.

Chapter I of this thesis describes the short history of the procedural issuance of the KHI, its contents and its position in Indonesian legal system. The narrative explanation in this chapter is intended to introduce the KHI, answering "what," "how" and "when" questions concerning it, and to analyze the debate among scholars on its status in the Indonesian legal system[8].

Chapter II uses social analysis to portray the sociological background of the enactment of the KHI. It centers on theoretical bases concerning the flexibility of both *adat* and Islamic law, which both influence and are influenced by each other. This chapter also deals with the practical relationship between Islamic law and *adat* law in general. In the last part of this chapter, the social significance of the KHI is addressed with respect to the question-why the KHI was enacted, from a sociological perspective.

The last chapter focuses on the political backdrop of the enactment of the KHI. The historical facts relating to Islamic law since its first arrival is briefly outlined to give a portrait of how Islamic law developed under the political pressure of the Colonial Dutch government which developed legal

[8] See Abd. Gani Abdullah, *Pengantar Kompilasi Hukum Islam*, pp. 58-67; see also A. Hamid S. Attamimi, "Kedudukan Kompilasi Hukum Islam dalam Sistem Hukum Nasional (Suatu Tinjauan dari Sudut Teori Perundang-undangan Indonesia)," in Amrullah Ahmad, et al. (eds), *Dimensi Hukum Islam*, pp. 147-154.

theories clearly opposing Islamic law. More importantly, this chapter explains why the KHI emerged in 1991, the twenty-fifth year of New Order government. The analysis on relationship between government and Islam throughout the New Order era is crucial to our analysis of the compilation. Finally, the political rationale of the KHI is presented to clarify political interests behind its enactment.

CHAPTER I

KOMPILASI HUKUM ISLAM DI INDONESIA: DEFINITION, STATUS AND CONTENT

Kompilasi Hukum Islam di Indonesia (KHI), literally translated as *Compilation of Islamic Law in Indonesia*, is one of many vehicles used by the Indonesian government to unify and codify Islamic law. This codification, utilized by judges in Religious Courts, was meant to serve as a reference guide in deciding cases. Before the enactment of the KHI, other efforts to unify and codify Islamic law had been tried. A government regulation suggesting the use of only 13 *fiqh books*[9] as judicial references, the enactment

[9] Those books are *Bughyat al-Mushtarshidin* by Husain al-Ba'lawi, *al-Faraid* by al-Shamsuri, *Fath al-Muin* by Zayn al-Din al-Malibari, *Fath al-Wahhab* by Zakariyya al-Ansari, *Kifayat al-Akhyar* by al-Bajuri, *Mughnii al Muhtaj* by al Gharbini, *Qawanin al-Shar 'iyyah* by Sayyid 'Uthman ibn Yahya, *Qawanin al-Shar 'iyyah* by Sayyid 'Abdullah Ibn Sadaqah

of Marriage Law No. 1/1974 and the Religious Judicial Act No. 7/1989 are counted among those efforts.

With respect to the historical perspective, efforts to unify and codify Islamic Law in Indonesia may be regarded as an extension and perpetuation of Islamic legal thought expressed throughout the development of Islamic law. Notions of unification, compilation, and codification have occupied jurists from an early date of Islamic history. Ibn al-Muqaffa (d. 139/756), for example, suggested to al-Mansur (754-775), an Abbasid Caliph, that "the caliph should review the different doctrines, codify and enact his own decisions in the interest of uniformity, and make this code binding on the *kadis*."[10]

Dakhlan, *Shark Kanz al-Raghibin* by al-Qalyubi and 'Umayrah, *Shark al-Tahrir* by al-Sharqawi, *Tuhfat al-Muhtaj* by Ibn Hajar al-Haytami, *Targhib al-Mushtaq* by Ibn Hajar al-Haytami, and *al-Fiqh 'ala Madhdhib al-Arba 'ah* by al-Jaziri. These books were used on the basis of the Letter of the Religious Judiacry Beaureu (Surat Edaran Biro Peradilan Agama) No. 8/1/735, dated on 18 February 1958 as a manifestation of Government regulation (PP) No. 45/1957 regarding the establishment of Religious Court/Mahkamah Syar'iyah outside Java and Madura. The above books are Shafi'ite, except for the last one, *al-Fiqh 'ala Madhdhib al-Arba'ah*, which provides comparative opinions from the four famous schools of Islamic law, i.e., the schools of Maliki, Hanafi, Shafi'i, and Hanbali.

[10] Joseph Schacht, *Introduction to Islamic Law* (Oxford: Clarendon Press, 1986), p. 55. See also N. J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), p. 52. In Marshal G. S. Hodgson's words, Ibn al-Muqaffa' urged al-Mansur to control any group in the society "by rallying the agrarian classes—and tying the religious specialist ('Ulama') to the state." His policy toward the *'ulama'* was

For this reason, Ibn al-Muqaffa' proposed to al-Mansur to make the *al-Muwatta'* of Imam Malik ibn Anas, the Medinan Jurist, the standard juridical work to be used throughout the empire. While on his first pilgrimage, al-Mansur met with Imam Malik and repeated al-Muqaffa's proposal to make the *al-Muwatta'* the standardized reference for all juristic questions, and that it be given a prominent place in the *Ka 'bah,* with copies circulating in all parts of the Empire.[11] Imam Malik declined the suggestion,[12] however, insisting that people should not be forced to adhere to the opinions of a single jurist—opinions, which might possibly be wrong and imperfect.[13]

From the medieval era on, efforts to codify Islamic law, or in the words of Muhammad Hashim Kamali "the introduction of statutory legislation," have been made in

making "the piety minded...into an official established order...copying such a priestly structure by asserting a final authority in question of law." See *The Venture of Islam* (Chicago: The University of Chicago Press, 1977), volume 1, pp. 284-5.

[11] Mazheruddin Siddiq, Preface to *Muwatta' Imam Malik,* trans. and notes by Muhammad Rahimuddin (New Delhi: Kitab Bhavan, 1989), pp. iv-v

[12] Patricia Crone and Martin Hinds, *God's Caliph: Religious Authority in the First Century of Islam* (Cambridge: Cambridge University Press, 1986), pp. 86-7. See also Joseph Schacht, "Foreign Elements in the Ancient Islamic law," *Journal of Comparative Legislation and International Law* 32 (1950), p.17; Ann Elizabeth Mayer, "The Shari'ah: A Methodology or a Body of Substantive Rules," in Nicholas Heer (ed.), *Islamic Law and Jurisprudence: Studies in Honor ofFarhatJ. Ziadeh* (London: University of Washington Press, 1990), p. 179.

[13] Siddiq, Preface to *Muwatta',* p.v.

most Muslim countries.[14] In the Ottoman Empire, particularly during the *Tanzimat* period (1839-1879), the government was successful in codifying the provisions of Islamic law and compiling them in the so-called *Majallah al-Ahkam al- 'Adliyah*[15]. The Mughal emperor Awrangzib Alamgir (d.1707) ordered the compilation of *fatwas* known as *Fatawa al-Alamgiriya* or *Al-Fatawa al-Hindiyah*[16] in an attempt to unify legal rulings of his realm. The *Code Morand* or *Avant-Projet de Code du Droit Musulman Algerien*, published in 1916 in Algeria, had a similar purpose.[17]

In Indonesia, attempts at the unification, compilation and codification of Islamic law have been numerous. *Kompilasi Hukum Islam* (KHI), which was officially issued in 1991 through a Presidential Instruction (*Instruksi Presiden* or *Inpres*), is only the latest so far.

A. Definition of *Kompilasi Hukum Islam di Indonesia*

Defining *Kompilasi Hukum Islam* as the compilation or codification of Islamic law has been a much debated

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[14] Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Text Society, 1991), p. xvii.

[15] See S. S. Onar, "The Majallah," in *Law in the Middle East: Origin and Development of Islamic Law*, eds. Majid Khaddury and Herbert J. Liebesny (Washington D.C.: The Middle East Institute, 1955), pp. 292-306.

[16] See Shaikh Nizam and 'Ulama' al-Hindal-'Alam, *al-Fatawa al-'Alamkiriyah al-Ma'rufah bi al-Fatawa al-Hindiyyah*, eds. Ghulam Nabt Tunsawi (Kuitiyah: Maktabah Majidiyah, 1983), 6 volumes.

[17] See Joseph Schacht, *An Introduction to Islamic Law*, pp. 94-8. 10

issue, though literally it is translated as "Compilation of Islamic Law". This debate is fueled by an analysis of KHI's contents which reveals it to be more than a mere compilation of rulings from various legal texts.[18] In fact, some scholars argue that it is a new formulation of Islamic law, as it not only gathers legal rules from numerous and various texts but also enlivens the living unwritten law in the society as ideal law, elevating it to the status of formal law.[19]

Before proceeding to define the KHI's status as a legal document, it would be prudent to clarify the meaning of the terms "compilation" and "codification".

Hendry Campbell Black defines compilation as:

"A bringing together of pre-existing statutes in the form in which they appear in the books, with the removal of sections which have been repealed and substitution of amendments in an arrangement designed to facilitate their use. A literary production composed of the works or

[18] See the discussion about the content of KHI in part three of this chapter

[19] See Abdul Gani Abdullah, "Kehadiran Kompilasi Hukum Islam dalam Hukum Indonesia, Sebuah Pendekatan Teoritis," in Tim Ditbinbapera, *Berbagai Pandangan Terhadap Kompilasi Hukum Islam*, (Jakarta: Yayasan Al-Hikmah, 1993/1994), pp. 71-2; see also his *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Jakarta: Gema Insani Press, 1994), pp. 60-1.

selected extracts of others and arranged in methodological manner."[20]

He defines codification as:

"The process of collecting and arranging systematically, usually by subject, the laws of a state or country, or the rules and regulations covering a particular area or subject of law or practice."[21]

The definitions above are seemingly similar and equally suited to the KHI, as it is a compilation of selected statutes or Islamic regulations which are systematically arranged to cover a particular area or subject of law. It is significant, however, that the Minister of Religious Affairs at the time, who was also regarded as the first to promote the enactment of the KHI, tended to use the English term "codification" rather than "compilation" in reference to the KHI.[22]

[20] Hendry Campbell Black, *Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Fifth Edition (St. Paul Minn: West Publishing CO., 1979), p. 258.

[21] Black, *Black's Law*, p. 234.

[22] This information was provided by Akhmad Minhaji, *alumni* of McGill University who supplied me with the content of Munawir Sjadzali's speech at McGill University, 1994.

B. The Issuance Procedures of *Kompilasi Hukum Islam*

It would be difficult to identify, with certainty, the first figure to promote the KHI. Some say that the idea was the brainchild of then Minister of Religious Affairs, Munawir Sjadzali, who proposed it at a general lecture in IAIN Sunan Ampel Surabaya in February, 1985.[23] Others, however, believe that the notion came from Prof. H. Bustanul Arifin, SH.[24], the Junior Head of Religious Judicial Affairs, who organized a RAKERNISGAB (The Meeting on Cooperative Technical Work) bringing together the Supreme Court, the Department of Religious Affairs, and the High Religious Courts in a cooperative venture to develop Islamic law through Jurisprudence.[25] However, a third group declares that Bustanul Arifin's initiative was little more than a response to Ibrahim

[23] See Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, (Jakarta: Akademika Presindo, 1995), p. 31; See also Amrullah Ahmad et.al (eds), *Dimensi Hukum Islam dalam Sistem Hukum Nasional: Mengenang 65 tahun Prof. Dr. H. Bustanul Arifin, SH* (Jakarta: Gema Insani Press, 1996), p. 11.

[24] This opinion is written in a formal book about *Kompilasi Hukum Islam* edited by Ditbinbapera (Direktorat Pembinaan Badan Peradilan Agama). See, "Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia" in Tim Ditbinbapera, *Berbagai Pandangan*, p. 8.

[25] See Roihan A. Rasyid, "Kompilasi Hukum Islam (Penelitian Tentang Dasar dan Norma Hukum Serta Aplikasinya di Peradilan Agama)," (Yogyakarta: Fakultas Syari'ah IAIN Sunan Kalijaga, Mei 1995), pp. 8-9.

Hosen's call for the compilation or codification of Islamic law.[26]

In the official history, however, the decision to enact the KHI is attributed to the cooperative efforts of the Supreme Court and Department of Religious Affairs. Together, they concluded that a functional, religio-judicial body must be preceded by two matters:

One, a formal basic foundation to the Religious Judiciary which would ensure legal certainty in procedural law and legal security in terms of material law; and ***two***, a compilation of Islamic rulings dealing with marriage, inheritance and *-waqf* allowing judges, justice seekers, and Islamic society in general, to attain legal certainty.[27]

[26] See Panitia Penyusunan Biografi, *Prof. K.H. Ibrahim Hosen dan Pembaharuan Hukum Islam di Indonesia*, (Jakarta: Putra Harapan, 1990), pp. 223-4.

[27] Presented by Bustanul Arifin on 16 October, 1985 in the Opening Ceremony of an interview with *'ulama'*. See Abdul Chalim Muhammad, "Peradilan Agama dan Kompilasi Hukum Islam sebagai Pranata Hukum Nasional," *Pesantren* No. 2 vol. VII, 1990, pp. 35-6; See also the speech of the Minister of Religious Affairs Munawir Sjadzali in the opening ceremony of the National Seminar on Inpres 1/1991 regarding the socialization of the KHI. He said that the emergence of law No. 7/1989 and the KHI have made Religious Courts exactly equal to other courts in the country, in terms of having procedural law and material law to gain the legal certainty. See Munawir Sjadzali, "Peradilan Agama dan Kompilasi Hukum Islam," in Moh. Mahfud et.al. (eds), *Peradilan Agama dan Kompilasi Hukum Islam dalam Tata Hukum Indonesia*, (Yogyakarta: UII Press, 1993), pp. 1-2.

Bustanul Arifin declared that the idea of compiling an Indonesian Islamic law first gained currency two and half years after the Supreme Court[28] had established a justicial technique for Religious Courts in accord with the demands of Statute No. 14/170. This statute places the Supreme Court at the apex of all other courts, including the Religious Courts, and stipulates that the personal, financial, and organizational management of existing courts be determined independently. Justice technique, however, is determined by the Supreme Court,[29] an arrangement formalized in 1983. The idea of enactment gained wider currency once the Supreme Court had identified certain weaknesses in the Religious Courts. These weaknesses particularly stemmed from the legal uncertainty perpetrated by the various legal opinions resorted to in each court when ruling on similar cases. Thus, the only way to eliminate these weaknesses, it was proposed, was by making a compilation which covers all legal materials administered under the authority of the Religious Courts and, then, using it as a standardized reference for all legal arbitration.

[28] According to Articles 10 and 11 of Statute No. 14/1970, LN (State Letter) 1970-74, the main stipulations of the juridical authorities are as follows: four kinds of court (Civil Court, Religious Court, Military Court, and State Administrative Court) under the Supreme Court as the highest judicial body, with jurisdiction beyond which there is no appeal (*kasasi*, the highest legal decision on a case), and control over those four courts.

In short, it may be said that the notion of compilation first appeared in 1985 as a result of the cooperative efforts of the Supreme Court and the Department of Religious Affairs, receiving further impetus when President Suharto initiated and signed a letter sanctioning cooperative work (SKB) between the heads of the two bodies with the aim of launching the KHI.[29] In a formal cooperative meeting attended by the head of the Supreme Court and the Minister of Religious Affairs in Yogyakarta on the 21 March 1985, the SKB was initiated.[30]In this meeting, the Minister promoted the event as an opportunity as well as a challenge to the *'ulama'* who wished to contribute to the application of Islamic law in the country.[31]

In SKB No. 07/KM/1985 and No. 25/1985 dated on March 25th, 1985, it is stated that:

First, the project is to be headed by Prof. Bustanul Arifin, SH, from the Supreme Court, and assisted by two

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[29] See Ismail Sunny, "Kompilasi Hukum Islam ditinjau dari Sudut Pertumbuhan Teori Hukum Indonesia," *Suara Muhammadiyah* No. 16/6, August 1991, p. 43; For the President's impetus and support, in the final workshop of the KHI, the Islamic leaders and the *kiyais* asked the Minister Munawir Sjadzali to represent all Indonesian Muslim society to thank the President. See, Munawir Sjadzali, "Peradilan Agama dan Kompilasi Hukum Islam," p. 3.

[30] See Masran Basran, "Kompilasi Hukum Islam," *Mimbar Ulama* No. 105/X, May 1986, p.12

[31] Bustanul Aifin, "Pemahaman Hukum Islam dalam Konteks Perundang-undangan," *Wahyu* No. 108/Vn, May 1985, p. 47.

individuals, one from the Supreme Court and the other from the Department of Religious Affairs; *second*, the project must be completed within two years of the date of the SKB's commencement; *third*, an outline of the schedule and agenda of the project were to keep it true to what had been decided upon; *fourth*, the guarantee of financial support from the government on the basis of the Presidential Decision *(Keputusan Presiden)* No. 191/SOSRROCH/1985[32] and No. 068/SOSRROCH/1987; *fifth*, that the Project was to begin on 25 March 1985; and *sixth*, a stipulation that the premiere aim of the project should be to develop Islamic law through jurisprudence by enacting the KHI. Moreover, this last stipulation affirmed that the goals of the project were to ascertain the "living" Islamic laws in society and, together with the compilation of regulations derived from various *fiqh* texts, devise suitable Islamic laws for Indonesia.[33] To attain these goals the project initiated four steps: the gathering of data; interviews; comparative studies; and workshop.[34]

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[32] This financial support is directly from the President, not from the APBN (National Budget). The amount of this support is Rp. 230,000,000 . See *Panji Masyarakat* No. 502/XXVII, 1 May 1986.

[33] For further information about the content of the mentioned SKB, please read "Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia" as mentioned in foot note No. 5, pp. 10-2; see also the book of KHI it self.

[34] See Ditbinbapera, "Sejarah Penyusunan," p. 12; Roihan A. Rasyid, "Kompilasi Hukum Islam," p. 10, Compare to M. Atho' Mudzhar, *Fatwas of The Council*, p. 39, who says that there are five steps.

The first step, gathering data, entailed the examination of 38 *fiqh texts*[36] and numerous works of jurisprudence. The 38 *fiqh* texts are not only chosen from the Shafi'ite *madhhab* but from the other *madhhabs* as well. To clarify this, a list of the 38 books is offered below:

1. *Hashiyyah Kifayat al-Akhyar* by Ibrahim ibn Muhammad Al- Bajuri (1260/1844);
2. *Fath al-Mu in* by Zayn al-Din al-Malibari (982/1574);
3. *Sharqawi 'Ala al-Tahrir* by 'Ali ibn Hijazi ibn Ibrahim al-Sharqawi (1150-1737);
4. *Mughni al-Muhtaj* by Muhammad al-Sharbini (977/1569-70);
5. *Nihayat al- Muhtaj* by Al-'Ramli (1004/1595-6);
6. *Al-Sharqawi 'Ala al-Hudud* by 'Ali ibn Hijazi ibn Ibrahim al-Sharqawi (1150-1737);
7. *I'anat al-Talibin* by Sayyid Bakri al-Dimyati (1893);

Mudzhar adds the examination of the previous jurisprudence used by the Religious Court as one step, but according to the SKB it is included in the gathering of data. However, both are essentially correct. Atho's note is similar to Zarkasih's. See Muchtar Zarkasih, "Hukum Islam dalam Putusan-putusan Pengadilan Agama," unpublished paper, 1985, p. 10.

[35] M. Atho Mudzhar mentions 41 fiqh books, but the truth, according to the primary sources, is 38. See M. Atho' Mudzhar, *Fatwas of The Coucil*, p. 39. The list *of 38 fiqh* texts is available in Abdurrahman, *Kompilasi*, pp. 39-41.

8. *Tuhfat al-Muhtaj* by Shihab al-Din Ahmad Ibn Hajar al-Haytami (973/1465);
9. *Targhib al-Mushtaq* by Shihab al-Din Ahmad Ibn Hajar al-Haytami (973/1465);
10. *Bulghat al-Salik* by Ahmad Ibn Muhammad al-Sawi (1825/6);
11. *Al-Favaid* by Shamsuri (d. unknown);
12. *Al-Mudawwanat al-Kubra* by Sahnun ibn Said al-Tanukhi (854);
13. *Kanz al-Raghibin wa Sharhuhu by* Jalal al-Din Muhammad al-Mahalli (864/1460);
14. *Fath al-Wahhab* by Abu Yahya Zakariyya al-Ansari (926/1520);
15. *Bidayat al-Mujtahid* by Ibn Rushd (1126-1198);
16. *Al-Umm* by Muhammad ibn Idris al-Shafi'i (767/8-820);
17. *Bughyat al-Mustarshidin* by 'Abd al-Rahman ibn Muhammad al-'Alawi (fl. 1835);
18. *Aqidah -wa al-Shari'ah* by Mahmud Shaltut (1893-1963);
19. *Al-Muhalla* by 'Ali ibn Muhammad Ibn Hazm (994-1064);
20. *Al-Wajiz* by Abu Hamid al-Ghazzali (1058-1111);
21. *Fath al-Qadir 'Ala al-Hidayah* by Muhammad ibn 'Abd al-Wahid al-Siwasi (1457);

22. *Al Fiqh 'Ala Madhahib al-Arba'a* by 'Abd al-Rahman al-Jaziri (1882-1941);
23. *Fiqh al-Sunnah* by Sayyid Sabiq (d. unknown);
24. *Kashfal-Qina' 'an Tadmin al-Sana 'i'* by Ibn Rahhal al-Ma'dani (1727/8);
25. *Majmu' Fatawa Ibn Taimiyyah* by Ahmad ibn Taymiyyah (1263-1328);
26. *Qawanin al-Shar 'iyyah* by al-Sayyid 'Uthman ibn Aqil ibn Yahya (1822-1913);
27. *Al-Mughi* by 'Abd Allah ibn Ahmad Ibn Qudamah (1147-1223);
28. *Hidayah Sharh Bidayat al-Mubtadi* by 'Ali ibn Abi Bakr al-Marghinani (1196);
29. *Qawanin al-Shar 'iyyah* by Sayyid 'Abdullah ibn Sadaqah Dakhlan (d. unknown);
30. *Mawahib al-Jalil* by Muhammad ibn Muhammad Hattab (1497-1547);
31. *Hashiyat Radd al-Mukhtar* by Muhammad Amin ibn 'Umar Ibn Abidin (1252-1836);
32. *Al-Muwatta'* by Malik ibn Anas (795);
33. *Hashiyya al-Dasuqi 'ala al-Sharh al-Kabir* by Ibn 'Arafah al-Dasuqi (1815);
34. *Bada 'i' al-Sana 'i 'fi Tartib al-Shara 'i'* by Abu Bakr Ibn Mas'ud al-Kasani (1191);
35. *Tabyin al-Haqa 'iq* by Mu'in al-Din ibn Ibrahim al-

Farahi (811/1408);

36. *Al-Fatawa al-Hindiyyah* by al-Shaikh Nizam and other 'ulama' (fl. 1535-1674);

37. *Fath al-Qadir* by Muhammad ibn Ahmad al-Safati al-Zaynabi (1244-1828);

38. *Nihayat al-Zayn* by Muhammad Ibn 'Umar al-Nawawi (1298);

In surveying these books, the committee for the project devised organized questions to beresolved by the seven IAINs[36] by referring to the above books. Their conclusions were subsequently discussed by the *'ulumu'* in a separate workshop.

While the 38 books above convey a definite bias in favor of the Shafi'ite school[37],a few books from the other

[36] The seven mentioned IAINs are IAIN Syarif Hidayatullah Jakarta, IAIN Sunan Kalijaga Yogyakarta, IAIN Sunan Ampel Surabaya, IAIN Arraniri Banda Aceh, IAIN Antasari Banjarmasin, IAIN Alauddin Ujungpandang, and IAIN Imam Bonjol Padang. This limitation of these seven IAINs is based on the letter of cooperative work between the Minister of Religious Affairs and the Rectors of the IAINs dated 19 March 1986. See. Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, p. 39.

