

**ISLAMIC LAW AND SOCIAL CHANGE:
A COMPARATIVE STUDY OF THE
INSTITUTIONALIZATION AND CODIFICATION OF
ISLAMIC FAMILY LAW IN THE NATION-STATES
EGYPT AND INDONESIA (1950-1995)**

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Joko Mirwan Muslimin
aus Bojonegoro (Indonesien)
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1. Gutachter: Prof. Dr. Rainer Carle
 2. Gutachter: Prof. Dr. Olaf Schumann
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Introduction

CONCEPT, OUTLINE AND BACKGROUND

In order to understand clearly the detail from this dissertation, we need to know first the basic concepts and problem mapping as a context and perspective in the discussion of the writing which has inter-relative and inter-complementative character. Understanding of this concept, problem mapping and perspective in the same time can be hopefully the major key descriptions of terminologies and definitions, which can be used as the gateway to understand the writing and conclusion, comparative analyses from chapter to chapter as a whole.

Šarī'a and Fiqh

Theoretically, although Islamic jurisprudence normally is known as the Islamic law, detail observation shows that the above terminology is not absolutely correct, or at least too general. In the Islamic jurisprudence concept, there are differences between the mutable and immutable law. The mutable, due to historical demand or evolution, is grouped into *fiqh*, the immutable is grouped into *šarī'a*. However, in this writing, the both terms are used in the general sense. Thus, Islamic law then will signify the terms *šarī'a* and *fiqh* as identical or synonym.¹

For Muslims, *šarī'a* is understood as a framework of values (in terms of ontology, epistemology and practice) which comes directly from *al-Qur'an* and narrated from prophet Muhammad's sayings and deeds (*ḥadīth*). On the other hand, *fiqh* can be more understood as the framework and derivative values in practical manner. The *fiqh* is thus, more affected by the human effort and human formulation processes through

¹ For the comprehensive definition of *Šarī'ah* and *fiqh*, see ; Fazlur Rahman, *Islam* (Chicago: The University of Chicago, 1975), pp. 100-101; Abdul Wahhab Khallaf, *Ilm Uṣūl al-Fiqh* (Kuwait: Dar al-Qalam, 1978), p. 11.

understanding and jurisprudential indication from the holy texts (*al-Qur'ān* or *ḥadīth*), which is systematically restructured later on by prominent figures or early Islamic law scholars through a series of interpretation, method, analogy, local tradition and religious practices before Islam especially from the Jews and Christians that lived in the Arabian region.²

Further observation shows that in the next historical development of the Islamic law, the difference between *ṣarī'a* and *fiqh* is also complex and sometimes paradoxical. To distinguish which aspects are changeable and unchangeable in the Islamic law is not a simple matter. As a matter of fact there are some basic differences between scriptural Islam and reformist one. With the scriptural Islam, there is a claim that whatever in the *Al-Qur'ān* (texts) and the deeds and speeches of the Prophet Muhammad are all-inclusive or contain all aspects of the teachings of human life and show practices and examples of the final models. On the other hand, the reformist Islam (especially the neo-modernist) assumes that holy scripture and the prophet Muhammad's *ḥadīth* contain only ethical points and moral attitudes, which its technical detail application can be formulated according to the needs of the spaces and time.³

² The points derived from; Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (Islamabad: Islamic Research Institut, 1988), p. 5; Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953), p. 5; Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1984), p. 23; Schacht, "Pre-Islamic Background and Early Development of Jurisprudence", in Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East* (Washington DC: The Middle East Institute, 1955), I, p. 40.

³ For the coverage of latest development and streams in the Islamic theology and its sociological relevance, see Fazlur Rahman, "Islamic Modernism: Its Scope, Method and Alternatives," *International Journal of Middle East Studies*, I, No. 4 (October 1970), 317-333; Rahman, "Revival and Reform

In the Muslims perception, the Islamic law itself is not regarded as law as in the modern secular world, which governs and covers only the physical human activities. The Islamic law contains not only secular aspects but also religious or spiritual aspects. The Islamic law is believed by its follower to contain spiritual law concerning common ritual such as the *ṣalāt*, *haḡḡ*, psychological, and material ablution.⁴ Besides, many Muslims believe that the law could function as the source of conflict resolution in a governmental or justice system as well as *modus vivendi* from conflicts in society or in a family. Moreover, in many cases, Islamic law issues appear as a fascinating jargon, symbol or political rhetoric that form an independent and basic political constituent.⁵ Behind the Islamic law issues, there are sometimes intentions to maintain social-political structure of a country or regime or dynasty as shown later on in the detail of the following chapter.

Hierarchy of the Sources of Islamic law

As mentioned above, the major source of the Islamic law that has been agreed upon by Islamic jurists (especially of the *Sunnite*) is the *al-Qur'ān* then the prophet Muhammad's sayings

in Islam," in P.M. Holt et al. (eds.), *The Cambridge History of Islam*, Vol. 2. Cambridge: Cambridge University Press, 1970; David Sagiv, *Fundamentalism and Intellectuals in Egypt, 1973-1993* (London: Frank Cass, 1996); Mahmud A. Faksh, *The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria and Saudi Arabia* (Westport, Connecticut, London: Praeger, 1997); Javaid Saeed, *Islam and Modernization: A Comparative Analysis of Pakistan, Egypt, and Turkey* (Westport, Connecticut, London: Praeger 1994).

⁴ Coulson, Noel, J., *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).

⁵ Sagiv, *Fundamentalism*, pp. 17-27; Faksh, *The Future*, pp. 23-40; Saeed, *Islam and Modernization*, pp. 69-71.

and deeds (*ḥadīth*), followed by consensus of Islamic law theoreticians and leading Islamic socio-political figures (*iğmāʿ*). The next sources of Islamic law is the analogy method (*qiyās*), which is accepted by some Islamic jurists, and the more controversial one, that is a quasi-opinion (*aqf*), which is normally formulated in terms such as *maṣlaḥah*, *mashalih murshalah*, *istishhab*, *ṣad al-darīāh*.⁶

The position of *al-Qurʾān* in the process of deriving the law and as the source of the Islamic law is central and fundamental. Although more specific observation reveals that the *al-Qurʾān* itself is not a book of law with all detail and explanations of the technical aspects of law. Only about 500 verses in *al-Qurʾān* (from total of 6666 verses) contain explicitly or implicitly legal materials and instructions. The rest are related to history, common moral teachings etc. Due to the lack of legal material in *al-Qurʾān*, large portions of Islamic law explanation were recompiled from the sayings and deeds of the prophet Muhammad (from *ḥadīth* collections). Of course, there is not only one version of collected *ḥadīth* compiled by Islamic jurists, but many versions with their own controversies and commonly accepted points among Muslims themselves.

Generally, in the Sunnite Muslim tradition, *ḥadīth* collections with high acceptability are the collection by Bukhari (died in 870 AD) and Muslim (died in 875 AD), which both are famous as the *Ḥadīth Ṣaḥīḥ Bukhari* and *Ṣaḥīḥ Muslim*. Especially the book of *Ṣaḥīḥ Bukhari* is placed directly below the *al-Qurʾān* in its function as a source of references in Islamic law books.⁷ The book *Ṣaḥīḥ Bukhari* itself is divided into 97 main problems, which are then divided into 3450 titles and into an additional 2762 *ḥadīth*; many of them are repeated under different contexts.

⁶ Mahmassani, Subhi, *Falsafah al-Taṣrif al-Islām*, translated by Farhat J. Ziadeh, (Leiden:E.J.Brill, 1961), pp. 60-102,

⁷ Mahmassani, *Falsafat*, pp. 71-75.

The content of these *ḥadīṭ* covers many problems such as ablution, prayer, fasting, giving donations, witnessing, trading, marriage etc. The materials inside this *ṣaḥīḥ* book are cited by Islamic jurists when developing and constructing legal arguments. Lower than these two *ṣaḥīḥ* books in the level of hierarchical recognition and authority are the compilation of *ḥadīṭ* by the following: Abu Dawud (died in 888 AD), Al Nasai (died in 915 AD), Al Tirmidzi (died in 892 AD) and Ibn Majah(diedin896AD).⁸

After all, it is necessary to mention that among the *ḥadīṭ* experts themselves, the big problems and debates center mainly on the textual validity, correctness, accuracy of transmission, the reliability of the transmitters of *ḥadīṭ* in the context of historiography, their implications upon decision makers and their function as sources of the Islamic law. Debate and disagreement among Islamic jurists on these matters are very important because the legitimate position of *ḥadīṭ* as the source of Islamic law in the eyes of Muslims is only directly below the first source which is the *al-Qur'ān*.⁹ In fact, the multiplicity of opinions, debates and disagreements on the subject, has caused and provoked various multiplier effects (such as the creation of a socio-political polarization within the Islamic community).

The next sources of Islamic law are respectively: the analogy (*qiyās*) according to the Syafiite, the jurists preferences (*istiḥsān*) according to Abu Hanifah (the Hanafite), or the preference towards function or communal interest (*istiṣlāḥ*) according to Malik Ibn Anas (the Malikite).¹⁰ If we look deeper into this, these latter sources are indeed the sources of

⁸ Zubaida, Sami, *Law and Power in the Islamic World* (London-New York: I.E. Tauris, 2003), p. 30.

⁹ Coulson, History of Islamic Law, *ibid'*, Schacht, *The Origins*; David Pearl, *A Textbook on Muslim Law* (London: Croom Helm, 1979), pp. 4-5.

¹⁰ Mahmassani, *Falsafat*, pp. 19-32, p. 79, pp. 83-92.

law predominantly based on reasoning or the logical capacity of human endeavour. Included in this category is the use of logical justification or the terms *maṣlahah* or *maqāṣidu al-taṣrī'*) as formulated by an Islamic jurist from Andalus, Abu Ishaq al-Syatibi. The theory focuses on the function and the aim of the Islamic law which has been stated in order to prevent the disadvantageous and support what is useful.¹¹ Today, in the practical life of the Muslims, Islamic law theories which are based upon the *ṣarī'a* function and aim (*maqāṣidu al-taṣrī'*), are considered as practical legal derivations, legal debates or as ways to conduct a dialog between the texts of Islam (*naṣṣ, al-Qur'ān* and *ḥadīth*) and the real life of Islamic community, though these theories are not explicitly found, either in *al-Qur'ān* or *ḥadīth*.

The Formative Periods of Islamic law: Systematization and the Pioneers

Systematization of Islamic law was formulated during the first three centuries of Islamic era. The main location of the Systematization and conceptual formulation of the Islamic legal theories were around the city of Mecca, Medina, Baghdad, Syria and Egypt. Elements of pre-Islamic traditions especially of local traditions as well as the Jewish and Christian heritages can be found in these legal materials.¹²

The pioneers of the process of systematization were local leaders and influential figures having different backgrounds and occupations such as traders, soldiers, aristocrats or persons whose function within communities are as mediators of conflict. The role of oral tradition in some debates and

¹¹ Mahmassani, *Falsafat*, pp. 83-92.

¹² Pearl, *A Textbook*, p. 7; Mahmassani, *Falsafat*, p. 92.

discussions during the systematization process and the crystallization of Islamic law theories in the first and second decades were great. Given the dominant role of the oral tradition, the major debates very frequently took place during public meetings attended by interested people and leading figures.

With large tendency to the inductive processes referred to logical idea from the Quranic verses or prophetic traditions among Islamic community during the era of the prophet Muhammad (*ḥadīth*), actual case by case had been discussed and searched for their legal argument from the ethical and normative standard that had agreed upon by the earlier Islamic jurists, although some parties still have different interpretations on the method of normative derivation from the *al-Qur'ān* and the *Ḥadīth*.¹³

The names of the pioneers of the debate in the early systematization processes of the Islamic law can be found in Medina (the place where Muhammad died), for example Said ibn Musayyab (d. 94 AH/712 AD), Urwah Ibn Zubair (d. 93-94 AH/ 711-712 AD), Abu Bakr bin Abdurrahman (d. 94-5 AH/713 AD). In Mecca, there were also names like Atha bin Abi Rabah (d. 114 AH/732 AD), Amr bin Dinar (d. 126 AH/743 AD). In Iraq, there were al-Qamah bin Qays (d. 62 AH/681 AD), Syurayh bin al-Harist (d. 78 AH/697 AD), Ibrahim al-Nakhai (d. 96 AH/714 AD). In Syria there are Qabishah bin Dzuwayb (d. 86 AH/705 AD), Umar bin Abd. Aziz (d. 101 AH/719 AD) dan al-Awzai (d. 157 AH/773-4 'AD).

Because of the regional context of the debates on systematization, the early stage produced methods of thinking and legal streams specifically identified as regional cases and

¹³ Pearl, *A Textbook*, p. 9.

assumptions and therefore known as the Medina legal stream (*madhab*) the Hijaz *madhab*, the Kufah *madhab* (Iraq) and the Syam *madhab* (Syria).

Later on, in the process of Islamic legal development, the identification and development of such regional *madhab* diminished due to the more intensive mobility and closer contact among the regional leaders and pioneers themselves.¹⁴

In the third century of the spread of Islam, Islamic legal development was marked by the decreasing role of regional legal stream (*madhab*) which was replaced by the rise of individual *madhab*. Those individuals who were regarded as authoritative personnel had their own circles and followers. In relation to the systematization process, this century was also marked by the gradual shift from oral to written codification and compilation.

In line with the process of written systematization, the competition between figures with their own followings intensified. The written systematization was also done very quickly along with the bureaucratic reform and formalization of Islamic norms into operational and professional legal systems within a governmental structure. The moment of codification required the formulation of more concrete theoretical interpretations, derivations and juridical justification systems from each individual. Then there were also the different versions of Islamic theoretical jurisprudence (*uṣūl al-fiqh*).¹⁵ In relation to the codification and compilation processes (professionalism) and bureaucratization, Norman Calder said:

"The third century sees a movement from a jurisprudence which is a predominantly oral and socially diffuse informal

¹⁴ Hasan, Ahmad, *The Early Development*, p. 19 and p. 29.

¹⁵ Pearl, A Textbook, *Ibid*; Hasan, The Early, *Ibid*

process towards a jurisprudence which is a complex literary discipline, the prerogative of a highly trained and socially distinct elite. That movement (not transition, for the end of the process was centuries off), signaled by the terms professionalization and bureaucratization, was no doubt part of natural process but was also affected by school competition and government policy".¹⁶

In the history of Sunnite Islamic law, the competition between different views and Islamic legal streams (*madhab*) which employed various methods and juridical justifications culminated in the existing four leading pioneers of Islamic legal development, whose theoretical foundations of Islamic law are still widely used, interpreted and revitalized by their followers until today.

In brief, the four pioneers are: a. Abu Hanifah (died in 150 AH/767 AD), known later as the Hanafite *madhab*. Nowadays the Hanafite *madhab* are spread out mainly in Pakistan, Turkey and Egypt. The typical characteristics of this madzhab is the dominant use of logic and thinking in relation to the *istiḥsān* theory; b. Malik bin Anas (d. 179 AH/795 AH), also known as the Malikite *madhab*. Nowadays this *madhab* dominates North Africa (Morocco). In the method of legal thinking, this *madhab* is associated with the *istiṣlāḥ* theory or the *maṣlaḥah* theory; c. Muhammad ibn Idris al-Syafii (d. 204 AH/819 AD), known today as the Syafiite *madhab*. This *madhab* has followers mainly in Indonesia, Malaysia and in the Southeast Asian region. The main characteristic of this stream is the balancing tendency and the use of a combination of text, doctrinal Islamic law and the process of rationality in reaching legal argument, especially in the use of the method of analogy (*qiyās*); d. Ahmad bin Hanbal (d. 241 AH/855 AD), also known as the Hanbalite *madhab*. Nowadays this *madhab* has become dominant and is considered the official madzhab in Saudi

¹⁶ cf. Zubaida, *Law and Power*, p.21

Arabia. The main characteristics of this *madhhab* is the strict use of textual law (*al-Qur'ān* and *ḥadīth*) literally and scripturally.¹⁷

Islamic Law and Power; the Period of the Classical Islam and its Development

As explained above, since the coming of Islam, early Muslims and the immediately following generations focused and engaged upon expanding the Islamic teachings which were related to purely religious deeds. Though the stay of Muhammad in Mecca and Medina (he migrated to Medina on 16 June 622 AD, which was then marked as the 1 Muharram of the *Hijrah* calendar –Islamic calendar–, the calculation of which is based on the lunar system) brought significant social and political changes, the concepts of power and of governmental management including the relation between Islam and state were not explicitly elaborated upon by him during his lifetime.

Socio-political documents such as the Medina charter, if analyzed carefully, focused on the temporal and reconciliatory command from Muhammad in Medina to work together with the local peoples of different ethnics, religions and denominations. At the same time, this document introduced a new religious-communal identity in Medina which distinguished itself from the old religious-communal identity of the Jews in Medina or the Christians in the nearby region (Najran).

Because of its temporal reconciliatory characteristics, this document later received many amendments, in view of actual socio-political realities and the ability of Muhammad as religious leader to play a diplomatic role and to act as the leader of community with a new religious-communal identity (Islam).

¹⁷ Mahmassani, *Falsafat*, pp. 13-32.

Thus, from the point of view of the power-managerial concept, the main substance of this document clarified that the history and teaching of Muhammad himself on the concept of power and other governmental issues did not make any clear and sharp definitions or formulations which could be a final model for the next generation of Muslims.¹⁸

This view is further strengthened by the historical fact that after the death of Muhammad, the community of Medina with this new religious-communal identity (Islam), encountered some complex problems around the concept of power and other governmental issues, such as the steps which must be taken to find a new leader to substitute for Muhammad, who was (during his life) the central figure and the sole interpreter and bearer of Islamic thought. Even historically, his role was widened to include leadership in the social and political dimensions, especially during his stay in Medina.¹⁹

After Muhammad died, the young Islamic community found itself in an uncertain situation regarding the method of arriving at a social consensus on the principles of leadership succession and the process of gaining social legitimacy for the new successor. The situation was worsened by the tendencies towards the disintegration of the Islamic community. The community was split along the lines of previous ethnic

¹⁸ The description on the ethical principles of Medinan community, see, Nurcholish Madjid, *Islam : Doktrin dan Peradaban* (Jakarta : Yayasan Wakaf Paramadina, 1992); On the Medinan Charter, see, W.Montgomery Watt, *Muhammad at Madina* (Oxford : The Clarendon Press, 1977).

¹⁹ Gibb, H.A.R., "Constitutional Organization" in Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East* (Washington DC: The Middle East Institute, 1955), p.4; Muhammad Az-Zuhaili, *Tārīḥ al-Qaḍāfi al-Islam* (Damascus: Darul fikr al-muashir), pp.42-50. For a comparison (in the Indonesian version) see, Kraemer, J., *Agama Islam* (Jakarta: Badan Penerbit Kristen, 1952), pp. 15-46.

affinities and affiliations which also included a genealogical and tribalistic character.

The latter fact can be traced from historical facts that the inauguration of Abu Bakr as the first successor of the Islamic community leader in 632 AD - 634 AD, was gained after a series of controversies and heated discussions caused by the debate of each ethnical group on the concept of leadership. After his acclamation, each socio-ethnic group took their loyalty oaths (*bai'āh*). Even though, after six months of the Abu Bakr leadership, there was still a person left, namely AH bin Abu Thalib (the son-in-law of Muhammad), who had yet taken an oath to the Abu Bakr leadership. The problem was also worsened by the disharmonious relationship between the family of Abu Bakr and Ali bin Thalib, especially between Fatimah (the wife of Ali bin Thalib, who was also the daughter of Muhammad) and Aisyah.

The second leader after Abu Bakr was chosen by Abu Bakr himself through a hearing process with some seniors. Abu Bakar formed a trustworthy panel (*ahl ḥalli wa al-aqd*) as his advisers during a serious illness and came into agreement to appoint Umar bin Khattab as the next leader to replace him. Umar bin Khatab ruled for 10 years and 6 months (13 AH/634 AD - 23 AH/644 AD). The next leader was Utsman bin Affan. The appointment was done through the formation of a council. Usman bin Affan's main rival was Ali bin Abi Thalib. Utsman ruled for eleven years (644 AD - 655 AD) and was marked by a more political and sectarian crystallization and grouping within the community. The next leader was Ali bin Abi Thalib. The coming of Ali bin Abu Thalib to power meant the coming to power of the opposition group which had been marginalized during the previous three leaderships.²⁰

²⁰ The long explanation on leadership during this era, see, Hasan, Ibrahim Hasan,

It is worth noting that especially starting from the Utsman leadership to Ali, there were major differences in the leadership and administrative processes in the government. As a result, there were a series of political tensions within the inner circle itself. Thus, tendencies towards polarization and disintegration started to intensify in the Islamic community because of unresolved tensions and conflicts due to political processes on the one side and due to the different perceptions and interpretations of the Islamic legal as well as Islamic concept of power on the other side.²¹

Although after the death of Muhammad, the newly founded Islamic community faced a crisis due to the power vacuum he left behind, the remarkable success of Muhammad in shaping social solidarity and developing a more universal norm (within the standards of his time) is worth pointing out. In this case, Robert N. Bellah stated:

"... There is no question but that under Muhammad, Arabian society made a remarkable leap forward in social complexity and political capacity. When the structure that took shape under the prophet was extended by the early caliphs to provide the organizing principle for a world empire, the result is something that for its time and place is remarkably modern. It is modern in the high degree of commitment, involvement, and participation expected from the rank-and-file members of the community. It is modern in the openness of its leadership positions to ability judged on universalistic grounds and symbolized in the attempt to institutionalize a non-hereditary

Tarikh al-Islam (Cairo: Maktabah an-Nahdhah al-Misriyyah, 1979); von Grunebaum, G.E, *Classical Islam: a History 600 - 1250* (Chicago: Adline Publishing Company, 1970).

²¹ Najjar, Fauzi, M., *The Islamic State: A Study in Traditional Politics* (Darien, Connecticut: Monographic Press, 1967), p. 11; For the historical background, see, Muhammad Abu Zahrah, *Tārīḥ al-Madāhib al-Islāmiyyah* (Cairo: Dar al-Fikr al-Arabi, 1971); Hugh Kennedy, *The Prophet and the Age of the Caliphates* (London and New York: Longman, 1986).

top leadership. Even in the earliest times certain restraints operated to keep the community from wholly exemplifying these principles, but it did so closely enough to provide a better model for modern national community building than might be imagined".²²

From the above comments, we can summarize that: a. the explicit system and foundation for the construction of an operational Islamic government cannot be found in the *al-Qur'ān*'s teaching and the historical tradition of Muhammad; b. in regard to this, the *al-Qur'ān* and the historical tradition of Muhammad focused more on the principles of upholding societal norms based on justice, deliberation and freedom with very little attention given to the elaboration of a concept of power.