[37] The preference for Shafi'ite books here is a reflection of the Shafi'ite *madhhab's* prevalence in Indonesia. Looking at the Shafi'ite books used by the project of the KHI, it is very surprising that the monumental work of al-Nawawi, *Minhaj al-Talibin*, and that of al-Rafi'i, *al-Muharrar*, are not included, while those books are very famous and widely used in the *pesantrens* (Indonesian Islamic boarding schools). The reason for this exclusion may be that commentaries of the al-Nawawi and al-

schools, are also taken into consideration. The use of Ibn Qudama's *al-Mughni* and *Majmu' Fatawa Ibn Taimiyyah* (from the Hanbalite school), Maliki's *al-Muwatta'* and Zaynabi's *Fath al-Qadir* (Malikite school), and *Tabyin al-Haqa'iq* and *Fatawa al-Hindiyyah* which generally follows Hanafite school, are very important comparative texts. Moreover, the use of books which fall outside the four schools, such as Ibn Hazm's *al-Muhalla* from the Zahirite school and Sayyid Sabiq's *Fiqh al-Sunnah*, which are comparative legal books, is very meaningful to the development of Islamic law in Indonesia, since, in fact, the promotion of pluralism in Islamic thought has become the new paradigm in Indonesia.[38]

While the books above convey a strong grasp of Islamic law and openness to opinions which fall outside of the Shafi'i *madhhab*, they lack one very important element axiomatic for indigenizing Islamic law — none of these texts include the works or *fatwas* of Indonesian scholars who based their opinions on specifically Indonesian social phenomena. These include the works of Hasbi Ash-shiddieqy,[39] Hazairin,[40] and A. Hassan,[41] to

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Rafi'i, such as *Kanz al-Raghibin, Mughni al-Muhtaj* and *Minhaj al-Tullab* have been included.

[38] Compare to 13 books used before the KHI. See footnote No.1 of this chapter. The use of the opinions of other schools, beside Shafi'ite, is moreover, indicative of the KHI's flexible and accommodative nature to Indonesian social needs.

[39] T.M. Hasbi Ash-Shiddieqy is an Indonesian scholar who expressively promoted the idea of Indonesianizing fiqh (Islamic law).

name but a few. The KHI failed to touch on any of these important works. Fortunately, this imbalance was

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He wrote many books on many aspects of Islam such as Qur'anic exegesis *(Tafsir)*, Prophetic tradition *(Hadith) and fiqh*. Among his fiqh works are: *Syari'at Islam Menjawab Tantangan Zaman* (Yogyakarta: IAIN Sunan Kalijaga, 1961), *Pengantar Ilmu Fiqh* (Jakarta: Bulan Bintang, 1967), *Fiqh Islam Mempunyai Daya Elastisitas, Lengkap, Bulat dan Tuntas* (Jakarta: Bulan Bintang, 1975), *Falsafah Hukum Islam* (Jakarta: Bulan Bintang, 1975). *Hukum Antar Golongan dalam Fiqh Islam* (Jakarta: Bulan Bintang, 1971), *Kumpulan Soal-Jawab dalam Post Graduate Course Jurusan Ilmu Fiqh Dosen-dosen IAIN* (Jakarta: Bulan Bintang, 1972), *Dinamika dan Elastisitas Hukum Islam* (Jakarta: Bulan Bintang, 1976), *Pengantar Ilmu Perbandingan Madzhab* (Jakarta: Bulan Bintang, 1975), etc.

[40] He wrote many books containing his Islamic legal idea and thought. Among others is *Hukum Kekeluargaan Nasional*, Hukum Islam dan *Masyarakat, Hukum Kewarisan Bilateral menurut Qur 'an dan Hadits*, and *Tinjauan Mengenai UU Perkawinan nomor 1/1974*.

[41] A. Hassan was a religious scholar who came to Indonesia from Singapore. He was very active in promoting Islamic purification in Indonesia through educational instruction. (See, Howard M. Federspiel, "The Importance of Islamic Law in Twentieth Century Indonesia," Completed Research Awaiting Publication (July 1995), p. 8; There are many books written on his thought and organization, PERSIS (Persatuan Islam). The most authoritative works specifically dealing with it are that by Howard M. Federspiel, *Persatuan Islam Islamic Reform in Twentieth Century Indonesia* (Ithaca: Modern Indonesia Project Southeast Asia program Cornell University, 1970) and Akhmad Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia, 1887-1958," Ph.D dissertation, McGill University, Montreal, Canada, 1997. There are many works written by Ahmad Hassan. Among others are *Soal Jawab* (1931-1950, 1956-1958), *al-Burhan* (1933), *al-Furu'il* (1949), *Risalah Zakat* (1953), *Risalah al-mutlchab* (1956) and *al-Furqan* (1956).

tempered by the formal use of *fatwas* issued from the MUI (The Council of Indonesian Ulama),[42] the *Majelis Tarjih* of Muhammadiyah,[43] and the *Bahtsul Masa 'il* of Nahdlatul Ulama,[44] which were included in the data gathered.[45]

Aside from examining the foregone *fiqh* books, the committee also examined jurisprudential works which had been compiled into 16 books. These can be broken down into the following groups: four books of compiled legal decisions; three books of compiled *fatwas*; five books of jurisprudence from Religious Courts; and four law

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[42] The MUI is a Council of Indonesian Ulama which is established by the government to deal with the religious questions in the country. This council is active in issuing *fatwas* concerning Islamic legal practice. The fatwas issued by this council tend to support government policies. For further information on this council, see M. Atho Mudzhar's *The Fatwas of the Council of Indonesian Ulama*.

[43] *Majlis Tarjih* is an institution within the Muhammadiyah Organization which is responsible for answering religious questions which arose. The problems included the matters of Islamic Theology, law, ethics, and modern social issues. *The Majlis Tarjih*'s answers of the problems have been compiled into many books. Among them are *Tanya Jawab Agama I* (n.p: Penerbit Suara Muhammadiyah, 1990), and *Tanya Jawab Agama II* (n.p: Penerbit Suara Muhammadiyah, 1991).

[44] Like the Muhammadiyah, the Nahdlatul Ulama organization also has an institution for discussing various problems raised by its members throughout Indonesia. This institution is called *Bahtsul Masa 'il* (Forum for discussing many problems). The conclusions of the answers are collected and published into many books, namely *Ahkam al-Fuqaha'*.

[45] See M. Yahya Harahap, "Tujuan Kompilasi Hukum Islam," in IAIN Syarif Hidayatullah, *Kajian Islam tentang berbagai Masalah Kontemporer* (Jakarta: Hikmat Syahid Indah, 1988), p. 93.

report books.[46] These were studied by the Directorate of the Establishment of the Bodies of the Religious Judiciary *(Ditbinbapera)*.

The second step consisted of interviews with the *'ulama'*. One hundred and sixty six *'ulama'*, regarded as the representatives of the body of Indonesian *'ulama'* were interviewed from across ten cities. In addition, of the 166 *'ulama'*, some were representatives of Islamic organizations while others were independent *'ulama'*, especially from among the heads of the *pesantrens*. The interviews were conducted both individually and collectively at a set location where the *'ulama* 's opinions were solicited on the problems outlined in the agenda.[47] These interviews proved fruitful in illuminating the Islamic laws to be used by Indonesian Islamic society. Hasan Basri, Head of the MUI, commented that this interview process would make the KHI's work "aspirative, accommodative, and credible."[48]

The third step entailed comparative studies with the Muslim countries of Egypt, Turkey, and Morocco to

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[46] See Ditbinbapera, *Kompilasi Hukum Islam di Indonesia*, (Jakarta: Ditbinbapera, 1991/1992), p. 152.

[47] See, Bustanul Arifin, "Kompilasi: Fiqh dalam Bahasa Undang-Undang," *Pesantren* No. 2 vol. II, 1985, p. 29; see also M. Atho Mudzhar, *Fatwas*, p. 39.

[48] Hasan Basri, "Perlunya Kompilasi Hukum Islam," *Mimbar Ulama* No. 104/X, April 1986, p.61.

which Indonesian experts in Islamic law were sent.[49] Morocco was chosen because it followed the Maliki's school, Turkey because it was a secular state and follower of the Hanafite school, while Egypt was chosen because of its geographical position between Morocco and Turkey and its adherence to the Shafi'i *madhhab*[50] A question which arises is; why was a Hanbalite country like Saudi Arabia or Syria, not included in this comparative study when Hanbalite opinions are found in the KHI and in Indonesian society? In this manner, the means by which each of these countries applied Islamic law, particularly in matters related to the Kffl's work, could be understood and taken into account in making the KHI.

As for the last stage. it comprised a five-day[51]workshop in Jakarta inaugurated by the head of the Supreme Courts, Ali Said, and the Minister of Religious

[49] These experts were assisted by the Indonesian students in those countries. See M. Yahya Harahap, "Tujuan Kompilasi," in Syarif Hidayatullah, *Kajian Islam*, p. 2

[50] See Munawir Sjadzali, "Pengadilan Agama and Kompilasi Hukum Islam," p. 3; see also Seyyed Hossein Nasr, "Islam," in Arvind Sharma (ed). *Our Religions*, (New York: Harper Collins, 1993), p. 466.

[51] There are many versions of this, in Presidential Instruction No. 1/1991, it is mentioned that the workshop was from 2'nd to 5'th February 1988, whereas in chapter 4 of the enactment of KHI it was written that the workshop was from 2 to 6 February 1988. Furthermore, Roihan Rasyid, in his "Kompilasi Hukum Islam," p. 11, said that the workshop was conducted for two days. Abdurrahman in his Kompilasi Hukum Islam di Indonesia mentions five days from 2 to 6 February 1988.

Affairs. In his speech, the Minister of Religious Affairs asserted that:

"To place the Religious Courts on a firm basis, or in stable condition, the New Order Government has striven to provide a draft of the bill for the Religious Judiciary... [such that] the Religious Courts will be independent Courts ...The continuous effort that is exerted by the New Order Government in improving and establishing a stable Religious Court is completing and perfecting the material laws used by the Religious Court. Ideally, new complete regulation should be in the form of law (*Undang undang*), but for a temporal time, based on agreement between the Supreme Court and the Department of Religious Affairs, this will be in a form of a Compilation of Islamic Law, that will be a reference or guide for the Religious Courts."[52]

The Minister's choice of words, especially the words "ideally" and "for a temporal time", implies a willingness to promulgate the KHI into law with binding power over the problems brought before the Religious Courts.

The workshop was attended by 124 persons *from* every province in Indonesia, including the heads of the provincial MUI, the heads of the High Religious Courts, some rectors of IAINs, deans of Syari'ah faculties, some *'ulama'*, Muslim scholars, and representatives of Islamic

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[52] Translated by the writer from Menteri Agama RI, *Himpunan Pidato Menteri Agama RI*, (Jakarta. Biro Hukum dan Humas Sekretaris Jenderal Departemen Agama, 1988), p. 28.

and women organizations.[53] Unfortunately, almost none of the examiners of the 38 *fiqh* texts were invited to contribute to this workshop and were, as such, unable to present their comments[54] Three different committees were formed to evaluate the acquired data; 1) the committee for matters on the law of marriage, 2) the law of inheritance, and 3) *waqf* law.[55] The workshop resulted in the compilation of three volumes of the KHI containing 229 articles.[56]

Three years after completion,[57] the KHI came into legal force through Presidential Instruction (Inpres), No.1/1991,[58] dated 10 June 1991, and followed by the

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[53] *Sinar Darussalam* No. 166/167, 1988, p. 11. *Tempo*, 4 February 1989 explains more detail about the persons attending this workshop, that is that there were 13 professors of Islamic law, 46 *'ulama'*, 21 jurists, some judges of the Supreme court, and a number of rectors of IAIN's.

[54] See footnote No. 4 in Roihan Rasyid, "Kompilasi Hukum Islam," p. 11.

[55] Detailed explanation of the structure of the committee can be read in Ditbinbapera, *Sejarah Penyusunan KHI*, pp. 158-9.

[56] What M. Atho' Mudzhar writes in his *Fatwas of the Council* p. 40 (that the number of articles is 108 and the number of chapters as seven) is not correct. The correct number of articles KHI contains is 30 chapters and 229 articles. See the book of *Kompilasi Hukum Islam di Indonesia*.

[57] One must question why the Presidential Instruction was three years in coming (from February 1988 to June 1991) to legitimate the use of the KHI. This question should be answered from a political perspective. See the discussion in Chapter in on the political background of the enactment of the KHI.

[58] A Presidential Instruction is different from a Presidential Decision in the sense that the former is not included as an Indonesian legal order

Decision of the Minister of Religious Affairs, No. 154/1991,[59] dated on 22 July 1991.

C. The Content of *Kompilasi Hukum Islam di Indonesia*

The *Kompilasi Hukum Islam di Indonesia* (KHI), accepted by the participants in the workshop as a standardized reference for the Religious Courts in matters of marriage, inheritance and *waqf*, is regarded as the *ijma'* (consensus) of the Indonesian *'ulama'*. Since the KHI can be consigned to *ijma'*, it is to be applied by

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while the latter is. The second difference is that the Presidential Decision is used to draw up or to rescind a law or regulation and is general in terms of its scope and object, while a Presidential Instruction is used to ask or prohibit something and addressed to a certain individual or individuals. Presidential Instruction No. 1/1991, for example, is addressed to the Minister of Religious Affairs and instructs him to disseminate the KHI in society and to do the instruction correctly and with full responsibility. See A. Hamid S. Attamimi, "Kedudukan Kompilasi Hukum Islam," p. 153.

[59] In a response to the Presidential Instruction No.1/1991, the Minister of Religious affairs made a decision addressed to the all instances of the Department of Religious Affairs and other department dealing with it, to use the KHI, so far as possible, in deciding on matters of marriage, inheritance and *waqf*. Since this Minister's Decision contains instruction rather than a decision per se, Attamimi has criticized it for being Decision of Minister's instruction rather than a Minister's Decision. A. Hamid S. Attamimi, "Kedudukan Kompilasi Hukum Islam," pp. 153-4. The consequence of this critique is that the KHI, according to Attamimi, lacks a strong legitimizing power.

Indonesian Muslims.[60] Moreover, this KHI is legally accepted by the President through his instruction No. 1/1991 issued on 10 June 1991.

In content, the KHI consists of three volumes: the first volume deals with marriage law; the second evaluates inheritance law, and the third deals with *waqf law*. Further comment on the three volumes of the KHI, and on their consistency with previous laws or regulations, demands a more thorough examination of the contents

1. Volume I

The first volume of the KHI contains legal stipulations regulating the institution of marriage. This section consists of nineteen chapters and 170 articles, the largest allocation of KHI space. This is significant, and points to Indonesian Muslim society's need for a

[60] See Amir Syarifuddin, *Pembaharuan Pemikiran dalam Hukum Islam* (Padang: Angkasa raya, 1993), pp. 138-9. Muhammad Rashid Rida, in his *Tafsir al-Qur'an al-Hakim (Tafsir al-Manar)*, says that executives, judges, *'ulama'*, military leaders, the heads of instances, and the leaders to whom the society entrusts its problems of social justice, are considered *ahl al-hall wa al-'aqd*. When they agree on a matter, the society must follow it as far as :(1) they are Muslims;(2) the mentioned agreement is not against the Qur'an and Hadith *Mutawatir(3')* there is no compulsion; (4) the mentioned law or matter is for *masalih al-'ammah* (social justice or public interest);(5) the law or matter above is not a matter of *'ibadah* (rite of worship) and *'aqidah* (belief). See Muhammad Rashid Rida, *Tafsir al-Qur'an al-Hakim*, (Beirut: Dar al-Ma'arif, 1973), p. 181.

comprehensive law regarding marriage, divorce and other related issues. As well, the first volume of KHI generally elucidates the law of marriage No. 1/1974 and Government Regulation (PP) No. 9/1975,[61] in detail, so as to eliminate any ambiguity. Moreover, new regulations, not covered by the previous laws, were added. In light of this, one can argue that the KHI is not a mere clarification of previous regulations, but is also, in effect, a supplement to them.

The marriage laws regulated in the first volume of the KHI include:

I. General Provisions
II. Bases of Marriage
III. Marriage Proposal
IV. Pillars and Requirements of Marriage
V. Dowry *(Mahr)*
VI. Marriage Prohibitions
VII. Nuptial Agreement
VIII. Marriage of Pregnant Women

[61] When we compare the first volume of KHI and the law of Marriage No. 1/1974, it becomes clear that many of its articles are the same as the articles of the law of Marriage. See, Zainal Abidin Abubakar, "Materi Pokok Hukum Perkawinan dalam Kompilasi Hukum Islam," Gema No.72/XV, 1994, p. 47; See also M.Yahya Harahap, "Materi Kompilasi Hukum Islam," in Moh. Mahfud etal. (eds), Peradilan Agama, p. 79, idem in Ditbinpera, *Berbagai Pandangan*, pp. 171-2.

IX. Polygamy
X. Marriage Impediments
XI. Annulment of Marriage
XII. Rights and Duties of Husband and Wife
XIII. Marriage Property
XIV. Child Custody
XV. Guardianship
XVI. Termination of Marriage
XVII. Consequences of Marriage Termination
XVIII. Grieving Period

Even though the first volume bears many similarities to the law of Marriage No 1/1974, its efforts to "Islamize" and specify the general stipulations and regulations[62] the latter are obvious. A case in point is the definition of marriage offered in article 2 and 3 of the KHI, which resembles the definition found in article 1 of the 1974 law of Marriage. Indeed, KHI defines marriage as:

Article 2:

[62] As we know, the law of Marriage is intended not only for Muslims but also for non-Muslims *(lex generalis)*. Thus, some regulations are phrased in a deliberately ambiguous fashior even though many of them are Islamic. KHI, however, is a compilation of regulations intendec for the Muslims *(lex specialis)* and tends to use the religious *fiqh* or Qur'anic terms rather thar the Indonesian terms

"Marriage, according to Islamic law, is *nikah*, that is a strong contract (agreement) or *mithaqan ghalizan* to obey Allah, and doing it is a form of *'ibadah*, that is a rite of worship"[63]

Articles 3:

"Marriage aims at establishing a family through *sakinah* (prosperity), *mawaddah* (love), and *rahmah* (mercy)."

The above articles are similar to article 1 of the law of Marriage of 1974, which state that:

"Marriage is an internal and external bond between a man and a woman as a couple and as husband and wife whose purpose is to establish a family that is happy and eternally based on the Unity of God."[64]

The KHI articles stipulate an Islamic philosophical foundation to marriage that is in keeping with the philosophical foundation of marriage promoted by the

[63] Translated by the writer from Article 2 the original Indonesian read: "Perkawinar menurut hukum Islam adalah pernikahan, yaitu akad yang sangat kuat atau *miitsaaqan ghaliizhan* untuk memenuhi perintah Allah dan melakukannya merupakan ibadah."

[64] Translated from the Indonesian: "Perkawinan ialah ikatan lahir batin antara seorang pria dengan seorang wanita sebagai suami isteri dengan tujuan membentuk keluarga (rumah tangga) yang bahagia dan kekal berdasarkan Ketuhanan Yang Maha Esa."

law of Marriage of 1974 on the basis of the state philosophy, *Pancasila.*[65]

It is notable that the first volume of the KHI consolidates or reiterates the juridical philosophy of marriage promulgated by Article 2 of Law No. 1/1974 which says[66]:

(I). Marriage is legitimate when it has been concluded according to the dictates of the religion and the belief of the two concerned parties.

(2). Every marriage is to be administered according to the prevailing regulations."

Similarly, articles 4, 5, 6, and 7 of the KHI place emphasis on the same themes, declaring that the marriage contract must be administered by the official marriage administrators. Moreover, the KHI demands that a marriage be conducted before, and under the auspices of, these officials. According to Article 6, any marriage administered by parties not conforming to government ordinances is legally without validity. Hence, these articles clearly support and bolster

[65] See, M. Yahya Harahap, "Informasi Materi Kompilasi Hukum Islam," in Ditbinbapera, *Berbagai Pandangan*, p. 172-3; see also Zainal Abidin Abubakar, "Materi Pokok Hukum Perkawinan dalam Kompilasi Hukum Islam," *Gema*, NO. 72/XV, 1994, p. 47; see also Abdurrahman, *Kompilasi Hukum Islam*, p. 67.

[66] Translated from Indonesian (1). Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya itu. (2). Tiap-tiap perkawinan dicatat menurut menurut peraturan perundang-undangan yang berlaku.

government's intervention in matters of marriage, shunning the dogmatic belief and traditional conception of marriage as a personal affair or a matter of local *adat*.[67]

A number of new provisions were added to the KHI under discussion on items related to, among others, engagement *(khitbah)*, dowry *(mahr)*, and marriage to a pregnant female, matters previously ungoverned by the law. Engagement is covered under articles 11, 12, and 13 of the KHI for it bears a legal consequence in both Islamic law[68] and in *adat* laws[69].

Moreover, in *the fiqh* texts, engagement falls under the rubric of marriage law. "Dower" is yet another subject which the KHI delves into, expounding upon it in detail[70] and lending it legal certainty and juridical status. As marriage to a pregnant female was also overlooked under

[67] See M. Yahya Harahap, "Informasi," p. 174

[68] The Hadith strongly prohibits a person from becoming engaged to a girl/woman who is already engaged to another. The hadith transmitted by al-Bukhari and Muslim says: *"La yakhtubu Ahadukum 'Ala Khitbati Akhihi* (Do not become engaged to a girl that is already engaged to others). See Muhammad ibn Isma'il al-Kahlani al-San'ani, *Subul al-Salam Sharh Bulugh al-Maram min Adillat al-Ahkam*, vol. in (Beirut: Maktabat al-Tijariyat al-Kubra, nd), p. 111.

[69] *Adat* law in some areas demands a fine from a person who is engaged to a girl that has been engaged by another, and considers the doer as performing an immoral act.

[70] See eight articles, from 30 to 38, of the first volume. This issue is also a controversial issue in Islamic law. *The fuqaha'* from various schools are in disagreement regarding this matter. The broad discussion on this matter, see chapter II of this thesis.

previous regulations, the subject continued to fuel disagreement among judges, as it had among *the fuqaha'* in history.[71] To dispel ambiguity and foster legal certainty, article 53 of the KHI stipulates that a man is allowed to marry a pregnant female without waiting for the birth of her baby. However, this article does not specify whether if the prospective groom is someone who is not the father of the woman's fetus.[72]

The latest and most controversial regulation in the KHI concerns the prohibition on marriage between Muslims and non-Muslims. Article 40 (point c) clearly states that a Muslim man is prohibited from marrying a non-Muslim woman. The controversy arises because the majority of *fuqaha'* from various schools[73] had permitted Muslim men to marry women of *ahl-kitab*, whether Nasrani (Christians) or Yahudi (Jewish), on the basis of Quranic injunction.[74] Going against the general tide, the KHI has adopted the opinion of a minority of *'ulama'*, an opinion also advocated by the *'ulama'* of the MUI (The Council of the Indonesia Ulama) who frown upon such inter-religious alliances.[75] Consequently, the article does

[71] There is *ikhtilaf* (disagreements) among *fuqaha'* on this matter. For more on this matter, see chapter n.

[72] Abdurrahman, *Kompilasi Hukum Islam*, p. 73.

[73] See Al-Jaziri, *Al-Fiqh 'ala Madhahib Al-Arba'ah*, vol. IV (Egypt: Dar Ihya' al-Turath al-'Arabi, 1986), pp. 76-7.

[74] See *surah Al-Ma'idah* (5):5

[75] In the case of Indonesia, forbidding marriage with *ahl-kitab* places a prohibition on marriage with Christians, as there are no Jews in the

not regard the inter-religious marriage[76] between Muslims and non-Muslims as a legal option anymore. Yahya Harahap, one of the main architects of the KHI, argued that the KHI advocated this opinion because marriage to a non-Muslim in Indonesia involved more *mafasid* (negative consequences) than *maslahah* (positive consequences).[77]

It must be said that other regulations in the first volume of the KHI are hardly novel or controversial anyway, but, rather, a reiteration of previous laws and regulations. This is especially true with respect to the law of Marriage No. 1/1974 and Government Regulation No. 9/1975.

country. As such, the prohibition may be related to the issue of Christian prosetylization in Indonesia which frequently occurred through marriage institution. Meanwhile, "religionizing the religious person" is prohibited by Indonesian statutes.

[76] The term "inter-religious marriage" is preferable to the term "mixed marriage" and closer to the Indonesian term "kawin campur". The term "mixed marriage" also denotes the marriage between Indonesians and other persons who are subject to other laws, such as a marriage between a Dutch man and an Indonesian woman. See the discussion on this in Hasbullah Bakri, "Tak Ada Kekosongan Hukum," *Panji Masyarakat* No. 719/XXXIV, 11-20 May 1992, pp. 67-8.

[77] M. Yahya Harahap, "Informasi," pp. 177-8. Again, the broader discussion on this issue is discussed in chapter II.

2. Volume II

The second volume of the KHI outlines the regulations governing inheritance issues. More succinct than the first volume, it consists of just four chapters and 23 articles. Primarily, the chapters deal with general provisions of the inheritance; the heirs *(ahli waris);* the distribution of inheritance; *'Aul* (increase) and *Radd* (return); bequest *(wasiat)* and gift *(hibah)*.[78]

Generally speaking, the regulations governing inheritance found in the second volume follow the stipulations stated in the Our'an. The classification of the heirs and the distribution of wealth are, for the most part, based on the Qur'anic prescriptions. Thus, a woman gets half the share of a man in terms of the amount of inheritance they both receive.[79] They do not receive equal shares, as proposed by some scholars who demand the

[78] In the fiqh texts, bequest (*Ai&bic'.wasiyyah;* Indonesian: *Wasiat)* and gift *(hibah)* are not explained in the chapter on inheritance, because the two are made while the giver still lives. In addition, gift *(hibah)* is also given without waiting for the death of the giver. These two matters are included in this volume because, materially, the object of inheritance is denoted by the giver of the testament or gift. Moreover, this case is a consequence of the acceptance *ofAdat* law's principles about inheritance and *wasiat wajibat* being utilized by the KM. For instance, Article 211 of KHI states: "a gift *(hibah)* from parents to their children, is counted as inheritance." Article 209 of KHI says: " Adopted parents or adopted children have the right to receive *wasiat wajibat* (obligatory bequest)." The above articles clearly relate gift and bequest to inheritance. See, Roihan Rasyid, "Kompilasi Hukum Islam," p. 94.

[79] The Qur'an, *Surat al-Nisa'* (3): 11.

reactualization of Islamic law.[80] Moreover, adopted children do not have a right to any share of the inheritance as legitimate children do.[81] Nevertheless, the influence of *adat* law on this KHI is apparent, but muted.[82] Legitimizing the obligatory bequest to be the right of adopted children and adoptive parents are the lucid example of the *adat* influence.

A novel clause to the volume under discussion is the *Plaatvervulling* or the substitution of heirs. The *plaatvervulling* attempts to give the grandchild a right to demand and receive his father's share of the estate of a grandfather, even if the child's father pre deceased the grandfather.[83]

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[80] Before the enactment of the KHI, Munawir Sjadzali, the Minister of Religious Affairs presented his ideas on how to reactualize Islamic law, especially inheritance between a man and a woman. This idea has been a hot issue up to now. Some scholars and Islamic leaders accept this idea while others reject it. For further on this idea, see Munawir Sjadzali, "Reaktualisasi Hukum Islam," in Eddy Rudiana Arif (ed), *Hukum Islam di Indonesia Perkembangan dan Pembentukan*, p.83-93,

[81] See Article 171. This follows the *Hadith* about Zayd bin Harithah whom the Prophet Muhammad adopted, rather than the *adat* law which puts the adopted and legitimate children on equal terms with respect to inheritance.

[82] The example is taken from Article 209 verse 1 which gives the adopted children the right to get *-wasiat wajibat*, as much as one third of their adopted parents' wealth as the maximal limit. This article actually accommodates the *adat* law. Similar to the adopted children, the adopted parents are also to be given *wasiat wajibat* in similar limit.

[83] *Plaatvervulling* is stated in Article 185 verse 1 and 2: (1) Heirs who predeceases propositus, their positions can be replaced by the

As a regulation, this *plaatvervulling* regulation is actually a persuasive interpretation and adaptation of both *adat* and European laws. Thus, according to the KHI, the substitute heir cannot exceed the share of inheritance received by the direct legatees who are in a similar position to the substituted heir.

The motives behind the *plaatvervulling* institution are humanitarian and just. It is regarded as inhumane and unjust to deprive a child of the right to receive the inheritance that his father would have received, had the father not died before his own father, i.e., the child's grand parent.

Chapter VI of volume two is devoted to a discussion on gift *(hibah)* and is basically similar to the norms of *adat* and European laws. The similarities arise from the symmetry in basic principles applied to *hibah* within these three laws. Consequently, after the unification of the administrative procedure governing *hibah* was established through Government Regulation No. 10/1961, it became difficult to distinguish any differences between the three laws.[84]

Nonetheless, the KHI further modified the legal formulation of *hibah*, and endowed it with legal certainty, creating a uniform perception of it among society and officials. Among other modifications promulgated by the

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children, unless for those who are mentioned in Article 173. (2) Share for a replacement heir may not exceed that of equal heirs they replace.

[84] See M. Yahya Harahap, "Informasi," p. 192.

KHI are statements on the minimal age at which a gift may be bequeathed, i.e., 21 years, and the limits on the amount of wealth one is entitled to bequeath in the form of *hibah*, (one third of his wealth). Prior to this, uncertainty and disagreement prevailed among Indonesian *'ulama'* on these questions.

3. Volume III

Waqf is an Islamic institution which took root in Indonesian Muslim society from the early years of Islam's arrival to the country. From its inception, the institution has been regulated by both unwritten and written laws. *Fiqh* texts dealing with *-waqf* and jurisprudence of the Religious Courts constitute a part of the unwritten law, while the Government Regulation No. 28/1977 is a specific written law concerning landholdings. However, prior to the emergence of the KHI, the *waqf of* other matters was still regulated by the unwritten laws.

Viewed from the legal perspective, the third volume of the KHI can, according to Taufiq,[85] be regarded as *ius generalis*, while the Government Regulation No. 28/1977 can be seen as *ius specialis*. This delineation is well founded as the stipulations found in the third volume of the KHI are representative of the generalizations or extensions made to previous regulations. Indeed, the

[85] Taufiq, "Asas-asas Hukum Perwakafan menurut Kompilasi Hukum Islam," in *Gema* No, 72/XV, 1994, p. 42.

formulation of articles in this volume of the KHI mirrors that of the regulation No. 28/1977. Therefore, some legal scholars[86] do regard this third volume as a re-write of the previous regulations with minimal additions made here and there.

The main detectable difference between the third volume of the KHI and the regulation No. 28/1977 is the term used to denote the object of *waqf*. In regulation No. 28/1977, the term "owned land" is used whereas in the KHI it is termed a "thing". The reference to "thing" in the KHI includes everything donated as *waqf*, while the term "owned land" is only used for *waqf* of land.

Systematically speaking, this third volume of the KHI consists of fourteen articles arranged under five chapters. By comparison with the preceding volumes, this volume is the shortest. The chapters are:

I. General Provisions
II. Functions, Elements, and Regulations
III. Procedure and Registration of *Waqf*
IV. Change, Solution, and Control of *Waqf*
V. The Transitional Provisions

[86] See, Abdurrahman, *Kompilasi*, p. 82.

D. The Legal Status of *Kompilasi Hukum Islam di Indonesia*

To determine the legal status of the KHI in the Indonesian Juridical System, one must appreciate earlier the position of Islamic law in the Indonesian legal system, for, in itself, the KHI is a compilation of Islamic laws already extant in Indonesian society. We must also take cognizance of the legal leverage employed by the Presidential Instruction which was used to legitimize the use of the KHI.

Indonesian history informs us of the vibrancy of Islam (since its introduction) in the archipelago.[87] Scholars have, nevertheless, disagreed on the exact date of Islam's debut in Indonesia. S. Q. Fatimi[88] and Syed

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[87] See Muhammad Daud Ali, "Kedudukan Hukum Islam dalam Sistem Hukum Indonesia," in Taufik Abdullah and Sharon Siddique (ed), *Tradisi dan Kebangkitan Islam di Asia Tenggara*, (Jakarta: LP3ES, 1989), p. 208, or see its English version, "The Position of Islamic Law in the Indonesian Legal System," in *Islam and Society in Southeast Asia*, (Singapore: SEAS, nd), p. 187; See also Panitia Penyusun Biografi, *Prof. K.H. Ibrahim Hosen dan Pembaharuan Hukum Islam di Indonesia*, (Jakarta: C.V. Putra Harapan, 1990), p. 101.

[88] His opinion about the coming of Islam to Nusantara is clearly presented in his *Islam Comes to Malaysia* (Singapore: Malaysia Sociological Research Institute, 1963). In this book he attempts to answer three questions; where, when, and how did Islam come to Malaysia, which automatically addresses the coming of Islam to Indonesia.

Naquib Alatas[89], for example, say that the first coming of Islam to Indonesia occurred in the eight century[90]. Meanwhile, many other scholars such as Schrieke[91], Harrison[92], and Hall[93] assert that it took place in the thirteenth century. The rapid spread of Islam in the Malay world and in the Indonesian archipelago was through many acculturative ways, such as marriage between the Muslim merchants and indigenous women, relations nurtured through trade and the like.[94]

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[89] See his book. *Preliminary Statement on General Theory of Islamization of the Malay-Indonesian Archipelago*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969).

[90] There are many other scholars who support this opinion. N. A Balloch in his *The Advance of Islam in Indonesia* (Islamabad: NIHCR, 1980), Syed Farid Alatas in his article "Notes on Various Theories Regarding the Islamization of the Malay Archipelago," *Muslim World* 75 No. 3-4 (July-October, 1985), pp. 162 175 arrives at the same conclusion. Muhammad Daud Ali in his "Kedudukan Hukum," in *Tradisi dan Kebangkitan*, p. 208, quotes the similar conclusion to the seminar on the coming of Islam to Indonesia that was conducted in Medan 1963.

[91] B. Schrieke, *Indonesian Sociological Studies* (Den Haag: W. van Hoeve, 1955), pp. 7-37.

[92] Brian Harrison, *Southeast Asia: A Short History* (London: Macmillan & Co, 1957), pp. 50-60

[93] D. G. E. Hall, *A History of Southeast Asia* (London: Mcmillan & Co, 1964), pp. 190-204.

[94] Lapidus mentions three factors which eased the Nusantara people into an acceptance of Islam: the role of Muslim merchants who were actively involved in social life with local citizens through marriage to local women and the sharing of diplomatic knowledge and skills on trade with local rulers, the role of sufi in communicating Islamic

Certain kingdoms in Nusantara applied Islamic law alongside *adat* law, which preceded Islam, in arbitrating disputes. The co-existance of these two legal systems was remarkably harmonious, a fact which may be explained by reference to Islamic legal theory which accommodates *al- 'adah* (custom) or *al- 'urf* (usages). Later development reveals this relationship to have facilitated the "Islamization" of some aspects of *adat* (tribes) law, while the latter was allowed to color the practices of Islamic law.[93] This exchange was interrupted with the arrival of the Dutch colonizers who introduced Western law and, in

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teachings, and the value of Islam itself. See I. M Lapidus, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1988), p. 469. See also the quotation of Lapidus' notion by Gavin W. Jones in his *Marriage and Divorce in Islamic South-East Asia* (Kuala Lumpur, Oxford, Singapore, and New York:'Oxford University Press, 1994), p.2; For an anthropological perspective of the conversion to Islam, see Judith Nagata, *Malaysian Mosaic Perspectives A Poly-ethnic Society* (Vancouver: University of British Columbia Press, 1979), pp. 15-16; See also, M. C. Ricklefs, *A History of Modern Indonesia c.1300 to the Present* (Bloomington: Indiana University Press, 1981), p. 2; Regarding the motivation behind the acceptance of Islam by Nusantara society, Winstedt, in his *The Malays: A Cultural History* (Singapore: Kelly and Walsh, 1947) p. 27, concludes that it was motivated by the political interests of local rulers who accrued great economic benefit from and strong diplomatic relations with the foreign traders through the conversion to Islam.

[93] This mutual exchange between Islamic law and adat law could be a reflection of Islamic legal flexibility through the concepts of *istihsan* (juristic preference), *maslahah mursalah* (consideration of public interest), the maxim *al- 'adah muhakkamah* (*Adat* can be considered as law) and the like.

the process of promoting it, separated and emphasized the contradictions between Islamic law and *adat* law. In sum, these three laws, which have all been applied in Indonesia, fostered an increasingly pluralistic society in terms of race, religion, and law.

After Indonesia gained its independence, the government, through Article 2 of the transitional provisions *(aturan peralihan)* in the Constitution of 1945,[96] recognized and perpetuated the application of the three legal systems and laws enacted by national legislature in so far as they were not abrogated by newer legal rules.[97] In so far as Islamic law went, the Old Order government (from 1945-1966) passed many statutes or laws recognizing its status as a source of reference on certain matters decided by the Religious Courts. The influence and authoritativeness of Islamic law was made apparent by the following: law No. 22/1946, regarding family law (marriage, divorce, and reconciliation); law No. 1/1951, concerning the elimination of *adat* judicial institutions; government regulation No. 45/1957 on the authority of judicial affairs; law No. 5/1960 regarding the principle of

[96] Article 2 says: "All existing state institutions and laws shall remain in force so long as new ones have not been created in accordance with the Constitution."

[97] See Article 2 on the Transitional Provisions (*Aturan Peralihan*) in the Constitution 1945.

agrarian affairs; and statute No. 15/1961 on the authority of attorneys.[98]

The laws enacted by the New Order government which are concerned with Islamic law are: law No. 14/1970, which affirms the equality of Religious Courts to other courts; the law of marriage No. 1/1974; government regulation No. 9/1975 on registration of marriage; regulation No. 28/1977 on *waqf*, and the law of Religious Judiciary No. 7/1989. Such laws, some explicitly and others implicitly, buttress the application of Islamic law.[99]

The conclusive point to be made is that in terms of family law, marriage, inheritance, and also *waqf*, Islamic law has been legally or constitutionally accepted as a material law to be applied by society and to be used by Religious Courts as reference. This point is further substantiated by a look at Indonesian Constitutional law

[98] The laws and regulations mentioned above allude to the existence of a close relationship between Islamic law and National law. This relationship resulted in "existence theory" *(teori eksistensi)*. See *Kenang-kenangan Seabad Peradilan Agama di Indonesia* (Jakarta: Ditbinpera & Ditjen Bimas, 1985), p. 163; For the broader explanation of the laws and regulations above in their relation to Islamic law, please see Wasit Aulawi and Arso Sosroatmodjo, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 1975), pp. 23-30, 80-98.

[99] These law and regulations were issued to secure Islamic law a place in national positive law. See. Nur Ahmad Fadlil Lubis, "Institutionalization and the Unification of Islamic Courts under the New Order," *Studio Islamika*, vol. 2, No. 1, 1995, p. 41.

which acknowledges Islamic Law as one of its sources.[100] Article 2 of the transitional provisions of the Constitution of 1945 above allocates to Islamic law a status equal to other laws in the Indonesian legal system.

Furthermore, Lubis[101] accounts for the effectiveness of Islamic law in the Indonesian legal system by emphasizing the demographic fact that the majority of Indonesians are Muslims, and that Pancasila's first principle enunciates as belief in one God. Consequently, Islamic law plays a unique role in the formation of a "unified modern national legal system." Moreover, he states, "the possibility of Islamic legal values influencing national law or the element of Islamic law, so that it is received as positive law, is extensive, if not imperative." His assertions are supported by a reality in which any regulation which contradicts the basic spirit of Islamic law tends to be ineffective.

With the above in mind, the depiction of the KHI as a compilation of living Islamic laws in Indonesia gains credibility. The validity which this position gives to the KHI as a legal proscription is self evident. Nevertheless, the promulgation of the KHI, which consists of the matters of marriage, inheritance, and *waqf*, is regarded as

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[100] See Kusumadi Pudjosewojo, *Pedoman Pelajaran Tata Hukum Indonesia* (Jakarta: Sinar Grafika, 1990), p. 153; see also Achmad Sanusi, *Pengantar Ilmu Hukum dan Pengantar Tata Hukum Indonesia* (Bandung: Tarsito, 1984), pp. 70-1, 83-5.

[101] Nur Ahmad Fadlil Lubis, "Institutionalization," p. 41.

problematic since, on the one hand, it is just based on the Presidential Instruction which, according to the Indonesian legal system, does not have legal power to decide or determine the application of any regulations, but is just an instruction. On the other hand, the matters of marriage, inheritance and *waqf* have been accepted by the constitution and laws, which are hierarchically higher, in terms of their legal position, than the presidential instruction and, even, presidential decision, as a legal reference. The debate that arises is "Does the status of KHI derive from presidential instruction or to the previous laws and regulation since it contains some same matters as laws before?."

Indonesian legal theory states that the regulations will have a binding effect if they are in the forms of: Constitution *(Undang-undang Dasar);* Decrees of the People's Assembly *(Ketetapan MPR);* Statute *(Undang-undang)* or Regulation in lieu of statute *(Peraturan Pengganti Undang-undang);* Government Regulation *(Peraturan Pemerintah);* Presidential Decision *(Keputusan Presiden);* and other implementing regulations.[102] Attamimi expounds on the meaning of "other implementing regulations" by mentioning the Decisions of the Minister; the Decisions of non-departmental State Institution; Decisions of the Head of State Institution

[102] This is the hierarchical order of laws applied to the Indonesian legal system that is based on Decrees of the People's Assembly (TAP MPRS) No. XX/1966. The consequence of this order is that the lower law cannot contradict the higher one.

established through the Statute; the Regulations of Provincial Government; the Decisions of Governor of the Province; the Regulations of District Government; and the Decisions of the Head of District Government.[103] The Presidential instructions are not included in the above structure and have, therefore, no power to affect the implementation of a regulation or law.

Addressing these problems, Gani Abdullah[104] argues that regulations, including Presidential Instruction, which is a subsidiary to the Government Regulations, have the power to shift *the ideal living law* in Indonesian society into the realm of formal law. He cites three reasons for this: *first*, each regulation can, effectively work without the continuous support of the subordinate regulations;

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[103] See A. Hamid S. Attamimi, "Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara," Ph.D Dissertation submitted to University of Indonesia (Jakarta: 1990), p.287-9. In this dissertation, however, Attamimi does not include the Constitution of 1945 and the Decree of the Peoples Assembly in this legal order; See also Attamimi's article, "Kedudukan Kompilasi Hukum Islam dalam Sistem Hukum Nasional, Suatu Tinjauan dari Sudut Teori Perundang-undangan Indonesia," in Amrullah Ahmad etal. (eds), *Dimensi Hukum Islam*, p. 152; See also, MPRS decree No. XX/MPRS/1966 dated July 5, 1966; See also Eddy Damain and Robert N. Homick, "Indonesia's Introduction of Comparative Law," *American Journal of Comparative Law*, 20/3, 1972, pp. 521-6.

[104] See his writing, "Kehadiran Kompilasi Hukum Islam dalam Hukum Indonesia Sebuah Pendekatan Teoritis," in Tim Ditbinbapera, *Berbagai Pandangan*, pp. 72-3; see also his *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia*, (Jakarta: Gema Insani Press, 1994), pp. 60-61.

second, there is a phenomena in Indonesian legal system that the order of laws is not applied strictly and, therefore, leaves room for the use of other regulations, such as shown by the *rechtsvinding* theory (a theory that determines the use of certain law); *third*, the practical implementation of legislative programs implies that Presidential Instruction has effective independent power to work effectively and can, therefore, empower the KHI in the national positive law-making process.

Ismail Sunny[105] states that it matters little whether the KHI is used on the basis of Presidential Decision or Presidential Instruction, as the KHI is only a compilation of material laws used in a legal capacity and acknowledged as the laws applicable to Muslims based on article 2 section 1 and article 63 section 1 of the law of Marriage No.1/1974[106] and article 49 section 1 of the Juridical Statute No. 7/1989.[107] Sunny furthermore says

[105] See Ismail Sunny, "Kompilasi Hukum Islam ditinjau dari Sudut Pertumbuhan Teori Hukum di Indonesia," in Ditbinbapera, *Berbagai Pandangan*, p. 111-2.

[106] Article 2 verse 1 is: "Marriage is legal when it is concluded according to the laws of religion and belief of the parties." Article 63 verse 1 states: " What is meant by Religious Courts here is: a. Religious Court for the Muslims, b. Civil Court for others.

[107] Article 49 verse 1 says: " The Religious Court has a duty and responsibility to investigate, decide, and solve the problems among Muslims at the first level in the fields of a. marriage; b. inheritance, testament *(wasiat)*, and gift *(hibah)* which are concluded according to Islamic law; c. *waqfand sadoqah* (religious gift)."

CHAPTER II

SOCIOLOGICAL BACKDROP TO THE ENACTMENT OF *KOMPILASI HUKUM ISLAM DI INDONESIA*

In the socio-legal discourse, society functions as the premier instrument of law. It is regarded as an exact maxim that laws should be adaptable to the demands of a changing society. In Lev's words:

> "What law is...depends upon what it is allowed to be by conditions of political power and authority, and these conditions in turn are determined by a wide variety of social, cultural and economic forces. When the conditions change, the law must also change, sometimes explicitly but at the very least implicitly."[108]

[108] Daniel S. Lev, *Islamic Courts*, p.2.

On the other hand, law can be an instrument for evolutionary or revolutionary change when used as a tool of social engineering.[109] Concerning this matter, Jenkins asserts that, in the panorama of legal history, law's function has been threefold; conservative, liberalizing and constructive. In the first phase, law functions to protect and reinforce an established order which is challenged by dispute. In the second phase, law is wielded as an instrument for change, to mold or re-mold certain social order, while in the last phase law assumes a positive and creative role.[110]

In short, it can be said that, on the one hand, law shapes the society when it functions as a tool of social engineering. Conversely, it is also adaptable to social demands, norms, customs, and usages. Both legal functions can be seen clearly in the promulgation of a new law when its social backdrop is considered.

Islamic law, as one of legal systems adhered to by many followers of Islam, is also flexible to change. The interpretations of an Islamic legal base *(nas)*[111] are subject

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[109] Roscoe Pound is considered leading figure of the idea of law as a tool of social engineering. To him, sufficient understanding on the problems of social values and making social hypothesis the object of law are the important ways of applying a law. See, Satjipto Raharjo, *Ilmu Hukum* (Bandung: Citra Aditya, 1991), pp. 190-1.[109]

[110] See Iredell Jenkins, *Social Order and the Limit of Law* (Princeton, New Jersey: Prenciton University Press, 1980), p. 124.

[111] There are two kinds of *nas Qat'i* and *Zanni*. *Nas Qat'i* (absolute base) indicates an exact and clear legal base, such as the obligation to

to change over time and across regions. One legal maxim which typifies this approach is provided by the *usuliyyun* (experts in Islamic legal theories) particularly of the Hanafite schools; *al-hukm yataghayyaru bitaghayyur al-azminah wa al-amkinah* (law changes together with changes in time and place).[112] The "time and place" can be broadly understood as the social context encompassing economic, social, political and other factors, specifically the *'adah* (customs) and *'urf* (usages) of the society.

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perform prayer and fasting, the prohibition on drinking *khamr* (alcoholic drinking) or eating pork and the division of inheritance. *Nas Zanni* (speculative base) means a legal base that is ambiguous in meaning, such as the word *quru'* in its relations to the lapse of time between a woman's divorce and her remarriage (*'iddah*). Some Islamic legal scholar, such as al-Shafi'i and his followers interpret *quru'* as *al-tuhr* (free, not in menstruation) while others such as Abu Hanifah and his followers interpret it as *hayd* (in menstruation). These different interpretations give rise to different legal opinions. It is in the latter kind of *nas* that the Islamic legal scholars have large space to interpret differently and that allow interpretations to change over time. See, Wahbah al-Zuhayli, *al-Wajiz fi Usul al-Fiqh* (Beirut and Dimashqi: Dar al-Fikr al-Mu'asir, 1994), pp. 32-33; Muhammad ibn Husain ibn Hasan al-Jizam, *Ma'alim Usul al-Fiqh 'inda Ahl al-Sunnah wa al-Jama'ah* (Jeddah and Riyad: Dar Ibn al-Jawzi, 1996), pp. 82, 85-7; Muhammad Mustafa Shalabi, *Usul al-Fiqh al-Islami*, Vol. 1 (Beirut: Dar al-Nahdah al-'Arabiyyah, 1986), pp. 93-5.

[112] In relation to this maxim, see Muhammad ibn Ahmad al-Sarakhsi, *al-Mabsut*, vol. 15 (Cairo: Matba'atjil-Sa'adah, 1906-12), p. 171. See also Jalal al-Din al-Suyuti, *al-Ashbah wa al-Naza'ir* (Cairo: 'Isa al-Babi al-Halabi, n.d.), p. 99. See also Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin* (Cairo: Matba'ah al-Sa'adah, n.d.). Vol. 3, pp. 14-70.