Because of the looseness of the political leadership and of the nation concept introduced by Muhammad, as a newborn society, the new Islamic community was not free of conflicts, political disintegration and competition between and among the groups. Thus, the historical fact of the early classical Islam showed that theological frictions and factions appeared after Muhammad's era with many religious sects such as *Mu'tazilah* (the rational group), *Hawārij* (the legal-literalist group), *Shiite* (a group behind Ali and his heirs) and *Ahl sunnah wal ġamā'ah* (the majority group which supports consensus).

Those groups have different ideas, which in turn caused internal polarization on issues revolving around the concepts of political power and leadership they believed in and which kind of theological doctrine they emphasized in legitimating their leaders: who has the legitimacy of rule, etc.

²² Bellah, Robert, N., "Islamic Traditions and Problems of Modernization," in Robert N. Bellah, ed., *Beyond Belief* (New York: Harper & Row, 1976), pp. 150-151.

This theo-political polarization, till today flows into the two main streams of the Islamic community; the Sunnite group (*Ahl sunnah wal ǧamaʿah*), whose main political thought is that the Islamic community requires a political leadership (usually called *ḥilāfah* or *imāmah*) based on the consensus which had been indicated in the historical precedents and shown in the customs of the classical Islamic people.

For the Sunnite group, the appointment of a leader can be done by choosing certain qualified persons (*ahl hal wal aqd*) as council members or by means of a common mechanism such as a council session or deliberation (*ṣūro*).²³ On the other hand, the *Shiite* group declares that only the heir of Ali bin Abi Thalib (the son in-law of Muhammad) can hold the leadership (hereditic concept of leadership). Furthermore, the *Shiite* group is more strict on the question of political leadership, stating that the Islamic community ought to appoint a leader because the leadership is the integral component of the pillars of Islam.²⁴

History showed subsequently that this kind of leadership (*ḥilāfah* or *imāmah*) developed into a political concept exclusive to the elite, tyrannical, exclusive, nepotist and dynastic. That character is obvious from the practices developed by several dynasties which declared themselves as the representatives of the Islamic *ḥilāfah* systems such as the Umayyad dynasty in Damascus which had 14 caliphs, Abbasiyah in Baghdad (750 AD - 1258 AD) with 37 caliphs, Umayyad dynasty in Spain (756 AD-1031 AD) with 18 caliphs, Fatimide dynasty in Egypt (909 AD -1171 AD) with 14 caliphs,

²³ Khan, Qamaruddin, *Political Concepts in the Quran* (Karachi: Institute of Islamic Studies, 1973) p. 1; Ahmad Syafii Maarif, *Islam dan Masalah Kenegaraan: Studi tentang Percaturan dalam Konstituante* (Jakarta: LP3ES, 1987), p. 28.

²⁴ From shiite perspective, see, S.H.M.Jafri, *The Origins and Early Development of Shia* (London: Longman, 1979).

Ottoman dynasty in Istanbul (1299 AD-1924 AD) with 37 caliphs, Safawide dynasty in the Persian (1501 AD -1722 AD) with 9 syahs and the Mogul in India (1526 AD -1858 AD).²⁵

The Fatwa and the Court (*Qaḍā*)

As explained above, in the beginning, the type of theoretical and argumentative development which arose within Islamic law was more personal than organized. During the following phase, various individual arguments developed and appeared within each Islamic legal stream (*madhāb*). Each of those streams divided itself into groups which supported the theoretical foundation of its own assumptions.

Not all of the Islamic legal streams have their places within the ruling system. The stream which had a position of power was usually more dominant in developing their legal arguments and theory through the court system (*qaḍā*). On the other hand, the other streams which do not have a place in the system of political power have chosen to develop their thinking and theory through fatwa (*iftā*). Of course, with the latter method, it could not oblige the community to follow their *fatwās*. On the other hand, the former with the power of patronage, possessed juridical authority and could assert its legal standpoint and opinion through the governmental apparatus. Thus, the community must obey. Nevertheless, it does not mean that the *iftā* way has not had a significant impact. Even in some cases, —the way of asserting oneself outside of power ~ had become a

²⁵ Az-Zuhaili, *Tārīḥ al-Qaḍā fī al-Islām*; Hitti, Philip, K., *History of the Arabs* (London: The Macmillan Press, 1970); Syalabi, Ahmad, *Sejarah Kebudayaan Islam*, translated by. Muchtar Yahya and Sanusi Latif (Jakarta : Pustaka al-Husna, 1983).

symbol of legal opposition to the ruling government.²⁶

The two trends, the court (*qaḍā*) and *iftā* ways can be seen by comparing the Hanafite and Hanbalite streams. The Hanafite stream could achieve progress faster than the Hanbalite. Although Abu Hanifah (the founder) himself rejected being an employee of the ruling dynasty, the Hanafite, whose center was in Kufah (Iraq) gained a good position within the government at the end of the Umayyad»or during the Abbasiah.

Among several reasons for this good position was the striving of his disciple and his main cadre Abu Yusuf Yakub. He became the Supreme Judge with the authority to elect all the judges in the Abbasiah dynasty. One of the products of Abu Yusuf himself was the book *Al-Kharraj*, which was written for the Harun al-Rashid's government (from the Abbasite dynasty). It contained details of problems of taxation and finance. In turn, the book served as the major reference for legal decisions throughout the kingdom during that dynasty.

Furthermore, during the Ottoman dynasty— the Islamic dynasty with the broadest territory compared to previous ones and the longest ruling Islamic dynasty (more than six centuries)--, which ended in 1924Jn Turkey, the Hanafite attained the status of being the official stream within the kingdom. In fact, it was the longest official *madhab* which had ever existed. Moreover, the first systematized codification of the Islamic law which was called *al-Majallah*, drafted in the middle of the 19th century by the Ottoman dynasty was based mostly on the *fiqh* of the Hanafite.²⁷

²⁶ The example of the case in the modern Egypt is the 'fatwa' of Muhammad Abdussalam Faraj, *al-Farīdah al-Ġaibah*, as cited by Barry Rubin, in *Islamic Fundamentalism in Egyptian Politics* (London: Macmillan, 1990).

²⁷ Mahmassani, *Falsafat*, pp. 19 - 23, p. 39.

The Hanbalite experienced quite a different story. As explained above, this religious stream was more literal and scriptural in comparison to the Hanafite. In contrast to the Hanafite, the followers of the stream did not have a good position in the court (*qaḍā*) of the structures of power in the Islamic dynasties of the early and the middle ages of Islam.

In later developments, the main and famous follower of Hanbalite, Ibnu Taimiah (621-728 AH) were known by his *fatwās* which were critical of the government and of the dominant religious tradition at the time. Nevertheless, the Hanbalite gained its spiritual awakening when Muhammad Ibn Abdul Wahhab (1115-1206 AH or around 18th century AD), the loyal follower of this *madzhab*, declared a puritanical movement and directed a strong criticism against the religious tradition prevailing in Nejd (Mecca). Slowly but surely, this religious legal stream developed further and reached its peak, when it became the official *madhab* during the al-Saud dynasty, which founded the kingdom of Saudi Arabia in the early 20th century.²⁸

The sharp polarization *between fatwā* and *qaḍā* developed further. Often, the *fatwā* institution was more independent and autonomous before the ruling government. It proceeded sporadically and belonged to several Islamic socio-political streams. In turn, either directly or indirectly, it became a competitor to the *qaḍā* institution which was a part of the governmental organ and authority.

During the peak of the Ottoman dynasty (15th and 16th centuries), those two institutions were integrated and controlled under one authority. *Mufti* and *qadli* was chosen from the

²⁸ "Ahmad B. Hanbal" in *The Encyclopedia of Islam* (Leiden and London, New Edition, reprint of 1st edition, 1967), pp. 272 - 277; Hourani, Albert, *Arabic Thought in the Liberal Age, 1798 - 1939* (Cambridge, 1983), pp. 37-38.

official religious stream and both became parts of the government. Thus, we know of the famous mufti from the Ottoman dynasty Abus Suud (1490-1574 AD), whose arguments were some of the important sources of legal materials for that dynasty, although in producing the *fatwā*, Abus Suud himself was not a judge (*qadli*).²⁹

In modern Islamic societies, as in Egypt for example, the *iftā* is separated from the structure and hierarchy of the central authority. However, practically speaking, it cannot become an effective opposition because the authoritative structure of government has been created in such a way that it tends to be hegemonic.³⁰

Thus, the power of an opposition's *fatwā* institution was run clandestinely behind that hegemonic authority. *Fatwās* produced by clandestinely were direct, very scriptural and spread only in a limited way. In brief, the style of the fatwa's expression was just like the traditional Hanbalite and Ibnu Taimiah's. They confronted and criticized the dominant religious practice in a frontal and literal way.

In the Indonesian context, when the Dutch colonial ruler found out that *the fatwā* method was also important and influential in the local Islamic traditions, *the fatwā* method became an important component for the suppression of Islam by the colonial ruler, *eg. fatwā* cases in relation to Sayyid Ustman. Nevertheless, Sayyid Ustman's *fatwās* were not effective. They were weak of social relevance and ineffective due to the growing anti-colonialism. Instead, it encouraged the coming of

²⁹ Imber, Colin, *Ebus Suud: The Islamic Legal Tradition* (Edinburgh: Edinburgh University Press, 1997).

³⁰ "Popular Islam and Official Ulama" in Barry Rubin, *Islamic Fundamentalism*, pp. 79-92.

contra *fatwās* with an anti-colonial attitude.³¹

After Indonesian independence, especially during the New Order regime of Suharto, the *fatwā* institution attained official status. That was the *Majelis Ulama Indonesia*, The establishment of the institution was designed to be under the corporative and hegemonic New Order authority.³²

In short, in the Islamic tradition of government, both institutions (*fatwā* and *qaḍā*) were always revitalized. In the era of nation-state, when the *qaḍā* institution perished, the fatwa replaced it.

Islamic law and Power: al-Mawardi and Ibnu Taimiah's Perspective

In line with the victory of the legalist wing over the *sufis* and philosophers in the traditional rivalry within Islamic discourse, the concept of the interrelationship between power and Islam was described in the legal manner. The work on the Islamic governmental system and its development was illustrated by judicial formulation. In short, within the cognitive structure of Muslim thinkers in the middle ages, the legal frame of mind dominated: Islamic law was the ultimate solution and the central point of theoretical discourse.

Considering the relevance of this study, we will describe below the views of the two Muslim jurists in the middle age who saw the relation between Islam and power within the domination of the legal perspective (*ṣarīʿa or fiqh*), i.e. the views of al-Mawardi and Ibnu Taimiah.

The full name of al-Mawardi was Abu Hasan Ali bin

³¹ Noer, Deliar, *Gerakan Modern*, p. 9.

³² Mudzhar, *Fatwa*

Muhammad bin Habib al-Mawardi. He was born in Basra, 364 AH/975 AD and died in Baghdad in 450 AH/1058 AD. Al-Mawardi was a leading scholar (*'ulamā'*) from Syafiite *madhab* and became an important judge in the Abbasiayulynasty, which became degraded and sunk in popularity due to a local rebellion led by the Buwayhid Shiite group.³³

Al-Mawardi's works concerning Islam and power was *al-Aḥkām al-Sultāniyyah* (the Governmental Ordinance). This work was considered important by several researchers of Islamic political thought in relation to the evolution of the Islamic power concept.³⁴ As an active individual in the Abbasite government, the main goal of the work of al-Mawardi is to show that the Abbasite dynasty has social legitimacy and a political right to leadership, including the authority to control the Buwayhid Shiite group.

Al-Mawardi stated that there were two arguments regarding the obligation of leadership possessed by the Islamic community. According to Muktazilite (Islamic rationalist group), logical reasoning demands that a leadership must exist, while other groups stated that a leadership is obligatory on the basis of religious reasoning. In this matter, al-Mawardi stated that a leadership is obligatory because of early consensus of commitment (*iğmā'*) from the Islamic community which had agreed upon that obligation.

Regarding the goal of leadership in Islam, according to al-Mawardi "the leadership is institutionalized to replace the prophet hood to protect the religion and to control the world".

³³ Watt, W. Montgomery, *Islamic Political Thought* (Edinburgh University Press, 1980); Qamaruddin Khan, Al-Mawardi's Theory of the State, cf., Ahmad Syafii Maarif, *Islam*, p. 25.

³⁴ Binder, Leonard, *Religion and Politics in Pakistan* (Berkeley: University of California Press, 1963), p. 15.

In addition, al-Mawardi emphasized that in the Islamic community there must be only one ruler allowed. And the legitimate ruler according to *šarī'a* (which at that time was the Abbasite dynasty) had the right to command obedience from the people.³⁵

Among other things explained in his book was that al-Mawardi divided the Islamic community into three categories: (a. the ones who are allowed to rule. People in this category should meet several requirements, such as being just, physical and non-physical capability. Another requirement according to al-Mawardi was that they belong to the Quraisy clan. The second category of people is the individual or the group of individuals who are allowed to choose a leader, called *ahl ḥalli wa al-aqd*.

The *ahl ḥalli wa al-aqd* should represent the third category of people, the majority, whose aspirations are represented. Thus, according to the al-Mawardi's version, the existence of leadership is obligatory, due to consensus (*iğmā'*). The procedure of appointing a leader is by election. Among some requirements of leadership was hereditic: belonging to the Quraisy clan.³⁶

The second theoretician from the Islamic jurists in relation to the Islamic law and power was Taqī al-dīn Ahmad ibn Abdul Shamad ibn Taimīyah or famous as Ibn Taimīyah. He was born in 1263 AD in Harran Turkey and died in 1328 in Damascus. He was from a prominent family of the religious tradition. When Harran was attacked by the Mongol in 1270 the Taimīyah family moved to Damascus, which was also under the shadow of Mongol rule.

The geopolitical and psychological environment of the Islamic

³⁵ Maarif, *Islam*, pp. 25-27.

³⁶ *Ibid*, pp. 29-31.

community during Jhe Ibnu Taimiah's life was in a critical phase and processes of disintegration within the Islamic community were widespread, especially because there were political fractions within the Sunnite regime and foreshadow of the Shiite community and real threat from the Mongol empire and the feeling of being powerless and defeated.³⁷

The Abbasite dynasty in Baghdad was defeated by the Mongol empire in 1258. According to Ibnu Taimiah, the Islamic community all over the world has been in a state of degradation and decadence both in thought and scientific innovation. In the midst of such a situation, Ibnu Taimiah who was the follower of the Hanbalite stated that the gates of legal reasoning (*iğtihād*) were not the exclusive domains of Islamic jurists. It still open by means of the direct citation of the *Al-Qur'ān* and *ḥadīth* as authentic sources of Islamic thought in the combat against irreligious practices.

Ibnu Taimiah believed that by continuing the invention and preservation of authentic Islamic values, widespread "diseases" of thinking and the political disintegration caused by the many new sects which taught Islamic Sufism could be prevented. Another theme emphasized by Ibnu Taimiah was that the Islamic community should go back to the pure Islamic *ṣarī'a* which should be the major term of reference in the Islamic life.³⁸ I

Many works of Ibnu Taimiah are polemical. His arguments are literalist, straight, direct and legalist. One of his famous works is *Minhaj al-Sunnah al-Nabawiyyahfi Naqd Kalam al-Shiah wa al-Qadariyyah* (A method of the prophet in rejecting the Shiite

³⁷ *Ibid*, pp. 31-40.

³⁸ *Ibid*- Williams, John Alden, Islam (New York and London, 1961), pp. 205-210.

and Qadarite doctrines).

In relation to the concept of power, he wrote *al-siyāṣah al-Syarīyyah* (*Šarī'a* administration). The *Minhaj* book consists of detailed objections to the Shiite teachings and the doctrine Qadariyyah, while *al-siyāṣah* was a speculative and theoretical work which dealt with the *Šarī'a* supremacy as the supra-structure of society and with how the underlying system supported the *Šarī'a*. The implementation of *Šarī'a* was the central issue in these two works of Ibnu Taimiah.³⁹

In relation to the need of the Islamic community to appoint a political leadership, Ibnu Taimiah's opinions were contradictory. In his polemic work *Minhaj*, he said that a political leadership for the Islamic community is not obligatory in the same way that it is an obligation to perform other Islamic rituals such as *ṣalāt* (prayer) or paying donation.

As evidences he argued that the prophet Muhammad himself never discussed the question of political leadership in detail. Meanwhile, in his work *al-siyāṣah*, he explained that the prophet Muhammad advised the Islamic community to elect leaders, even for a journey with only three persons. A closer look shows that his first work, was meant to reject the Shiite arguments, which considered the political leadership as one of the Islamic pillars. The second work was meant to be internal to the Sunni Moslem community.⁴⁰

Other things said by Ibnu Taimiah in *al-siyāṣah* were that the need for leadership and the obedience to a leader is obligatory, even when that leader's conduct is mistaken. Moreover,

³⁹ Maarif, *Ibid*; Williams, *Ibid*.

⁴⁰ Maarif, *Ibid*.

different from al-Mawardi, for Ibnu Taimiah, leadership in the Islamic community need not be single but it may also be a double leadership in the peaceful neighbouring Islamic communities.

Ibnu Taimiah did not go into detail on the relation between the principles of deliberation (*ṣūrā*) and their function as the basis for leadership. The discussion about this matter was not taken seriously.⁴¹

The opinions of two jurists regarding Islamic law and power has thus been discussed briefly. The similarity between the two opinions is that they are both theocratic and, legalistic in the logical derivation of their ideas. This is aside from their similarity on the need for leadership in the Islamic community.

On the other hand, the difference rests on the reason given of why a leadership is needed. Al-Mawardi based his idea on consensus, while Ibnu Taimiah based himself on the sayings of the prophets (*ḥadīth*). Both tend to base their theories of leadership on reality. In fact, the theories they developed were mirrors of their era and environments. Al-Mawardi stressed the importance of a single leadership, while Ibnu Taimiah tolerated more than a single leader in the Islamic world. Those ideas came from the social setting where they lived. Al-Mawardi was a Muslim jurist worked for Abbasite regime while Ibnu Taimiah was in the outer circle of power.

Although Ibnu Taimiah was more strict and critical when facing the threat of the Shiite sect, they are however in agreement when it comes to the terms of loyalty to a leader. They looked upon a leader as a necessary aspect of the Islamic community and dissidence to a leader was considered an

⁴¹ Maarif, *Ibid*.

intolerable act.

Another notable thing is that both did not discuss the council session principles (*ṣūrā*) as a form of collective leadership in sufficient detail. There was a strong indication that they still understood the leadership symbol as personal, dynastic and elitist and not as a collective leadership concept which is procedural, institutional and popular,

The work of Ibnu Taimiah focused more on in giving an internal command to the Islamic community to purify religious practices by going back to the basic *al-Qur'ān* and *ḥadīth* literally. The character of that work was direct, scriptural and legal and it vehemently attacked other opinions which he regarded as deviating from authentic Islamic thought (*al-Qur'ān* and *ḥadīth*).

At the beginning of the twentieth century, Ibnu Taimiah's opinions inspired a new international Islamic intellectual movement, which had a reformist character as can be seen for example in Muhammad Abduh in Egypt or the Muhammadiyah organization in Indonesia. But on the other hand, its logic, legal-formal and its scriptural approach has inspired a revivalist and scriptural Islamic movement as can be seen in the movement of the Wahabbite by Muhammad Ibnu Abdul Wahhab (1703-1787) in Saudi Arabia and *al-Iḥwān al-Muslimīn* in Egypt.⁴²

⁴² *Sagiv, David*, Fundamentalism and Intellectuals in Egypt; *Mahmud A.Faskh*, The Future of Islam; *Deliar Noer*; Gerakan Modern; *Maarif*, Islam dan Masalah Kenegaraan.

Islamic Law and Power; the Phenomenon of the Ottoman Dynasty

One of the biggest and last empires which tried to implement many aspects of the Islamic *ṣarī'a* was the Ottoman dynasty. Although the Turkey-Mongol nuance in the governmental structure and bureaucracy was obvious, in its religious justification, the Ottoman dynasty called itself the legitimate dynasty and power holder as well as the embodiment of the governmental system of the Sunnite Islam (*ḥilāfah*).⁴³

The origin of the Ottoman dynasty was the Anatolia region. It was formed as an emporium power by Usman in 1300 AD. In its later development, its power covered all Arab countries except Morocco. Its territory even reached the European continent, especially the Balkans and Hungary,

In brief, especially during the Sulaiman (The Magnificent) era, who ruled from 1520 to 1566 AD, the Ottoman dynasty was one of the major players in the world as a military and bureaucratic power. In Turkey itself — the central government of Ottoman (Constantinople)— the power of the Ottoman dynasty had totally disappeared by the year 1924 AD.⁴⁴

Along with the geopolitical anatomy of that time and at the same time to maintain its governmental domination over several regions (which were formerly the centers of Islamic civilization like Baghdad, Cairo and Damascus), the Ottoman dynasty laid the foundation of its government in the process of centralizing its power with a strong combination of military, state and expansionist traditions.

⁴³ Az-Zuhaili, *Tārīḥ al-Qaḍa*, pp. 423-436; Colin Imber, Ebus Suud, pp. 3-64.

⁴⁴ Az-Zuhaili, *Tārīḥ al-Qaḍa*, *ibid*; Imber, Ebus Suud, *ibid*.

During Sulaiman's era (The Magnificent Solomon), the relation between the state and Islam was strengthened and all legal apparatuses and bureaucratic regulations were based on Islamic law, especially as taken from the Hanafite as the official madzhab.⁴⁵

For internal consolidation purposes, external expansion and the attainment of power were the privilege of bureaucrats, soldiers and royal family. The Ottoman dynasty implemented basic laws to preserve territorial stability in all regions with preemptive actions.

The implementation of that basis was the Islamic criminal law which was similar to the implementation of the emergency law or the internal security act as known today.⁴⁶ It was implemented in such a way that some European analysts at that time who were oriented towards an imperialist perspective and etatism saw that the law was very effective. Uriel Heyd in his *Studies in Old Ottoman Criminal Law* stated:

"European observers in the sixteenth, seventeenth, and eighteenth centuries were impressed by the efficiency, effectiveness, and even fairness of the Ottoman administration of criminal justice. In their view, it compared favorably with the long-drawn-out and very costly lawsuits and trial in Europe. They noticed with astonishment that in the Ottoman courts a case was generally dealt with in a single session; there were no lawyers who would drag out the procedure unnecessarily, and appeals were relatively rare. The speedy and often severe punishment meted out, together with the efficient police methods and the collective responsibility at the whole

⁴⁵ Mahmassani, *Falsafat*, pp. 39-46; Imber, *Ebus Suud*, *ibid*.

⁴⁶ Peters, R., "Sharia and The State: Criminal Law in Nineteenth Century Egypt" in van Dijk, *State and Islam* (Leiden: CNWS, 1995), pp. 152-177; Uriel Heyd, *Studies in Old Ottoman Criminal Law*, edited by V.L. Menage (Oxford at the Clarendon Press, 1973), pp. 1-3.

village or town-quarter for any crime committed there, were in their opinion the main reasons for the amazingly low crime rate, especially in the cities".⁴⁷

It is also necessary to note the relation between the Ottoman dynasty and external powers especially the other important external powers in the world, and at the same time, the relation of this dynasty to the non-Muslim world.

Because the Ottoman dynasty was one of major players in world geopolitics at that time, international relationship with other major players cannot be ignored. Since its golden age (the Sulaiman's era), around 1535 AD, the Ottoman dynasty opened cooperation for political and trade purposes with France.⁴⁸ Besides, for the non-muslims within its power, the Ottoman dynasty preserved their right to perform their religious traditions⁴⁹

However, the latter two steps and policies, if we observe in detail were short-term political and economic compromises short of a breakthrough. The cause was the basic formulation of Ottoman's religious policy (the application of Islamic law, preserving the traditions and a need for militaristic and centralistic power hegemony) was not proceeding smoothly and even faced some difficulties.⁵⁰ Therefore, in the effort of reducing the inefficiency and difficulties of its strategy and problem solving, the Ottoman dynasty needed a crash policy.

In other words, we can state that the difficulties and failures were not merely technical but due to the stagnant epistemology of the Islamic concept concerning power. Up to that time, the dominant Islamic concept of power was greatly influenced by

⁴⁷ Heyd, *Studies*, p. 313.

⁴⁸ Az-Zuhaili, *Tārīḥ al-Qaḍa*, p. 433.

⁴⁹ Az-Zuhaili, *ibid*; Mahmassani, *Falsafat*, p. 44.

⁵⁰ Heyd, *Studies*, *ibid*.

al-Mawardi's and Ibnu Taimiah's ideas.

This failure became evident in the events which followed. The Ottoman, could not avoid the external economic and political competition presented by other foreign powers, especially those from Europe. Due to intensifying competition, the Ottoman) was in the end forced to implement bureaucratic, structural and legal reforms.

The reform process began in the middle of the XIXth century. In 1850, the Ottoman adapted the French commercial law. Then in 1858 the French and Italian Code of criminal and agrarian law were also adapted, closely followed by the European maritime law in 1861. Aside from geopolitical and economic reasons, those adaptations and adoption of the law were also done to cope with internal pressures brought about by the stagnant condition of the Ottoman bureaucratic and legal system.⁵¹

However, though some steps in pursuance of the bureaucratic and legal reform processes had been made, the effort of legally preserving the presence of Islamic symbols in the Ottoman structure of jurisdiction was always kept. Moreover, before the Islamic communities, the Ottoman still needed to assert its social legitimacy as the true caliphate system.

The effort of maintaining Ottoman Islamic legal symbols can be traced to the dual program of 1876 of adopting the system of European codification in the process in the drafting of the law on the one hand, and on the other of maintaining the Hanafite

⁵¹ Mahmassani, *Falsafat*, pp. 42-43; Az-Zuhaili, *Tārīḥ al-Qaḍa*, pp. 440-444.

Islamic legal substance. The result of this effort was called the *Majallah al-Aḥkam al-Adliyyah*.⁵²

The content of the codification was partly a revision of the adopted European legal substance. However, combining the European style of legal drafting with the Islamic substance as it was done in the codification was not an easy job. Therefore, such a codification could neither meet with the actual demand for reforms nor satisfy the young reformists of the next generation of Ottomans. Nevertheless, at that time, such a codification that tried to combine the Islamic *fiqh* with the European legal system of jurisprudence was the first had ever done in the history of Islamic communities.⁵³

The following events in the history of the Ottoman dynasty saw the total abolition of Islamic caliphate system in the structure of government in 1924. Turkey was then declared as a secular nation-state. The new idea of secularism reversed the central basis of the caliphate system. With this new idea, Islam became separated from state. It was indeed reversal of the previous conception marked by the strong interrelationship between Islam and the state in the caliphate system of governance.⁵⁴

Corresponding to the new trend of secularism was the rise of public consciousness in relation to the necessity for a new formulation of the legal system in the nation-state. Many young reformers in Turkey saw the need to introduce a more humanistic character in the daily practice of the state. The legal system of the Ottoman was thus revised. For them, the traditional Islamic concept of the state and the criminal code were obsolete. Hence, Uriel Heyd in the continuation of his previous writing (*Studies in Old Ottoman Law*) was right when

⁵² Mahmassani, *Falsafat*, pp. 42-47; Az-Zuhaili, *Tarikh*, pp. 453.

⁵³ Mahmassani, *Ibid*; Az-Zuhaili, *Ibid*

⁵⁴ Heyd, *Ibid*.

he stated:

"The negative aspect of Ottoman criminal justice, however, were not overlooked. Little values were attached to the life, limb, property, and honor of the individual. Punishment was often hasty, arbitrary, and excessively cruel. Suspicion often passed as proof..."⁵⁴

"Ottoman Justice will rather cut off two innocent men, than let one offender escape; for in execution of an innocent, they think if he be held guilty, the example works as well as if he were guilty indeed".⁵⁵

The Evolution of Caliphate Theory versus the Nation-State Phenomenon: Significant Social Change in the Islamic World

By the end of XIXth century, the Islamic community faced two major problems: on the one hand, the static condition and intellectual malaise as had been indicated by Ibnu Taimiah continued. This condition influenced directly the weakening of the political leadership. On the other hand was the arrival of real challenges from Europe, presented by the extension of the commercial and capitalist network through imperialism. In such a condition emerged the new trend of Islamic thought, introduced by Jamaluddin al-Afghani (1839-1897), Muhammad Abduh (1849-1905) and Rasyid Ridha (1865-1935).

The main themes present in al-Afghani's ideas were the proclamation of the necessity for opening the gates of *iğtihād* (intellectual exercise) and the empowerment of the Islamic political network (pan-Islamism) against colonialism.

Due to his ideas, al-Afghani confronted two challenges: within the Islamic community, he faced the conservatives, who

⁵⁵ Heyd, *Ibid*

preferred to maintain the traditional approach towards Islamic legal doctrine by asserting that the gate of *iğtihād* (Islamic intellectual exercise) should remain closed and dependent upon the old products of legal thinking. The external challenge came from the colonial power. The colonial power will not allow al-Afghani to campaign and spread the idea of independence under the slogan of pan-Islamism.

Despite this, al-Afghani had two major supporters for his ideas. The first was Muhammad Abduh who exerted all his creative efforts towards translating and modifying the progressive ideas of al-Afghani by making several educational reform programs within the Egyptian governmental structure. The second was Rasyid Ridha, who spread the idea of independence under the slogan of pan-Islamism.⁵⁶

Despite the differences between Abduh and Ridha, the role of both in the spread of al-Afghani's aims was important. Abduh was more accommodating to the British in reforming the educational and social system of Egypt, whereas Ridha was more assertive in his campaign for political independence from colonial power. In fact, before the arrival of the colonial power, Ridha appeared very conservative in his argument in support of maintaining the existing theories of Islamic government, completely closed to al-Mawardi's concept of the caliphate system. Moreover, he stated that the caliphate system was necessary and to be caliphate was the privilege of prophetic heredity.⁵⁷

⁵⁶ Kedouri, Elie, *Islam in the Modern World* (London, 1980), p. 25, Nikki R. Keddie, *An Islamic Response to Imperialism* (Berkeley: Berkeley University Press, 3rd Edition, 1983); Muhammad Imara, *Ġamāluddīn al-Afġānī* (Cairo: Dar al-Mustaqbal al-Arabi, 1984); Hourani, *Arabic Thought*, pp. 108-111, 130-160, 231; M.A. Zaki Badawi, *The Reformers of Egypt* (London: Groom Helm Ltd., 1978).

⁵⁷ Maarif, *Islam dan Masalah*, p.45.

However, the circulation and resonance of al-Afghani's ideas were not restricted to Egypt and its surroundings. From the beginning of XXth century, Islam in the South-East Asia had already made contact with those ideas. Thus, the Muhammadiyyah's establishment in 1912 was one of the signals of al-Afghani's and Abduh's influence.⁵⁸

Regarding the growth of the nationalist tendency, it is necessary to highlight what had happened in Egypt on the eve of the XXth century. In line with the birth of Islamic reform and the improving power of colonialism, the feeling of nationalism as an ideological counter of colonialism spread. The growth of nationalism appeared at the right moment, following as it did the collapse and bankruptcy of the Ottoman caliphate system in Turkey since 1922.

Egypt was a part of Ottoman dynasty. Until 1924 and before the total independence of Egypt from England, the existing Egyptian kingdom was the continuation of Ali's dynasty. However, culturally and historically, Ali's dynasty could not be totally separated from Ottomanism. Thus, the bankruptcy of the caliphate system of Ottoman in the Turkey had a direct influence upon Egypt.

In 1924, under the strong influence of Musthafa Kamal, the caliphate system of Ottoman in Turkey was set aside. Afterwards the era of secularization began.

Corresponding to these developments, at least two groups of political debates took place in Egyptian public life. The one was a group which saw Egypt as the center of the new caliphate system after its collapse in Turkey. Another group rejected the idea and preferred to build a new system for Egypt. That new system should be based on Egyptian nationalism, instead of the

⁵⁸ Noer, *Gerakan Modern*, pp. 316-318.

caliphate system.⁵⁹

After a series of debates and seeing the fact that it was not easy to establish the caliphate , system in Egypt due to the intense rivalries of other Arab nations as well, the second group won the debate and their ideas dominated the public life of Egypt.⁶⁰

In the Egyptian and Islamic world context, the failure to establish a new caliphate system in Egypt had at least two meanings. First, from the geopolitical perspective, the last form of the caliphate system as reflected in the practice of the multinationalist-Ottomanist system of caliphate was not workable. Instead, the new concept of geographic and patriotic nationalism in the Islamic communities emerged. Second, this new trend of nationalism will eventually lead towards the national sovereignty. This national sovereignty will be tied to a new social contract and consensus. The new social contract and consensus will not be bound to the concept of caliphate system or solely tied to the homogenous and strict concept of *ṣarī'a* as practiced in the former Islamic communities.⁶¹

Hence, as a consequence of these significant changes in the social model, the cultural patterns of public and daily life within the Islamic communities would also undergo changes. The changes will naturally demand the revision or reinterpretation of the social construct which had been used for long time or at least force the communities to reinterpret some cultural patterns as well as legal assumptions which had earlier

⁵⁹ "Egypt and the Caliphate Question, 1924-1926" in Israel Gershoni and James P. Jankowski, *Egypt, Islam and the arabs: the Search for Egyptian Nationhood, 1900-1930* (New York-Oxford: Oxford University Press, 1986), pp. 55-74

⁶⁰ *Ibid*

⁶¹ *Ibid*, p. 74

supported their social existence. However, these revisions and ^interpretations had a dual meaning. Internally, they were for the sake of strengthening the basis for the social existence of Islamic communities themselves within the newly founded nation-states, but externally, they were meant as a creative response towards the existing European colonial power.

Regarding Islam in Indonesia, by the end of the XIXth and the beginning of the XXth century, the issues of the caliphacy and of pan-Islamism had also forced the Dutch colony to respond.

Snouck Hurgronje as colonial adviser in Islamic affairs, frequently raised the danger posed by these issues for the existing colonial power. According to him, one of the means which could pave the way for the spreading of such 'disease' was the contact between the indigenous Muslims and their coreligionists during the pilgrimages (*hağğ*) to Mecca and Medina.⁶²

In fact, pan-Islamism had spread through a series of publications by the Islamic reformists in the *al-'Urwah al-Wuṭqā*, the Quranic commentaries of *al-Manar*, and even through local magazines, such as of *al-Munir* which was published in the West Sumatera.⁶³

At the level of political as well as social organization, Sarekat Islam and Muhammadiyah were the symptoms influences of the pan-Islamism. Nevertheless, the specific discussion of the caliphate system was not very attractive and not listed with the

⁶² al-Gadri, Hamid, *Snouck Hurgronje: Politik Hindia Belanda Terhadap Islam dan Keturunan Arab* (Jakarta: Sinar Harapan, 1984); Aqib Suminto, *Politik Islam Pemerintah Hindia Belanda 1899-1942* (Jakarta: LP3ES, 1989); Deliar Noer, *Gerakan Modern*, pp. 180-234.

⁶³ Noer, *Gerakan*, pp. 38-65.

main priorities of the organizations.⁶⁴

The explanation for this could be: a. at the beginning of its existence the Sarekat Islam was mainly concerned with the issue of the economic disparity between some groups in the Dutch East Indies, Muhammadiyah on the other hand, restricted itself as a social organization, focusing its concern in areas of educational and social charity in the Muslim public life, working for the establishment and improvement of the Islamic school systems and the founding of hospitals; b. due to the geographical distance, the immediate and core priorities of problem solving and the limited capacity of their human resources, these organizations could not establish close contacts with the 'outside' Islamic world. The consequence was that their movements focused on domestic affairs and on maintaining the spirit of national struggle together with other secular movements.⁶⁵

In such a context, the following debates regarding the application of Islamic law (*šarī'a*) in Indonesia did not dominantly focus upon the issue of the caliphate system, but rather upon the positivisation of the Islamic legal elements in the fundamental basis of the nation-state framework. To some extent, these can be seen within the framework of 'religious-nationalism'.⁶⁶

The Nation-State Phenomenon

Either in Egypt or Indonesia, the emergence of the nation-state concept and the elimination of a denominational or Islamic

⁶⁴ Noer, *Ibid*, p.153.

⁶⁵ *Ibid*, pp. 115-126; pp. 114-169; Maarif, *Islam dan Masalah Kenegaraan*, pp. 79-80.

⁶⁶ Maarif, *Islam*, pp. 124-192.

state (theocratic state) were unavoidable historical necessities. The denominational or theocratic state could not be accepted as the basis for eliminating the colonial influence and empowering the civilian and legal order of the state.

The historical necessity of using and choosing the nation-state concept in both states is defined in this writing as a significant factor and variable. The choice will influence other, wider aspects of the public and national life, including the legal one.

The definitions and terminologies in relation to nationalism which will be used in this writing will refer mainly to that employed by Ernest Gellner in his *Nations and Nationalism* and Anthony D. Smith in his *Theories of Nationalism*. Within the Egyptian and its wider context, Israel Gershoni and James P. Jankowski's framework of nationalism will also be referred.⁶⁷

Gershoni and Jankowski explained that by analyzing the interminable process of becoming of nationalism as an idea, we would come to the following definition:

"...we define nationalism as a perception about political community: that nations are a natural social formation, that they are the object of the ultimate political loyalty and allegiance of their peoples, and that they have an inherent right to autonomy and self-determination within the world assembly of nations. This perception finds tangible expression in ideological movements that are devoted to the realization of new political order: the reorganization of certainly the political but often also the economic, social, and cultural life of the community defined as the nations".⁶⁸

On the ideological content as well as the pragmatic substance of nationalism, they wrote that:

⁶⁷ See Gershoni and Jankowski, *Egypt, Islam and the Arabs*.

⁶⁸ *Ibid*, p. vii.

"... As an ideology, nationalism is a comprehensive interpretation of past, present, and future. Its concepts have their roots in an idealized past and point toward the realization of an equally glorious future. But its main concern is the here and now; its attitude toward other times is centered on the question of how they can be utilized for the purpose of the present. To be sure, nationalist ideology requires objective element existing outside human consciousness: territory, race, language, kinship, religion, history, and the like".⁶⁹

Related to the framework of this writing, it is also necessary to state that in the history of one nation or community, we will find individuals who acted as leaders, pioneers of reform process, reconciliatory of vertical as well as horizontal competing and conflicting interests among the social groups or inspirational figures of intellectual movements. In this writing, those individuals will be highlighted. However they will be analyzed within the context of their total historical role and other interrelated phenomenon. They will not be considered as isolated personalities. Karl Mannheim suggested such a method of exploring the ideas of individuals:

"It is not men in general who think, or even isolated individuals who do the thinking, but men in certain groups who have developed a particular style of thought in an endless series of responses to certain typical situations characterizing their common position. Strictly speaking it is incorrect to say that the single individual think. Rather it is more correct to insist that he participates in thinking further what other men have thought before him".⁷⁰

Codification and the Status of Women

Before the coming of Islam, the Arab tradition had placed women almost at the level of property. Esposito explained:

⁶⁹ *Ibid*,

⁷⁰ *Ibid*, p. xi.

"The marriage of dominion in ancient Arabia produced a situation in which a woman subjugated by males, her father, brother or close male relatives when she was a virgin and her husband when she became a wife. As a matter of custom, she came to be regarded as little more than a piece of property".⁷¹

As the Muslim community came to the process of organizing themselves within the nation-state bureaucratic system, managing their affairs through the adoption of the methods and techniques, empowering their legal infra-structure (e.g., performing the codification process), it also became necessary to analyze how the Islamic family law had adjusted itself to the changing condition, especially regarding the issue of women's rights. Moreover, without any doubt, the growing trend anywhere is the continuing demand for equal rights and treatment regardless of the sex.

In this writing, to some extent the analyses on the codification of Islamic law will be from a feminist perspective: how far the process of codification had made an effort to accommodate the right of women in the sense that it reflected an individual or collective awareness that women have been and continue to be oppressed in diverse ways and for diverse reasons, and attempts towards liberation from this oppression involving a more equitable society with the effort of cultural as well as the ignorant of legal equality between women and men.⁷²

Concerning the matter, Esposito stated:

"In its attempts to meet the needs of a particular social milieu, Muslim family law reflected the social mores of the time — the traditional roles of men and women and the function of the

⁷¹ Esposito, John L., *Women in Muslim Family Law* (New York: Syracuse University Press, 1982), p. 14.

⁷² Karam, Azza M., *Women, Islamism and the State* (London: Macmillan Press, 1998), p. 5.

extended family in a patriarchal society. . . Profound social forces in modern times have affected the status and roles of women and the family in Muslim society. This process has been accompanied by reforms in Muslim family law which have sought to respond to as well as to foster social change".⁷³

Operational Framework of the Dissertation

Operational Background

Egypt and Indonesia are nation-states with a Sunnite Muslim majority. As a consequence, both Egypt and Indonesia have traditions, customs and social values which are influenced by Islamic religion. Even though, it is necessary to note that both states do not formally declare themselves as Islamic states. Furthermore, both countries have non-Muslim minorities who have significant socio-political roles. Besides, both countries have an open policy towards foreign influences; undertake series and process of modernization, secularization and copying some aspects of Western paradigm in doing the agenda. Institutionally, this phenomenon can be traced to the growing numbers of Western Universities' graduates who presently hold strategic positions as the new educated-elite in bureaucracy, professional careers, education, military and even in socio-religious activities. The last, of course, includes the prominent leaders of the Islamic community. In such a socio-cultural context, the growth of Islamic values is to be seen, especially the ones which have a strong relation to Islamic family law and are deviated from the texts of four Sunnite schools of thought.'

It has been well known already that the four Sunnite schools of thought (Malikite, Hanafite, Syafiite and Hanbalite) come from

⁷³ Esposito, *Ibid*, p. 46.

Muslim jurist who lived ten centuries ago. Their thoughts, writings and legal assumptions inevitably were influenced by the trends and tendencies of their eras. Derivation the laws of these writings and then to be codified and institutionalized by the Egyptian and Indonesian Governments in this era is difficult and hard work; the logic of the language, socio-cultural setting, the explicit and implicit juridical indication of the writing of those four Sunnite schools of thought seem to be different from today's legal-administrative discourse. Therefore, it can be assumed that the Egyptian and Indonesian Muslim jurists find some difficulties to 'translate' those legal texts within the rapid socio-cultural changes.

The core analysis of this dissertation tries to trace and identify the history of law, the way of thinking of Muslim jurists in a comparative fashion as well as the politics of law and the dynamics of socio-structural changing in the nation-states Egypt and Indonesia. It also includes to what extent the classical Islamic legal texts within the rapid changes of society are reinterpreted.

The object of this study will be the typical response of Egypt and Indonesia in adopting the Islamic Family Laws as reflected in their legal institutions and the effort to codify the laws as material laws in the public court of Egypt and in the religious court of Indonesia. As concluding remarks, within Egyptian and Indonesian context I will underline that an analysis of the legal institution and codification of Islamic family law of Egypt and Indonesia could represent one of the trends of the socio-political response of Egypt and Indonesia in dealing with Islamic issues.

Focus of Study

The study will focus on:

- The process of institutionalization of Islamic Family law within the socio-political setting, structure, organization

and judicial competence of the Egyptian Civil and Indonesian Religious Courts after 1950s. However, the historical process as social-precedence will also be highlighted.

- Some codifications of the Islamic Family Law of Arab Republic of Egypt and the Republic of Indonesia. The codifications that will be analyzed are those, which have 'the reinterpreted character'; that is the codifications that have the different legal substance from the standard opinion of four Sunnite schools of thought as the result of social change.

Hypothetical Assumption

- There is a reaffirmation of the importance and meaning and at the same time reinterpretation of the Islamic family law, as it will be reflected in the institutionalization and codification of Islamic family law in the nation-states of Egypt and Indonesia.
- The institutionalization and codification occurs due to the current demands of the socio-cultural as well as socio-political changes which did not happen during the formative years of the Sunnite schools of thought or even before their independence as nation-states.
- There are similarities and differences in terms of pattern, method and substance of institutionalization and codification of the Islamic family law in Egypt and Indonesia.

Method of Research

The method of research employed in this study is a comparative description and analytical method combined with the study of written document (content analysis). It will describe and compare the socio-political settings, structure, organization and juridical competence of the Egyptian civil court and Indonesian religious courts as well as the codification of Islamic family

law in a comparative fashion.