'Adah and *'urf* [113] are recognized as determining factors of legal change and, even, as sources of law in Islamic legal theory.[114] Another famous maxim stipulates that the *adat* (custom) can become law *(al- 'adah muhakkamah)*[115]as far as it does not contradict general Islamic legal principle.

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[113] 'Ali ibn Muhammad al-Jurjani differentiates between *'urf* and *'adat* as follow: " *Al- 'Urf Ma istaqarrat al-Nufus bi Shahadat al- 'Uqul wa talaqqata al-Taba'i' bi Qabul wa Huwa Hujjah Aydan Lakinnahu Asra'u Ila al-Fahm. Wa kadha al-'Adah wa Hiya Ma istamarra al-Nas 'Ala Hukm al-'Uqul wa 'Adu ilayhi Marrah ba 'da Ukhra ('Urf is* something which can convince the soul through the aproval of *'aql* [reason] and which the senses can accept it. This *'urf* is also known as *hujjah* [legal base] or understanding. Meanwhile, *'adah* is something which is upheld by people on the basis of rational considerations). See 'Ali ibn Muhammad al-Jurjani, *Kitab al-Ta'rifat* (Beirut: Maktabah Lubnan, 1990), p. 154. For further discussion on this matter, see Ahmad Fahmi Abu Sinnah, *al-'Urf wa al-'Adah fi Ra'yi al-Fuqaha'* (n.p.: Matba'at al-Azhar, 1947).

[114] It is true that in the order of Islamic legal sources, especially in *Sunni's* jurisprudence, *'adah* and *'urf* are not mentioned beside the *Qur'an, Hadith* (Prophetic Tradition), *Ijma'* (Consensus) or *Qiyas* (Legal reasoning). However, it is not deniable that throughout Islamic legal history, since the time of the Prophet, local traditions and customs have played an important role in law-making. See Gideon Libson, "On the Development of Custom as A Source of Law in Islamic Law," *Islamic Law and Society*, vol. 1 No. 2, June 1997).

[115] On the important role of *adat* or *'urf in* Islamic law, see M. Habibbur Rahman, " The Role of Pre-Islamic Customs in the Islamic Law Succession," *Islamic and Comparative Law Quarterly* 8 (1988), pp. 48-64; see also, Mohamed el-Awa, "The Place of Custom ('Urf) in Islamic Legal Theory," *Islamic Quarterly* 17 (1973), pp. 177-82; see also Ahmad

The theoretical underpinnings described above imply a close mutual relationship between law and society and convinces us that the development of any law can and must be viewed from social perspective. The promulgation of the KHI, as part of the chain of Islamic legal developments in Indonesia, should also be analyzed in this light. This methodology gives rise to three main questions: how does the KHI meet the legal needs and practices of Indonesian Muslims? What reforms or innovations do the KHI offer compared to previous laws? And what is its significance for society? The answers of these questions will signify the social rationale behind the enactment of the KHI directly or indirectly.

To answer the questions posed above, three main points need elaboration: the position and relationship *of adat* to Islamic laws through Indonesian history; the influence *of adat on* the KHI as demonstrated by its contents; and the significance of the KHI to the Religious courts when deciding cases of a social nature.

A. *Adat* Law and Islamic Law in Society

Although the term " *adat* law" (Dutch: *adat recht)* is supposed to have come into use in the 1900's[116], the use of

Fahhmi Abu Sinnah, *al- 'Urf wa al- 'Adah fi Ra 'yi al-Fuqaha'* (n.p.: Matba'at al-Azhar, 1947).

[116] See Jan Prins, "*Adat* law and Muslim Religious Law in Modern Indonesia An Introduction," *The World of Islam,* vol. 1 (Leiden: E.J. Brill, 1951), p. 283. The term was firstly used by Snouck Hurgronje and

terms like *Godsdienstige Wetten* (The Religious Rules) and *Instellingen des Volks* (The Institutions of People) in several Colonial statutes — A.B. *(Algemene Bepalingen van Wetgeving/* General Provisions of Statutes) Article 11, R.R. of 1854 Article 75, and I.S. *(Indische Staatregeling)* Article 128— highlights the existence and practice *of adat* prior to that date.[117] The use of the term *Godsdienstige Wetten* (The Religious Rules) for *adat* law implies a close relationship or even synthesis of *adat* law with religious law or *shari'ah.*[118] The term *adat* law *(adat rechf)* itself first came

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latter was followed by many other scholars, such as Van Vollenhoven etc. See, Imam Sudiyat, *Asas-asas Hukum Adat Bekal Pengantar* (Yogyakarta, Liberty, 1985), p.i; The assumption that *adat* law first came into use in 1900s could be based on the fact that the first attempt conducted by the Dutch to codify *adat* regulations which occurred in the late nineteenth and early twentieth centuries. See, Howard M. Federspiel, "The Importance of Islamic Law," p. 1; For the description on the chronological development of the use of the term, see Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat* (Jakarta: C.V. Haji Masagung, 1990), pp. 23-4.

[117] See Imam Sudiyat, *Asas-asas Hukum Adat*, p. 3; The *Regeringsreglement* (Constitutions of the Netherlands East Indies) of 1854 uses three terms to refer to *adat* law: first, religious laws, institutions and customs; two, religious laws or ancient sources; three, popular institutions and customs. Use of these various terms is made because there is no exact word which fully represents the term *hukum adat*. See, Van Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*, trans. by J. F. Holleman, Rachel Kalis, and Kenneth Maddock, ed. by J. F. Holleman, (Leiden: The Hague-Martinus Nijhoff, 1981), p. 3

[118] For more discussion on the translation of this term by Indonesian legal scholars, see Sajuti Thalib, *Politik Hukum Baru Mengenai*

into official use in the statute in 1929, that is in the IS (Indisce Staatregeling) article 134 point 2.[119]

Scholars do not agree on the definition of *adat* law, especially concerning its material scope and sources.[120] However, they do agree that *adat* law is unstatutory law or, the uncodified rules held by a society in relation to aspects of human life. It includes State, Administrative, Criminal, Civil, and *inter-adat* laws.[121] Moreover, *adat* law is not static, but dynamic and responsive to the demands of prevailing conditions.

The coming of Islam, which brought a new legal conception to Indonesian society called *shari'ah*, does not marginalize the function and practice of *adat* law. The fact that more and more people embraced Islam did not mean that *adat* laws were abandoned. Rather, the existence of *adat* was acknowledged and, more importantly, supported by Islamic law. This is not to suggest,

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Kedudukan dan Peranan Hukum Adat dan Hukum Islam Dalam Pembinaan Hukum Nasional (Bandung: Binacipta, 1987), pp. 22-7.

[119] See Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat*, pp. 23-4.

[120] For a good description of the definition of *adat*, see Imam Sudiyat, *Asas-asas Hukum Adat*, pp. 5-21; See also. Van Vollenhoven, *Van Vollenhoven on Adat Law*, pp. 4-5; See also. Van Dijk, *Pengantar Hukum Adat Indonesia*, trans. A. Soehardi (Bandung: Sumur Bandung, 1982), pp. 6-11; See also, Soekanto and Soerjono Soekanto, *Pokok-pokok Hukum Adat* (Bandung: Penerbit Alumni, 1981), chapter I; See also, Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat* (Jakarta: CV. Haji Masagung, 1990), pp. 14-16.

[121] Soerojo Wignjodipoero, *Pengantar dan Asas-asas Hukum Adat*, p. 18.

however, that Islam did not color the contents of *adat* or subject it to the interpretations and practices of Islamic law.

The prominence given to *adat* law since the coming of Islam occurred for two principal reasons. First, as far as sociological theory is concerned, the coming of religion into a society with *adat* law can strengthen the position of *adat* itself for religion; in Indonesia's case this is Islam, legitimizing the social orders by bestowing upon them "an ultimate and valid ontological status ... by locating them within a sacred and cosmic frame of reference."[122] Religion, as a world-view, functions socially as a legitimizing force for human action. Second, Islamic law itself is not rigid. Rather, Islamic law brings its flexible concept especially in dealing with *mu'amalah* (rules regarding the human interaction), where the *adat* law plays a prominent rule. It offers a variety of interpretations and allows for novel interpretations when a new case or phenomenon arises. The employment of the concepts of *istihsan* (judicial preference)[123], *maslahah*

[122] See Peter L. Berger, *The Sacred Canopy; Elements of Sociological Theory of Religion* (Garden City, New York: Doubleday and Co., Anchor Books, 1969), p. 33.

[123] In terminological definition, *istihsan* means "the renunciation of analogy and the adoption of what is more fitting for people. Some say: *istihsan* seeks to introduce more lenience in laws in connection with difficulties encountered by the individual and the general public (vis., everyone). Some say: it is to give wide latitude and to solicit comfort." See, al-Sarakhsi, *Mabsut*, vol. 10, p. 145, as cited by Gideon Libson, "On the Development of Custom as A Source of Law in Islamic Law,"

(public interest),[124] *sadd al-dhara'i'* (blocking the means to harmful conditions) and the position of *'adat* in the Islamic legal thought, lends itself to an adaptive and accommodating relationship with local customs and usages (*adat* law).

The above leads us to conclude that, in Indonesia, the ties between *adat* law and Islamic law were harmonious as neither set of laws is immutable. This was the case prior to the coming of colonialism, a feature conducive to Islam's rapid spread in *Nusantara* (Indonesian

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Islamic Law and Society, vol. 4 No. 2, June 1997), p. 151; For the discussion on istihsan as a source of law, see J. Makdisi, "Legal Logic and Equity in Islamic Law," *The American Journal of Comparative Law*, 33 (1985), pp. 63-92.

[124] Etymologically, *maslahah* means interest, goodness, justice, or an effort to seek something useful and to remove harm. In Islamic legal terminology, *maslahah* means the preservation of the objective *ofshar'that* includes religion, life, intellect, offspring and property. See Abu al-Hamid al-Ghazzali, *al-Mustasfa min 'Ilm al-Usul* (Baghdad: Muthana, 1970), pp. 286-7. For a more detailed explanation on this matter see M. Khalid Mas'ud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institute, 1984). pp. 149-63; See also, idem. "Shatibi's Philosophy of Islamic Law An Analytical Study of Shatibi's Concept of Maslaha in Relation to His Doctrine of Maqasid al-Shari'a with Particular Reference to the Problem of the Adaptability of Islamic Legal Theory to Social Change," Ph.D dissertation, McGill University, Montreal, Canada (1973), pp. 43-74, 209-41. Sometimes, *maslahah* is called *istisiah*, looking for the benefit) or *al-istidlal al-mursal*. See Abu Ishaq al-Satibi, *al-Muwafaqat ji Usul al-Ahkam*, vol. 2 (Beirut: Dar al-Fikr, n.d), p. 39. See also Malcolm Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (Los Angeles: University of California Press, 1966), pp. 87-8.

archipelago). It is very unfortunate that the flexibility of Islamic law is hardly discussed or included as a facilitating factor in the spread of Islam. Most scholars focus the discussion on the role of *Sufis* and Sufism by relating them to the ancient syncretic beliefs and customs of Indonesian people.[125] Significantly, no apparent conflict ensued between *adat* law and Islam in the pre-colonial period in much the same way as the mystical systems.

In contrast to the above view, Lev argues that the conflict between *adat* law and Islamic law commenced with the coming of Islam itself. It was, he continues, this tension which led the Dutch to intervene in support of one law over another. The Dutch bias against Islam ensured that that support would go to *adat* law.[126] Many other scholars, generally Western, like Snouck Hurgronje,[127] M.B. Hooker,[128] Jan Prins[129] and J.N.D.

[125] See Clifford Geertz, *Religion of Java* (Glencoe: Free Press, 1960), pp. 124-5; See also James L. Peacock, *Indonesia: An Anthropological Perspective* (Pacific Palisades, Cal: Goodyear Publishing Co., Inc., 1973), pp. 23-28; See also, A.H. John, "The Role of Sufism in the Spread of Islam to Malaya and Indonesia," *Journal of the Pakistan Historical Society* 9 (1961), pp. 146-7; See also Ruth McVey, " Islam in Indonesian Politics," p. 210.

[126] Daniel S. Lev, *Islamic Courts*, pp. 8-10, 69.

[127] See his explanation in *The Achehnese* trans. by A.W.S. O'Sullivan (Leiden: E.J. Brill, 1906). See also M. A. Jaspan, "In Quest of New Law: The Perplexity of Legal Syncretism in Indonesia," *Native Studies in Society and History*, vol. VII (1964-1965), p. 258.

[128] See his book, *Adat Law in Modern Indonesia* (Kuala Lumpur, Oxford, New York, Jakarta: Oxford University Press, 1978), pp. 91-2; See also

Anderson[130], and some Indonesian scholars such as Muhammad Rajab,[131] hold a view similar to Lev's and argue that Islamic law was brought into forceful confrontation with local customs. Coulson's ideas are also in keeping with this view:

> "...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."[132]

Lev and Coulson's arguments have been challenged by many Indonesian scholars. Bustanul Arifin, for instance, throws doubt on the notion of conflict between

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his book, *Islamic Law in South-east Asia* (Singapore: Oxford University Press, 1984), p. 36.

[129] See his "*Adat* Law and Muslim Religious Law in Modern Indonesia," pp. 283-300.

[130] See his *Law Reform in the Muslim World* (London: The Athlone Press, 1974), p. 11.

[131] See his *Perang Paderi di Sumatera Barat (1803-1838)* (Jakarta: Perpustakaan Perguruan Kementrian P dan K, 1954).

[132] J. N. D. Anderson, "Reflection on Law-Natural, Divine and Positive," *940 'th Ordinary General Meeting of the Victoria Institutes*, at Westminster, December 10, 1956, pp. 1-23, as cited by Ismai'il bin Mat, "*Adat* and Islam in Malaysia: A Study in Legal Conflict and Resolution," Ph.D dissertation, Temple University, 1985, p. 1.

the two legal systems prior to the advent of colonialism. Legal conflict, he asserts, was actually engineered by the colonialists in relation not only to Islamic law and *adat* law but also to civil (western) law.[133] Like Bustanul Arifin, Deliar Noer asserts that the conflict only dates from the period of Dutch rule and was aggravated after colonial experts in the Netherlands "discovered" a new law called *adat* law at the beginning of this century. Awareness of this other law led the Dutch to extend its application into aspects of personal law on which Islamic law had governed.[134] This latter view is more consistent with the apparent acceptance and application of Islamic law in the seventeenth and eighteenth centuries by the various courts of Muslim princes and even by colonial authorities. On May 25th, 1760, for instance, the Dutch colonial authority recognized the place of Islamic family law through issuance of *Resolutie der Indische Regeerng*, better known as Compendium Freijher. As well, the Dutch commissioned the translation of the Shafi'ite *fiqh* text *al Muharrar* by Al-Rafi'i by the Dutch as a compendium to the application of Islamic law in

[133] See Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia Akar Sejarah, Hambatan dan Prospeknya* (Jakarta: Gema Insani Press, 1996), pp. 33-4.

[134] See Deliar Noer, "Administration of Islam in Indonesia," *Monograph Series*, No. 58 (Ithaca, New York: Cornell Modern Indonesia Project Southeast Asia Program Cornell University, 1978), footnote 7, p. 45.

Indonesia and the writing of *Cirebonsche Rechtsboek*.[135] In addition, the writing of many *fiqh* texts by Indonesian *'ulama'*, such as *Mir 'at al-Tullab*, *Sirat al-Mustaqim* (1004/1636) by Al-Raniri, *Sabil al-Muhtadin* (1195/1780) by Muhammad Arshad al-Banjari, *Kutaragama* and *Sajinat al-Hukm* allude to the place and importance of Islamic law in Indonesian society.

The close and harmonious alliance between Islamic law and *adat* law in Indonesian society is also well represented by many local idioms and proverbs; in Minangkabau, for instance, a famous saying states, *adat dan syara' sunda menyanda, syara' mengato adat memakai* (*adat* and *shari'ah* are interrelated, what *shari'ah* says is what *adat* actually does) or *adat bersendi syara'*, and *syara' bersendi kitabullah* (*adat* is based on *shari'ah* and *shari'ah* is based on God's book [al-Qur'an]).[136] In Acehnese society, we find the idiom *hukum ngon adat hantom ere', langee' zat ngon sipeut* (Islamic law and *adat* are inseparable for they are like an entity with one character). In South Sulawesi, it is said that *adat hula-hulaa to syaraa, syaraa hula-hulaa to*

[135] See Ismail Sunny, "Tradisi dan Inovasi Keislaman di Indonesia dalam Bidang Hukum," *MimbarHukum Aktualisasi Hukum Islam*. No. 8/TV, 1993, p. 20.

[136] For further information on this matter, see Taufik Abdullah, "Adat and Islam: An Examination of Conflict in Minangkabau," *Indonesia* 2 (October 1966), pp. 1-24.

adati (*adat* is based on *shara'* (Islamic law), and *shara'* is based on *adat*).[137]

The competing views on the relation between *adat*-Islamic laws probably arise from the differing theoretical and historical approaches used. Scholars who view the *adat*-Islamic law relationship as one of natural conflict tend to stereotype Muslims as people bound by a strict religious code which differs from *adat* and which consider all *adat* law to be a set of customary belief that are inimical to Islam by nature.[138] Meanwhile, some other scholars view it differently, believing that some *adat* laws are in keeping with the right Islamic spirit, and others are changeable, if the society demands it. Theoretically speaking, the former's argument assumes that the coming of a foreign legal system to a culture with an established legal order would exactly create conflict, while the latter view guarantees the absence of conflict on the basis of the cultural dynamism and tolerance of both Islamic law and Indonesian *adat* law. Another factor which contributes to this disagreement is that many scholars in the first group have misconstrued the nature of Islamic law by perceiving it as a system which offers only one rigid opinion for every case. Gouwgioksiong's conclusion, that

[137] See Mohammad Daud Ali, *Asas-asas Hukum Islam (Hukum Islam I) Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Rajawali Press, 1990), p. 201.

[138] See E. N. Taylor, "Aspects of Customary Inheritance in Negeri Sembilan," in M.B. Hooker (ed). *Readings in Malay Adat Laws* (Singapore: University of Singapore Press, 1970), p. 163.

marriage law for native Muslims recognizes fully the legal institution of polygamy and that the women who protest this polygamy are considered "anti-Islam" is the consequence of this misunderstanding on Islamic law.[129]

The opinions of both groups are only half correct. The spectra of conflict between Islamic law and *adat* in early Indonesian Islamic history are made reasonably plausible by socio-legal theory. Such conflict can not, however, be characterized as final. Islamic law, with its conceptual tools of *'urf* (usage), *maslahah* (public interest), *istihsan* (juristic preference) and others, tempers this conflict. Thus it may be said that, even as differences between Islamic law and *adat* law were palpable in the early Indonesian Islamic history, its projection by some Western scholars is too emphatic.

When the Dutch first arrived in Indonesia with the intention of trading, the association between *adat* law and Islamic law was a compatible one. The first Dutch colonial government acknowledged and admitted this state. This is apparent from L.W.C. van den Berg's theory that the laws of indigenous peoples are determined by their religion until the contrary is proven, because, he emphasized, in accepting a religion, they subjected themselves to its law automatically. Since Islam is accepted by the indigenous people, every Muslim is

[129] See Gouwgioksiong, "The Marriage Laws of Indonesia with Special Reference to Mixed Marriage," *Rabels Zeitschrift* 28 (1964), p. 719.

subject to Islamic law in totality (in *complexu*)[140] This theory is well known as *Receptio in Complexu* and enacted in Law No. 152 of 1882.[141] The advantages which accrued from this theory were that *fiqh* text and Islamic institutions, especially Islamic Courts, were evidently given a substantial attention.[142]

Berg's theory was not, however, in vogue for long. Its tenure expired when the Dutch government demonstrated a willingness to politically intervene in Islamic legal areas, or more precisely when van den Berg retired and was replaced by Snouck Hurgronje (from 1889-1906) as the advisor to the Dutch colonial government.[143] Driven by Dutch political ambition,[144] Snouck Hurgronje coined his own theory, called *Receptie theory*. Rejecting Berg's *Receptio in Complexu*, he argued that the living law of natives was in fact *adat* law and that

[140] Van Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*, p. 20.

[141] See Ichtijanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia," in Tjun Surjaman (ed), *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: PT. Remaja Rosdakarya, 1991), p. 120. Further explanation on this matter, see chapter III in this thesis.

[142] Ichtijanto, "Pengembangan Teori," p. 120.

[143] See P. Sj. Van Koningsveld, *Snouck Hurgronje dan Islam* (Jakarta: PT. Girimukti Pusaka, 1989, p. 251; see also H. J. Benda, *Rising Sun*, p. 20.

[144] Snouck Hurgronje did not want the indigenous people to revere Islam, because it would be an obstacle to the Westernization process. Furthermore, Hurgronje feared the influence of Pan Islamism, pioneered by Jamaluddin al-Afghani, which was very popular in Indonesia. See chapter III of this thesis.

Islamic law could not, therefore, be binding in so far as it contradicted or was not derived from the former.[145] Later on, this *Receptie* theory was given further credence by Van Vollenhoven and Ter Haar and their Javanese students who saw *adat* law as the most significant part of indigenous legal thinking.[146] Since the rise of this theory, Islamic law has been pitted against *adat* law in an antagonistic fashion. The symptoms of this conflict persisted even after Indonesia gained its independence.[147]

Receptie theory has endured its share of vehement protest from many Indonesian scholars, such as Hazairin (d. 1975), Sayuti Thalib and others.[148] A counter-theory, called exit theory, was developed by Hazairin and further established into the *Receptio a Contrario* by Sayuti Thalib. Both these theories have been important interpretations since Indonesian independence.[149] At heart, both theories contend that Hurgronje's *receptie* is faulty and contradictory to the letter of the Constitution of 1945 and must, therefore, be left out. Furthermore, the theories state that since both the Constitution of 1945 and *Pancasila*

[145] See Ichtijanto, "Pengembangan Teori," pp. 101, 122
[146] See Ichtijanto, "Pengembangan Teori," pp. 101, 122
[147] See M. A. Jaspan, "In Quest of New Law," p. 258
[148] See Federspiel, "The Importance of Islamic Law," p. 5.
[149] Immediately after Indonesian independence was declared on 17 August 1945, there were major demands from the Muslim society throughout Indonesia for the application of Islamic law, especially which of the Shafi'ite school. See Federspiel, "The Importance of Islamic Law," pp. 11-2.

place emphasis on the importance of religious beliefs, religious law is to constitute the law of the indigenous people. For Muslims, Islamic law is the law to which they have to subject themselves, since in nearly all cases it is recognized as a key ingredient of Islamic belief and action and expressive of moral and spiritual ideals. Most Muslims would also hold that *adat* law should be binding upon them, but only if they are not contrary to Islamic legal stipulations,[150] although in actual practice the issue is not as clear as to when *adat* is contradictory to Islamic teachings.

At a glance, one may think that the theories described above mirror the fluctuating development of Islamic law and *adat* law. Van Den Berg's theory recognized Islamic law; Hurgronje's *Receptie* advocated the promotion of *adat* law and the extinction of Islamic law; while Hazairin and Sayuti Thalib's theories symbolize the revival of Islamic law. In fact, this linear fluctuation is not utterly true since, throughout Indonesian Islamic history, both *adat* law and Islamic law have coexisted in various stages of tension and accommodation that might be different from one place to another.

Since both laws are dynamic and flexible to social demand, later developments in Islamic law in Indonesia were inevitably shaped by the influence of customs and

[150] See Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1962), pp. 4-6; Ichtijanto, "Pengembangan Teori," pp. 128-33.

usages. The interpretations of Islamic legal bases and choices made when seeking Islamic legal opinions in Indonesian *fatwas* which are used in making *fatwa* and rendering decision in Islamic courts in Indonesia can be viewed from its relation to *adat* law.

B. *Adat* and Social Influence Toward the KHI

Social demands for change and improvement in the quality of life are features of a dynamic society. A change in socio-legal perceptions is also a form of development. The changing role of women, for example, is case in point of positive legal change in Indonesian society.[151] While in traditional society a wife's functions entailed support for husband's career, in the modem state she has a right to a

[151] Actually the status of woman in Indonesia is not restrictive as it is in the Middle East. Historically, in the traditional agricultural society, Indonesian women were involved actively in the family economy. Meanwhile, in the modern or urban Indonesian women are not only active in the sphere of economics, but also in other areas such as politics and law. Those women, especially those who are involved in feminist groups or organizations, voice the necessity for gender justice and equality. The reform in the family law, such as the regulation of polygamy, *taklik talak* (conditional repudiation) and *harta gono-gini* (jointly property) may be considered as the result of the improvement of women status. See Lev, *Islamic Courts*, p. 137-8; On the debate over contemporary Indonesian woman, their status and the reconstruction of Islamic legal perspective on it, see M. Hajar Dewantoro and Asmawi (eds), *Rekonstruksi Fiqh Perempuan dalam Peradaban Mayarakat Modern* (Yogyakarta: Penerbit Ababil, 1996).

career. Other examples include the more liberal view on adopted children and the demonstrable trend to donate goods other than land as *waqf*. Such changes demand attention to Islamic law on matters of inheritance, marriage, divorce and the like.

Islamic jurists in Indonesia are open to such developments. Although Islamic law in Indonesia has been dominated by the Shafi'ite *madhhab*, it has not given rise to rigid adherence by its followers. This may be explained by the fact that the Shafi'ite *madhhab* itself offers a variety of opinions on a given case. Many Shafi'ite *mujtahids*, such as al-Nawawi, al-Ramli and Al-RafH often disagreed with one another but were still regarded as equally valid. As such, the choice in law is hermeneutically conditioned by social and political factors. This condition has enabled Indonesian Muslims to live in a pluralistic world of thought, where minor cases of conflict stemming from the differing opinions *(khilafiyah)*, have occurred. As well, the prominent role played by *Sufism* in disseminating Islam in *Nusantara* meant that the emphasis for Indonesian Muslims, particularly Javanese, was also on a spiritual level (the relation between human and the God) rather than as a debate only within the Islamic legal discourse.

In recent years, the Islamic legal thought and practice in Indonesia allude to remarkable changes. The educational curriculum used in Islamic schools and universities, for instance, tends to be adaptable to modern

developments in many aspects of life. The domination of the Shafi'ite *madhhab*, particularly in modern schools and *pesantrens*, has dwindled gradually with the rise of other alternative legal opinions.[152] Such change and developments must also be seen as a continuity of (he initiatives of previous *'ulama'* who regarded social factors as they constructed their interpretations of Islamic law.

The use of Sheikh Arshad al-Banjari's work, *Sabil al-Muhtadin* (1195/1780), in deciding cases of family property, *gono-gini* or *harta pantangan* (property acquired jointly in the marriage contract and rendered community property) and the employment of *Al-Fiqh 'Ala Madhahib al-Arba 'ah* of al-Jaziri as one of the many legal sources used in deciding court cases, convey the moderation with which legal developments in Indonesia have accommodated *adat* and social demand.

The use of many *fiqh* texts derived from other legal schools, including the Hanafite, Malikite, Hanbalite and Zahirite schools, were reviewed for legal rules when the KHI was developed,[153] further highlights the flexibility of Islamic legal developments in Indonesia and its sensitivity to the social and political demands of the culture. There are many novel articles in the KHI which

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[152] The analysis on educational development relating to this issue, see Howard M. Federspiel, *Muslim Intellectuals and National Development in Indonesia* (New York: Nova Science Publishers, Inc, 1992), pp. 177-83; See also, idem, "The Importance of Islamic Law," p. 20-1.

[153] See chapter I of this thesis on analysis to the 38 books examined in the project of the KHI.

reveal their source in social influence. Articles on marriage to a pregnant woman, marriage to a non-Muslim, inheritance for adopted children and joint property rights *(harta gono-gini)* are good examples of this. These issues deserve some discussion in their own right because of their origin in social development.

1. Marriage to a pregnant woman

The issue of marriage to a pregnant woman is a historically controversial problem among the *fuqaha'* and in the classical Indonesian Islam. There is no agreement among them concerning its legal status, as being permitted or prohibited. Malik ibn Anas and Abu Yusuf, the famous disciple of Abu Hanifah, argue that marrying a pregnant woman before she gives birth, as her *'iddah* (waiting period), is prohibited *(haram)*. Meanwhile, al-Shafii comments that marriage to her prior to birth is permissible *(mubah)* in the case of a pregnancy contracted from extra-marital intercourse because the latter does not give rise to a blood relationship *(nasab)*.[154] Opposed, Ibn Qudamah and others affiliated with the Hanbalite *madhhab* remark on the prohibition of this marriage[155] based on the prophetic traditions *(ahadith)*: "Whoever believes in Allah and the day hereafter does not shower

[154] See 'Abdullah ibn Ahmad ibn Mahmud Ibn Qudamah. *Al-Mughni*. vol. 7 (Beirut: Dar al-Kitab al-'Arabi, 1983), p. 515.
[155] idem

his "water" to the "plant" of others"[156]and "A pregnant woman is not allowed to copulate until she has given birth."[157] Both Prophetic sayings indicate a prohibitive stance on marriage to a pregnant woman. In disagreement with Abu Yusuf, his teacher, Abu Haniifah together with al-Shafi'i comment that no *iddah* exists for women pregnant through extra-marital relation.[158]

Facing problems of the kind described above, the KHI has adopted an opinion which allows for this kind of marriage. In Articles, 53 it states:

1) A woman pregnant out of wed-lock can marry a man who is the biological father other fetus;
2) Marriage for a pregnant woman as mentioned in clause [1] may be concluded without waiting until she has given birth;
3) By concluding the marriage while the bride is pregnant, remarriage is not needed after the baby is born.

This KHI's article would seem to adopt the opinions of al-Shafi'i rather than the Hanbalite and Hanafite views. The motivation for this stemmed from the demand made by society for greater legal certainty on this kind of

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[156] In Arabic: *Man kana yu'minu bi Allah wa al-yawm al-akhir la yusqi maahu zar'a ghayrihi.* The word "water" in this *hadith* symbolizes sperm, while the word "plant" means infant.

[157] In Arabic: *La tuta 'u Hamil hatta tata 'a.*

[158] Ibn Qudamah, *Al-Mughni*, p. 516.

marriage. An increase in the number of extra-marital pregnancies in recent years, combined with the traditional *adat*, as in Bali and South Sumatera, compelling the man who impregnates a woman to marry her, lead to pressures for Article 53.[159] In many cases, the woman may be married to another man, if the father of the infant refuses to marry her or if there is disagreement within family about the matter. This marriage is known as *nikah tambalan* (the patch-up marriage). From the perspective of custom, this marriage serves to legitimize the infant when s/he is born, since *adat* law recognizes any child born in wedlock as a legitimate child without regard to whether the pregnancy occurred before marriage or not. Moreover, in most *adat* situations, an illegitimate child is considered to constitute a bad omen for the entire family with repercussions in other areas of the family's endeavors.[160] For this purpose, a proverb says: *setiap tanaman yang tumbuh di atas lahan seseorang, dialah pemilik tanaman tersebut -walaupun bukan ia yang menanam* (Every plant grows in someone's land, it belongs to him even though he is not the one who originally planted it).[161]

It is self evident that the KHI's provisions give close consideration to *adat perspectives* on this matter and so

[159] See Nani Soewondo, " Family Law in Indonesia," in Judith E. Sihombing (ed). *Law Asia Family Law Series*, Vol. II (Malayan Law Journal Ptc. Ltd., 1982), p. 126.
[160] Nani Soewondo, "Family Law in Indonesia," p. 126, 58
[161] See M. Yahya Harahap, "Informasi Materi," p. 179.

favor the Muslim legal opinion which allows this arrangement, i.e., the Shafi'ite school. Unfortunately, the KHI does not elaborate on the alternatives concerning the case if the man who married a pregnant woman is not the man who impregnated her, nor on the status of the child in relation to the non-biological father. However, Yahya Harahap, one of the formulators of the KHI, does assert that the relationship between the child and his mother's husband is that of a blood kinship *(nasab)* regardless of whether or not he is the biological father.[162] Harahap's notion is novel and controversial from the Islamic legal perspective, as, according to classical *fiqh*, a child is legitimate only when born at least six month after marriage contract was conducted.[163]

2. Marriage of a Muslim to a Non-Muslim

A Qur'anic injunction which is allow marriage to women of "The People of the Book" *(ahl al-kitab)*, Jews and Christians, is very clear. It reads:

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[162] M. Yahya Harahap, "Informasi Materi," p. 179. This opinion relates to the provision of inheritance article 186 of the KHI: "Children who are born out of legitimate wedlock only have relationships with their mothers and relatives of their mothers." This can be understood to mean that as far as children are born in legitimate wedlock, they have a blood relationship *(nasab)* with their father.

[163] See al-Qur'an, surah al-Ahqaf (46): 15, and surah Luqman (31);14. 59.

> "This day are all things good and pure made lawful to you. The food of the people of the Book is lawful unto you and yours is lawful unto them. Lawful unto you in marriage are not only chaste women who are believers, but chaste women among the people of the Book revealed before your time, when you give them their due dowers, and desire chastity and not lewdness nor secret intrigues."[164]

When interpreting this Qur'anic verse, the founding fathers of the four legal *madhhabs* generally possess similar opinion. They allow marriage to the women of *ahl al-kitab*, but outlaw Muslim women from marriage to non-Muslim men.[165] Beyond this, however, the four major schools of law cannot agree on the status of a marriage to women of *ahl al-kitab* in an enemy land or "abode of war" *(Dar al-Harb)* or in the case when the parents of the women are not *ahl al-kitab*. The Hanafite *madhhab* prohibits such a marriage, "since it can lead to mischief. The Malikite school regards it with disapproval *(makruh)* as the daily activities and practices of the mother will affect the children's religious beliefs and practices. The Malikite school does not regard the religion of a woman's parents as an obstacle to the marriage. Others, from the Shafi'ite and Hanbalite schools, stipulate that a marriage

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[164] Qur'an, al-Ma'idah (5): 5

[165] al-Jaziri, *al-Fiqh 'Ala Madhahib al-Arba'ah*, vol. 4, pp. 75-7; see also, Sayyid Sabiq, *Fiqh al-Sunnah*, vol. 2, pp. 100-5.

is only valid if the religion of a woman's parents is either Christianity or Judaism.[166]

In addition to the opinions of the four *madhhabs*, opinions opposed to such marriage abound. 'Abdullah ibn 'Umar and Ibn Jabir, for example, insist on the prohibition against the marriages to Christians on the basis the Christians are no longer monotheistic. He hold that Christians of his time admit to many gods (polytheism) by claiming the Jesus as a god.[167] However, this is not the opinion is not held by a majority of *'ulama'* since the views of the four *madhhabs* and the practices of the Prophet's companions, e.g., 'Uthman ibn 'Affan, Ibn 'Abbas, Hudhaifah and others substantiated the Qur'anic injunction in allowing such a marriage.

The general acceptance of marriages to women of *ahl al-kitab* by the four *madhhabs* should mean that the practice was accepted by Indonesian Muslims, who claimed to adhere to the Shafi'ite legal school. On 1 June 1980, however, the MUI (The Council of Indonesian Ulama) issued an official *fatwa* in response to the rising number of inter-religious marriages. *The fatwa* consists of two clauses: the first states that a Muslim woman is forbidden to marry a non-Muslim man; the second states

[166] Al-Jaziri, *al-Fiqh 'Ala Madhahib al-Arba'ah*, vol. 4, pp. 76-7; the classical *fiqh* used as a reference by the KHI also admits the permissibility of this kind of marriage. See, for example, al-Nawawis *Minhaj al-Talibin* and al-Sharqawi's *Sharqawi 'alu al-Tahrir*.

[167] Sayyid Sabiq, *Fiqh al-Sunnah* (Kuwait, 1968) vol. 6, pp. 208-9.

that a Muslim man is forbidden to marry a non-Muslim woman.[168] The rationale behind this *fatwa* lay in local "wisdom" that such marriages engender more harm *(mafsadah)* rather than benefit *(maslahah)*. Although this *fatwa* is official, it has, like all *fatwas*, no binding power, but is merely advisory to the faithful.

Actually, an inter-religious marriage in Indonesia is marked by two main trends:

a. To marry a Muslim woman or man (a) non-Muslim man or woman converts to Islam

   1) converts to Islam for the marriage jand then revert back to his/her former religion;

   2) or asks the Muslim party to convert to his/her religion.

b. In an inter-religious marriage where each spouse follows his/her religion, the children are given the freedom to choose between the parents' religion. It is not unusual to have a family where some of the children follow their mother's religion and some their father's.

The foregone patterns generated unease among the Indonesian Muslim establishment, especially when the Muslim woman or man adopted his/her spouse's religion, or when a non-Muslim converted to Islam before

[168] M. Atho Mudzhar, *Fatwa-fatwa Majelis Ulama Indonesia*, pp. 99; In its English version, pp. 85 6; see also MUI, *Tuntunan Perkawinan Bagi Umat Islam Indonesia* (Jakarta: Sekretariat MUI, 1986), pp. 71-3.

marriage and, after some years of marriage, reverted to his/her former religion. These patterns persist today and are considered as one means of Christian prosetylization.[169] Actually, the inter-religious marriage occurs not just between Muslims and Christians but with Hindus and Buddhists as well, as between Muslims and Hindus in Bali. Some observers maintain that inter-marriage among believers of different religions places strain on the two religions involved and fosters suspicion among them. With this social consideration in mind, the concept of *sadd al-dhara 'i*[170] was employed by the KHI to label any marriage to a non-Muslim as *haram* (forbidden). The KHI states that "Marriage is prohibited between a man and a woman because of specific condition: ... because the woman is not of the Islamic faith."[171] In addition, in other article it stipulates that "Inequality *(sekufu')* cannot be taken as a reason to prevent marriage, unless the inequality stems from their different religions *(ikhtilaffi al-din)*"[172]

[169] For more detail examples of this, see M. Atho Mudzhar, *Fatwa-fatwa Majelis Ulama*, pp. 102-3; In English version, see pp. 87-90.

[170] Atho Mudzhar considers the KHTs decision to use the concept of *al-maslahat al-mursalah* (the interest of the Muslim community) rather than sadd al-dhara 'i' (preventing a negative or harm condition). See his book, *Fatwa-fatwa Majelis Ulama*, p. 103; for the English version see, p. 89.

[171] *Kompilasi Hukum Islam*, Article 40 point c.

[172] *Kompilasi Hukum Islam*, Article 61.

The KHI's decision, which disputes the opinions of the majority of *'ulama'* and the Qur'anic verse in question, is, of course, considered controversial and radical by some. *Sadd al-dhuru 'i'*, a conceptual tool in Islamic legal theory which opens the way for the attainment of social goals, was used to arrive at the decision by the KHI. However, the social argument used for justification is also controversial, since preventing marriages to non-Muslims is effectively closing an important route to a mutual exchange and understanding between persons of different faiths. Furthermore, it marks a hardship on individuals who are attracted to one another and wish to marry. In short, the KHI seems more concerned about holding the exclusivity of religion, than with promoting greater fraternization among members of different religions.

3. *Harta Gono-gini* (Jointly Property)[173]

The rules governing joint family properties are not explicitly outlined by the Qur'an, Prophetic traditions *(hadith)* or classical fiqh works. The chapter on inheritance in classical *fiqh* tends to outline mathematical distribution rather the various possible practices in society. As such, Muslim societies in which other inheritance practices

[173] *"Harta Gono-gini"* is a Javanese term to denote the property acquired together within marriage. In Indonesian term, this is called *harta bersama* (common property). In many other areas, the terms may be differ to each other.

prevailed, have left its regulation to *adat*. Nani Soewondo identifies some forms of marriage property according to *adat* law.[174] Among others are:

> (i) Property obtained by the husband or the wife by way of inheritance or gift, from their own family remained in the possession of the person who obtained the goods. This property could not be inherited by the other spouse. When there were no children of the marriage, this property had to be returned to the family from which it had come.
>
> (ii) Property obtained as the result of the efforts of the husband or the wife before marriage remained the property of the person concerned. (iii) Property obtained during marriage as a result of joint efforts of both husband and wife became joint property.[175]

Because there are no clear ordinances from the Qur'an, *Hadith* or classical *fiqh*, the formulators of the KHI restored to established *adat* when ruling on property. The KHI deals with this matter in depth both in the first[176] and second volumes.[177]Article 86 reads:

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[174] On form of joint property according to *adat* law in Indonesia, Nani Soewondo, "Family Law in Indonesia," p. 103.

[175] See Nani Soewondo, "Family Law in Indonesia," p. 103.

[176] See Articles 47-50 of the KHI on the procedural matters relating to the status of joint property.

[177] See Articles 85-97 of the KHI.

"(1) In principle, there is no mixture between a husband's property and wife's property resulting from marriage.

(2) A wife retains the right to and control of her property. Likewise, a husband retains the rights to and control of his property."

Article 87 reads:

"(l) Property which is brought by each husband and wife to the marriage, and property which each of them earns as a gift or inherits is under the respective supervision, as far as each party to a marriage does not stipulate otherwise in a pre-nuptial agreement.

(2) A husband and wife entertain full legal rights to do any action to their respective property in the form of gift, present, donation and others."

The most interesting point is article which says: "If there is a marriage dissolution due to death, half of the common property becomes the right of the surviving spouse."[178]

The above provisions of the KHI are heavily influenced, if not inspired, by the *adat* regulations because the Islamic law of inheritance *(fara 'id)* itself, as described in classical *fiqh* texts, does not distinguish between acquired property and ancestral property. Dialogue on

[178] See Article 96 point 1 of the KHI

this issue is actually not new in Indonesian legal treatise, as Shaykh Arshad al-Banjari in his *Sabil al-Muhtadin* (1195/1780) has discussed regarding this matter.[179] But, the idea to make this issue "Indonesian *fiqh*", a standardized reference for Islamic courts, is a new phenomena.

There are many other examples of *adat* and social influences on the KHI. The provisions on *plaatvervulling* (substituting heir)[180] and *waqf* (religious donation), mentioned in chapter I, and the status of children conceived from FIV (Fertilization in Vitro) are among the issues raised by new social phenomena. The right of adopted children and adoptive parents to get obligatory bequests is a salient example of the impact of *adat* and new social phenomenon on the KHI's provision.

[179] See Bustanul Arifin, *Pelembagaan Hukum Islam di Indonesia*, p. 122. It is unfortunate that the book, *Sabil al-Muhtadin*, was not examined in the process of KHI's enactment.

[180] Articles 185 of the KHI stipulates: (1) Heirs who predeceases propositus, their positions can be replaced by their children, unless for those who are mentioned in article 173. (2) Share for a replacement heir may not exceed that of equal heirs to the heirs they replace. This article is called *plaatvervulling*. The legal reform in this matter has taken a place in many Muslim countries, such as Morocco, Syria, Egypt and Pakistan. For the fuller description, see Tahir Mahmood, Personal Law in Islamic Countries (New Delhi: Academy of Law and Religion, 1987); J. N. D. Anderson, "Recent Reforms in the Islamic Law of Inheritance," *International and Comparative Law Quarterly* 14 (1965), pp. 349-65.

In Islamic law, the adopted child does not have a position equal to biological children in inheritance because the former does not share familial bond which is the main factor to be the heir.[181] Adoption *(al-tabanni)* is not mentioned in the Islamic legal inheritance as cause for inheritance.[182] However, in Indonesian *adat* law, it is common for adopted children to become the full members of a family and, accordingly, can get the inheritance from their adoptive parents, especially if the adopted children treat their adoptive parents well.[183]

Considering the *adat* law practices on the rights of adopted children, the KHI's formulators compromised by deciding that: (1) the estate of an adopted child is divided in accordance with the provisions of Articles 176 to 193, meanwhile adopted parents who are not entitled to receive any bequest, are now given an obligatory bequest, at most one-third of their adopted child's estate; (2) the

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[181] See Qur'an, Surah al-Nisa' (4):11-2;

[182] In the pre-Islamic Arab, the adoption is a part of local culture. Even in the early era of Islam, the Prophet Muhammad adopted Zayd ibn Harithah (Zayd the son of Harithah). As the local culture determined, the adopted child can use his/her adoptive father's name as his/her family name (Zayd ibn Muhammad). And s/he has the right on the inheritance as the real child do. This practice is later on phased out through Qur'anic verses surah al-Ahzab (33):4-5, 40.

[183] On the position of adopted children in Indonesian law, see Soerjono Soekamto, "Hak Mewarisi Bagi Janda dan Anak/Anak Angkat," *Hukum Nasional* No. 23/7 (1971), pp. 73-96; see also Sri Soedewi Masjchun Sofwan, ""Hak Mewaris Bagi Janda dan Anak/Anak Angkat," *Hukum Nasional* No. 24/7 (1974), pp. 72-83.

adopted child who does not get any bequest is given the obligatory bequest, at most one third of his/her adoptive parents.[184] The KHI's provision does not arise through Islamic legal principles because Islamic law does not consider the adopted child as similar to the biological child, but the KHI does appreciate the position of the adopted child as it is practiced by the *adat* law. Adopting parents are also given the bequest just as adopted children are.

C. The Social Significance of the KHI

The above examples demonstrate how the KHI was influenced by the *adat* law and social needs. The KHI response in these terms reflects society's demand for a change in Islamic legal court process. In some quarters the performance of the Islamic courts was considered oblique and confusing. Lev provides examples of the gap between social demands and the position taken by the Islamic courts in the 1960s and 1970s — a condition he attributes to the "rigid" existing legal system. The demand for women's full and equal rights before the law is one such example. When the demands for equality in inheritance between women and men arose, for instance, the Islamic Courts were actually responsive and accommodating, but they were limited by the boundaries of the Shafi'ite *madhhab*, which played an authoritative

[184] Article 209 of the KHI

role.[185] Furthermore, mentions Lev, impediments to legal reformation based on social demands were found in the Islamic Courts themselves which were poorly staffed by inadequately trained judges. Although the judges could fulfill the essential social functions of the court and even react sympathetically to new demands made of them, they lacked the training to practice *ijtihad* and bring about legal reformation.[186] To accomplish the latter, it was necessary to use sources outside of the Shafi'ite school. The KHI's solution was to compile and codify legal opinions from various *madhhabs*, and, even, from unconventional and liberal *madhhabs* which seemed suited to the social developments overtaking Indonesian Muslim society.

If we examine the whole of the KHI, we find that it only uses customary regulations which do not transgress beyond the accepted boundaries of Islamic law, although often outside of Shafi'ite *madhhab* itself. Actually, no *adat* regulation which is totally out of keeping with Islamic legal principles is included in the KHI. Marriage based on *aliran kepercayaan* (sect of belief) that is contracted by non-Islamic means, has been rejected by the KHI in spite of the fact that many Indonesians are/were married in that way. Some of other *adat* practices rejected by the KHI include the distribution of inheritance in Minangkabau, in which the women received the dominant share as

[185] See Daniel S. Lev, *Islamic Court*, p. 182
[186] See Daniel S. Lev, *Islamic Court*, p. 182

prescribed by the matrilineal line system,[187] or in Bali, in which the men dominated the shares of inheritance. It can be concluded that of the many theories on the relationship between *adat* law and Islamic law, the theory of *receptio a contrario* is most utilized by the KHI, i.e., only *adat* laws which are not contrary to Islamic law are included in official law. Finally, the KHI stands as evidence of the fact that Islamic law retains an integral place in the Indonesian legal system.

Strangely, moreover, modern interpretations of Qur'anic verses which are often used currently by the Islamic writers to justify modern social patterns were not directly accepted by the KHI. The idea of Islamic legal re-actualization *(reaktualisasi hukum Islam)* forwarded by the Minister Munawir Sjadzali,[188] who promoted an inheritance ratio of 1:1 for men and women, was not even broached during the process of KHI's enactment. The majority of Indonesian Muslims were not amenable to Sjadzali's views and more inclined to classical interpretations on this matter and. Such attitudes speaks

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[187] See Michael G. Peletz, *Social History and Evolution in the Interrelationship of Adat and Islam in Remau Negeri Sembilan* (Singapore: The Institute of South East Asian Studies, 1981), p. 19.