The core compactions and analysis will be around:

- A. Islam within Egyptian and Indonesian social context
- B. State position and policies regarding Islam and Islamic law.
- C. Modernist muslim intellectuals' views of religious matters and practices before and after the establishment of nation-states.
- D. State responses to religious leaders' views and demands regarding issues of Islam and Islamic law.
- E. *Modus vivendi* (accommodation and consensus) created after the debate from both sides (state and Islamic society).
- F. Pattern and analysis of institutionalization process of Islamic family law in both countries.
- G. Codification of Islamic family law in both countries: descriptive and comparative explanation.

Type of Data and Variable of Research

The data gathered in the research will be both quantitative and qualitative. They consist of primary and secondary data. The primary data are derived from the manual books of Islamic family law which are used by the judges in Egypt and Indonesia. The secondary data are gathered from books, journals and other publications which are related to the subject.

Goal of Research Result

The study is thus a description and an examination of how religious family law affects, and has affected in the past, the political culture and law of these countries, and consequently how those nation-states try to accommodate within the modernization and social change process. By identifying religious family law as a crucial variable in the social change, hopefully this study can add a new dimension to the theories of

development and social change in societies with predominantly Muslim populations.

CHAPTER I

Islam in the Egyptian Social Context

I. ISLAM IN THE EGYPTIAN SOCIAL CONTEXT

Seeing the relevance of the study and its framework, the first part of the following writing tries to focus on developments in Egypt after 1952, especially on the process of modernization efforts of the regimes (state) vis a vis Islamic community (society). However, because the existing condition is the result of its historical precedence, the chapter will also examine an earlier part of Egyptian history —especially the main relevant ideas and their proponents which we consider as the intellectual link and basis for further development that culminated in Egypt's independence and pass the way and conditions for the next step of modernization efforts which in turn have strong correlation with the topic.

A. State and Islamic Political Activism: Before and After Independence

Historically, massive islamization had occurred in Egyptian politics and social condition since the tenth century onward. However, in the mid of twentieth century —especially after the independence of Egypt from British colonialism—the general pattern of the interrelationship between state and Islam is hegemonic and centralistic: it is the state which brings the religious establishment under the control of the central government. Furthermore, after 1952, the government intense upon dominating all Egyptian aspects of religion both 'official' and 'popular'.¹

Since this time and before, the official Islamic manifestation in Egypt was dominated by al-Azhar institution. Al-Azhar itself was a mosque founded by Fatimid dynasties in tenth century, aiming at propagating Islam for the Egyptian community and its surrounding. Because of its history and role in developing

¹ Cantori, Louis J., "Religion", p. 80. The general explanation of the political activism and the interrelation between state and Islam of this point is based on Faskh, *The Future*, 1997; and Saeed, *Islam and Modernization*, 1994.

Islam as cultural and ideological basis for Egyptian society, this mosque was later on expanded as the centre of Islamic learning and became one of the most influential centers of Islamic learning in the Islamic world in recent days. On another side the popular Islam in Egypt was manifested in some Sufi orders with their influential leaders and in social as well as political organization *al-Iḥwān al-Muslimīn* and its derivatives.

Al-Iḥwān al-Muslimīn was established by Hasan al-Barma in 1928 as a social organization based on Islam. In 1940, because of its activities and programs especially dealing with social activities and aiming at expelling the British colonial power, this organization became a mass organization with thousands of activists and followers.

The growing number of Muslim Brothers (*al-Iḥwān al-Muslimīn* -Islamic Brotherhood) in society and the strong cultural influence of 'ulamā' prior and after 1952 made the state especially sensitive both to the political possibilities and existence of 'popular' Islam.² Whereas Egypt's major political party, the *Wafd*, at least until 1942, drew its strength and social basis from the land-owners and the *Pasha* class, it also enjoyed the backing of the Egyptian masses in a kind of 'mass narcissism'.³

The coup of 1952 by Gamal Abdel Nasser marked and cut off extremely the seventy years of British rule and at the same time marked the end of "two thousand years of slavery" by the Egyptians.⁴ At this time, when Nasser took power, he stated that his country needed a social revolution in addition to the political revolution. He describes what he perceived as a social

² *Ibid*, see also Sadat, *Revolt on the Nile* (New York: John Day Co., 1957), pp. 91-92

³ H.B. Sharabi, *Government and Politics of the Middle East in the Twentieth Century* (Princeton, N.J.: D. van Nostrand, 1963), pp.202-203.

⁴ President Nasser's foreword in Anwar el Sadat, *Revolt on the Nile*, p.6.

revolution as a movement in which the classes of society would struggle until justice for all” countrymen have been gained and conditions have become stable. Because Nasser sees that he needed ideological formulation for his physical as well as psychological struggle in combating British influence and in radicalising his national awakening program, he uses Arab Socialism as his main manifesto.⁵

However, as in other newly-born countries, besides their longstanding desire to free Egypt from British control, the revolutionaries did not have a coherent program and ideology to follow after they succeeded in gaining independence; in turn this caused great difficulties when they set about to govern Egypt.⁶

Meanwhile, after the independence of Egypt, the popular organization *al-Iḥwān al-Muslimīn* as cited before, did not stop to campaign against any influence of the British. Furthermore it declared "a complete and full estrangement from western ideas, institutions and habits."⁷ It declared at the same time that its main agenda for this attitude is to bring and enforce *ṣarī‘ah*, which they regarded not only the kernel of Islam itself but also a means of identification.⁸

Hassan al-Banna (assassinated in 1949), the founder and the leader of Muslim Brothers had the opinion that the British occupation is an exploitation of Egypt and therefore, according to him, it is a duty for every Egyptian to create a complete removal of the British from Egypt and introducing and

⁵ Gamal Abde! Naser, *The Philosophy of the Revolution* (Buffalo, N.Y : Smith, Keynes and Marshall, 1959), p.36.

⁶ Sharabi, *Government and Politics*, p.209. see also Keith Wheelock, *Nasser's New Egypt* (New York : Praeger, 1960).

⁷ Richard F. Nyrop, ed.; *Egypt: A Country Study* (Washington, D.C.: American University, 1983), 4th ed., p.26.

⁸ Ibrahim Ibrahim, "Islamic Revival in Egypt and Greater Syria;" in Cyriac K. Pullapilly, ed. *Islam in the Contemporary World* (Notre Dame, Ind.: Cross Roads Books, 1980), p.163.

replacing its influence by *šarī'ah* as way of life of Egypt. Nasser and his ruling elite, however, were disdainful of the *al-Iḥwān al-Muslimīn* agenda. Nasser and his group believed that the *al-muslimūn*'s ideas of Islam were regressive and could not meet his pragmatic requirements and approach in dealing with Egyptian national awakening.⁹

Therefore, in Nasser's era, the *al-muslimūn* acted as strong oppositional force based on Islamic platform (*šarī'ah*). It began to criticize and oppose the government. According to them, Nasser's policy was too secular. It also resented the state's interference in the affairs of al-Azhar University for political purposes.¹⁰

From 1954 onward the political interrelation of popular Islam and state was problematic and full of contradiction, confrontation and conflict. It was marked by series of physical Violence.

The first direct and physical confrontation between the government and the Brotherhood occurred in January 12, 1954, when members of the Brotherhood and student supporters of the so called Liberation Rally clashed. The state proclaimed the dissolution of the Brotherhood the next day. A state of emergency was declared on January 14 and 450 members of the Brotherhood, including its leaders were arrested.¹¹

In explaining the state's action against the Brotherhood, the Revolutionary Command Council (RCC) stated on January 15, 1954, that the leader of the Brotherhood, Hassan el-Houdeiby had refused to support the revolution unless the *šarī'ah* was implemented. According to the RCC, el-Houdeiby had presented unacceptable nominees to the cabinet after Nasser had agreed to accept three representatives of the

⁹ *Ibid*

¹⁰ Dan Hofstadter, ed., *Egypt and Nasser: Volume I, 1952- 1956* (New York : Facts on File, 1973), p.56.

¹¹ *Ibid*

Brotherhood. El Houdeiby also demanded veto power for the Brotherhood in all legislative matters, a demand that was rejected by the RCC. El-Houdeiby then instructed the Brotherhood to subvert Liberation Rally meeting and to organize paramilitary groups in the police, army and student organizations.¹²

Hoping to create more harmonious situation, by July 8, 1954, the RCC restored the legitimacy of the Muslim Brotherhood, even though it did not make any sense. Because the different outlook of the both parties (government and Islamic Brotherhood) did not perish.

The culmination of this conflict was on October 26. The Brotherhood attempted to assassinate Nasser when he was addressing a gathering in Alexandria. The following day in Cairo mobs burned the central offices of the Brotherhood. Lastly on October 29, the government arrested the leader of the organization and banned the organization for the second time. On December 7, the government executed six leaders of the Brotherhood. The death sentence of the organization's leader, however, was commuted to life imprisonment.¹³

According to some researchers, the '*ulamā's*' opposition to the government dates back to 1809 when Muhammad Ali first attempt to curtail the power of the '*ulamā*'. In that period, the '*ulamā*' were members of the Egyptian elite. The '*ulamā*' had a strong economic political as well as cultural influence on the masses. In the course of the nineteenth century, along with the rise of an intellectual force that was secular in nature, the influence of the '*ulamā*' gradually decreased. To these and other changes and challenges the '*ulamā*' reacted by becoming more rigidly traditionalists and conservative, opposing all change in the name of *ṣarī'ah*.¹⁴

¹² *Ibid*

¹³ *Ibid.*, pp. 60-61.

¹⁴ Harold B. Barclay, "Egypt: "Struggling with Secularization," in Carlo

In Nasser's era, state played an important role in directing and defining society. Nasser himself believed that the religious institutions could and should be adapted to promote the interests of a modern Egyptian nation-state.¹⁵ Therefore, to that goal, Nasser maximized state control in different aspects of Egyptian national life; all significant economic, social, and political institutions were placed under state control as part of nationalisation and aims at maximising social welfare under the jargon of socialism. In Islamic aspect of life: mosques, mosque officials (preachers, *imāms*, *muaddins*), religious schools, religious foundation and voluntary benevolent societies were also brought under state control.¹⁶ In this particular aspect, Nasser wanted the religious institutions to espouse aversion of Islam that would appeal to the masses as well as to the middle class within socialist framework.¹⁷

Due to this policy, in Nasser's era, the *awqāf* (religious endowments) were the first semiautonomous institutions brought under state control. The regime felt that reform was a pre-requisite to land reform, for through this system large areas of land had been set aside, the revenues from which were used to support mosques and religious institutions.¹⁸

In Egypt, the tradition of religious endowment itself was rooted from the Ottoman dynasty's time. Under Nasser's socialist framework, this tradition is not always in line with the program of social welfare, because some of the religious institutions could support their need independently due to their great amount of religious endowment and land ownership as well as financial asset. In turn, it could contradict the program of land reform as Nasser saw.

Cadarola, ed., *Religion and Societies: Asia and the Middle East* (Berlin: Mouton, 1982), p. 127.

¹⁵ Bruce M. Borthwick, "Religion and Politics in Israel and Egypt," *The Middle East Journal* 33, No.2 (Spring 1979), p. 153.

¹⁶ *Ibid.*, p.156.

¹⁷ *Ibid.*, p.156.

¹⁸ *Ibid.*

In the judicial sphere, the *šarī'ah* courts, which dealt with such matters as marriage, divorce, and inheritance, along with the courts of the minorities (millat court), were amalgamated into one "secular system" on January 1, 1956. However, the basis of the *šarī'ah* courts, that is, the *šarī'ah* itself, was retained as before. (The latter will be described more detailed in the next chapter).¹⁹

Culturally, in Egyptian daily life, when the Ministry of *Awqāf* (religious endowments) began preparing sermons for the mosque, the government's policies were espoused and backed up with quotations from the *al-Qur'ān* and the *sunnah*. In practical life, the government generally asks the '*ulamā*' to give formal legal opinions (*fatwās*) on such matters as birth control, land reform, nationalization, scientific research, foreign policy and social affairs.²⁰

Constitutionally, the 1971 constitutions of Egypt declared that "the principles of the Islamic *šarī'ah* are a major source of legislation",²¹ even though opinions still varied on the issue of the *šarī'ah*. Some members of the Preparatory Committee demanded "that the constitution prescribe the *šarī'ah* as the principal source of legislation."²² Whereas educated women demanded "that a new law of personal status be enacted, that the constitution contain (guarantees of) the freedom of the feminist movement, and that women be granted a fuller share of civil rights in keeping with their equality with men," the '*ulamā*'s insistence was on the continuation of the *šarī'ah*. Therefore, the *muftī* of the republic, while agreeing with the demand for equalization, insisted that it should be achieved

¹⁹ *Ibid.*, p.158.

²⁰ *Ibid.*

²¹ Constitution of the Arab Republic of Egypt" *The Middle East Journal* 26, No. 1 (Winter 1972), p.55.

²² Joseph P. O'Kane, "Islam in the New Egyptian Constitution: Some Discussions in al-Ahram, " *The Middle East Journal* 26, No.2 (Spring 1972), p. 138

within the framework of the provisions of the Islamic *ṣarī'ah*.²³ In Nasser's era the expression of Islam has centered primarily on the three groups: the Islamic Brotherhood circle, the Sufi orders and al-Azhar institutions. Religious leaders' responses to the state's policies regarding religion have come primarily from these three groups.²⁴

The Political and ruling elite in Egypt, generally, gain cultural and political legitimacy through one of the three mentioned groups. It is just like the triangle: when the politicians fail to get political legitimacy from one group, they try to be in another group and get their support. The real case we can make as one example is as follows: when the Muslim Brothers was banned in 1954, the members of the Revolutionary Command Council were apparently aware of the use that could be made of mystical Islam (Sufi orders) to combat the Brother' opposition. They also sought to strengthen and widen its own base of support by stimulating and favouring the conceptions in popular Islam.²⁵

Therefore in 1961 when the state established its own political party, the Arab Socialist Union, it openly encouraged its involvement in the Sufi organization and then both the Sufi order and government organized many religious celebrations, which were used to make propaganda for the regime. The Sufi orders, which were under the supervision of the Sufi Council, were increasingly used as a political vehicle to achieve state political interest. Moreover the Arab Socialist Union party became directly involved with the administration of the

²³ *Ibid.*, p.139-140.

²⁴ Fred De Jong, "Aspects of the Political Involvement of Sufi orders in Twentieth Century Egypt (1907- 1970)-An Exploratory Stock-Taking, "in Gabriel R. Warburg and Uri M. Kupferschmidt, eds., *Islam, Nationalism and Radicalism in Egypt and the Sudan* (New York : Praeger, 1983), p. 196.

²⁵ *Ibid*

orders.²⁶

When Anwar Sadat became president in 1970, his liberal policies allowed greater latitude to religious leaders. The *Šaiḥ* al-Azhar (rector of al-Azhar University) for instance, from time to time took positions in opposition to government policies. Furthermore, the pressure of religious groups on the state was greater. In April 1974, an organization called the Islamic Liberation Organization attacked the Military Engineering College in Cairo with plan to assassinate Sadat when he was delivering a speech nearby.²⁷

Following the friction and split of the Brotherhood, there were at least three prime groups that opposed and overthrow Sadat's government, mainly *Ġamā'ah Takfīr wa al-Hijra* (the Organization of Penance and Migration), *Ġund Allah* (Soldiers of God) and *al-Ġihād* (the Religious Struggle). Sadat himself described the Muslim Brothers as a “state within a state”.²⁸

In the era of Husni Mubarak, his policy regarding Islam is to be cautious of Islamic political dimension by prohibiting any islamic political party, placing bureaucracy as tool in giving a full support for the ruling party and encouraging pragmatic solution for Egyptian national interest under the slogan of development and economic growth.

To conclude this description, as Barry Rubin described that:

“... there are four distinct categories of Islamic groups (especially after Sadat's era, —*my personal* comment). Each of them has its own claim on what constitutes a proper approach to Islam. Each has its different attitudes toward the existing Egyptian system and strategy for making the society more

²⁶ *Ibid.*, see also Michael Gilsenan, *Saint and Sufi in Modern Egypt* (Oxford : Oxford University Press, 1973).

²⁷ Cantori, "Religion and Politics," in Curtis, ed., *Religion and Politics*, p.83.

²⁸ *Ibid.*, p.86.

Islamic:

- The mainstream *'ulamā'* claim that the existing structure provides an opportunity to make improvements by more vigorous preaching, religious education, and individual self-improvement.
- The Muslim Brotherhood organizes to win votes and to lobby parliament to enact the Shari'ah as the basis of legislation.
- The *ḡam'iyyāt* and some charismatic preachers use campus and communities to organize their own Islamic communities, denouncing the *'ulamā'* as puppets of the government and criticizing the Brotherhood as too willing to compromise.
- The revolutionary *jamā'ah* reject the system altogether, go underground, and denounce everyone (including each other), claiming that only violence can bring about an Islamic state".²⁹

However, apart from those circles there are individuals and opinions that tried to interpret Islam within Egyptian context and at the same time made every effort to reconcile the interplay and interrelationship between society and Egyptian state. The histories and discourses of those are as below.

B. Social Challenge, Public Discourse and Islamic Intellectualism

Due to the influence of Islamic Modernism on the establishment of Egyptian Islamic legal thinking, I shall, however, briefly list the aspects of the movement which most directly concern the Egyptian Islamic thinking and at the same time the Egyptian public discourse.

The emergence of Islamic Modernism in Egypt was marked by what is so called the *salafi* movement. The *salafis* were Muslim

²⁹ Barry Rubin, *Islamic Fundamentalism in Egyptian Politics* (London: Macmillan, 1990), pp. 91-92.

intellectuals who aimed at a restoration of a pristine, simple and humane Islam at a time when the European powers were dominating the majority of Muslim lands. In the *salafis* interpretation, Islam should be a national, practical and scientifically sound religion in complete accordance with human nature. Islam, according to *salafi*, should contain liberty, equality and universal fraternity, as well as tolerance, cleanliness, sincerity and social responsibility. It has been observed that the leading *salafi* proponent in Egypt, Muhammad Abduh, has a concept of *ṣarī'ah* those conies close to the natural law.³⁰

Muhammad Abduh (1849 - 1905), a pupil of Jamal al-Din al-Afghani whom he met in 1872. He was a theologian, reformer, political activist and grand *mufti* of Egypt around the turn of the century (1899 - 1905). Historically, Abduh had collaborated with the rebels in the Urabi uprising against the *Khedive* (the hereditary viceroy under the Ottoman Empire), who was supported by the British troops that had occupied Egypt in the summer of 1882.³¹ When the revolt failed, Abduh was exiled for over three years. On his return, he became convinced of the futility of such efforts to change Egypt. He perceived that the problem facing Egypt and other Muslim countries was not the material power of the west but the decay of the intellectual and social spheres of Muslim societies as compared to the West.³² He, therefore, attempted to revise some of the orthodox conceptions of Islam which he felt were not in keeping with modern times. He vehemently rejected the centuries-old orthodox conception that the doctrine and law of Islam had been formulated for all times to come by the medieval interpreters. His most revolutionary idea was his spousal of the right of every generation to go to the original sources and interpret them according to its own light. He also called into

³⁰ Kerr, Malcolm H. : *Islamic Reform : The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (Berkeley: University of California Press, 1966), p.187.

³¹ Cantori, "Religion and Politics in Egypt", p.80.

³² Sharabi, *Government and Politics*, p.203.

question the orthodox view of what these sources were.

Abduh held the idea that the '*ulamā*' responsible for the glory of state and of Muslim societies; they had totally neglected the modern sciences. According to him, the '*ulamā*' continued to busy themselves with what might have been suitable for a time that is long gone by, not realizing the fact that we are living in a new world. He pointed out that the wealth and power of Western societies was due to their progress in the sciences, including the social sciences and education. He called it the first duty of the government to spread education and the sciences in the country.³³

Another Salafi leading figure is Rashid Reda. Of special important to Abduh and — Ridha is his proposal on the dynamism of Islam. To them, the Quran has given patterns, rulings, values and principles, but it is up to every age to apply them in the most practical, ethical, and correct manners. For times change. Principles for this application are also given in the Koran and *Sunnah*, but it is the responsibility of every age and every Muslim to consider how they can be applied to the general interest of the community (al-maslaha al- 'amma). *Maṣlaḥah* is an old concept in the *uṣūl al-fiqh* (principal theories of Islamic law) but with *Salafis*- it gained significantly in importance and scope, reminiscent of the utilitarian thinking so much in vogue in Europe at the time.

Another important issue for the *Salafī* is *iğtihād*. Traditionally signifying the personal endeavour by the scholar to arrive at a ruling (*ḥukm*) in accordance with principles of *fiqh*. This word (*iğtihād*) in Salafī terminology acquires the broader meaning of independent legal reasoning on the basis of the Koran and *Sunnah*. Its antonym, *taqlīd*, traditionally meaning the acceptance and faithful following of the teaching of the *madhab* (school of thought) similarly acquires a broader meaning and the negative implication of copying the words of the masters without ever considering their relevance, or even meaning. A

³³ Cantori, "Religion and Politics " p.80

scholar who practices *iğtihād* is called *muğtahid*, and someone who practices *taqlīd* is a muqallid. Since around the 10th century a certain measure of agreement arose among the ‘*ulamā*’ that there was no scholar alive who had sufficient knowledge and authority to practice full *iğtihād*. Given this lack of a *muğtahid*, the Muslims should instead endeavour to follow the rulings of the four founders of the *madāhib* even without knowing the proof (*dalīl*) of the particular rulings. Later generations spoke of "the closing of the gate of *iğtihād*", and this was the prevailing view in the centuries to come, but there was always a minority who affirmed that they were in fact practising *iğtihād* and defended their right to do so.³⁴

During the 18th and 19th century several scholars and movements defended the right to practice *iğtihād*, even if they seem to have had very differing ideas about the limits and rules for it in practice.³⁵ With the *salafis* we are in many respects confronted with a movement of a very different kind from these earlier advocates of *iğtihād*. Not only do they emerge under very different historical circumstances in the colonized metropolises of the late 19th century, but to a certain degree they also belong to strata in Arab society most directly exposed to European thinking. They have adopted a number of the 19th century's dominant social, ethical and political values and strive to demonstrate that these are to be found in the message of Islam and can therefore be implemented in society a new without further ado. This requires a thorough re-interpretation of the legal material, or rather discarding it in exchange for a re-examination of the original Quranic legal rules, and it is this project that they qualify with the term *iğtihād*. Moreover, it needs an explanation that enables them to distance themselves from the ‘*ulamā*’ and their legal interpretations. This provided by the negative interpretation of *taqlīd* as the mindless copying of a tradition that is already flawed. Thus, *iğtihād* and *taqlīd*

³⁴ Hallaq, Wael, B. : Was the Gate of *iğtihād* Closed? International Journal of Middle East Studies 16, 1984 : 3 - 41.

³⁵ Peters, R.: *Idjtiḥād and Taqlīd in 18th and 19 Century Islam. Die Welt des Islams* 20, (3-4), 1980 : 131-145, pp.142-143.

come to mean the rational, authentic (and modern) way of life, as opposed to a tradition that dares not consult the Koran and the *Sunnah* to see how much it has degenerated.

From year 3 to 6 (1900-1904) in *al-Manar*, Rashid Ridajjiqblished "The Discussions of the Reformer and the *Muqallid*. In the discussion, Rida argues that there are parts of the religious law which are unalterable, and parts which should be adapted to the need of the age. The former includes all acts of service to God proper (*ibādah*) and some rulings of general human and ethical behavior (*mu'āmalah*), whereas the latter consists of most of the *mu'āmalah* which are merely of a socio-political character and therefore subject to change in practical details, if not in spirit³⁶ Quoting the Hanafi principle of personal evaluation of the validity and desirability of a legal analogy, *istiḥsān*,³⁷ the reformer gives the mufti wide room for re-interpretation of the law.

In another explanation Rida argues that if a muslim does not know the ruling of God or a particular issue, he should consult the Koran and *Sunnah* himself, and if he does not find a clear text he should ask a *muḡtahid* for a ruling and its proof. To Rida the *Imāms* were masters, but not necessarily infallible or valid for all times; they merely taught people what they knew without any claim to perfection.³⁸ Furthermore, in recent and future days, says Rida, it is quite apparent that the traditional teachings of the *madāhib* are insufficient to meet the demands of the age - even if in very remote places like Najd or the Yamen it might still seem possible - but even in previous centuries there have always been people who opposed *taqlīd*.³⁹

³⁶ Rida, Rashid, *Kitāb Muḡāwarāt al-Muḡliḡ wa l-muqallid*. (Cairo, al-Manar, 1906).

³⁷ Schacht, Josef: *An Introduction to Islamic Law*. (Oxford: Clarendon Press, 1964), p. 60.

³⁸ Rida, Rashid: *Fatwa al-Manar*. Al-Manar 28, (6) 1927, p.427.

³⁹ Anderson, J.N-D : *Law Reform in the Muslim World*. (London, Athlone Press, 1976), pp. 47-58 and Rida, Rashid : *Fatawa al-Manar* 28, (6), 1927, p.430.

Here *salafi* opposition to *taqlid* is spelt out. *Iḡtihād* is not only permitted, it is indeed, according to Ridha, obligatory.

According to Ridha too, there has always been opposition to *taqlid* and in the 20th century the idea of *taqlid* is incompatible with the demands of the age. Hence, any Muslim is free to choose between the rulings of the various *madāhib* and should follow the ruling with the strongest argumentation. The idea of taking in better rulings from other *madāhib* (called *tahayyur*) or the further step of mixing the ruling altogether (called *talfiq*) have been major tools for legal reformers in the early 20th century.⁴⁰

In the mid of the 20th century, along with other socio-political changes in Egypt especially and in other Muslim world in general, the three Egyptian thinkers mainly Taha Husayn (d. 1973), Muhammad Husayn Haykal (d. 1956) and Abbas Mahmud al-Aqqad (d. 1964) took up the challenge to continue the spirit of *salafi* movement led by Muhammad Abduh and Rashid Ridha.

By reason of their acquaintance with contemporary Western culture, they found themselves in a unique position to try to integrate their modern vision of Islam with the new discoveries and trends of Western thought and life.

On the national level, these three intellectuals had to face three issues: the system of the government, societal organization and education. They all favored a liberal and democratic government and shared a progressive outlook on societal organization. Husayn was the most outspoken in his espousal of the cause of downtrodden sections of Egyptian society. Al 'Aqqad was a socio radical, while Haykal preached a mild form of socialism. Inevitably, they had to face the question of the relationship between religion and the state. In the terminology of Western scholarship, this is given the name of secularism versus theocratic government. To those questions, the three intellectuals answer that the question as posed is largely

⁴⁰ Anderson, J.N-D : Law Reform in the Muslim World, pp. 47-58.

irrelevant to the conditions of Sunni Islamic society. This is because Islam did not have a church which contested power in the name of religion. After all, according to them, in legislation, Islam distinguished between two areas: one limited in scope in which religion dictated the law and a wider area of worldly interest which was left for society using instruments acceptable to Islam, namely, *al-Qiyās* (deduction by analogy) and *al-iğmā'* (consensus of the authorities on a legal question), and observing with the general spirit of Islam.⁴¹

Concerning the relationship between Western culture and Islam in the light of world realities and national outlook, the three intellectuals state that there was no question of the material superiority of the Western world over the world of Islam. The Islamic world, therefore, had to think deeply about the causes of this superiority, especially, in view of the fact that the West had contributed a vast heritage of philosophy, literature and art which commanded respect and admiration. Behind this heritage, there lay a great wealth of ideas. The world of the West could not be ignored or neglected, especially, as its ideas also affected human life and started to lay plans and induced trends for introducing vast changes in social structures to suit both the new concepts of men — human dignity, freedom, equality, justice — and to suit the needs of changing economic patterns of production and industrial relations. The world of Islam, therefore, could not isolate itself, even if it wished, from the call for a new distribution of wealth, for a humane treatment of the unprivileged, for a new order in the state, for the reorganization of political power and government.⁴² According to Husayn, the Egyptian should advocate the need for re-linking his faith with Western civilization.

As far as the latter is concerned, Husayn made an endeavour to maintain a sane and rational attitude towards it, which actually

⁴¹ Dajani, Zahia Ragheb, *Egypt and the Crisis of Islam*, (New York ; Peter Lang, 1940) p.viii. Dajani's explanation on the ideas of reformers is illuminating the point of this chapter.

⁴² *Ibid*, p.161.

called for assimilating it without fears or complexes. In his work, *Muṣṭaqbal al-Thaqāfa fī al-Miṣr*, Husayn brings many arguments to support this view. From the beginning, Husayn stated Egypt has already assimilated Western Culture in dress, furniture, in systems of administration and education, in form of government and laws, in systems and means of production and in patterns of consumption. Any pretence at rejecting this is an act of hypocrisy. Without western technologies, operational systems, skills and equipments, it is not possible to preserve political freedom and independence, or to achieve economic independence, and without assimilating Western literature and art, it is not possible to achieve literary and artistic independence. Egyptians need to understand Europeans and be understood by them, to make them feel that they see things evaluate and judge them in the same manner, accepting and rejecting the same things.⁴³

Regarding the issue of Egyptian and the West Husayn offers also a discussion on the cultural affinity of Egypt with Western Civilization. In dealing with such a topic, he took into consideration the ancient and Islamic history, emphasizing relations with the West in both eras. Thus, he maintains that Egyptian civilization is part of the Mediterranean, *al-Bahr al-Abyaḍ al-Mutawassiṭ* and the Eastern Mediterranean's, *Baḥr al-Rūm* civilizations and was in turn influenced by it. It derives from parallel sources to those of European civilizations. This latter has its sources in Greek philosophy, art and literature, Roman jurisprudence and administration, Islamic civilization borrowed from Persian Heathenism, Byzantine Christianity and all cultures it contacted without fear, and integrated all these borrowing into its outlook. The breakdown of European Roman civilization in the middle Ages was due to the breakdown of Europe's links with the Eastern Mediterranean.⁴⁴ The breakdown of Arab Islamic civilization in modern times was due to the breakdown with the Western Mediterranean caused

⁴³ Husayn, Taha : vol XI. *Mustaqbal al-Taqaḍa fī Miṣr* (Beirut: Dar al-kitab al-Lubnani wa maktabat al-madrasa, 1982), pp.54-58.

⁴⁴ Husayn, *Mustaqbal al-Taqaḍa fī Miṣr*, pp.22-36.

by the Turkish invasion and isolation.⁴⁵

Husayn believes that Egypt twice played a role as the guardian of civilization. First, when Greek civilization was driven off the Greek mainland, and took refuge in Alexandria, and second when Islamic civilization was destroyed by Mongols and Turks and took refuge in Egypt where it was preserved by the Mamluks.⁴⁶ Despite historic fluctuations, Egypt never lost its identity or personality, and cannot lose that personality by assimilating Western culture. Its characteristics are obvious. It has its geographical position which it can only defend by a Westernized system of defense. It has its culture and its needs to preserve and adopt it to the requirements of modern life as its forefathers had done. It has its language and must enlarge it to embody all the achievements of Western heritage. Assimilation is a source of strength and not a source of danger.⁴⁷

In line with his belief in the cultural affinity of Egypt with Western culture, whose sources are Mediterranean, Husayn build a strong argument for teaching Greek and Latin in the state school system, along the same lines applied in European countries. His main target is to spread among Egyptians patterns and habits of thought similar to those of Europeans, by exposing them to the same intellectual influences. Besides, according to Husayn, the two languages are indispensable for the study of law and humanities, and needed for understanding the history of Egypt which lived for hundreds of years under Greek and Roman rule. They are indispensable for archeologically research, which some day must be taken over Egyptians.⁴⁸

Considering all those points, one can state that the intellectual message of Husayn is clear. He has a confidence in the great intrinsic value of the Egyptian Islamic heritage, in its openness,

⁴⁵ *Ibid*, p.37.

⁴⁶ Husayn, *Mustaqbāl al-Taḳafa fī Miṣr*, p.38

⁴⁷ *Ibid*, pp.72-74.

⁴⁸ Husayn, *Mustaqbāl al-Taḳafa fī Miṣr*, pp.279-280.

flexibility, resilience, enlightened growth, and its ability to borrow from other cultures, without giving away its identity. And at the same time, to give to other cultures without a feeling of superiority and he believed also in its spirit of basic human equality, Husayn's discussion on Islamic Western relations through history avoided him from apologetic attitude and did not engage him in either defence or counter - attack. He removed the matter from the context of a game to the context of a dialogue, asserting, thereby, as he clearly remarks, a fundamental Islamic view of other religions, which in a broad human sense towers far above pettiness.

If we proceed to Haykal, we find that in his work *al-Sharq al-Jadid* (The New Orient), he holds substantively similar view to Husayn. Like the latter, he brings to attention the fields which Muslims took from Europe in modern times, emphasizing the urgent need of Western technologies, managerial and organizational techniques for the Islamic world.⁴⁹ However, Haykal, somehow seems to give more attention to the spiritual aspect than Husayn in this connection. Haykal set out to show that the "absolute" happiness of humanity is not only practically linked with its material prosperity, *al-Raḥa al-Maddi* rather, it is associated with its moral or spiritual power, *al-quwwā al al-rūḥiyya*. This moral power, as he conceives it, should overcome materialism in some way or ather. According to him, history, in its ancient and contemporary periods, provides us with examples which support such a view.⁵⁰ Taking the modern era into consideration, he mentions that the resistance of Mahatma Gandhi to the British occupation is an example of this hypothesis.

In our understanding, Haykal seems to be very largely concerned with the question of the preservation of Islam as a spritual power which should be taken into consideration, in any endeavor to stimulate change and progress in Egypt in particular and the Islamic World in general. He is determined to

⁴⁹ Haykal, *al-Šarq al Ğadid* (Cairo: Dar al-Maarif, 1978),pp.249 : 255-256.

⁵⁰ *Ibid*, p.217.

say the Egyptians especially that material gains alone are not sufficient, for there is a power over materialism namely the spiritual power. He attempts to show that the real happiness, to which the Egyptians aspire, cannot be attained except through the preservation of their culture and history.

Al Aqqad, in the third place, pointed to the fields of knowledge which Arabs or Muslims have taken from Europe adopting, by this, a similar position to Haykal and Husayn. He, however, went one step beyond these two scholars to declare that, in assimilating European sciences and arts, Egyptians are regaining a part of their debts owed by Europe. For in his work, *Athār al-Arab fī al-Hadārah Al-Awrībiyya* (The Contribution of Arabs to European Civilization), he made an attempt to specify the fields of Islamic knowledge from which European scholars benefited. These fields, in al-Aqqad's account of the matter, include: medicine, physics, chemistry, astronomy, mathematics, literature, music, and art.⁵¹

However an important point which should be stressed is that as non-specialized religious scholars, their main interest lie in matters of faith and moral behavior, rather than in rituals and specific jurisprudence, unlike Abduh and Rida, yet they do not necessarily contradict them. As regards the burning issue of Islamic government, the thinkers were able to clarify many points. Their concern to the concept of theocracy is linked with the political situation in Egypt at their time. The three scholars rejected King Fuad's ambitions towards establishing a theocratic rule in Egypt (*caliphate system*). Instead they warned Egyptians the dangers and abuses of theocracy. They attempted to show that the idea of theocracy does not exist in Islamic dogma. It has its roots in Christianity. For the Christians believed that the idea is linked with the struggle between the church and state in Christendom, which lay at the root of many political and intellectual upheavals in European history. Haykal suggested that due to the great interference of religious men in

⁵¹ Al-Aqqad, *Aṭar al-‘Arab fī al-Ḥadārah al-Awrūbiyyah* (Cairo : Dar al-Maarif, 1946), pp.32-93.

temporal affairs, and in an attempt to limit their power which they claim to possess by divine right, certain European leaders declared themselves monarchs by divine right.⁵²

In point of fact, mainly influenced by Abduh, the three scholars believed that there are two major channels for attaining knowledge in Islam, one is revelation and the other is rationality. In their thought, revelation represents the truth as transmitted by God directly to the Prophet Muhammad. At the same time, they hold that human beings are asked to apply their reason for the discovery of the truth, and they are assured that any discovery they make will come as a confirmation to divine revelation. This approach is naturally logical. Since revelation is transmitted through one person only, i.e., the Prophet Muhammad as a recipient and, therefore, nowadays a bridge is needed to mark the point of credibility, and this bridge can only be human reason.

Hence, they insist that all the body of modern sciences is accepted and absorbed by modern Islam not as a "secular" matter, but as representing the "rational channel" which has been asserted by revelation itself. In their views, Egyptians should be capable of embracing and integrating all the discoveries of sciences and revelations of the human intellect. However, their analytical methods were unlike those of earlier Muslim school of thoughts such as *Mu'tazila* and *Aš'ariyya*. Instead of attempting to match the diverse complications of Aristotelian, Platonic, and neo-Platonic logic, dialectic, intuitive mysticism, and speculation, with a similar complexity of religious thinking, they stood for "simplicity" of belief, in the conviction that such simplicity alone can stand in the face of growing body of scientific knowledge.⁵³

⁵² Haykal, *al-Šarq al-Ġadīd*, pp.30-46

⁵³ Al-Aqqad, *al-Qarn al-‘Išrūn, mā kāna wa mā sayakūnu* (Beirut: Das al-Kitab al-Arabi, n.d.) pp.154-155. Al-Aqqad, *Aqā'id al-Mutafakkirīn fī al-Qarn al-Āhirīn* (Cairo: Maktabat al-Anglo al-Misriyya, 1960), pp. 161-162. Also see Haykal, *Ḥayāt Muḥammad*, pp.522-524. Also Husayn, *Mi'rāt*

After 1970s until 1990s

Those people whose ideas have been quoted above are influential individuals, especially between the years 1950's and 1970's. Their writings, professions and careers make an access for their prestige as public figures. After 1970's their progressive ideas about Islam relating to the contemporary social challenge were continued with more concrete and focused issues around Islam, Islamic Law and State by some younger generations whose works become opinion leaders through their professions as philosopher, author, thinker, historian, researcher or journalist. Considering the relevance of our study, here are some of these younger generations with the summary of their writings and opinions.⁵⁴

Muhammad Said al-Ashmawi

Al-Ashmawi is a jurist and writer. In his two books *Jawhār al-Islām* (The Essence of Islam) and *al-Islām al-Siyāsī* (Political Islam), Al-Ashmawi opposed the proponents of the slogans calling for the application of *Šarī'ah* and the establishment of an Islamic state. He based his argument on the theological assumption derived from the Quran that the word *Šarī'ah* appears explicitly only once in the Quran and implicitly three times. He believed that God transmitted to His prophets and Messengers a single faith, namely belief in Him and devotion to Him. For Allah, then, religion is unitary, but the *Šarī'ah* (according to him, the meaning is the way of life) differs among the messengers and the prophets. The *Šarī'ah* of Moses was justice; have Jesus peace and love; and have Muhammad,

al-Islām, pp.265-267.

⁵⁴ The discussion after 1970s, refers mainly to David Sagiv, *Fundamentalism and Intellectuals in Egypt, 1973-1993* (London: Frank Cass, 1997).

compassion. The form of Islam differs from Judaism. Islam is not a religion of *tašrīʿ* (legislation) like Judaism. Only one thirtieth of the Quran's verses are considered laws. Ashmawi states that the Quranic term *ḥukm* refers to a judgment or ruling in a dispute between individuals, or to a trial just in its wisdom. It should not be understood in its modern sense of governing, which is expressed by the term *imāra*.⁵⁵

Husain Ahmad Amin

Like al-Asmawi, Amin is also a well-known jurist and writer. For Amin, no more than 80 verses in the Quran relating to questions of law such as theft and adultery punishment. And majority of these verses only determine general principles and open to be multi-interpretable texts in accordance with the needs and circumstances. Amin stated:

“With the prophet's death and the cessation of divine revelation came also the end of the legislation which can be extracted from the Quran and from the Hadits when the need arises. Did we not see how Abu Bakr changed the punishment of the wine drinker from flogging with whips to flogging with shoes ?. We know how Umar Ibn al-Khattab annulled the punishment of cutting off a thief's hand in the year of *al-ramada* and how he prevented *muṭ'ah* marriages and the pleasure of *al-Qubḍah*...”⁵⁶

Beside that, Amin explained that the majority of the *Šarīʿah* laws originated from the *ijma'* (consensus of the religious

⁵⁵ Muhammad Said al-Asmawi, *Jawhar al-Islam* (Cairo, 1984) pp. 12-28 and *al-Islam al-Siyasi* (Cairo, 1987), p. 10, cited from Sagiv, *Fundamentalism*, p. 85.

⁵⁶ The year of Ramada is the year of crisis in which many people died because of financial shortage at the time of caliph Umar; *Muṭ'ah* is marriage that was for a set period. This kind of marriage was annulled by the Sunnis, but remained in force for the Shiite; Husai Ahmad Amin, *Dalīl al-Muslim al-Ḥazīn* (Cairo, 3rd edit. 1987), pp. 185-189, cf. Sagiv, *Fundamentalism*, p.93.

cleric) not revelation such as the theory of caliphate. Therefore, because of the changing of time we need another consensus. The religious clerics (‘*ulamā*’) are like us: we are capable as they of seeing and of exercising thought. We can consider something as a new consensus, another generation may reject it and a third generation may once again accept as consensus? How is it possible to say that these laws are permanent and valid for every time and place and that if governments do not accept them they must be accused of heresy and deposed?⁵⁷

Yusuf Idris

Yusuf Idris is one of Egypt's great writers, a leftist and a Nasirist. Arab nationalism is the issue in domestic politics that most interested him. In one of his writings, Idris wrote that the slogan of application of the Islamic *Šarī’ah* or more accurately applying Islam's criminal law is frightening and dangerous. He believed it would cause further deterioration in Egypt.⁵⁸

Idris urged an immediate fruitful dialogue, especially related to the application of the *Šarī’ah* and Egyptian people should think it more careful and wise. He wrote:

"I have read a great deal about the opinions of respected clerics on this question and on the need to implement the Islamic *Šarī’ah* immediately and without delay. I asked my self: What kind of Islamic government do they wish to establish?. Is it the Islamic rule of Khomeini, that is, to turn clerics into governors as was done for Ayatullah ? Or would it be a Wahhabi government, as in Saudi Arabia and the Gulf states? Or Qadhafi-style Islamic government of the kind that exists in Libya? Or the kind of government Zia al-Haq has set up in Pakistan, or a Numairi-type rule (as) in Sudan? Will it apply the religious doctrines of the *Imām* al-Shafii or of Ibn

⁵⁷ Sagiv, *ibid*, p. 94.

⁵⁸ Yusuf Idris, *Intibāt al-Mustafizza* (Cairo, 1986), pp. 80-84, cf. Sagiv, *Fundamentalism*, p. 95.

Taymiyya or the school of Ibn Hanbal? How shall we go about implementing whichever school it is, once we have made the choice? Are we to consider all the innovations in our lives since the death of those great *imāms* and the closing of the gates of *iğtihād*, such as modern dress, radios, watches, televisions, cinema, theater, music and so forth... as a revolt against the Sharia simply by virtue of the fact that they were not mentioned in the Hadits or in the *iğtihād*, and then do away with all of them and go back to living intents or clay dwelling?... I personally have no objection to our being ruled by a cleric, I even dream of it, provided this religious ruler has the broad horizons of Muhammad Abduh, the purity of Shaikh al-Ghazali, the openness of Khalid Muhammad Khalid..."⁵⁹

Ahmad Kamal Abu al-Majd

As a social researcher, Abu al-Majd is concerned with the need for the people to make a social equilibrium in which the social progress can be achieved for the benefit of all Egyptians. According to him, there are four reasons explaining why some people demand an immediate application of the *Šarī'ah*: a. people start thinking on the basis of nostalgic-romantic tendency. There is a desire to exhume the past, to restore the experiences of the great historical actors in the past Islamic history. At the same time they ignore the facts of the present and the changes of the future; b. a textual and scriptural way of thinking. People follow blindly the letter of the religious texts. The call to deploy cognitive capacity and intelligence in understanding religious texts is considered to be either non-Islamic or the kind of tendency associated with Islamic sects such as Mu'tazilites (rational group of Islamic sect) who are not acceptable in their opinions; c. the revolutionary way of thinking in changing the existing condition and elite with the slogan of establishing Islamic law and order without further consideration that such a changing will imply absolute despotism; d. insensitivity to the right of other groups who have

⁵⁹ Sagiv, *ibid*, p. 97.

different opinion and religious denominations.⁶⁰ The -more or less— same ideas expressed also by Thariq al-Bishri, a prominent Egyptian jurist and social researcher in one of his writings concerning the application of *Šarī'ah*.⁶¹

Thus, social formation and public discourse have been explained. Theoretically, the essence of the difference within Islamic communities themselves lays in the method and approach of interpreting the sacred texts. In describing this phenomenon, Leonard Binder is true in his explanation that:

"For Islamic traditionalists, the language of the Quran is the basis for absolute knowledge of the world. For Islamic liberals, the language of the Quran is coordinate with the essence of revelation, but the content and meaning of revelation is not essentially verbal. Since the words of the Quran do not exhaust the meaning of revelation, there is a need for an effort at understanding which is based on the words, but which goes beyond them, seeking that which is represented or revealed by language".⁶²

⁶⁰ *Ibid*, pp. 104-105.