[188] See his writing, "Reaktualisasi Ajaran Islam," in Eddi Rudiana Arifet.al (eds), *Hukum Islam di Indonesia Perkembangan dan Pembentukan*, pp. 83-93. In this article he expressed the hope that the KHI, particularly in volume n on inheritance, would base their compilation on the practice of society rather than just following *the fara'id* (Islamic inheritance law) which are not applied by the Muslim society (p. 87).

volumes about the KHI's stance towards the major voices of the Islamic *ummah* (community), that is, it was absorbed by the past, but gave little attention to current trends seeking solutions equitable for social issues.

From the socio-legal perspective, the KHI is meant to provide legal certainty on both the theoretical and practical levels. As mentioned, the absence of a codified Islamic law had previously engendered legal uncertainty, since judgments were rendered on the basis of opinions derived from various *kitab kuning* (yellow books; *fiqh* texts) which were not comprehensible to most Indonesian Muslims because they are preserved in classical Arabic. Before the enactment of the KHI, Islamic law was subordinated to civil law, and Muslims felt marginalized in the Indonesian legal discourse. Since the KHI is comparable to the civil legal code and uses the same "legal language", a legal parity has been achieved between the two. In effect, the KHI functions to minimize the existing conflict between Islamic law, civil law and *adat* law.[189]

Moreover, since law, viewed from sociological perspective, can be used for social engineering to shape or re-shape the social order and legal thought,[190] the KHI

[189] See Iredell Jenkins, *Social Order and the Limit of Law*, p. 214

[190] On this goal, see Yahya Harahap, "Materi Kompilasi Hukum Islam," p. 64; On the roots and the forms of conflicts among Indonesian Muslims, especially between the traditionalist *(kaum tua)*

can also be interpreted as a bid to lead Muslim society to certain views. For example, it was hoped that the KHI would lower the rate of conflict among Muslims which arises from the ambiguous and conflicting opinions found in the legal schools.[191] Further, a unified law would gradually affect and change *adat* law or, to borrow Harahap's term, precede the 'Islamization of *adat* law.[192] The KHI attempted to address such differences, as we have explained above, but it remains to be seen whether the disputants to such controversies will accept the new formulations as definitive.

Finally, from the socio-political perspective, the KHI can be advantageous to the Islamic courts for it gives them the authoritative leverage with which to convince Islamic society that Islamic law can handle the modern social problems through the KHI's family law. This is crucial, as the compilation of the KHI was, in fact, designed to stem and allay the public perception than an eternal conflict rages between Islamic law and *adat* law.

The objectives cited above motivated the enactment of a KHI in which *adat* and social needs are well

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and the modernist *(kaum muda)* on legal matters, see Howard M. Federspiel, *Persatuan Islam*, pp. iii-iv,chapter IV (pp. 46-68).

[191] On this goal, see Yahya Harahap, "Materi Kompilasi Hukum Islam," p. 64; On the roots and the forms of conflicts among Indonesian Muslims, especially between the traditionalist *(kaum tua)* and the modernist *(kaum muda)* on legal matters, see Howard M. Federspiel, *Persatuan Islam*, pp. iii-iv,chapter IV (pp. 46-68).

[192] Yahya Harahap, "Materi Kompilasi Hukum Islam," p.77.

accommodated. Beyond this sociological backdrop, however, the enactment of the KHI is also rooted in political considerations. This political backdrop is the subject of chapter III.

CHAPTER III

THE POLITICAL BACKDROP TO THE *KOMPILASI HUKUM ISLAM DI INDONESIA*

Behind the enactment of any law, the political will of a government and the demands of society usually meet. In Joseph Schacht's words, "Modernist legislation is imposed by a government whenever the modernists have succeeded in gaining its sympathy and the government feels strong enough to overcome the resistance of the traditionalist." [193]The enactment *ofMajallat al-Ahkam al-'Adliyah* and the development of legal codification in Malaysia,[194] the Philippines,[195] and Thailand[196] all concede

[193] Schacht, *Introduction to Islamic Law*, p. 105.

[194] See Ahmad Ibrahim, "The Shari'ah and Codification: Malaysia Experience," *Shari'ah Law Journal*, January 1987

[195] See Datu M.O. Mastura, "Shari'ah and Codification: Islamic Legislation in Relation to Legal Reforms in the Philippines," *Shari 'ah Law Journal*, January 1987.

to Schacht's model as both government and society determined Islamic legal development. The enactment of *Kompilasi Hukum Islam di Indonesia* (KHI) is not an exception to this rule. The demands by Indonesian Muslim society for a codified set of Islamic laws and the government's support for this endeavor, met in the enactment of the KHI. However, this development gives rise to at least two important questions: why was the KHI enacted as late as 1991 when the need for codification had long been felt; and, to what degree are the contents of the KHI political?

In an attempt to answer these important questions, this chapter provides an analysis of the political backdrop to the emergence of the KHI, a standardized reference by which Religious Courts *(Pengadilan Agama)* apply Islamic law in Indonesia. Two major themes are presented: first, the relationship between the Indonesian government and Islam, especially the political policies devised by the government to shape the development of Islamic law; second, the political rationale behind the enactment of the KHI. The first matter is discussed in light of the New Order era when the KHI was enacted. An understanding of the political history of Indonesia prior to the New Order era is critical to the discussion on the nature and

[196] See Arong Suthasasna, "Shari'ah and Codification: Thailand Experience," *Shari'ah Law Journal*, Januari 1987.

development of Islamic law.[197] As well, the impact of colonial policies which interfered with the development of Islamic law in the Old Order era cannot be ignored in any analysis of law in the New Order era. Political content in the KHI is to be measured in terms of the political aspects and implications of the document.

A. Government and Islam in Indonesia

1. Islamic Law in the Colonial and Old Order Era

Islamic law has existed in Indonesia since Islam's first arrival in the archipelago.[198]Before the coming of Islamic

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[197] M.B. Hooker asserts that there are many distinctions between the pre-colonial, the colonial, and the modern eras in understanding the Indonesian state. However, any relationship or linkages between the previous and the succeeding era are inevitable. See M.B. Hooker, *Adat Law in Modern Indonesia* (Oxford, New York, Kuala Lumpur, Jakarta: Oxford University Press, 1978), pp. 9-10.

[198] See Muhammad Daud Ali, "Kedudukan Hukum Islam dalam Sistem Hukum Indonesia," in Taufik Abdullah and Sharon Siddique (eds.), *Tradisi dan Kebangkitan Islam di Asia Tenggara*, (Jakarta: LP3ES, 1989), p. 208, or see its English version, "The Position of Islamic Law in the Indonesian Legal System," in Islam and Society in Southeast Asia, (Singapore: SEAS, n.d.), p. 187; See also Panitia Penyusun Biografi, *Prof. K.H. Ibrahim Hosen dan Pembaharuan Hukum Islam di Indonesia* (Jakarta: C.V. Putra Harapan, 1990), p. 101. For the sufficient discussion on the coming of Islam, see S. Q. Fatimi, *Islam Comes to Malaysia* (Singapore: Malaysia Sociological Research Institute, 1963); see also, Syed Naquib Alatas, *Preliminary Statement on General Theory of Islamization of the Malay-Indonesian Archipelago* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969); see also N.A. Balloch in his *The Advance of Islam in Indonesia* (Islamabad: NIHCR, 1980); see also Syed Farid Alatas

law, *adat* or customary law was the only authoritative legal instrument by which problems arising among the indigenous people were resolved. The regulation and application of *adat* law was different from one *adat* area to another.[199] The scope *of adat* area was, for the most part, determined by the respective kingdoms.

The coming of Islam did not mean the demise *of adat* law. Rather, Islamic law coexisted with *adat* law, and came to influence and be influenced by the latter set laws.[200] Thus, in Minangkabau, for example, *adat* laws

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in his article "Notes on Various Theories Regarding the Islamization of the Malay Archipelago," *Muslim World* 75 No. 3-4 (July-October, 1985), pp. 162-175; see also B. Schrieke, *Indonesian Sociological Studies* (Den Haag: W. van Hoven, 1955), pp. 7-37; see also Brian Harrison, *Southeast Asia: A Short History* (London: Mcmillan & Co, 1957), pp. 50-60; and see also D. G. E. Hall, *A History of Southeast Asia* (London: Mcmillan & Co, 1964), second edition, pp. 190-204.

[199] According to Van Vollenhoven, the founding father of *adat* law in Indonesia, there are 19 main areas *of adat* law *(adatrechtskingen):* Aceh; Tanah Gayo, Alas and Batak; Nias; Tanah Minangkabau; South Sumatera; Tanah Melayu; Bangka and Belitung; Kalimantan; Minahasa; Gorontalo; Tanah Toraja; South Sulawesi; Ternate island; Maluku Ambon; Irian; Timor island; Bali and Lombok; Central Java, East Java and Madura; Kingdom areas; West Java. See Soekanto and Soerjono Soekanto, *Pokok-pokok Hukum Adat* (Bandung: Penerbit Alumni, 1981), pp. 55-7; see also Imam Sudiyat, *Asas-asas Hukum Adat Bekal Pengantar* (Yogyakarta: Penerbit Liberty, 1985), pp.59-61.

[200] This may be caused by the flexibility of Islamic legal theory which views *al- 'adah* (custom) or *al-'urf* (usage) as a supplementary source of law as affirmed by the formula *"o/-'ddah muhakkamah"* which means *"Adat* can become law". Through this flexibility, the peoples who converted to Islam were able to continue their customs, traditions, or

remained strong until the nineteenth century.[201] However, the quick spread of Islam, facilitated by traders, *'ulama'* and *sufis* in the areas of *Nusantara*, especially Sumatera and Java islands, rendered Islamic law a familiar canon frequently used to decide legal matters.[202]

The arrival of the Europeans to Indonesia at the beginning of 16th century began a new chapter in that country's history in matters relating to both trade and the spread of Islam. Although the initial purpose of the European merchants was the spice trade, later they had to deal with Islam, since the local rulers and the people were mostly Muslim.

The Portuguese were the first Europeans officially to reach Malacca, doing so in 1509 under the command of Diego Lopes de Suquera and in 1911 under the successful supervision of Albuquerque.[203] Their arrival was at first welcomed by the local ruler Sultan Mahmud Syah (r. 1488-1528). But after the Sultan was informed by international Muslim traders about the threat posed by the Portuguese, the Sultan opposed and captured them.[204] Unfortunately, in later development, a subsequent clash

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adat as far as they were not contradictory to the *Al-Qur 'an* and Prophetic Traditions *(Hadith)*.

[201] See Robert van Niel, "The Course of Indonesian History," in Ruth T. McVey (ed.), *Indonesia* (New Haven: SAS Yale University, n.d.), p.277.

[202] The spread and early development of Islamic law in Indonesia can be traced in Robert van Neil, "The Course." pp. 276-8.

[203] See, M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, p. 23

[204] Ibid

within the ruling class as well as among Muslims in Malacca created political conflict among the Malaccans.[205] Seizing this opportunity, the Portuguese easily conquered and took control of Malacca.

However, it later transpired that the Portuguese colonialists were not commercially independent and were quite disorganized. They could not really afford their life in Malacca, they were dependent on food supplies from other areas. Their administration was colored by corruption, inefficiency and overlapping authority.[206] Consequently, the internal problems as well as the external conflicts with other European countries occurred in this 16th century. The clash between the Portuguese, the Spanish and local Muslims, for instance, was the most apparent one.[207] Actually, the Portuguese threat to Islam was not serious, especially with respect to the Islamic

[205] M. A. P. Meiling-Roelofsz, *Asian Trade and European Influence on the Indonesian Archipelago between 1500 and about 1630* (The Hague: Martinus Nijoff, 1962), pp. 121. In later years, the Indonesians were unified in opposing the Portuguese. Dealing this matter, Meiling-Roelofsz asserts that it was Islam that served as a unifying factor, (p. 118).

[206] *Ibid*

[207] Portuguese accounts of Islam in Indonesia may be read in Karel Steenbrink, *Dutch Colonialism and Indonesian Islam Contacts and Conflicts 1596-1950* trans. by Jan Steenbrink and Hendry Jansen (Amsterdam-Anlanta, GA: Rodopi, 1993), pp. 26-9.

law.[208] It seems that economic opportunism was their overriding concern.

The golden opportunity for great economic advantages in Indonesia through the spice trade invited competition among the European merchants. Not long after the Portuguese and the Spanish, the Dutch expedition first arrived in East Indies in 1595 under Cornelis de Houtman. After this first expedition, other Dutch ships traveled to many Indonesian islands for spices and as merchants competed with each other. Such competition among Dutch merchants was discouraged by the Dutch government. Therefore, the idea to merge the mutually competitive Dutch trading agents was advanced and finally realized through the establishment of the VOC (Dutch East India Company/ *Vereenigde Oost-Indische Compagnie)* in 1602.[209]

The response of Indonesians to the VOC was actually varied. Some groups opposed the Dutch economic monopoly and its threat to local business.[210] Others, like the Mataram group, established a working relationship with the Dutch and used them for local economic

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[208] M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, p. 27. Compare to Muhammad Daud Ali, "The Position," p. 186.

[209] M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, p. 27. Compare to Muhammad Daud Ali, "The Position," p. 186.

[210] Sartono Kartodirdjo, *Pengantar Sejarah Indonesia Baru: 1500-1900, dari Emporium sampai Emperium* (Jakarta: Gramedia, 1988), p. 71. See also J. D. Legge, *Indonesia* (Englewood Cliffs, New Jersey: Prentice Hall, Inc., 1964), p. 67.

advantage. These divergent responses toward the Dutch indicated, to some extent, conflict and competition among Indonesians in matters of trade as well as in other areas.[211] This condition led the Dutch to intervene in this conflict.

Luc Mactegaal concludes that, actually, in 16th and 17th century the relations between the Dutch and Indonesians, particularly the Javanese, were generally good and dynamic. The two communities were not separated or mutually exclusive.[212] However, in the later period, when the Dutch sought not only to dominate economic benefit but also political power, the Indonesians were unified in their opposition to the Dutch.

In the field of law, the Dutch introduced their own law to the Indonesian people. In the early years of settlement in Indonesia, Dutch law had been only intended for Dutch and other European subjects. Later developments, however, saw the application of this law to Indonesians who adhered to it voluntarily.[213] As political interests impinged upon the trading relationship

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[211] For some examples of conflict, see M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, pp. 42-9.

[212] Luc Mactegaal, *Riding the Dutch Tiger The Dutch East Indies Company and Northeast Coast of Java, 1680-1743* trans. by Beverly Jackson (Leiden: KITLV Press, 1996), p. 5.

[213] See Mohammad Daud Ali, "Kedudukan," pp. 208-9, or "The Position," p. 187. For a broader discussion , E. S. De Klerk, *History of the Netherlands East Indies*, Vol. 1 (Amsterdam: B.M. Israel NV. 1975). p. 147-61

between the Dutch and Indonesians, the Dutch interests were advanced by other factors. It was here that the Islamic law felt the impact.

a. Islamic Law in the Colonial Era

The internal conflicts among Indonesians concerning trade matters and authority were ignored for a higher purpose: opposing the Dutch colonialism which aimed, at economic domination and which led inexorably to interfering with local authority. Throughout the Dutch colonial period, the relationship between the Dutch colonial regime and the Muslim communities, indeed the majority of Indonesian citizens, was one of distrust and of commitment to different interests. Local outbreaks of Islamic inspired resistance led by Muslim rulers and the *'ulama'*, in the form of both small and large-scale actions,[214] threatened the consolidation of Dutch power.[215] The most famous of the large-scale actions were the *Padri* war in West Sumatra (1821-1938), the *Diponegoro* war in Central Java (1825-1930), and the Aceh war (1873-1974).[216]

Aware of the potential threat posed by Muslims, the Dutch adopted strategies to weaken the Muslims' political influence. Since Islam, and specifically its laws,

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[214] DaliarNoor, "Islam as a Political Force in Indonesia," *Mizan* Vol. 1 No. 4, 1984, p. 32.

[215] Harry J. Benda, *Continuity and Change in Southeast Asia* (New Haven: Yale University Southeast Asian Studies, 1972), p. 83.

[216] See Syafi'i Ma'arif, "Islam and Nationalism in Indonesia: A Historical Perspective," Mizan Vol. 1 No. 4, 1984, p. 12.

are regarded as the nucleus of Muslim life, the Dutch eventually centered on it as a means of controlling Muslim influence in Indonesian society.[217] In general, Dutch political attitudes toward Islamic law in Indonesia may be divided into two periods. The first period is that of *receptio in complexu* era, whereby Islamic law was accepted and considered an authoritative and operative legal canon. The second is that of *receptie* era, whereby the Dutch regarded *adat* law as the operative law; therefore, only some parts of Islamic law that had been accepted or adopted by *adat* law that might be applied to the society.[218]

Recetie in Complexu was actually a theory promoted by Lodewijk Willem Christian van den Berg (d. 1927). He conceded that Indonesians had actually accepted Islamic law as their own. As Muslims, furthermore, they considered it incumbent upon themselves to follow Islamic law, though in reality there efforts varied in

[217] This was one the things taken up in the letters sent by a sheikh in Mecca to the King of Madura, Tjakraningrat, and a letter sent by the King of Madura to the Dutch government. These letters were written in the Malay-Javanese language using the Arabic script.

[218] Juhaya S. Praja, "Pengantar," in Eddi Rudiana Arief (ed.), *Hukum Islam di Indonesia Pengembangan dan Pembentukan* (Bandung: PT. Remaja Rosdakarya, 1991), p. x; see also, Ismail Sunny, "Kedudukan Hukum Islam Dalam Sistem Ketatanegaraan Indonesia," in Eddi Rudiana Arief (ed.), *Hukum Islam di Indonesia Pengembangan dan Pembentukan*, p. 73;

intensity and in knowledge of the law itself.[219] This theory was, however, first articulated by Carel Frederick Winter (d. unknown) and Solomon Kuyzer (1823-1868).[220]

Van Den Berg's theory was based on his observation of the application of Islamic law as established in the old kingdoms and Indonesian society. In cases of marriage and inheritance, for example, existing judicial bodies used the Islamic law in regulating matters. As previously mentioned, the VOC's initial response was to accommodate Islamic law and contribute legal compendiums to be used as a guidance in solving the Muslim problems, examples of which include the *Compendium Freijher* of 1760,[221] an extracted translation of *al-Muharrar* of al-Rafi'i (*Compendium der Voornamste Javaansche Wetten Nawkeuring Getrokken Uit het Mohammedansche Wetboek Mogharraer)* for *Landraad* (Courts) in Semarang of 1750, the *Cirbonsche Rectboek* of 1757-1765, and *Compendium Indlansche Wetten bij de Hoven van Bone en Goa.*[222]

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[219] Ichtijanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia," in Eddi Rudiana Arif (ed.), *Hukum Islam*, p. 117-120.

[220] See Sayuti Thalib, *Receptio a Contrario*, p.7.

[221] *Compendium Freijher* is the first provision consists of compilation of Islamic law, covering marriage and inheritance matters, to be applied by the VOC court. See Soepomo and Djokosutono, *Sejarah Politik Hukum Adat 1609-1848* (Jakarta: Djambatan, 1955), p. 26

[222] Arso Sosroatmodjo and A. Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 1976), pp. 11-2; For more information see Muhammad Daud AU, "The Position," pp. 189-90.

Later, the Dutch government provided Islamic law with a legal status by issuance of *Resolutie der Indische Regeering* of 25 May 1760 and of article 75 of *Regereeringsreglement* (RR) of 1885, which instructed Indonesian judges to use the religious law *(godsdientige wetten)* and the customary law in rendering decisions. It is also stated, moreover, that the European judges were to use the above mentioned law in the appellate courts when faced with Muslim litigants.[223]

In the nineteenth century, according to Harry. J. Benda, the Dutch launched an initiative which was designed to minimize or, even, to eliminate Islamic influences. One means to this end was through Christian prosetylization. A belief in the superiority of Christianity over Islam, and the observably syncretic nature of Islam in Javanese villages, were held as evidence that Indonesian Muslims would make an easier targets for conversion than Muslims in other countries.[224] Once initiated, reasoned the Dutch, the process of conversion would generate loyalty to them.[225] This effort had only limited influence on several regions, mostly where populations were marked by animism or where adherence to Islam was only nominal.

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[223] *See Sayuti Thalib,* ReceptioA Contrario *(Jakarta: Bina Aksara, 1980), pp. 1/-8.*

[224] See H.J. Benda, *The Cresent and the Rising Sun* (Bandung: van Hoeve Ltd., 1968), p. 19.

[225] See the quotation of Deliar Noer, *Gerakan Moslem Islam di Indonesia 1900-1942* (Jakarta: LP3ES, 1980), p. 27.

Another method by which the Dutch sought to minimize Islamic influence was through the marginalization of Islamic law. Henceforth, its scope was to be limited and its development shaped by Dutch influence. Van den Berg's theory of *recetio in complexu* was thus dismissed by Snouck Hurgronje (1857-1936), the Dutch official advisor of the time.

Hurgronje promoted a new theory called the *receptie* theory which stipulated that the indigenous peoples actually followed their *adat* laws, not Islamic law, and that the latter could not, therefore, be accepted as law until *adat* had embraced it. This implied that once Islamic law had been fused into *adat* law, it could no longer be called Islamic law but rather represented the corpus of *adat* law. As such, the legal status of the former law was predicated on the acknowledgment of the latter one.[226]

Hurgronje's theory was later developed more fully by van Vollenhoven (1874-1933) and Ter Haar Bzn. The content of *Receptie* theory suggests that it was promulgated to achieve the two-pronged objective of Dutch colonialism; to delute Muslim identity and to promote Western legal tradition.[227]

It is clear that the *receptie* theory was originally devised by Snouck Hurgronje as one of the points of his

[226] See Ichtiyanto, "Pengembangan," p. 100, 122-27; see also M. Daud Ali, "The Position," p. 192-3; see also Abdul Mutholib, *Kedudukan Hukum Islam Dewasa Ini* (Surabaya: PT. Bina Ilmu, 1984), p. 29.

[227] Ichtijanto, "Pengembangan," p. 122.

"Islam Policy" which conveyed three major themes: first, that the Dutch government should accord Muslims real freedom in terms of ritual observance (*'ibadah, godsdienstige);* second, that they should also respect the social customs and traditions of Muslims *(mu 'amalah, maatschappelyk);* and third, the Dutch were advised to prevent any elements which could encourage the ideals of Pan-Islamism *(siyasah, staatkundig)* from taking root.[228] It should come as no surprise, therefore, that the Dutch, as represented by Hurgronje in particular, were anxious to stave off Jamaluddin al-Afghani's popularity in Indonesia. Alfian makes the points that the Dutch operated under the assumption that if the indigenous peoples were assimilated to European culture, colonialism could be sustained with less trouble.[229] While the Dutch government and its intellectuals disagreed on

[228] See Aqib Suminto, *Politik Islam Hindia Belanda* (Jakarta: LP3ES, 1985), p. 12; see also Ruth McVey, "Faith as the Outsider: Islam in Indonesian Politics," in James P. Piscatori (ed.), *Islam in the Political Process* (Cambridge: Cambridge University Press, 1983), pp. 199-225; See also H. J. Benda, "Christian Snouck Hurgronje and the Foundation of Dutch Islamic Policy in Indonesia," *The Journal of Modern History* 30 (1958). See also in *Continuity and Change in Southeast Asia: Collected Journal Articles of Harry J. Benda* (New Haven: Yale University Southeast Asia Studies, 1972).

[229] See Alfian (ed.), *Segi-segi Sosial Budaya Masyarakat Aceh* (Jakarta: LP3ES, 1977), pp. 207-9.

the best means to colonial rule, their objective remained one: to consolidate their power.[230]

In 1929, the *receptie theory* was given legal status through article 134 section 2 of the Dutch constitution or ZS' (Indische Staatsregeering). This document affirms that civil problems among Muslims were to be solved by judges presiding over the Religious court only when *adat* law supported it and only so far as no other ordinance regulated the matter. Logically, this clause was also known as the *receptie* article.[231]

Snouck Hurgronje was fierce in his criticism of the Dutch government's policy of recognition and regulation of Religious courts[232] alongside State courts. It was an

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[230] See Bustanul Arifin, *Pelembagaan Hukum Islam di Indonesia*, (Jakarta: Gema Insani Press, 1996), pp. 35-6. See also Sayuti Thalib, "Receptio," p. 19; Sayuti Thalib writes that Hurgronje's theory was intended to weaken the opposition of Indonesian Muslims to Dutch authority, and to arrest the growth and development of Islamic law in the community by eliminating Muslim leaders and *'ulama'* (as was the case in Aceh).