⁶¹ Thariq al-Bishri, *Baina al-Šyarīah al-Islāmiyyah wa l-alqānūn al-waḍīy* (Cairo: Dar al-syuruq, 1996), pp. 85-98.

⁶² Leonard Binder, *Islamic Liberalism* (Chicago, 1988), p. 4, cf. Sagiv, *Fundamentalism*, 82.

C. The History of Islamic Law in Egypt The Rotation of Power and Ottoman Dynasty

Before the coming of Islam to Egypt, Egypt was under the three strong powers. Pharaonic power (3200-322 BC), Ptolemaic (322-30 BC) and Roman (30 BC-641 AD).⁶³ After 642 AD Egypt was under the caliph Umar bin Khattab. In the following times Egypt was always under the Islamic dynasty; the dynasty of Four Calipha (*al-Kulafā al-Rāšidūn*), Umawid and Abbasid with their capitals Madinah, Kufah, Damascus and Baghdad.

Under the next dynasty, mainly the dynasty of Ibnu Thulun (868-905 AD) and the dynasty of al-Ikhsyidiyyah (935-969 AD) emerged the effort of searching for Egyptian local identity. In the following dynasty (the dynasty of Fatimid) Cairo was established as the capital of Egypt. After this time, it became one of the centres of Islamic civilization.⁶⁴ Al-Azhar University was founded and the massive process of Islamization and Arabization took place. The same trend continued until the dynast of Ayyubid (1171-1250 AD) and Mamalik (1252-1517 AD). After 1517 AD until Egypt became a Republic (1952), it was under the Ottoman dynasty.⁶⁵ Before the coming of the XXth century the dynasty cooperated together with the British colonial authority in governing the state and society.

From the legal perspective, in the period of the Islamic chaliphate, the legal and governmental system of Egypt was a

⁶³ El-Anshari, Nasir, *al-Muğmal fi Tārīḥ al-Miṣr; al-Nuḍūm al-Siyasiyyah wa al-Idāriyyah* (Cairo: Dar al-Syuruq, 1997); Abdo, Geneive, *No God but God: Egypt and the Triumph of Islam* (Oxford: Oxford University Press); Basyuni, Adil, *al-Wasīṭ fi Tārīḥ al-Qānūn al-Miṣr* (Cairo: Dar Nahdhat al-Sharq, 1999).

⁶⁴ Imarah, Muhammad, *‘Indamā aṣbahat al-Miṣr ‘Arābiyyah Islāmiyyah* (Cairo: Dar al-Shurq, 1997).

⁶⁵ Winter, Michael, *al-Muğtama al-Miṣr taḥta al-Ḥukm al-‘Uṭmāni*, transl. Ibrahim Muhammad Ibrahim (al-Haiah al-Misriah al-Ammah li al-Kuttab, 2001); El-Anshari, *al-Muğmal*; Najib, Muhammad Fathi, *al-Tanzīm al-Qaḍā’i al-Miṣr* (al-Haiah al-Ammah li al-Kuttab, 2001).

mixture between the Arab tradition and the Islamic one. That was the caliphate system. The caliphate system is theocratic. The caliph has a secular as well as religious legitimation. He acts as a ruler in the political perspective and he acts also as a religious leader who is perceived as a representative of God (*kalifah Allāh*). In the daily practical matters, the caliph was assisted by the judge in solving the problems. The judge was chosen by the caliph but the caliph had an absolute power in judiciary, legislative and executive matters. Therefore, the caliph was not subject to be changed. (tidak bisa diturunkan). Thus, in such a governmental and legal system, there was no distribution of powers and authority. The caliph could be the executive authority (ruler), at one time be a judge and in another time could be a law-maker.⁶⁶

In Islamic tradition the principles of justice, deliberation, equality before the law and egalitarianism were introduced by sacred texts and the behavior of prophet Muhammad but in practical governance, those principles are not systematically explored and arranged. Instead, it was still very idealistic and the practice is far from the ideas.

After the process of massive Arabization in the era of Fatimid, the substance of laws in the courts was derived from Islamic law, local tradition and the Coptic one. After all, the legal procedure and its practice were not standardized and systematically arranged.⁶⁷

The geo-politics of Egypt within Islamic dynasties (near from Madinah) brings the possibility of Malikite school of thought to

⁶⁶ Abu Thalib, Hamid Muhammad, *Nizām al-Qaḍā al-Miṣrifi Mīzāni al-Šar‘iyyah* (Cairo: Dar el-Fikr al-Arabi, 1993), pp. 47-54; Najib, *al-Tanzīm*; Basyuni, *al-Wasīt*; Crone, Patricia and Martin Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge University Press, 1986); Gellner, Ernest, *Muslim Society* (Cambridge University Press, 1983).

⁶⁷ Najib, *al-Tanzīm*; Abu Thalib, *Nidzam*; al-Bishri, Thariq, *Fi al-Masalah al-Islamiyyah al-Muashirah Baina al-Islam wa al-Urubah* (Cairo: Dar al-Shurq, 1998); Imarah, *‘Indamā*

be the formal *madhab*. After establishing the Fatimid dynasty (970 AD), the Malikite perished and then came the shiite ismailite as the dominant school of law (*madhab*).⁶⁸ When the successor of the dynasty (Ayyubid) took power the practice of law was changed to be syafiite. Therefore, the ruler introduced its school of thought and the ruled has to follow the decision.⁶⁹

Before the establishment of Fatimid dynasty, the pattern, process and substance of Muslim jurists (*qādī*) in solving the legal problems which they dealt with were not systematized according to a certain legal school of thought (*madhab*), but they solve the problems by deriving the legal indication based on the quick and spontaneous judgement in accordance with their knowledge and understanding of legal conclusion from the Quran and hadist.

However, after the Fatimid came to power, they changed this judicial tradition by introducing the new problem solving on the legal matters which were based on the Shiite school of thought. After the fall of the Fatimid, the art and reference material of legal problem solving in court was always based on the formal school of thought in accordance with the political will or school of thought (*madhab*) of the rulers.⁷⁰

Until the Umayyad came to power, the authority of Arab judges was restricted to the military legal cases which had strong correlation with the politics of territorial and gradual expansion, whereas the civilian legal cases were solved and decided by Coptic judges.⁷¹ The transfer of authority in dealing with the legal cases was carried out slowly in line with the strengthening process of Arabization. The massive process of Arabization took place in the era of Fatimid.⁷²

⁶⁸ Imarah, *‘Indamā*; Najib, *al-Tanzīm*; Abu Thalib, *Nidzam*.

⁶⁹ Imarah, *al-Tanzīm*.

⁷⁰ Najib, *al-Tanzīm*.

⁷¹ Najib, *al-Tanzīm*.

⁷² Imarah, *‘Indamā*.

Concerning the place where the Arab judges held a session of the court, some historians indicated that the judges often held the session of court in a mosque or in the hall of a mosque. Very seldom the judges made the session in the public hall. But occasionally the judges could hold the session in their homes.⁷³

The court session consisted of one judge, one witness and one secretary. The legal decision made by a judge was written on a sheet of paper and at the end of the writing the judge marked his decision by writing his name.⁷⁴

As it is explained before, there was no real job description and distribution of power and authority in the governmental system. Therefore it was very often that one judge is not only responsible for carrying out the legal and judicative assignment but he was also responsible in assisting the ruler dealing with inspection and supervising the state treasury or planning and doing pre-emptive action against any legal destruction (*wilāyah al-ḥisbah* and *wilāyah al-maḍālim*). Furthermore according to some historians, most of the judges were also the legal and political advisers of the rulers (*ḥalīfah*).⁷⁵

Ottoman Dynasty

Many states in the present Middle East were parts of the Ottoman dynasty. One of them was Egypt. The power of Ottoman Turk was built by few armed force in the beginning of XIVth century in the west Anatolia. They recruited afterwards some people around the region and trained them in the military camp to be a militant armed force with the special job to extend

⁷³ Najib, *al-Tanzīm*; as a comparasion see also, Rosen, Lawrence, *The Anthropology of Justice; Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

⁷⁴ Zubaida, *Sami, Law and Power in the Islamic World* (London-New York: I.B. Tauris, 2003), pp. 40-73.

⁷⁵ Zubaida, *Law and Power*, Najib, *al-Tanzīm*

their territory. This armed force did its job meticulously. In 1453 AD they were able to invade Constantinople and make the city as the center of their territorial expansion.⁷⁶

The genesis and power of the Ottoman dynasty was based on its centralization and bureaucratisation of political power. The dynasty applied a strict hierarchy of power based on the military managerial system. The XVth and XVIth century were the golden age of the Ottoman dynasty. The general characteristics of Islamic practice in the Ottoman dynasty was the mixture between Islamic traditional sufism and the heroic military tradition. In applying the Islamic legal doctrine, they were the followers of the Hanafite school.⁷⁷

One of the most popular sultans of Ottoman dynasty was sultan Sulaiman (The Magnificent Solomon). He came to power in 1520 until 1566 AD. He was well known for his great capacity in dealing with governmental and managerial skill of the dynasty. Under his control, the dynasty could extend its geographical as well as political power to be one of the biggest empires in the world. Because of his merit, the dynasty could extend its territory to Egypt in 1517. Moreover it survived for more than three centuries.⁷⁸

Under the successor of Sulaiman, Sultan Salim I, Egypt could be fully under the control of the dynasty. In managing Egypt, Salim planned his strategy of governmental coordination by three patterns of governmental management: a. the central power of dynasty should chose a loyal representative in Cairo which had capacity to implement the strategically plan of action dealing with skill of good governance. For this purpose,

⁷⁶ Zubaida, *Law and Power*, pp. 113-120.

⁷⁷ Zubaida, *Law and Power*; Winter, *al-Muğtama al-Miṣr*, pp. 180-203; As a comparison see also, Gerber Haim, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: Stae University of New York Press, 1994).

⁷⁸ Zubaida, *Law and Power*; El-Anshari, *al-Muğmal*, p. 185; Winter, *al-Muğtama al-Miṣr*.

the center should evaluate and always supervise; b. to maintain and secure the political interest of the centre, the centre should also build special armed forces and divide them into many divisions. In chaotic and emergent situations which could endanger the loyalty of the local towards the centre, the armed force could abolish all of the strategically implementations which had been done by the local governmental representative and instead act as the real bureaucracy and political power to overcome the problem and control the situation on the ground; c. establishing framework of cooperation with the remaining power of the experienced Mamluk dynasty (especially outside Cairo) and divided the regions into 24 provinces.⁷⁹

With such a framework of governance, the general performance of judicial court system of Ottoman dynasty in Egypt was marked by overlapping authority just like before. The court system was not merely built on the Arab and Islamic tradition. The main reason was that the interrelation between the Centre and local authority was not always in harmonious situation. It was due to the fact that the centre used to be in their old tradition of Turk and Mongolian customs in dealing with governmental management, whereas the locals preferred the Arab tradition.⁸⁰

To protect the religious legitimacy of Ottoman as Islamic political power symbolized by its adoption of the caliphate system, the centre was really aware that applying Islamic law in all aspects of life was necessary. However, because the political power and Ottoman's territory was very wide, the centre thought that the priority of this agenda was restricted to applying the criminal law system and substance of Islam. Because by applying the system the centre could benefit twofold: once, it could use it as a tool of controlling the loyalty of local government towards the centre and another it could show to the people that the centre deserved to be the legitimate

⁷⁹ El-Anshari, *al-Muğmal*, pp. 190-191.

⁸⁰ Zubaida, *Law and Power*; El-Anshari, *al-Muğmal*, pp. 185-206.

symbol of Islamic caliphate power.⁸¹

Related to the Ottoman dynasty and the development of Islamic law, the effort of institutionalisation and codification of Islamic law was carried out in the XVIIIth century. In that time, the contact and international relation between the Ottoman and neighbouring states especially in Europa were intensified and closed more than before. Culturally the contact and relation caused more competition among the dominant powers of global political actors.

Moreover, the military victory of Britain, France and Russia over the Ottoman empire, caused the latter to reform and restructure its system of governance, law and social institutions all over the Ottoman dynasty.⁸²

Sultan Salim III under the platform of *Nizām al-jadīd*, began the reform. After that, the continuation of reform was hold by Sultan Mahmud II in 1826. Inspired by the progress of Europe in its governmental as well as its legal system, Sultan Abdul Hamid tried to formulate state-constitution 1876, in which Islamic law was part of the constitution.

Concerning the application of Islamic law in all of Ottoman dynasty and especially in Egypt, there are two different opinions. One stated that especially since Sulaiman al-Qanuni came to power, Ottoman court applied the Islamic law in all aspects of governmental system. Another opinion states that the law which related to the family, was the only one the rulers of Ottoman tried to apply. However, the external symbol of Ottoman dynasty, that was the caliphate system, was used to

⁸¹ Winter, *al-Muğtama al-Miṣr*, pp. 141-203.

⁸² Quataert, Donald, "The Age of Reforms, 1812-1914", in Suratya Faroghi, Bruce McGowan, Donald Quataert and Sevkett Pamuk (eds.), *An Economic and Social History of the Ottoman Empire, Volume II, 1600-1914* (Cambridge: Cambridge University Press, 1994), pp. 759-943; Deringil, Selim, *The Well-Protected Domains: Ideology and the Legitimation of Power in the Ottoman Empire, 1976-1909* (London: I.B.Tauris, 1998).

gain and protect its political-legitimacy before the people of different societies which were under the Ottoman dynasty.⁸³

Finally, we have to note that after Muhammad Ali came to power in the beginning of XIXth century in Egypt, Egypt enjoyed its political status as a autonomous region under the political protection of the Center.⁸⁴

D. The Politics of Law in Egypt Note on the Politics of Law

When politics is regarded as an art of governmental as well as power sharing mechanism and the state is the center of the political circulation, politics is the business of the elite. This opinion tends to be etatistic, like what has been explained by Thomas Hobbes as one of the proponents of the idea. According to Hobbes, the state is the source of legitimacy and sovereignty and at the same time, the state can manage the individual and public affairs in the public interest (*salus populi*). It is the duty of state to take care of this matter, though it should do it by its 'sword'.⁸⁵

In turn, the idea could not be well-accepted. As Montesquieu underlined, the daily reality told us that the role of the state (as the center of power management) can not always solve the problems and conflicts of interest, though the state can use its 'sword'. Moreover, the conflicts can be solved when the system (in which the public interest is governed or managed) is constructed. That system is law. That is the law which is standardized and the law which can bring society closer to prosperity and just principle. Hence, the politics as an art of

⁸³ Zubaida, *Law and Power*, pp. 79-81; Gerber, *State, Society*, pp. 1-24; 174-186.

⁸⁴ Salim, Latifah Muhammad, *al-Nizām al-Qaḍā'i al-Miṣr al-Ḥadīf, 1875-1914* (Cairo: al-Haiah al-Misriah al-Ammah li al-Kuttab, 2000), pp. 15-24. Davison, Roderick, *Reform in the Ottoman Empire, 1856-1878* (New York: Gordian Press, 1973).

⁸⁵ Hobbes, Thomas, *Leviathan*, Ricahrd Tuck (ed.) (Cambridge University Press, 1996), p. 9.

managing people and government will find its strong foundation when it is based on justice and law, resulted from social contract.⁸⁶

In the following explanation, politics is perceived as an art of governing state, institution and their sovereignty. Law is perceived as a set of regulations and norms which were institutionalized and practiced in the legal and court system in order to secure and protect the living values and customs in the society. The act of institutionalizing the norms and values are justified through political as well as legal mechanism.⁸⁷ Thus, the laws which were practiced were a mirror of dynamics of the society and a reflection of its values in the effort of respecting human rights and individuals as well as social dignity.

Before the Era of Muhammad Ali (1805 AD)

Before the era of Muhammad Ali, that was the era of Islamic dynasties until the coming of Napoleon into Egypt in the end of XVIIth century, the condition of court and legal institution was static and unchanged.

The politics of law was state-based and state-centered (statism). The sovereignty of people was under the sovereignty of state. The state controlled and managed all matters in its governmental as well as its political system. The process of politics and legal activity was concentrated to the central actor of ruling that was sulthan/caliph.

In such a situation, the state monopolized all of political

⁸⁶ Montesquieu, *The Spirit of the Laws* (1748) Anne M.Cohler, Basia Carolyn Miller and Harold Samuel Stone trans. And ed. (Cambridge University Press, 1989), Bk. 20.

⁸⁷ Aristotle, *The Politics*, T.A.Sinclair trans., Trevor J.Saunders ed. (Harmondsworth: Penguin, 1981), Bk. I, ii. H.J. Morgenthzu, *Politics Among Nations* (New York: Knopf, 6th ed. 1985), p. 345; John Austin, *The Province of Jurisprudence Determined* (J 832) Wilfrid E.Rumble ed. (Cambridge University Press, 1995), p. 166.

sources and legitimacies. The legal structures and institutions within the state were managed solely from the centre of power and designed to empower the state, not the society.

Ideologies, the goal and meaning of sovereignty were dictated by the center of power through Islamic tradition, ceremonies and rituals, such as in the public sermon during the Friday prayer. Thus, the standards of judgment and legal reasoning were legitimated by Islamic symbols but with the main purpose of maintaining the supremacy of the centre of power, that was the caliph. The legal institution and court system were merely the gift of the centre of the authority and not functioning maximally as a problem solver for legal cases.⁸⁸

Such a politics of law, resulted in the legal institution, with the aim of combining the interest of the central ruler (Constantinople) and the local one. Institutionally, within the inter-play of conflict of interest between the centrality and locality, since the era of Sulaiman (1522), there existed in Egypt, the following legal institutions:

- a. The Supreme Court: It was located in Cairo and had the widest legal competence in deciding the legal cases. The court was frequently called as The Pseudo-military Court. The main judges of the court were always Turkish,
- b. The District Court: Egypt was divided into 12 Court Districts. Each court was managed by one Egyptian judge, under the supervision of the above Supreme Court,
- c. The Administration and Trade Court: It was located in several places which were regarded as the centre of trading. It decided the legal cases related to commercial and administrative conflicts. In the beginning the court was directed by a Turkish judge but then by an Egyptian one.
- d. The Special Court: It dealt with legal cases related to the military and conflicts of family law. For the military cases the judge was Turkish and for family conflict, sometimes

⁸⁸ Salim, *al-Nizām*, pp. 15-24; Abu Thalib, *Nizām al-Qaḍa*, pp. 47-53; Nadjib, *al-Tanzīm*, pp. 37-44; Basyuni, *al-Wasīṭ*, pp. 389-452.

the judge was an Egyptian.⁸⁹

In the later development, the system of those courts were corrupt and needed to be reformed.⁹⁰

Muhammad Ali's Era until the Declaration of Egyptian Republic: Ottoman-Islamic law replaced by European and National law

In 1805 AD, Bonaparte's military occupation was expelled by Muhammad AH from Egypt. As a strong leader, Ali gained popularity and wide governmental autonomy from the centre of Ottoman's power (Constantinople). Ali knew that the political, military and economic influence of the Centre was degraded. That was due to the severe and tight competitions among the actors of global powers, especially Europe.

Based on Ali's knowledge of the European progress, soon after he came to power he planned structural reform especially economic reform.. His main idea was how to make Egypt more open towards European traders in order to gain more capital revenue for the development of Egypt. According to him, one of the barriers of his open policy was the legal structure of Egypt. The legal structure of Egypt was the continuation of Ottoman-Islamic legal system. Therefore, his economic policy urged him to run the progressive politics of law.⁹¹

Because of the progressive politics of law, Ali founded the new Mixed Court and Trade Court. At the same time it can be assumed that by the establishment of both courts, the Ottoman-Islamic law (with exception of family law) was marginalized and unpractical. The duty of both courts was to judge trade conflicts between Egyptian and among the foreigners in accordance with the foreign legal standards. Those courts were

⁸⁹ Farhoud, *Mauqiu al-Şulṭah*, p. 71.

⁹⁰ Salim, *ibid*, pp. 11-12; Farhoud, *ibid*, p. 71.

⁹¹ Salim, *al-Niẓām*, pp. 27-31; Najib, *al-Tanzīm*, pp. 47-54.

managed with the cooperation of foreign consulate in Egypt.⁹²

With his open policy, the Mixed and Trade Courts developed gradually. After Ali's era the foreigners did come more and more and every foreign nation had its own court. Ali and his successors (his family) succeeded in his economic plan and in reconstructing Egypt towards the leading region for trading. But the legal and psycho-national problems were coming soon. That was the feeling of inferiority complex of the Egyptian before the foreigner's law in his own home. Beside that, there were too many courts with various different systems of law.

Later on the Egyptians became aware that they had lost their legal sovereignty and that the real sovereignty was in the hand of the British (the main foreign traders).⁹³ In respond to this condition, in 1883 funded the Egyptian government founded the new Public Court which tried to offer the real and just decision for the interest of all Egyptians, to strengthen the self-confidence and sovereignty of nationalist leaders and to decrease gradually (within the existing-structural possibility) the influence of foreign legal system. Thus, the development of Egyptian Public Court was in the middle of political struggle between the rise of Egyptian nationalism, the emergence of the British colonial power with its superiority in military, commercial as well as legal aspect and the decline of the Ottoman-Islamic legal system.⁹⁴

Therefore, the following development of the politics of law was a nationalistic legal policy with the main agenda: being the structural and substantive empowering of Egyptian Public Court system under the colonial British system, reducing and abolishing the Mixed court gradually and keeping the Islamic and *Millet* courts in peripheral area by only allowing both to apply and decide family legal cases.

⁹² Salim, *ibid*; Najib, *ibid*.

⁹³ Salim, *ibid*, p. 25; Najib, *ibid*, p. 55; al-Bishri, *al-Waḍḥu al-Qanūni*, pp. 12-17.

⁹⁴ Salim, *ibid*, pp. 25-50; Najib, *ibid*, pp. 55-62;

The national struggle of Egypt to gain its legal sovereignty resulted in the agreement with the British colonial ruler in 1937. The agreement stated that gradually the role of the Mixed Court should be restricted. And in 1949, the mixed court was totally abolished.⁹⁵

The Era of Republic

After a series of national movement in order to gain the Egyptian independence from the British on the one hand and from the King Farouk I and Ahmad Fuad II (both were from Muhammad Ali's family), on 18 June 1953 through peaceful revolt by the military elite, Egypt was declared as independent and as Republic. Muhammad Najib was its first president. Because of internal conflicts and Najib's lack of capacity in governing the state, in 1954- 1956 Jamal Abdul Nasir took power and then became the next president.⁹⁶

The international political setting made Nasser's leadership revolutionary-nationalist. The politics of law in his era was also marked by legal revolutionary-nationalist politics. The main actor of such a type of leadership was the president. The laws and legal institution were subject to change whenever the president required in order adjusting to what he considered as the immediate national interest.

Hence, series of constitutional as well as legal changes occurred. The *Šarī'ah* and *Millet* court were integrated to the Public Court system, the Constitution of 1953 was amended with the Constitution of 1956. Due to the political tendency of

⁹⁵ Salim, *ibid*; Nadjib, *ibid*.

⁹⁶ Afaf, El-Sayid, Luthfi., *A Short History of Modern Egypt* (London: Cambridge University Press, 1990); El-Anshary, *al-Muğmal*, pp. 258-259.

Pan-Arabism, the mentioned constitution was amended with Constitution 1958 (the Constitution of United Arab Republic). In 1962, came the new constitution that was the Constitution 1962 and then replaced again by the Constitution 1964.⁹⁷

The internal and external threat to Egyptian territory and sovereignty such as the establishment of Israel and its foreign policy caused Egypt to stand firmly and involved itself in the war with Israel in 1956 and 1967. Those wars psychologically costed much. Practically Egypt had lost parts of its territory. One of those social costs for Egypt was, during this critical situation Egypt was governed by military pattern under the banner of pan-Arabism, nationalism and socialism. The practice of government and bureaucracy was deeply dependent on the President.

In managing the home affairs, Nasser faced a serious challenge from the social movement *al-Iḥwān al-Muslimūn* (Islamic brotherhood). Islamic brotherhood was also among the nationalist movement in combating the British colonial power and its influence in Egypt. But it differs from Nasser in its main ideology. Nasser offers Arab-socialism whereas the Brotherhood offers Islam (Islamic law) as an alternative. In the era of Nasser, domestically the conflict of power, interest and influence was between the Brotherhood (which was symbolized by its agenda of applying Islamic law) and Nasser's government. Once, they came to a compromise agreement but in another time the interrelation between the two was full of antagonism and often physical violence.⁹⁸

⁹⁷ Najib, *al-Tanzīm*, p. 59; El-Anshari, al-Muḡmal; al-Rafii, Abdul Rahman, *Tarikh Harakah al-Wathaniyyah wa tathawwuru al-Nizām al-Siyasi fi Misr*, two vols., (Cairo: 1981-1985); Farhoud, Ahlam, Muhammad al-Sadi, *Mauqī'u al-Sulṭah al-Qaḍāiyyah fī al-nizām al-Siyasi al-Miṣr*, Ph.D., diss. Political Sciences, Cairo University, 1998, pp. 69-99.

⁹⁸ Rubin, Barry, *Islamic Fundamentalism in Egyptian Politics* (London: Macmillan, 1990), pp. 10-15; Ibrahim, Saad Eddin, *Egypt: Internal Challenges and Regional Stability* (London: Routledge &

In 1969, in the name of revolution and socialism and to defeat the Brotherhood's opposition and empowering his government, Nasser systematically and directly brought the judiciary apparatus and legal system under his control. All personnel of law enforcement (judges, attorney) were managed by special regulations which put them easily under the control of Nasser.⁹⁹

Anwar Sadat's Era and Democratic Process: Accommodation, Opposition and Tragedy

After the death of Nasser (1970), Anwar Sadat came to power. In the beginning of his leadership, Sadat tried to make a new approach: he made possible the restricted multi-party system, he started the gradual process of democratization, got close to hear the demand of Brotherhood's leaders and other oppositional faction as well, and also revitalized the role and function of al-Azhar University and tried to open civil freedom.¹⁰⁰

Sadat's foreign policy was different from Nasser's. He was close to the West (USA), a bit liberal and acted as if pro-democracy. On close reading of his politics of law, one can say that it was consolidative-oligarchy. It was marked by the practice of restricted democracy in order to consolidate the power and at the same time accumulate it until the power could be centralized again.¹⁰¹

The era of Sadat's could be separated into two parts. The first was the beginning of his government (1970-1976). In this era the supremacy of law and the independence of legal institution

Kegan Paul, 1987).

⁹⁹ Farhoud, *Mauqiu al-Sulthah*, pp. 221-228.

¹⁰⁰ Farhoud, *ibid*; El-Anshari, *al-Muğmal*.

¹⁰¹ Farhoud, *ibid*, pp. 498-499.

were well-practiced. The second was the era between 1976 and 1981. In the era, the extra-ordinary legal institution was systematically built, the supremacy of law and the independence of legal institution were destroyed.¹⁰²

In the first era of Sadat's government, in line with the emergence of democratic process, the issue of applying Islamic law became a hot public debate. Should Egypt become an Islamic state which applies fully the Islamic law as the main opposition urged, or remains as a nation-state was the main question of debate. In coping with the situation and public debate, Sadat tried to be moderate: he let Egypt remain as a nation-state but with the concession for the Islamic opposition that "the principle of Islamic syariah is one of the legal sources in the process of legislation". The concession implies that the legal substance of the Constitution 1964 should be changed. Therefore, with such a legal change, came the new (Constitution of 1971).¹⁰³

The beginning of introducing democracy, the process of opening public participation, restructuring system of economy (from Nasser's socialism to capitalism) made the condition of government in the critical and transitional periods. Furthermore, due to those political as well as economic changes many new problems came: urban poverty increased, problems of health care, educational opportunity and the disappearance of social safety net as they were guaranteed during Nasser's era. At the same time, because of the previous wars with Israel, Egypt was not in a secure position psychologically and geographically. Seeing those conditions, Sadat jumped to the conclusion that one of the problems must be solved. He chose to make a peaceful agreement in order to gain security and at the same time return the lost Egyptian territory and Egyptian self-confidence. Then, two agreements were made with Israel

¹⁰² *Ibid.*

¹⁰³ Al-Minyawi, Muhammad Badri, *Dlawabithu al-Ilaqah bayna al-Syariah al-Islamiyyah wa al-Nudzum al-Qanuniyyahfi al-Bilad al-Arabiyyah* (Cairo: Minister of Justice, n.d.), p- 9.

in 1978 and 1979.

The policy of Sadat in making a peaceful agreement with Israel received a severe accusation especially from the Islamic radical groups which considered the agreements as a humiliation of Islam and Egypt and at the same time making too many concessions to Israel. Because the main agenda of Israel (as they believed) was not to let any Arab country grow stronger and bigger.

To cool the situation down, Sadat made another compromise with the Islamic opposition that was the new approach of applying Islamic law in the constitution. That was: "the principles of Islamic syariah will be the only legal source of legislation". However, despite such a compromise, Islamic opposition would never believe in Sadat's leadership and on 6 October 1981 Sadat was killed by the opposition. Indeed it was the great political violence and tragedy in Egyptian history.¹⁰⁴

Husni Mubarak's Era: The emergence of Pragmatic-realism

On 14 October 1981 Husni Mubarak came to power as the new president of Egypt. His governmental management was marked by strengthening the role of state in dealing with the social-conflicts, controlling the opposition carefully, planning the economic development, maximalizing the pragmatic-realistic approach in social welfare, letting the military circle and power in the heart of decision-making process as before.

In general, his politics of law is pragmatic-realist: he continues Sadat's policy of letting the extra-ordinary court and quasi-military court exist, Islamic law is accomodated in the

¹⁰⁴ Rubin, *Islamic Fundamentalism*, pp. 10-15.

constitution as before, besides he does not abolish many emergency regulations which give the state and bureaucracy extra-judicial power to solve what is regarded as extra-ordinary legal cases. His foreign policy is also the continuation of Sadat's policy: getting close to the USA, continuing the peaceful agreement with Israel.

Until 1986, Mubarak served and played very centrally in combating what he considered as destabilizing factors for creating the security and prosperity of the nation-state Egypt. He tolerated political as well as legal violence occurring in the cases of labour protest in 1986, extra-legal treatment due to the murder of some ruling-party prominent members, extra-legal treatment of national opposition of entrepreneurs and Islamic oppositions in 1984 until 1986.¹⁰⁵

Politically, the anatomy of conflicts during the Mubarak's time is not far from before. What is different is in the art of combining repressive action and accommodation. Mubarak seems to be Sadat in the first period of his government. The limit of his accommodation to groups of opposition is he does not allow any political party based on Islam to exist. Islamic brotherhood has tried to propose such a party. But so far this is rejected. Instead, the Brotherhood made an alliance with secular party and in exchange, the Brotherhood proposes the candidate of his own to be a member of parliament.¹⁰⁶

Another example of his method to cope with the oppositional power is using al-Azhar University and state-sponsored Islamic institution such as *Dār al-Iftā* as means of mediating politics between the centre of power and oppositional issues. For this purpose, he tries to reform al-Azhar University, place the moderate and reform-oriented '*ulamā*' in the strategical positions and build a better infrastructure for teaching and research centres.

¹⁰⁵ *Al-Taqrīr al-Istirāji al-‘Arab 1985* (Cairo: Markaz al-Dirasat al-Istirojiyyah bi al-Ahram, 1986), p. 317.

¹⁰⁶ Rubin, *ibid*; Farhoud, *ibid*, pp. 310-312.

For al-Azhar and the *Dār al-Iftā*, being the mediative political brokerage is not without risk. Once they are too state-oriented, their audience will leave them automatically and regard the institutions as only means of state agents in legitimating the state policy. But on the contrary, when they try to be more public-oriented, the power of bureaucracy and state will become suspicious and will not let them to get closer to the oppositional powers.¹⁰⁷

However, the effort of Islamic law proponents to apply a comprehensive Islamic law is not ending. It can be through formal legal drafting process such as parliament or through building public discourse of the necessity for the Egyptian to apply the law. However, until the present time, except for Islamic family law, no part of Egyptian public law can be regarded as fully Islamic (in accordance with the Islamic traditional standard of criminal or public law).

¹⁰⁷ Skovgard-Petersen, Jakob, *Defining Islam for the Egyptian State: Muftis and Fatwas of Dār al-Iftā* (Leiden: EJ.Brill, 1997).

CHAPTER II

Islam in the Indonesian Social Context

II. ISLAM IN THE INDONESIAN SOCIAL CONTEXT

A. Towards Islamization: Process of Syncretism and Acculturation

Through a peaceful process and without any significant encounter, Islam came to the Archipelago (Nusantara).¹ Before the coming of Islam into this region via Malaccan Strait in the XIIIth century, the region was one of the most significant Hindu and Buddha centers. The existence of the strong Sriwijaya Kingdom (Buddha) in South Sumatera as well as dynasty of Syailendra (Hindu) in the sixth century was sort of a historical evidence.² So far, according to some historians, the influence of a syncretistic and metaphysical Hindu-Buddhism, some elements of native belief (e.g, Animism and Dynamism) and the process of their unification and evolution which occur especially in the rural sub-kingdoms (like in Java), have created forms of social, cultural, and even political expression, which are still observable at the present.³

Within the context of pre-Islamic Java, the rooted influences which manifest themselves in tradition, folklore and systems of metaphysics as well as in philosophy and more expressively in the norms of power (politics) can be summarized as follows: the basic element of the principles is the interrelation between external cosmos and inner self. The concept empirically describes the development of a closed relationship between the order of the universe and the objective human kingdom. This

¹ Hooker, M.B. *Islam in South-East Asia*. (Leiden: E.J.Brill, 1983)
Nieuwenhuijze, C.A.O. (n.d). *Aspects of Islam in Post-Colonial Indonesia*. The Hague and Bandung.

² K.artodirdjo, Sartono. et.al. *Sejarah Nasional Indonesia* (Jakarta: Departemen P dan K, 1975) Koentjaraningrat *Kebudayaan Jawa*. (Jakarta: P.N.Balai Pustaka, 1985).

³ Steinberg, David Joel, et.al. (1971). *In-Search of South-East Asia: A Modern History* (Singapore: Oxford University Press, 1971) Jay, Robert *Religion and Politics in Rural Central Java*. (Yale University, 1963)

metaphysical teaching explains that the universe is like a round continent, surrounded by a rim with many great islands in four corners as the resorts for four holy protectors. In the center of the globe (pivot area) is Mahameru mountain. Here reside some Deities. One of the Deities is Indra. Indra acts as the King of Deities. The human world is represented by Kingdom. The King as the shadow of Indra Deity must keep the Cosmos' balance through imitating the order of the Universe in constructing the system of its real power. Therefore, the four ministers, the four wives and the four functionaries in the four different jobs symbolizing the four directions in the Universe. The basic structure of the order was also implemented in the hierarchy of state functionaries. Until present days, the implementation of the concept can also be traced from the geopolitical location of a capital city, a palace and other stone memorials.⁴

The structure of power and bureaucracy in Majapahit—the greatest Hindu Kingdom pre-Islam--can also be analyzed as such: The structure of Majapahit government reflected a territorial power. It was decentralized by a specified bureaucracy as a manifestation of a cosmogonic belief.⁵

Although the acceleration of Islamic belief and institution occurred in XIIIth century with the creation of Pasai Kingdom, many researchers suggest that since the seventh century, individual, unorganized and sporadic Islamic missionary activities have taken place around Malaccan Strait. However, the restricted activities have become a significant stepping stone towards the establishment of an Islamic Kingdom in Samudera Pasai. The process of establishing an Islamic

⁴ Leur, J.C.van. (1967). *Indonesian Trade and Society* (Netherlands: W.van Hoeve Publisher Ltd, 1967) Berg, C.C. „The Javanese Picture of the Past", in Soedjatmoko. ed. *An Introduction to Indonesian Historiography* (Ithaca and London: Cornell University Press, 1975)

⁵ Moertono, Soemarsaid *State and Statecraft in Old Java* (Ithaca: Cornell University, 1962).

Kingdom was easier after the decline of Sriwijaya due to the offensive attack of Hindu Kingdom of Java (Singosari) which was ruled by Kertanegara. The wide possibility was also created by the severe expansion of the Chinese King Kublai Khan in thirteenth century. Such those situations motivated the Muslim-merchants to not only strengthen economic and trade network but also the infra-structure of the government. Thus, the local elite named Marah Silu, was proclaimed as a King (Sultan) with the degree Sultan Malik Saleh.⁶

There are some theories related to the peaceful process of spreading Islam in the region and so that it became a massive belief. The theories explain the reason of contact between indigenous society and culture with some Muslim individuals and a foreign culture brought by Islam: As it was described in the previous words that Islam came to the region through Muslim merchants. They spread Islam in costal regions in Sumatera and Java Island. At first after their coming, they created centers of merchandise at the costal areas. Through the centers, the merchants could communicate more intensively with the local people. Until the fifteenth century, the concentration of spreading Islam in Sumatera and Java still took place in coastal areas. Therefore, these coastal areas accepted Islam first. The more the merchants did contact, the closer to the indigenous people they were: here, a form of assimilation occurred. Some Muslim merchants married the local people and due to their wealth and social standing the merchants then took some strategic socio-economic positions by being the local economic elite.⁷

Thus, with such an Islamic development, Islam became socially and economically strong. The development meant also the

⁶ Tjandrasasmita, Uka *The Arrival and Expansion of Islam in Indonesia*. A paper delivered in Seminar on Islam in Southeast Asia, Jakarta, 1982.

⁷ Hourani, George Fadlo, *Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times*. (Princeton University Press, 1951) Benda, Harry J., *Bulan Sabit dan Matahari Terbit* (Jakarta: Pustaka Jaya, 1980)

reducing of political influence of Majapahit Kingdom in East Java and Mataram Kingdom in Central Java. Furthermore, in seventeenth century, the King of Mataram embraced Islam. Within this condition, the way towards a massive and intensive islamization became wider and wider.⁸

Seeing the development one can assume that at the beginning, Islam in Indonesia was an urban, economic and business phenomenon and power. The first adherent of Islam was the economic elite of society. Most followers of Islam then were members of the urban society.

The socio-economic stratification of Muslims mentioned above *vis a vis* the indigenous elite, pattern and structure of the Javanese Kingdom which heavily lay on the traditional authority and patron client relationship made Islam more and more popular. One of the theories described the key factor of Islamic success was the basic teaching of egalitarianism based on monotheist principle. For the local aristocrat and ruling elite, being Islam meant gaining economic and political benefit. Being Islam meant also intra and extra-security: the elite realized the heavy rivalry among the local indigenous elite versus other external powers. The rivalry among the local indigenous elite could be an offensive attack of 'little' and local Kings in some regions, and the threath of external powers could be the tight business competition with the Chinese and Dutch businessmen. Hence, as J.C. van Leur described, especially among Javanese communities, being Muslims automatically meant gaining a social recognition as a member of a superior community and, therefore, being entitled for political power.⁹

⁸ Geertz, Clifford, Abangan, Santri, Priyayi dalam Masyarakat Jawa (Jakarta: Pustaka Jaya, 1981) Wertheim, W.F. Indonesian Society in Transition (Bandung: Sumur Bandung, 1956) Jay, Robert. (1957). Santri and Abangan, Religious Schism in Rural Central Java (Harvard University, 1957).

⁹ Leur, J.C.van. (1955). *Indonesian Trade and Society* (The Haque and Bandung: W.van Hoeve, 1955) Esp. Chapter 2,3 and 4.

Besides due to the mentioned social condition, the massive adherence of Islam was also caused by which aspect of Islam introduced firstly in the region. The main Muslim preachers were Hadramis, Persians and Indians. In their culture of origin, those people have a strong *sufi* tradition (mystical aspect). Therefore, the first aspect they introduced to local community was a *sufi* aspect. According to some Islamologists, the *sufi* aspect is the most flexible aspect of Islam in coping with foreign systems of belief and culture. To some extent, in that time, the *sufi* aspect could match together with Hindu-Buddhist tradition, which has already existed before their coming. The flexibility and adaptability of *sufi* Islam is believed to be one of the keys to success. And due to its flexibility, some of Java Kingdoms, e.g, Mataram, Demak, Gresik, Cirebon and others became Islamic Kingdoms.¹⁰

However, it is also important to state that from the geo-theological analyses one might conclude the mysticism brought by those Islamic preachers, long before the preachers came to Nusantara, was to some extent rooted and known by indigenous people, mainly the teaching and discourse on God, man, universe etc. The existence of Nuruddin Ar-raniri, Hamzah Fansuri and Samsuddin Pasai and their teachings were one of the evident. Therefore, it is not strange if in regard to the spread of Islam in the region (especially in Java), some researchers suggest that a kind of sharp syncretization occurred between Islam and Hindu-Buddhist teaching.¹¹ Because of the

Nieuwenhuijze, C. A.O.van, *Aspects of Islam in Post-Colonial Indonesia* (The Hague and Bandung: W.van Hoeve, 1958).

¹⁰ Geertz, Clifford, *The Religion of Java* (Chicago and London: The University of Chicago Press, 1976) Phoenix Edition.

¹¹ Al-Attas, Syed Muhammad Naguib, *Raniri and the Wujudhiyyah of 17th Century Aceh* (Singapore: Malaysian Branch of Royal Asiatic Society, 1966). Al-Attas, Syed Muhammad Naguib, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969) Geertz, C. *The Religion of Java* (New York: The Free Press, 1960)

syncretization, in the history of Islam in Indonesia, one can know about Islamic purification movement (Islamic reformism) which tries to purify Islam from local custom, heterodoxy and paganism. The later movement was later on introduced by Haji Miskin, Datuk Nan Rentjeh etc, in West Sumatera. Furthermore, the purification movement took place and centralized in the twentieth century in Yogyakarta—the most wellknown region for its heterodoxy, sincretism and paganism.¹²

About the business competition and political influence between Portugese/Dutch and other kingdoms in Nusantara one can analyse that despite local power has cooperated with foreign power (Islam), they lost some battles against Portugese/Dutch powers. It was due to the more sophisticated logistics and organization, Portugese and Dutch had. Compared to other networks of merchandice and power like Chinese network (which oftenly receive special benefit by becoming a mediative power between local and Dutch merchandice), local power and Muslim network were the main barriers of Portugese and Dutch expansion. Therefore, because of this historical experience and the history of Indonesian nationalism and its struggle against external-colonial power through many socio-political movements, later development indicates Islam as an important element in defining Indonesian identity.¹³

B. The Roots of Modern Islamic Thought in Indonesia

One may roughly classify two patterns and types of Islamic modern movement. The first type is the modern Islamic movement of socio-educational institutions. The second one is

¹² Nakamura, Mitsuo, *Bulan Sabit Muncul dan Balik Pohon Beringin* (Yogyakarta: Gadjah Mada University Press, 1983) P. 11.

¹³ Mehden, Fred R. von der. *Religion and Nationalism in Southeast Asia* (Madison, Milwaukee and London: The University of Wisconsin Press, 1968) Noer, Deliar, *The Modernist Muslim Movement in Indonesia 1900-42*. (Kuala Lumpur: Oxford University Press, 1973)

the modern Islamic movement through practical-political institution. The first type of modern Islamic movement through sosio-educational institutions began in the early twentieth century in West Sumatera. The most important pioneers of this movement, among others, are: Achmad Khatib and his disciples in Indonesia, e.g, Muhammad Djamil Djambek, Thaher Djalaluddin, Abdul Karim Amrullah, Abdullah Ahmad and in Jawa Ahmad Dahlan.¹⁴

Ahmad Khatib

His pseudoname according to Indonesian *ulama* is Syaikh Ahmad Khatib. He was born in Bukittinggi in 1855 into an *adat* (custom) and religious family. His first education was at Basic School and Teachers School in his village. In 1876, he went to Mecca. Because of his talent and intelligence, he became Imam in *Masjīd al-Haram* (Holy Mosque). He represented the adherent of Syafii. Despite he did not return back to his native land, Khatib's ideas influenced many of his disciples in Nusantara. His main Islamic reformative idea is his disagreement with *Tarekat Naqshabandiyah* and the Minang family custom dealing with the distribution of inheritance preferring a matrilineal form rather than a patrilineal or parental one.¹⁵ *Tarekat Naqshabandiah* itself considered by Khatib as a continuation from Hindu-Buddhistic element in Islam. Therefore according to him, it is the duty for every muslim to avoid such a heterodoc mixture in religious matters.