[231] See Abdul Mutholib, *Kedudukan Hukum Islam Dewasa Ini di Indonesia* (Surabaya: Bina Ilmu, 1984), p. 29.

[232] The Religious Courts were established by the Dutch in 1882. These courts were managed by the *penghulu*, who were called by the Dutch *Priesterraad* because the Dutch saw them as counterparts of priests in the Christian religion. The establishment of the Islamic (Religious) Courts was based on Staatblaad Vol. 152 Article 1, which stated that Religious Courts were to be established whenever there was a civil court, and that geographical jurisdiction of Religious Courts should be coterminous with that of the civil court. See Mark Cammack, "Islamic Law in Indonesia's New Order," *The British Institute of International and*

unmitigated error, he argued, for the Dutch government to lend Islamic law both recognition and status. He reasoned that such measures would invariably aid in the development of Islamic law and review its vibrancy. Supporting Hurgronje's position, van Vollenhoven and Ter Haar, were outspoken in commenting about the proper place of *adat* law in society and its influence in producing a political climate which militated against political and legal Islam.[233]

In response to Ter Haar's and Van Vollenhoven's efforts, the Dutch government formed a commission assigned to review and report on the status and the authority of the Religious Courts. While Indonesian members were on the commission the membership was so constituted as to assure the adoption of Betrand Ter Haar's recommendation for the appropriation of the authority of the Religious Court by the state in matters *ofwaqf* and inheritance. Daniel S. Lev states that this change was very much influenced by the political ideology of Ter Haar and his group, who had early been with Dutch efforts aimed at the containment if islamic influence.[234]

In 1937, through *Staatsblad*1937 No. 116, the authority charged with matters of inheritance was officially

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Comparative Law, Vol. 38, January 1989, p. 54.

[233] See Muhammad Daud Ali, "The Position", p.195

[234] See Daniel S.Lev, *Islam Courts in Indonesia* (London: University of California Press, 1972),p.19-20

transfered from the religious coutrs to the state courts *(Landraad)*[235] Soon after this trasfer , however the limited understanding of adat laws displayed by State Court Judges gave rise to new problems of making clear rulings. Consecquenly, most of their decicions were rendered on the basis of European Law.[236]

Muslims reaction to the Staatsblad of 1937 as expresed by muslims "ulama'" and activities—frequently cited in the press and latter to authorities – was very subtantial though it was ignored by the Dutch. However, news reports from the perid indicate that the responce was subtantial enough to warrant wide coverage.[237] For their part, the Religious Courts could di litle more than issue non-binding *Fatwas* on inheritance. It is not suprising, however, that after Indonesia gained Independence many sholars were suddenly critical of this theory of Hurgronje and followers. Hazairin (1905-1975), an expert on the adat and Islamic law in the Faculty of Law at the University of Indonesia criticized

[235] The *Staatblad* No. 116/1937 determines that the authority of religious courts is only on: (1) The dispute betwen moslem husband and wife. (2) The matters of marriage, devorce, rujuk (reconciliation) and divirce among moslems who need a mulslim judge to mediate them. (3) Giving decision on divorce. (4) Determining the existence of violation on *ta'lik talak* (the conditional repudiation). (5) Dower.(6). The duties of husbands relating to the needs of wife's life. See ahmad Rofiq, *Hukum Islam di Indonesia*, p. 19

[236] See Daniel S. Lev., *Islamic Court*, p. 21; see also Muhammad Daud Ali "Kedudukan" p. 224-5

[237] Aqib Suminto, *Politik Islam*, p. 30-31

Ter Haar's[238] notions on *receptie* theory. Ter Haar's ideas and Hurgronje's theory, he argued, were launched by Dutch colonial authority in an attempt to hamper the advance of Islam in Indonesia. On the strength of this conviction, Hazairin dubbed this theory *devil theory*.[239]

The collapse of Dutch colonialism in 1942 and the coming of the Japanese did not much alter the status and position of Islamic law in Indonesia. In the general field of law, what the Japanese did within three and half years of occupation (1942-1945) was mainly to phase out the Dutch colors out in Indonesian legal system and to replace them with Japanese colors. The change of legal institutions to Japanese names[240] and the establishment of some religious administrative institutions were some of the ways in which the Japanese tried to promote their

[238] Ter Haar was Hazairin's teacher in the study of *adat* law.

[239] Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintaroas, 1964), p. 4.

[240] For examples, the highest court in the Dutch legal system, *Hooggerechtshof*, was changed into *Saiko Horn; Raad van Justitie* became *Koto Horn; Landraad* became *Tiho Horn;* and *Landgerecht* became *Keizai Horn*. For further explanation and examples, see Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional*, p. 184-5. The change of the names of legal institutions was actually in keeping with two main Japanese policies towards Indonesian as mentioned by Ricklefs. Those are the effort to wipe out Western influences among them and mobilize them in interests of Javanese victory. To realize these goals, the Japaneses also banned the use of Dutch and English languages. See M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, p. 201.

own system.[241] The Japanese attempts in this matter, however, did not really touch the core of material law in the Islamic courts.

b. Islamic Law in the Old Order Era (1945-March 1966)

Actually, efforts to rehabilitate Islamic law in the Indonesian Judicial System were launched just prior to Indonesia's independence. BPUPKI (Independence Preparation Efforts Investigation Assembly) meetings, held during the Japanese occupation, brought together Islamic leaders who moved to revive the authority of Islamic law outside the sanction of *adat* law.[242] On June 22, 1945, the *Panitia Sembilan* (Committee of Nine Persons) of BPUPKI[243] succeeded in drafting a preamble (preface) to

[241] The Japanese undertook a kind of development in administration of legal affairs, including those touching on Islamic life, such as the establishment of *Kantor Urusan Agama (Shumubu)* and the training courses for the *penghulus* and *kyais*. But this development was not followed by that in material and procedural laws as it was in the Dutch colonial era. See M. C. Ricklefs, *A History of Modern Indonesia since c. 1300*, pp. 202-5

[242] Harry J. Benda, *The Crescent and the Rising Sun*, p. 89.

[243] The nine members are Mohammad Hatta, Muhammad Yamin, Subardjo, A.A. Maramis (a Christian), Sukarno, H. Abdul Kahar Muzakkir, Wahid Hasyim, Abu Kusno Tjokrosuroso, and Haji Agus Salim. See, M. Yamin, *Naskah Undang-imdang Dasar 1945*, Vol. 1 (Jakarta: Penerbit Yayasan Prapantja. 1959). p. 153: See also. Saafroedin Bahar, Ananda B. Kusuma and Nannie Hudawati, *Risalah Sidang Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia (BUUPKI) and*

the constitution. The preface, known as *Piagam Jakarta* or the Jakarta Charter, contains a philosophy of state, which affirms that an independent Indonesia is based on "the unity of God and the obligation for Muslims to apply Islamic *Shari'ah* (teaching) to Muslims."[244] Concerned that legal discrimination which may result from this formulation,[245] the above phrase was re-formulated by political leaders to mention only "the Unity of God" the day after Indonesia gained its independence. To eliminate the disappointment among some Muslims who might disagree with this change, Muhammad Hatta stated that the change did not detract from the significant assertion *tawhid*, which is made in accordance with Islamic teaching.[246]

Panitia Persiapan Kemerdekaan Indonesia (PPKI) 28 Mei-22 Agustus 1945 (Jakarta: Sekretaris Negara Republik Indonesia, 1995), p. 385.

[244] See Endang Saifuddin Anshari, *Piagam Jakarta 22 Juni 1945* (Bandung: Pustaka Salman ITB, 1981), p. 25-6.

[245] Non-Muslim groups, especially from Eastern Indonesia, feared discrimination and were uncomfortable with the phrase which favored Muslim groups. Non-Muslim groups then protested and demanded a change which would maintain and sustain the unity of Indonesia by foregoing the claims of any particular religious group.

[246] Mohammad Hatta, *Sekitar Proklamasi 17 Agustus 1945* (Jakarta: n.p, 1969), p. 57-9; Hatta's notion is softly refuted by Ali Murtopo, the chief architect of the New Order's Islamic Policy, who says that the belief of One Supreme God as mentioned in Pancasila does not mean that the state is based on a certain religion. To Ali Murtopo, Belief in God has a specific meaning, that is a democratic Theism, and not theocratic Theism. See Martin van Bruinessen, "State-Islam Relation in

Concerning the status of Islamic law within the Indonesian legal system in the Old Order era, Ismail Sunny places it into two major categories: one, in a period where the *shari'ah* (Islamic law) was accepted as a persuasive source of law; and the second in a period where the *shari'ah* has been accepted as an authoritative source of law.[247] Sunny's paradigm is built on the ideology of Pancasila as expressed in the UUD of 1945 and in the *Jakarta Charter* (Piagam Jakarta). Thus, from 22 June 1945 to the issuance of the Presidential Decree of 5 July 1959, Islamic law was constituted a persuasive source of law which could be used by the Indonesian population. The declaration of Independence (17 August 1945), and the implementation of the 1945 Constitution, even though it omitted the seven words of the *Jakarta Charter*, annulled the *IS* through which the *receptie* theory had operated.[248] The re-acceptance of the *Jakarta Charter* as the main consideration in the Presidential Decree of 5 July 1959, together with the Constitution of 1945 re-

Contemporary Indonesia: 1915-1990," in C. Van Dijk and A.H. de Groot, *State and Islam* (Leiden: CNSW Publications, 1995), fn. p. 96.

[247] Ismail Sunny, "Kedudukan Hukum Islam," p. 75.

[248] Ismail Sunny, "Kedudukan Hukum Islam," p. 76; Soon after Indonesia proclaimed its independence, the attempts to force the application of Islamic law was organized individually and communally. See, Howard M. Federspiel, "The Importance of Islamic Law," p. 11.

asserted the place of Islamic law as an authoritative and binding force.[249]

Sunny's division of the position of Islamic law into these two categories is open to critique on methodological grounds. Resting his analysis just on the re-acceptance of the *Piagam Jakarta* seems to be weak, partial and not applicable in the New Order era because the *Piagam Jakarta* is considered only as a historical note rather than as an actualization of a political change.

While it may be difficult to map the stages of Islamic legal development in the Old Order era, it can still be asserted that it represented an improvement to the colonial era. Hazairin's *exit* theory, which stressed the incompatibility of the *receptie* theory with Qur'anic verses and Prophetic traditions, signaled change when it called this old theory to"exit" from Indonesian public life.[250] His ideas were later developed by Sayuti Thalib in his *receptio a contrario* theory, a social model wherein Islamic law is applied to Muslims in matters of marriage and inheritance, and where *adat* law is used only in so far as it does not contradict the former.[251]

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[249] Ismail Sunny, "Kedudukan Hukum Islam," p. 77.

[250] Hazairin, *Tujuh Serangkai tentang Hukum* (Jakarta: Tintamas, 1974), p. 116

[251] See Sayuti Thalib, *Receptio a Contrario*, p. 65-7. This theory had great influence on the re-establishment of a harmonious relationship between *adat* law and Islamic law, which were formerly considered as being in conflict. The flexibility and willingness of Muslim intellectuals and professionals to take *adat* law into major

Many statutes, laws and regulations enforced by the state in the Old Order era were advantageous to Muslims because, to some degree, they invested Islamic law with authority and room for development. Statute No. 22/1946[252] on the registration of marriage, divorce, and reconciliation, and Law No. 1/1951 on the elimination *of adat* judicial institutions, for example, were among many measures which contributed to the authority and power of Islamic law. Another example is Law No. 5/1960[253] on the basic principle of agrarian affairs which was heavily influenced by Islamic legal concepts. Other regulations which supported, either explicitly or implicitly, the investiture of Islamic law with authority were the government Regulation No. 45/1957 on the authority of judicial affairs; Statute No. 15/1961 on the authority of attorneys; and. Statute No. 13/1961 on state police.

In sum, the Old Order era witnessed a revival of Islamic law and its socio-political status as a major source of legislation. Islamic law did not, however, regain its pre-colonial stature. The position of the Religious Courts

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consideration when organizing the KHI seems to have been influenced by the spirit of this theory. As well, it is theoretically demanded by Islamic legal theory (*usul al-fiqh*).

[252] This law implicitly recognizes the authoritativeness of Islamic material law regarding the regulation of marriage in Indonesia.

[253] This law was also regarded as a filter for *adat* law while *adat* law itself was shifted to become national law. If *adat* law was not against Islamic law, it could become national law. Otherwise, it was eliminated.

in the Old Order era, for example, did not reclaim their independent status. As well, the Law No. 45/1957 (on the authority of judicial affairs) did not outline the position and relationship of the Religious Courts to other courts within the National Judicial system.

2. Government and Islam in the New Order Era

President Sukarno's letter to General Suharto "to take all steps deemed necessary to guarantee the security, tranquillity and stability of the government machinery and the process of the revolution,"[254] ushered in the New Order era on 11 March 1966, and marked a decisive transfer of political power.[255]

It is widely held that Sukarno's letter was dictated by the political will of the ABRI (Indonesian Army) which hoped to limit the power and authority of the PKI

[254] This is quoted from the English translated text in *Far Eastern Economic Review* (March 24,, 1966), p. 550; In Adam Schwarz's translation, it reads: "to take all measures considered necessary to guarantee security, calm and stability of the government and the revolution and to guarantee the personal safety and authority [of Sukarno]. See his book, *A Nation in Waiting Indonesia in the 1990s* (Boulder: Westview Press, 1995), p. 26.

[255] See Marwati Poesponegoro and Nugroho Notosusanto, *Sejarah Nasional Indonesia*, Vol. IV (Jakarta: Depdikbud and Balai Pustaka, 1984), p. 406; See also, Michael R.J. Vatikiotis, *Indonesian Politics under Soeharto: Order, Development, and Pressure for Change* (London & New York: Routledge, 1997), pp. ix, 1; See also Adam Schwarz, *A Nation in Waiting*, p. 26.

(Indonesian Communist Party) and that a large part of society concurred with that judgment. Toward that end, a coalition between the ABRI, Muslims, and students, was formed as a front against the communist bloc that had gained strength in the last part of the Old Order era. Muslims joined in this endeavor out of a dislike for the ideology of communism and for the style of the Old Order government.[256] In addition, Muslims hoped that the New Order era would bring them a better life[257] and allow them a greater role in civic affairs. Their hopes and these aims were to be disappointed. Though they participated in efforts to establish the New Order government, this did not mean that Muslims would either initially gain much in image or position in the New Order system.[258] Instead, the relationship between the state and Islam in the initial period of New Order establishment was marked by small gain and much discord.

Dody Truna differentiates two periods in the relationship betwen government and Islam: First, The period from 1966 to 1984, when the relationship was

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[256] See Donald K. Emmerson, *Indonesia's Elite: Political Culture and Cultural Politics* (Ithaca and London: Cornell University Press, 1976), pp. 22-3.

[257] See M. Syafi'i Anwar, "Negara, Umat dan Ijtihad Politik," *Panji Masyarakat* No. 693, 11-21 August, 1991, p.30. See also Abdul Azis Thaba, *Islam dan Negara dalam Politik Orde Baru* (Jakarta: Gema Insani Press, 1996), pp. 242-3.

[258] See Adam Schwarz, *A Nation in Waiting*, p. 31

colored by mutual supician and limited accommodation ; and, Second, the period from 18985 to 1990 when the relationship was more co-operative and mutually supportive.[259] Abdul Azis Thaba segments the same time frame into three periods: first, the antagonistic period from 1966 to 1981; second, a reciprocal and critical period from 1982 to 1985; and the last, the accommodative period from 1986 up to the present.[260] Both writers, however, come to a similar conclusion that the relationship between Islam and the government in New Order era is always going to a better direction.[261] Howard M. Federspiel, however, believes that the political tendencies toward accommodative relationship have occurred since 1970s.[262] Federspiel's notion appears closer to the fact as in 1974 and 1975; the government began accommodating the Muslim aspirations concerning the

[259] See his thesis submited to the institute of Islamic Studies Mc Gill University, "Islam and Politics under The New Order Government in Indonesia 1966-1990."

[260] Abdul Azis Thaba, *Islam dan Negara dalam Politik Orde Baru*, pp. 239-354.

[261] The categories used by both authors are, however, too broad to account for all significant cases in each category. The enactment of the law No. 1/1974 and the emergence of Government regulation concerning marriage in 1975 and 1979 are, for instance, better included in reciprocal era rather than in antagonistic era in which they fall.

[262] Howard M. Federspiel, "The Endurance of Muslim Traditionalist Scholarship: An Analysis of the Writings of the Indonesian Scholar Sirajuddin Abbas," in Mark Woodward (ed.), *Toward a New Paradigm in Indonesian Islamic Thought* (Tempe: ASU Program for Southeast Asian Studies, 1996), p. 193.

law of marriage as evinced by the promulgation of the law No. 1/1974 and the Government Regulation No. 9/1975.

The first two decades of the New Order era, the antagonistic period, were marked by high government suspicion to the Muslim involvement in building the New Order system.[263] Affan Gaffar[264] provides three reasons for this state of hostile suspicion. The first is that Muslims operated on the premise that an enhanced Islamic role in the state affairs would be preceded by the democratic reforms called for by Islam. Secondly, it was feared that the majority of the Muslim population would mobilize to achieve political power and facilitate Islam's penetration into the political realm. And thirdly, Gaffar believes that among Muslims, it was felt that many individuals and groups were inclined to interpret Islam literally and to express strong criticism against the government for not following their conception of just what an "Islamic" government should be.

Aside from aforementioned, Islam's "image problem" in the government's eyes and the features of the New Order government itself also contributed to the strained dialogue. Among the Army Ground Forces (*ABRI*

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[263] See M. Nasir Tamara, *Indonesia in the Wake of Islam* (Kuala Lumpur: Institute of Strategic and International Studies (ISIS), 1986), pp. 15-6.

[264] Affan Gaffar, "Islam dan Politik dalam Era Orde Baru. Mencari Bentuk Artikulasi Yang Tepat," *Ulumul Qur'an* No. 2 Vol. IV, 1993, p. 20.

Angkatan Daraf), for example, unpleasant memories remained of past experience with some Muslims, such as Kahar Muzakkar and Daud Beureuh, who fought to establish an Islamic State and a diminished national Indonesian state. To the Armed Forces, therefore, Islam remained suspicious and was marked as an ideology of the "extreme right". The New Order government's "authoritarian" and hostile posture toward Islamic political aspiration and Muslims sentiment created antipathy on the part of many Muslims and invited a negative response from Muslim society.[265]

In the legal field, the New Order government launched an agenda to clarify the type and order of law permitted and regulated by the Constitution of 1945. The People's Assembly, through decree No. XX/MPRS/1966, determined that Pancasila must be a source of all laws and adopted on this basis, the following order of laws proposed by the House of Representatives:

a. Constitution *(Undang-undang Dasar)*
b. Decrees of the Peoples Assembly (*Ketetapan MPR*)
c. Statutes (*Undang-undang*)
d. Government Regulations (*Peraturan Pemerintah*)
e. Presidential Decisions (*Ketetapan Presiden*)

[265] Affan Gaffar, "Islam dan Politik," p. 20-1.

f. Other implementing regulations.[266]

In the first years of the New Order, an effort was undertaken to promote the image of Indonesia as a state based on law *(negara hukum, rechstaat)*. A law upholding the independence of judicial bodies and promoting a better judicial system was promulgated. Law No. 19/1964, which had previously allowed the President to intervene in judicial matters, was thus phased out and summarily replaced by Law no 14/1970, the Basic Law of the Judiciary.

One important clause in Law No. 14/1970, which addresses the status of the Religious court and Islamic law, recognizes the former as the equal of other courts. Moreover, it outlines four court systems with a Supreme Court at the apex. These include: a Public Court *(Peradilan Umum)* for civil and criminal matters; Religious Courts *(Peradilan Agama)*; Military Court *(Peradilan Militer)*; and State Administrative Court *(Peradilan Tata Usaha Negara)*.[267]

Theoretically, the Religious Court is equal to other courts in terms of its standing in the National Judicial system. On the practical level, however, equality was

[266] See TAP MPR No. XX/MPRS/ 1966. See also, Nur Ahmad Fadlil Lubis, "Institutionalization and the Unification of Islamic Courts under the New Order," *Studia Islamica*, Vol. 2, No. 1, 1995, p. 13; See also, C. S. T. Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka, 1986), pp. 51-8

[267] Nur Ahmad Fadlil Lubis, "Institutionalization," p. 23.

illusive as remnants of the colonial administrative system dictated that all decisions rendered by the Religious Courts were to be ratified by the local civil court in order to be officially enforceable. Even, Marriage law No. 1/1974, which was largely viewed as a concession to Islamic law, stipulated that it was mandatory that all Religious Court decisions must be approved *(dikukuhkan)* by its counterpart, the Civil court.[268] This indicates that the Religious Courts were actually under the Civil Courts.[269]

Among other indicators of the antagonistic relationship between Islam and Government in the period 1966-1981 is the government's idea to put *Aliran Kepercayaan* (The Belief Sect) into GBHN (State General Guidelines) to be one of the "official religions" of Indonesia equal position to Islam, Christianity, Hinduism, and Buddhism.[270] The members of this sect were seen by Muslim community readers as Muslims, despite their adherence to practices and beliefs drawn from other traditions than Islam.

[268] See article 63 point 2 of the Marriage Law No. 1/1974. It says: "Every decision rendered by the Religious Court is to be approved by the Civil/Public Court."

[269] See T. Jafizham, "Peranan Pengadilan Agama dalam Pelaksanaan Undang-undang Perkawinan," in *Kenang-kenangan Seabad Peradilan Agama* (Jakarta: Depag, 1985), p. 170-2.

[270] See Kamal Hassan, *Modernisasi Indonesia, Respon Cendekiawan Muslim* (Jakarta: LSI, 1987), p. 186

Consequently the effort to move them away from Islam was bitterly approved. At the end of the day, however, Muslim protests to this initiative went unheard. Soon after the *aliran kepercayaan* case, on 16 August 1973, the government proposed another controversial matter; the Draft of the Marriage Law (RUU Perkawinan) which contained regulations seen by many Muslim scholars as not reflecting some of the nuances of Islamic law. Kamal Hassan describes all *'ulama'*, from Aceh to East Java, whether from traditional or modern institutions, as opposed to this Draft Law.[271] Some critics dubbed this an effort to Christianize Indonesian law, while others argued that the draft of the law was made without the consultation or involvement of the Department of Religious Affairs, widely regarded as the authoritative institution on the matter. The vehemence of the response prompted the government to compromise by deleting the clauses regarded as problematic and un-Islamic.[272]

The next period, beginning in 1982 to 1985,[273] was characterized by a growing reciprocity between government and Islam. Over these four years, a balance of accommodation and understanding was struck between the two positions. This period was also marked by government calls for Pancasila to be accepted as the

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[271] Kamal Hassan, *Modernisasi*, p. 190.

[272] For complete information, read Amak F.Z., *Proses Undang-undang Perkawinan* (Bandung: Al-Ma'arif, 1976).

[273] He broadly discusses this period is in his *Islam dan Negara*, pp. 262-278

sole ideological basis of political organizations and, later on, of all social organizations.

Muslim reaction varied. Some reacted passively and in the spirit of order, while other reactions were extreme and flouted the new regulation.[274] The more compliant position was taken by the PPP, the Islamic Political Party, while the latter was adopted by individual groups critical of the government policy. In the long run, all political and social organizations accepted Pancasila as their sole basis of organization. The PPP was quick to accept it, while Nahdlatul Ulama became the first Islamic social organization to accept it in its general conference (*mu'tamar*) in 1982.[275] Muhammadiyah was the last Islamic social organization to accept it, in the 41'st *mu'tamar* (general conference) in December of 1985.[276]

In 1986,[277] the accommodative[278] or good relations between Islam and the state was more obvious. In

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[274] See Affan Gaffar, "Islam dan Partai Politik, Bagian Kedua," *Risalah*, No. 7, November 1994,pp. 21-2.

[275] See Rusli Karim, *Dinamika Islam di Indonesia, Suatu Tinjauan Sosial dan Politik* (Jakarta: Hanindita, 1985), pp. 168.

[276] For detailed information, see Lukman Harun, *Muhammadiyah dan Asas Pancasila* (Jakarta: Pustaka Panjimas, 1986). Further information on the acceptance of Pancasila by Muslim organizations' can also be read in Faisal Ismail, "Pancasila as the Sole Basis for all Political Parties and for all Mass Organizations; an Account of Muslims' Response," Ph.D Dissertation, McGill University, Montreal, 1995; the short version of this dissertation can be read in *Studia Islamica*, Vol. 3, No. 4,1996.

[277] As mentioned, Dody S. Truna, who divides the relationship between Islam and government into two major periods, began one

general, this accommodative relationship followed several mutual principles. Howard Federspiel identified five main principles in operation at the time:

a. Worship and ceremonial practices of religion will be encouraged;

b. The State will continue to provide an administrative system for the functioning of certain Islamic communal obligations in education, in family matters, and in support of the pilgrimage, and to provide a mechanism for protecting the general standards of orthodoxy.

c. Religious goals will not be expressed in political terms, nor will religion be used as the primary organizational tool by political group

d. Religious groups seeking to operate outside the system to achieve their religious goals will be treated as outlaws and punished severely.

e. Muslim leader groups, particularly religious scholars and intellectuals, will support the government's

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year before 1986, i.e., 1985. Unlike Thaba and Truna, Affan Gaffar, in his "Islam dan Politik dalam Era Orde Baru, tends to generalize the 1980's as the starting point of this accommodative type of relationship.

[278] Some disagree with the term "accommodative" because, according to them, Islam did not receive benefit from the government, while the latter used Islam to mobilize the support for the government's political advantage. M. Syafi'i Anwar uses the term "bargaining position" to indicate this relationship. See his "Negara, Umat dan Ijtihad Politik," p. 31.

national development policies[279]

The government regarded this positive overture and paved the way for co-operative detente.[280]

Most scholars affirm that the acceptance of Pancasila by Islamic social organizations as the sole ideological bases eased government suspicion of Islam. In return, the emergence of the Law of National Education,[281] which removes the prohibition of wearing Islamic clothes [282]for Muslim students, is regarded as the first positive gesture for the Muslim acceptance of Pancasila as the *asas tunggal* (sole basis).

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[279] See Howard M. Federspiel, "The Endurance," p. 190-4.

[280] See Afan Gaffar, "Islam dan Politik Era Orde Baru," p. 18. Moreover, Afan Gaffar asserts that one of the important factors in this change is the increase in the number of educated Muslims. M. Syafi'i Anwar mentions the names such as Nurcholis Madjid, Dawam Rahardjo, Kuntowijoyo, and Jalaluddin Rahmat as the intellectuals who contributed to the change of the Muslim perceptions about government. See Anwar, "Negara, Umat dan Ijtihad Politik," p. 31.

[281] This law was submitted to the government on 23 May 1988 through the Minister of Education and Culture at the time. Prof. Dr. Fuad Hassan.

[282]Wearing *jilbab* (veil) in the public schools had been prohibited by previous government regulation No. 052/C/Kep/D.82, applied since 17 March 1982. The emergence of this regulation brought about many conflicts among educators, heads of public schools, and the Muslim society in general. However, in the period from 1982-1987 which is marked as the reciprocal relationship and the beginning of the accommodative period, the government did not address this issue. See *Panji Masyarakat*, 21-30 December 1990, pp. 80-1.

Soon after the issuance of the foregone Law, the government again supported the Muslim aspiration by passing the Law of Religious Judiciary,[283] a procedural law which is necessary to the functioning of the Religious Court. The importance of this law as well as the codification of Islamic law is evident from the judicial uncertainty and legal confusion observed earlier in this thesis.[284]

The ratification of this law did not go uncriticized by nationalist Muslims and non-Muslims who remain suspicious of long-term Muslim political aspirations. Some of the critics said that the law was the latest manifestation of the *Piagam Jakarta* (Jakarta Charter) which has been denounced by non-Muslim groups as

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[283] The draft of this law was submitted to the House of Representatives on 3 December 1988, and issued in 1989 as Law No. 7/1989. This Law regulates the structure and authority of the Religious Courts, and explains the religious judicature and civil law procedure used in the Religious Judiciary. The government has submitted the Law in implementation of act No. 14/1970 on the judicial powers in Indonesia. See Tommi Legowo, "Religious Issues in Indonesia," *Indonesian Quarterly* No. XVII/2, 1989, p. 105.

[284] The discussion on this can be read in Mudzhar's *The Fatwas*, and Zuffran Sabrie (ed.), *Peradilan Agama dalam Wadah Negara Pancasila* (Jakarta: Pustaka Antara PT, 1990). The lack of these two matters, the procedural law and a codified law, was also a factor in the emergence of Kompilasi Hukum Islam. In addition, see *Panji Masyarakat* No. 722/XXXV, 11-20 June 1992, p. 53-4, to see the effectiveness of the Law of Religious Judiciary; see also Zainal Abidin Abubakar, "Kebijaksanaan Pelayanan Hukum di Lingkungan Peradilan Agama," *GEMA* No. 80/XVin, June 1996, p.24.

affecting their status in a negative way. Others, especially Christians and Hindus, lobbied the government to provide other religious communities with an opportunity to have their own specific law and courts.[285] The controversy ended when President Suharto publicly declared that the government would not apply the *Piagam Jakarta*.[286]

The promulgation of the *Kompilasi Hukum Islam di Indonesia* in 1991, which is our main topic of discussion, is also seen as an extension of the government's accommodative stance towards Muslims, as the fate of the KHI was very much determined by the President and the Supreme Court. The call for the KHI generally came from the middle-class, comprising intellectuals, students and professionals. This class is always considered the linchpin, to use Daniel Lev's term of law-movements.[287] Following Marxist analysis on the role of the middle-class in ushering in fundamental change in Europe, Lev furthermore pays great attention to the role of middle

[285] The great debate between many writers, politicians, scholars, and religious leaders captured in many newspapers, journals, and magazines is compiled in one book edited by Zuffran Sabrie, *Peradilan Agama dalam Wadah Negara Pancasila.*

[286] See Afan Gaffar, "Islam dan Politik," *p. 21*

[287] Daniel S. Lev, "Judicial Authority and the Struggle for an Indonesian Rechtsstaat," *Law and Society Review*, 13/1 (Fall, 1978), pp. 40-1

classes in promoting law in post-colonial Asia and Africa.[288]

Other government policies viewed as solicitous to the needs and interests of Muslims included the banning of the *Monitor tabloid* (magazine),[289] the sending of 1000 *muballighs* (Islamic preachers) to resettled areas on a Rp. 100.000 month stipend, the emergence of the ICMI (Muslim Intellectuals Society of Indonesia), the establishment of the BMI (Bank Mu'amalat Indonesia), and the commitment and promise of President Suharto to finance the building or renovation of religious buildings by using funds raised privately but distributed by the

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[288] Lev says: "While elites talk about stability and "development," and lower-class millions appeal for substantive social justice, the growing middle class adds to this security, personal rights and liberties, and political participation via legal and constitutional routes to change." See, Lev, "Judicial Authority," pp. 40-1. Since the majority of the middle class in Indonesia is Muslim, the demand for Islamic legal reformation or developments is likely to occur. In other countries, however, the strength of the middle classes to conduct fundamental change varies one to another, depending on other classes or other variables existing there.

[289] The *Monitor* magazine was banned because it conducted a poll which ranked the Prophet Muhammad as the 11'th person in the list of the most amazing leaders by the *Monitor's* readers, while people such as President Suharto, Habibie, Sukarno, and, even Areswendo were ranked above the Prophet. This poll invited a strong protest and even demonstrations from the Muslims. See, Adam Schwarz, *A Nation in Waiting*, p. 191.

state through *Yayasan Amal Bakti Muslimin Indonesia* (Social Welfare Fund for Indonesian Muslims).[290]

For their part, Muslim responded to the government by providing both direct and indirect support. Afan Gaffar lists three major incidents which show political support for government policies: the show of support by Muslim leaders for Suharto's re-election to be President for the period 1993-1998, Muhammadiyah's support of Suharto for re-election as President, and the "political prayer" made for his future success.[291]

Political observers attribute reciprocal support to the position and interests of the respective parties. For the government, Islam is no longer viewed as a threat to national stability and, conversely, can actually be used to rally the support of Muslims. Meanwhile, for Muslims, the accommodative relationship provides greater opportunity for involvement and access to the decision-making process in national policies.

The end of the 1980's and the early of 1990s was a auspicious time to launch the KHI for two main reasons: first, to drum up support for the 1992 election, the government needed to convince Muslim society of its commitment and support to Islamic life; second, the Muslim side was aware that the Religious Courts urgently required the enactment of standardized

[290] See Afan Gaffar, "Islam dan Politik," p. 21; see also Abdul Azis Thaba, *Islam dan Negara*, pp. 279-304.
[291] See Afan Gaffar, "Islam dan Politik," p. 22.

codification, or compilation, of law to follow-up on the application of the Law of the Religious Judiciary No. 7/1989 and to strengthen the position of the Religious Courts *vis-a-vis* other courts.

The timing of this move towards legal reformation seems to lie outside Lev's theory that, in Indonesia and Thailand, legal reforms "is likely to emerge when a crisis of legitimacy almost inevitably develops between evolving middle strata and political elites.[292] Lev's theory may be appropriate for the political life of the 1970s, but not after 1980, when the relationship between the elite and middle-class, including Muslim intellectuals and professionals, improved. After 1980s, Muslims have not been confrontational in demanding legal reform. We can see, for instance, the non-confrontational approach of Indonesian Muslims when faced with the controversial draft of the Law of the Religious Judiciary No. 7/1989 compared to the response to the enactment of Law of Marriage No. 1/1974. The relationship between political elites and the Muslim middle classes being harmonious was also the case when the KHI was enacted.

B. Political Rationale behind the KHI

Despite the politico-historical explanation for the emergence of the KHI, which stresses the self-interest of both parties, an examination of the codes themselves

[292] See Lev, "Judicial Authority," p. 41.

illuminates the political rationale behind their enactment. The enactment of any new law must take into account the opinions and interests of the public, as well as the social, cultural and political norms of the society.[293] The power of a government comes into play when normative rules are translated into a formal system.[294] Islamic law, as a set of regulations or rules, can also be shifted or translated into a formal legal system in Indonesia, as is done with other regulations arising from other sources of law.

As far as historical perspectives are concerned, the accommodative relationship between the government and Islam which characterized the early 1980s has continued to elicit a positive response from the government with respect to the needs and interests of Muslims.[295] Government support to the Muslim life in

[293] See Ron Shaham, "Custom, Islamic law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari'a Courts," *Islamic Law and Society*, Vol. 2, No. 3 (October 1995), pp. 258-60.

[294] The relationship between law, rule, and power is clearly expressed in Sir Ivor Jennings, *The Law and the Constitution*, fifth edition (London: The English Language Book Society, 1979), p. 106; See also Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1993), p. 105.

[295] The fact that there were demonstrations and protests against some of the government's planning policies is undeniable. However, we cannot generalize this as something which the majority of Muslims agreed with. Moreover, we have to verify the type of government policies themselves, as to whether or not the policies are dealing with Islam and the needs of the Muslims. In addition, it is also important to know the government's response toward these demonstrations and

general and the practice of Islamic law in particular eventually culminated in promulgation of a procedural and codified law to fulfill the juridical needs of the Islamic courts. On the 29 December 1989, the government implemented the Law of Religious Judiciary No. 7/1989, after overcoming the criticisms and protests of both Muslim-Nationalists and non-Muslims.[296] The promulgation of the Law No. 7/1989 was considered as having provided enough incentive for the Supreme Court and the Department of Religious Affairs to enact the KHI, a compilation of material law,[297] without which the Law No. 7/1989 can not work proportionally.

After the KHI committee completed the draft of this codified Islamic law, its members encouraged the government to give the new code formal status. However, disagreement as to whether the KHI would be issued as law/statute, or as a Presidential Decision *(Keputusan Presiden)*, soon emerged. Although Muslim wanted it to be circulated, at least, in the form of a Presidential Decision, the final result was that it was

protests. Without intending to ignore some Muslim protests and demonstrations, the term "accommodative relationship" is intended to characterize the general phenomena of the relationship between government and Islam.

[296] The detail account on this matter, see Zuffran Sabrie, *Peradilan Agama dalam Wadah Negara Pancasila*. This book includes 58 articles in favor of and contrary to the Law of Religious Judiciary.

[297] Abdurrahman, *Kompilasi Hukum Islam*, p. 49.

formed and legalized by Presidential Instruction No. 1/1991.[298]

The ease with which the government agreed to the KHI's project was also indicative of its willingness to transform Islamic law into national legislation. This intention had been obvious ever since the government issued the law No. 7/1989.[299] The government apparently reasoned that this was legally permitted by the 1945 Constitution itself, which recognizes Islamic law as the unwritten law of Indonesian Muslim society.[300] A more obvious sign supporting this legal transformation was found in the speech of the Minister of Religious Affairs at the opening session of the workshop on the KHI which made a strong statement for the KHI to become formal law.[301] In relation to this, Basran states that the KHI, as a formal or positive law, represents the unification of national law as governed by the State General Guidelines

[298] See Ismail Sunny, "Kompilasi Hukum Islam," p. 43.

[299] Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam*, Chapter III. In this chapter he describes the history and the development of Islamic Law as national legislation.

[300] Article (transitional provision) of the Constitution 1945, which still recognizes Islamic law as one of four laws existing in Indonesia.

[301] The quotation from the Minister's speech is found in Chapter I, or see, Menteri Agama RI, *Himpunan Pidato Menteri Agama RI* (Jakarta: Biro Hukum dan Humas Sekretaris Jenderal Departemen Agama, 1988), p. 28.

(GBHN), the KHI then mediates legitimacy for Islamic law in the national legal arena.[302]

The political rationale of the enactment of the KHI may also be viewed from the stated and assumed goals set out by the committee itself. M. Yahya Harahap[303], one of the committee members of the KHI project, says that there were at least four goals operative during deliberation: to complete the pillars of the Religious Judiciary; to make legal application uniform; to cement the notion of *ukhuwah* (Islamic brotherhood);[304] and to deter the settling of disputes in the non-formal sector. The three pillars mentioned in the first goal include the existence of a well organized judicial body, the functionaries (i.e., judges and advocates) and the sources of reference. The Islamic court had met the first requirements by being accepted as a state court under the control of the Supreme Court as the highest state court.[305] The second pillar had been fulfilled by the Religious Court even before Indonesia gained its independence. But, the third pillar, that is, as a source of reference, generated confusion before the introduction of the KHI. Although Law No. 1/1974, Government Regulation No.

[302] See Masrani Basran, "Kompilasi Hukum Islam," p. 10.

[303] M. Yahya Harahap, "Informasi Materi Kompilasi," pp. 149-156

[304] Harahap uses the term "*Taqribi Bainal Ummah*" (process of making a close relationship among Muslim community).

[305] Article 1 of Law No. 14/1985 and article 3 of Law No. 7/1989. It is clear from here that the Religious Court is not a private court, but the Public/State Court for Muslim citizens.

1/1975, and a few clauses in Law No. 7/1989 all deal with material law, many matters remained unaddressed. To fill this void, the KHI was conceived and offered as a positive codified law.[306]

As an instrument for uniformity in legal decisions, the KHI was not intended to hamper the creativity of judges, but rather to eliminate disparity in legal decisions in the interest of social justice and of legal certainty. As well, the KHI was meant to promote *ukhuwwah* (brotherhood among Muslims) and to minimize debate and conflict concerning *khilafiyah* (the legal problems which are subject to various opinions and interpretations)[307] on matters of marriage, inheritance, and *waqf*. The many problematic cases and resulting chaos which arose out *of khilafiyah*[308] made this an imperative.

The last goal was to remove the traditional assumption that family law was a personal matter which

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[306] In his article "Tujuan Kompilasi Hukum Islam," p. 91, Harahap mentions the desired characteristics of KHI: systemic, national oriented, suited to the Religious Courts as a reference which provides uniform, legal certainty.

[307] *Khilafiyyah* meant disagreement among '*ulama*' on a given matter, so there are two or more different opinions. For a description and analysis on some *khilafiyyah* problems and its debate between kaum muda and kaum tua, see Howard M. Federspiel, *Persatuan Islam: Islamic Reform in the Twentieth Century Indonesia* (Ithaca: Modern Indonesia Project Southeast Asia Program, 1970).

[308] Harahap, "Informasi Materi Hukum Islam," p. 154-5.

needed no government intervention. Many Muslim citizens, *'ulama'*, and even elites still believe that the government should remain aloof from the administration of Islamic law in the areas of private business and personal affairs.[309] Marriage, divorce, and inheritance, for example, are considered the personal affairs of man before his God without requiring any intervention from others. This view was not accepted. Instead, the community obligation was stressed and KHI legitimated government intervention in the application of Islamic law on the basis of social welfare.

[309] This statement is based on data gathered from interviews with 'ulama' by the committee of the KHI and from the responses of other members of society. See Harahap, "Informasi Materi Kompilasi," p. 155.

CONCLUSION

A. *Kompilasi Hukum Islam* (Islamic Codified Law)

The enactment of Islamic codified law (KHI) in Indonesia is a latest effort to keep pace with social development and stay within tradition. The KHI has presented novel regulations on cases which are not previously recognized by Indonesian Islamic law. The daring use of non-Shafi'ite sources at the official judicial institutional level may be considered a new historical chapter following legal developments being discussed at the academic level. In addition, the willingness to consider social tradition and custom *(adat)* in choosing the law compiled in the KHI reflects the spirit of the Islamic legal reform as promoted by many scholars who seek to Indonesianize *fiqh* or indigenize Islamic law. This matter reverses a tradition of simply referring to the regulations stated by *fiqh* classical sources. However, it is unfortunate that the topics taken up by the KHI do not cover all legal trends and new cases in the society. It is right to say that although the KHI has demonstrated very

rapid development in terms of the references used, the boundaries of family law do not really go beyond the family law covered by the previous law.

However, the promulgation of the KHI, with its limits and weaknesses, at least, has helped lessen the rigidity of the current Islamic courts in rendering decisions. As a material law that acts as a counterpart of procedural law No. 7/1989, the KHI with its Presidential Instruction and Ministry decision is suitable to be main reference on Indonesian Muslim family law.

B. Social Background of the KHI

Two kinds of social factors may be mentioned which constitute the general background of the KHI's enactment. First, the desire to accommodate the *adat* regulations and traditions living in society which are acceptable to Islamic legal maxims and principle. For this purpose, the KHI employs not only Shafi'ite opinions as the references but also other *madhhabs* and even *non-madhhab* opinions as long these *adat* laws and traditions can be justified as compatible with Islamic law. Alas, the standard measurement for considering the survival or death of *adat* law and for determining which *adat* law was to be used as basic assumptions to be included in the KHI was unclear and relative. It is possible that a case normally solved through using *adat* law in one area could be solved by another body of principles in other parts of the country. Javanese *adat*, for instance, may be very

different from Sumateranese *adat* and Balinese *adat*. Kidnapping a woman for marriage is traditionally considered an acceptable, even good act and an honor to the woman's family in Balinese *adat*, but condemned by the Javanese. The practice of *adat* inheritance is certainly different from one place to another. Further, in contemporary Indonesia, *adat* and social traditions existing in rural areas could be very different from those of cities. Modern education in the cities might be effective in creating a metropolitan tradition in which official and government institutions are more influential than the traditional ones. In this light, the effort of the KHI project to interview *'ulama'* representing all provinces of Indonesia is to its credit, but, for closer coordination with *adat*, the project should also have interviewed the *adat* experts to make the KHI more reliable and accommodative of *adat* law. Many articles of the KHI may be mentioned to illustrate the influence of *adat* law upon the enactment of the KHI. The right of adopted children and adopting parents to receive obligatory bequest *(wasiyyah wajibah)*, the permissibility of marrying a pregnant woman, and the use of *plaatvervulling* concept are among the examples.

Observing the materials of the KHI, we may conclude that the elements of *adat* and social traditions which were included in the KHI were those which were still in accordance with Islamic principles. Those which were contrary to the Islamic legal spirit were rejected. This indicates that the project employed the theory of

receptio a contrario rather than other theories of *adat-Islamic* law relationships applied earlier in Indonesia. This indicates that currently, Islamic law finds its position more secure in Indonesian society than it was earlier.

The second type of social factor is the will to establish a better social life through the religious field. For this purpose, the KHI's formulators utilized the legal devices of *maslahah mursalah* (seeking public interest) and *sadd al-dhara'i'* (blocking the means), which are intended to promote public benefit and to prevent the harmful conditions from arising. Nevertheless, the strength of pluralism in religion, race, ethnicity and thought in Indonesia makes clashes of interests more likely than earlier. Take the case of marriage between a Muslim and a non-Muslim for an example. As mentioned in Chapter II, the KHI chose the opinion which prohibited such marriage, although the majority of *'ulama'* agreed on its permissibility in accordance with Qur'anic injunction *surah* 5:5. The formulators of the KHI reasoned that the choice of law above was to prevent social conflict and family quarrels when both husband and wife insisted on their own religious faith and demanded that their spouses convert to their religion, and the like. This kind of reasoning is, to some extent, acceptable, but this choice of law is still probably contrary to the idea of *pembauran* (mixture) between indigenous and non-indigenous people as promoted by the government. Other examples of this are the marriage to a pregnant woman, *taklik talak*

(conditional repudiation) and the administrative matters concerning the marriage and *waqf*.

The combination of these two social factors—accommodating the *adat* practices and realizing the better social life- are the main social backdrop of the enactment of the *Kompilasi Hukum Islam*.

C. Political Background of the KHI

As a material law used in the State Islamic court, the support of the government in its enactment is a necessity. The involvement of the Supreme Court (*Mahkamah Agung [MAJ)*, one of whose duties is to control the legal application of the Islamic courts, and also the direct support from the President Suharto, both indicate the great interest of the government toward the KHI. The KHI offers political advantages both to the government and the Islamic courts. These advantage can be clearly understood through these three points.

First, the enactment of the KHI in the late 1980s and its launching in 1991 is politically very meaningful to the government. that is. to demonstrate better relationship between the New Order government and Islam and to convince the Muslims that the government is giving considerable attention to Muslim concerns, in turn, the Muslims are expected to give their support to government policies.

Secondly, the goals of the KHI clearly show the political will behind the enactment of the KHI. One goal is to give Islamic courts a stronger position in the Indonesian legal system. Doubt on the Islamic courts as independent courts was refuted soon after the enactment of both the procedural law No. 7/1989 and the KHI as the material law. Another clear goal is to shift Islamic law along with some *adat* laws, from unwritten law, as mentioned in the Article II of the transitional provision in the Constitution of 1945, into the written law. Many scholars suggest that the promulgation of the KHI is the way to positify Islamic law. Another purpose, although not an absolutely clear one, is to help the Supreme Court in its function to monitor and control the legal practice of the Islamic courts. This is not without complication since, as it is known, among the members of the Supreme Court, there is only one person who can read Arabic texts. The enactment of the KHI in the Indonesian language and in the format of a statute should facilitate the members of the Supreme Court in monitoring and controlling the Islamic courts.

The third point is that many of the provisions in the KHI echo previous regulations and law, particularly the Law of Marriage No. 1/1974, the Government Regulation No. 9/1975 and No. 28/1977. There are two reasons behind these similarities: first, the Muslims want to support the existence and application of previous laws and regulations, which also signifies, to some extent, their support of government; second, they want to put the

position of the KHI equal to the laws and regulations whose provisions are adopted by the KHI.

The combination of these goals constitute general political rationale for the promulgation of the *Kompilasi Hukum Islam*. Whether all this reasoning is actually realized after the enactment of the KHI or not is another problem which needs further research.

D. The KHI and Islamic legal renewal in Indonesia

The accommodation of KHI to *adat* law does not necessarily mean the end of *adat* law and its replacement by Islamic law. Rather it reunites what has been lost for a long time. Moreover, as the product of many Indonesian *'ulama'* and scholars, the KHI is a great legal phenomena in terms of that the Islamic legal reform and renewal are not promoted by the Islamic side alone but, rather from the standpoint of social consensus and the involvement of the government.

The renewal or reform made by the KHI are actually in line with Islamic legal trends in academic life. In the State Institute of Islamic Studies (IAIN), for instances, the voice of Islamic reform and the use of many modern sources as reference of study have been clearly advocated for some time. The study of comparative *madhhabs (muqaranat al-madhadhib)* in the Shari'ah faculty is the most apparent development in this matter. Therefore, we

may say that the enactment of KHI is, to some extent, an attempt to follow this academic trend.

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