¹⁴ Noer, Deliar.(1973). *The Modernist*; Benda, Harry J. (1980). *Bulan Sabit dan Matahari Terbit* (Jakarta: Pustaka Jaya, 1980);Kutoyo, Sutrisno, *Kiai Haji Ahmad Dahlan dan Persyarikatan Muhammadiyah* (Jakarta: Balai Pustaka, 1998) Alfian, *Muhammadiyah: The Political Behavior of a Muslim Modernist Organization under Dutch Colonialist* (Yogyakarta: UGM Press, 1989); Azra, *The Transmission*.

¹⁵ Hamka, *Ayahku* (Jakarta: Wij ay a, 1958)

Thaher Jalaluddin

His complete name is Muhammad Thaher bin Syaikh Muhammad. He was born in Bukittinggi in 1869 within *ulama* and religious environment. Approximately in 1900, after his return from Mecca, he resided in Malaya. When he was in Malaya, Jalaluddin visited his country of birth twice. The first visit was in 1923, the second in 1927. In the second visit to his native country, he was jailed by the Dutch colonial rulers for six months.

Compared to other modernist Indonesian *ulama*, Jalaluddin was one who travelled a lot to foreign countries. In 1911 Jalaluddin visited London. Regarding the reform ideas of Islamic education, he was positively impressed by Al-Azhar University in Egypt. Because of his wide experience, Jalaluddin was the pioneer of a new method of expressing Islamic reform ideas. While other Indonesian *ulama* expressed their ideas through oral preaching, Jalaluddin used written media for his activities. The magazine he used was *al-Imām*. In 1908, he founded school called *al-Iqbāl al-Islāmiyyah* in Singapore. From his publications, one may conclude that he was impressed deeply by the educational system in al-Azhar and some Islamic reform ideas introduced by Muhammad Abduh and Jamaluddin al-Afghani in the *al-Manār* magazine. Later on, his magazine, *al-Imām* spread in several cities in Java, Sumatera, Sulawesi and Kalimantan. *Al-Imam* was the first important Islamic reformative magazine in the region. Furthermore, his idea of publishing a magazine and building a school was followed later by one of his disciple Abdullah Ahmad in Bukittinggi.¹⁶

Abdul Karim Amrullah

¹⁶ Azra, Azyumardi, The Transmission of al-Manar's Reformism to the Malay-Indonesian World: The Case of al-Imam and al-Munir. *Studio Islamika, Indonesian Journal for Islamic Studies*, 1999, vol.6, no.3.

Abdul Karim Amrullah, famous by his pseudonym Haji Rasul was born in Maninjau (West Sumatera) in 1879 into a distinguished family. His basic religious education was done in Minangkabau. In 1894 he travelled to Mecca to pursue his Islamic education for seven years. In the following years he visited Mecca again and he returned to Minangkabau in 1906. Since that year Haji Rasul continuously spread his Islamic thought through many religious gatherings in Sumatera and Malaya and through the *al-Munīr* magazine, coordinated by his colleague Abdullah Ahmad. He was wellknown for his sharp opposition towards local custom such as a matrilineal system of the family, *tarekat* (sufistic) tradition and heterodoxy between Islam and Hindu-Buddhistic teaching. His travel to Java in 1917 brought him to a closer contact to Muhammadiyah and the Islamic political movement such as Sarekat Islam. Because of his help, in 1925 Muhammadiyah could spread widely in West Sumatera. From 1929-1939, Haji Rasul was deeply involved in social, educational and reformativ Islamic activities. Because his activities were regarded by the Dutch colonial ruler as a destabilizing threat towards social order, he was expelled to Sukabumi (West Java). He died in Jakarta in the second of June 1945.¹⁷

Abdullah Ahmad

He was born in Padang Panjang in 1878 into a religious family. Abdullah Ahmad played a significant role in spreading Islamic reform ideas, mainly in publishing magazine and newspaper. He was the founder of *al-Munīr* (1916), a magazine for modernizing Islamic thought and a news magazine *al-Akhbar* in 1913 as well as the *al-Islam* magazine published by *Sarekat Islam*.

¹⁷ Hamka, *Ayahku*, op.cit. Abdullah, Taufik, *Schools and Politics: The Kaum Muda Movement in Indonesia (1927-1933)* (Ithaca: Modern Indonesia Project, Southeast Asia Program, Cornell University, 1971)

As it was described shortly above the *al-Munīr* magazine itself was the main press for spreading Islamic reform ideas after *al-Imām* magazine published in Singapura. This *al-Munīr* magazine was published from 1911-1916. The main issues of the magazine are the need for Muslims to free themselves from old custom and tradition influenced by Hindu-Buddhistic tradition, the opening gate of *iğtihād* (individual reasoning) and the acceptance of new ideas as the historical necessity for developing and interpreting Islam in accordance with the age. Like *al-Imām*, the writings in this magazine refer mainly to the *al-Manar* magazine published in Egypt. Furthermore, there was a serial writing about Musthafa Kamil, a nationalist hero of Egypt.¹⁸

Muhammadiyah

One of the most influential Islamic social organization is the Muhammadiyah. From its early establishment in 1912 until today's Indonesia, the Muhammadiyah has played a significant role in modernizing Islam in Indonesia.

Because of some suggestions of members of the *Budi Utomo* and his disciples, Ahmad Dahlan found the Muhammadiyah movement on the 18th of November 1912 in Yogyakarta. Dahlan himself was born into religious official members of Yogyakarta Kingdom in 1869. His birth name was Muhammad Darwis. In 1890, he was a disciple of Syaikh Ahmad Khatib in Mecca for one year. In 1903 he returned to Mecca to deepen his Islamic knowledge for two years. Afterwards Dahlan began his activities to spread his Islamic reform ideas centered in Yogyakarta. Because Dahlan himself was a member of *Budi Utomo*, his idea of Islamic purification and modernization related closely to Budi Utomo activities. In 1917, when there

¹⁸ Azra, Azyumardi. (1999). *Studia Islamica*, op.cit. Daya, Burhanuddin, *Gerakan Pembaharuan Pemikiran Islam: Kasus Sumatera Thawalib* (Yogyakarta: Tiara Wacana, 1995) Hamzah, Abu Bakar, *Al-Imam: 1st Role in Malay Society 1906-1908* (Kuala Lumpur: Pustaka Antara, 1981)

was a congress of *Budi Utomo* in Yogyakarta and at the same time the center of activities took place in Dahlan's house, he used this moment to spread his Islamic reform ideas. Since then Muhammadiyah began to become famous and its ideas spread outside Yogyakarta. The main theme of Dahlan¹'s speech was the same theme as was issued the above mentioned individuals in West Sumatera. Therefore after Abdul Karim Amrullah's return to West Sumatera from his visit and contact with some Muhammadiyah functionaries in Java to West Sumatera, the regional branches of Muhammadiyah extensively opened in the West Sumatera region.

It is necessary to mention that in the beginning of the twentieth century there were also some modern Islamic organizations like *al-Ġam'iyyah al-Hairiyyah*, established in Jakarta in 1905, *Persyarikatan Ulama*, established in Majalengka (West Java) in 1911, *al-Irsyad*, established in Jakarta in 1913 and *Persatuan Islam*, established in Bandung in 1920.

Compared to Muhammadiyah in their volume of activities and quantity of members, these latter organizations played a minor role. Muhammadiyah can execute and extend its activity, within along time of duration. It has also a very influential position with regard to establishing and promoting modern social, educational and religious institutions by building modern schools, hospitals, boy-scout movements even universities. Even at present, the extensive and broad networks of Muhammadiyah still live on.¹⁹

The Islamic organizations which have the same platform of mission like Muhammadiyah but with smaller influence in the society are *Persatuan Islam (Persis)*, *al-Irsyad* and *Ġam'iyyah al-Hair*.

¹⁹ Noer, Deliar. (1973). *The Modernist*, op. Cit. pp. 37-95. Pijper, G.F. (1985/ *Beberapa Studi tentang Islam di Indonesia 1900-1950*. Jakarta: UI Press.

Nahdlatul Ulama

In 1926 came to existence the new organization called *Nahdlatul Ulama* (NU). The organization was established in Surabaya. It differed in its mission from *Muhammadiyah* and the like. The *Nahdlatul Ulama* defined the mission as defending and conserving the practice of the four Islamic sunni school of thoughts (*madhab*). Thus, in term of methodology and relation to the inquiry into Islamic law, *Nahdlatul Ulama* tended to be conservative and traditionalist.²⁰

In fact, the establishment of *Nahdlatul Ulama* was a rejection of and reaction to the Islamic reformation process as pioneered by Muhammad Abduh in the Egyptian context or the *Muhammadiyah* in Indonesian one. At the same time, it aimed to prevent the growing influence of Wahhabism in the Kingdom of Saudi Arabia, whose program was to reduce and act maximally against what the latter believed as the heretical innovatory creation of Islamic rituals which could not be tolerated (*bid'ah ḍalālāh*). The program included banning and destroying the building of accessories and ornamental decoration on the prophet Muhammad's grave made by some Muslim mystical sects or some traditionalist Muslim circles.²¹

In the methodological approach of Islamic legal thinking, the NU stressed that to follow one of the Sunnite school of thoughts is unavoidable. For the NU, the activity of *iğtihād* (Islamic legal reasoning) is restricted only within the boundary of one *madhab* (called *madhab fi al-aqwāl*) and the opening of the the gates of legal reasoning (*iğtihād*) is impossible. This impossibility is due to the limited capacity of present Muslim

²⁰ Saifuddin Zuhri, *Sejarah Kebangkitan Islam dan Perkembangannya di Indonesia* (Bandung: Al-Maarif, 1 980), p. 6-15; Noer, *Gerakan*, pp. 235-266.

²¹ Noer, *Gerakan*, pp. 241-254.

jurists to draft a new methodological formula leading to a new approach towards the traditional texts. Therefore, for the NU to follow one of the sunnite school of thoughts is a more realistic option.

In the educational context, the NU also differed from the Islamic reformist organizations. While the Muhammadiyah and the like tried to adopt the Western system of education, introduced in the Dutch school system, the NU chose *pesantren* (Islamic boarding school) as the main basis and institution for educating people. To some extent, the option of *pesantren* as the basis for education could be interpreted as a reaction to and rejection of the educational system of Dutch colonial power or at least as a strategy of cultural isolation and a self defense mechanism against colonial educational penetration.²²

After the independence of Indonesia, the influence of the NU in East, Middle and some parts of West Jawa is significant. Outside Jawa, the NU has a strong constituency in South Kalimantan (Banjarmasin). Because of these socio-religious characteristics, the NU and Muhammadiyah often differed and even took position opposed to one another. However, after Indonesian independence, they united under the same political umbrella *Majelis Syuro Muslimin Indonesia (Masyumi)*. Due to political tension and dissatisfaction, between 1952 and 1973, the NU separated itself from Masyumi and became an independent political party. In 1973, the NU came back to its original roots as a socio-religious organization and distanced itself from all political parties.²³

²² Abdurrahman Wahid, "Pesantren sebagai Subkultur" in M.Dawam Rahardjo (ed.), *Pesantren dan Pembaharuan* (Jakarta: LP3ES, 1974), pp. 42-44.

²³ Alfian, *Hasil Pemilihan Umum 1955 untuk Dewan Perwakilan Rakyat* (Jakarta: Leknas, 1971), p. 9; Saifuddin Zuhri, *KH.Abdul Wahab Chasbullah: Bapak dan Pendiri Nahdlatul Ulama* (Jakarta: Yamunu, 1972).

Following the line of the NU in terms of Islamic legal thinking are some smaller Islamic organizations with a smaller influence in the society such as *Persatuan Tarbiyah Islamiyyah (Perti)* in West Sumatera, *al-Washliyyah* in North Sumatera, *Nahdlatul Wathan (NW)* in Lombok (West Nusa Tenggara) and *Persatuan Umat Islam (PUI)* in West Jawa.²⁴

After coming back to its original base as a socio-religious organization, the NU after 1980s, especially under the leadership of Abdurrahman Wahid, underwent a process of revitalization, reconceptualization and reorientation. It focused on the empowering of civil society, integrating firmly the Islamic oriented movement with national issues. Though it employed a traditional and conservative approach to Islamic thinking, the NU together with the young generation under the Islamic Student Association (*Himpunan Mahasiswa Islam*) played a leading role in promoting the concept of "Islamic vision, Indonesianism and modernism" (*Visi Islam, Keindonesiaan dan Kemodernan*). This cultural as well as intellectual movement will be described below.

C. State and Islamic Political Activism: The Formation of the National Ideology

As it was described in the former explanations that one type of Islamic modern movement in Indonesia was a political movement through political party. One of the Islamic political parties was *Partai Sarekat Islam* which had very influential position in modernizing Islam in the region. The *Partai Sarekat Islam* originated from *Sarekat Dagang Islam*. The party was established in 11 November 1912 in Solo. There were two major goals of establishing this party. The first was an external motivation; there was a tight competition of business between Chinese and native merchants. The second was internal motivation: within the native people there was an internal friction caused by geneological differentiation and

²⁴ Noer, *Gerakan*, pp. 235-266.

stratification. There were native people with aristocratic background who consider other native from non-aristocratic background inferior to the former. The former tended also to maintain their cultural as well as social privilege. The native people with non-aristocratic background include the majority of native merchants who were the main supporters of *Sarekat Islam*?²⁵

Sarekat Islam itself was founded by the prominent *batik* merchant Haji Samanhudi in Solo. Because Samanhudi obsessed by the idea that *Sarekat Islam* should become a big political organization and at the same time he realized his lack of capacity in managing the organization, he gave his mandatory job to Oemar Said Tjokroaminoto or was widely known as Hadji Oemar Said Tjokroaminoto (HOS Cokroaminoto). In the hands of Tjokroaminoto *Sarekat Islam* became bigger and stronger. Before he steered *Sarekat Islam*, Tjokroaminoto himself was known for his sharp opposition to customs and attitude that he considered as underestimating native people such as in the governmental offices only the Dutch who can sit on the chair whereas the native people should sit on the floor. He was also known for his idea that all people are equal regardless of their original background: Dutch, aristocratic and other ordinary people. The famous nickname for Tjokroaminoto was *Gatotkotjo Sarekat Islam*.²⁶

Besides Tjokroaminoto, the other prominent leaders of *Sarekat Islam* were Agus Salim and Abdoel Moeis. The last two originated also from the Islamic purification region: West Sumatera. Therefore it was not surprising that later on especially Agus Salim was known as a master key in

²⁵ Niel, Robert van, *The Emergence of the Modern Indonesian Elite* (The Hague and Bandung: W. van Hoeve, 1960) Ltd. Noer, Deliar (1973). *The Modernist*, op.cit. pp. 114-150.

²⁶ Noer, Deliar. (1973). *The Modernist*, op.cit, pp. 125. Sabirin, *Tarich Almarhum H.O.S. Tjokroaminoto -Pergerakan, Pahala dan Djahsanja* (Bandung: Sumber Ilmu, 1935).

Islamizing and modernizing *Sarekat Islam*.²⁷

From its history, especially between 1912-1921, one can conclude that the main focus of attention of *Sarekat Islam* was political activities related to issues of legal right advocacy for native people, such as political welfare for workers, building and strengthening economic networks, campaigning and socializing for socio-political equity among Dutch, Chinese and native aristocrats as well as non-aristocrat people.²⁸

By the coming of communism to Indonesia through the establishment of *Indische Social Democratische Vereniging* (ISDV) and because of its accute and long lasting internal conflict, the good track record of *Sarekat Islam* as a transformative political party which advocated people's and public issues and concern gradually decreased and devaluated. Even though its prominent leader Agus Salim had still an important role in the process of making Indonesian independence.²⁹

The Debate on the State Basis for the Independent Indonesia

The proclamation of the Indonesian independence which was declared by Sukarno and Hatta on the 17th August 1945 had a significant meaning for the empowerment of a nationalistic spirit among the Indonesian people. As it was described explicitly or implicitly in previous writings, the proclamation of the independence was the culmination point of the physical and psychological struggle of Indonesians against a common enemy (colonialism), whatever their ideological motivation: wether

²⁷ Salim, Hadji Agus. (1954). *Djedjak Langkah*. Djakarta: Tintamas.

²⁸ Pringgodigdo, A.K. (1950). *Sedjarah Pergerakan Rakjat Indonesia*. Jakarta: Pustaka Rakjat.

²⁹ McVey, Ruth Thomas. (1961). *The Comintern and the Rise of Indonesian Communism*. Ithaca: Cornell University.

Islamic, such as *Sarekat Islam*, or secular, such as the National Indonesian Party (*Partai Nasional Indonesia*).

However, shortly before the success of their struggle to expel the dominant foreign political power, internal factions based on ideological or temporary interest grew slowly. Every group with its own ideological vision, argued for the necessity of adopting a particular ideological alternative for the Independent Indonesia. Three groups dominated the debate on the basis of Indonesian state, mainly: a. secular nationalism; b. Islamic nationalism; c. socio-democracy. After a series of debates and tensions, they agreed to base Indonesia on *Pancasila* principles. The formula of compromise was known as *Piagam Jakarta* (the Jakarta Charter). The small committee representing all Indonesian factions in the process of compromise and agreement consisted of nine prominent figures: Abikusno Tjokrosujoso, Abdul Kahar Mudzakkir, Agus Salim, A. Wahid Hasyim (they were Muslim activists from *Sarekat Islam*, *Muhammadiyah* and *Nahdlatul Ulama*), Soekarno, Muhammad Hatta, Achmad Soebarjo, Muhammad Yamin (from the nationalist wing) and A.A. Maramis (Christian).³⁰

The agreement was made. But shortly before the announcement of the agreement, Muhammad Hatta urged that revision be made due to the serious dissatisfaction and the demands of a certain Indonesian circle in the Eastern part of Indonesian who had a serious objection to the first principle of *Pancasila* that was: Belief in one God with the obligation of applying Islamic Syaria for Muslims. After a short consultation with some Islamic leaders, the agreement was revised and became: Belief in one God.³¹

This short historical moment implicates a long political

³⁰ Endang Saifiiddin Anshari, *Piagam Djakarta 22 Juni 1945* (Bandung: Pustaka Perpustakaan Salman ITS, 1981).

³¹ Anshari, *Piagam Djakarta*.

controversy and tension between the future of the Indonesian state and Islam. For the Islamic community in Indonesia, the compromise of revising the first principle of Pancasila was understood as a symbol of Islamic defeat to the secular wing in defining the basis of the Indonesian state. For the secular wing, such a feeling of Muslims could hamper the process of national integration within Indonesian nation and society and at the same time lead to a political situation for isolating them in the decisive process of the coming Indonesia. However realizing the case, not long after Indonesian independence, the new Republic of Indonesia which was based on *Pancasila*, established the Ministry of Religious Affairs. The establishment of this ministry could not be separated from that historical moment and as was a sign of a further willingness towards achieving compromise and harmony in the Indonesian governmental structure and society at large. In relation to the establishment, the practice of Islamic family law in the Indonesia was consolidated bureaucratically by the Ministry.³²

The compromise on the 'white and black' paper had been made. Anyhow, the previous debate on the basis of Indonesian state was a direct reflection on the Indonesian political as well as social landscape, it is the mirror in which the future of Indonesian society can be seen and studied. The interconnected independent interests of Indonesian political streams and groupings vests on the feeling of being a continuation of such a psychology of debate.

In the following period of the history, based on the result of the first general election of 1955 which is regarded as the most and the only democratic election in Indonesia until 1998, such a debate in the Constituent Assembly was once more conducted but once more came to the same conclusion (though not by

³² Deliar Noer, *Administrasi Islam di Indonesia* (Jakarta: Rajawali-Yayasan Risalah, 1983).

design).³³

From Sarekat Islam to *Majelis Syuro Muslimin Indonesia (Masyumi)* : Consolidation and the Factionalism of Islamic Political Power

Soon after the popularity of Islamic political power symbolized by *Sarekat Islam* decreased due to the intense rivalry of ISDV (*Indische Social Democratic Vcreinigung*) -which later on became Indonesian Communist Party (*Partai Komunis Indonesia-PKI*)—the influence of the secular nationalist wing increased. Realizing this fact, the Islamic nationalist wing united after the independence of Indonesia, under one political party, the *Majelis Syuro Muslimin Indonesia (Masyumi)*.

Masyumi was established on 7-8 November 1945. The establishment of the party was supported by all of Islamic local as well as national movements. The full support was possible due to the long organizational experience under the Dutch colonial power before Indonesian independence. The unity was also possible, because of the leaders experience in the debate on the state basis of Indonesia against the secular-nationalist wing. The organizational experience and debate inspired them to be more united. Islamic political party *Masyumi* was a federative body which integrated all Islamic political leaders from all streams. The integration was aimed at contributing public political participation in the process of nation-building. Because of its federative character, which integrate all of Islamic political streams, *Masyumi* could not be a solid and strong party in the following phase of its existence. It was often in a fragile condition. This fragility was caused by an frequent internal conflicts and splits based on short term political interests or an internal difference among the Islamic streams.³⁴

³³ Maarif, *Studi*.

³⁴ Deliar Noer, *Partai Islam di Pentas Nasional* (Jakarta: Pustaka Utama Grafiti, 1987), pp. 44-47.

On the plurality and heterogeneity of Islamic leaders who were integrated in the Masyumi, it is relevant to quote Abu Hanifah's description as follows:

"The first chairman of the Masyumi was the well known Moslem leader of the old Sarekat Islam, Dr. Soekiman. The 'brain trust' were the younger intellectual Moslem leaders such as Sjafruddin Prawiranegara, Mohammad Roem, Kasman Singodimedjo, Jusuf Wibisono and myself. This younger group belonged to the 'religious' socialists. In their thinking they were a little different from another group of young Moslem leaders under the direction of Mohammad Natsir. Afterwards there were three groups in the Masyumi, the conservative group mainly consisting of Moslem religious leaders; the moderate groups consisting of Mohammad Natsir, Sjarrudin, Roem; and the more Western-thinking religious Socialists such as Dr. Soekiman, Jusuf Wibisono and my self. The moderate group was linked politically more to Sjahrir, while the conservative group and the religious Socialists happened to fight more side by side, especially during the first years of the Revolution".³⁵

Until 1952, Masyumi was the main house speaker of Indonesian Muslims, especially in the critical years after Indonesian independence. After 1952, its political role decreased. That was caused by the NU's resignation from the federation which then became an independent Islamic political party. Indeed the declaration of NU was a sign of Islamic political factionalism. As described before, the main motive of the disintegration and factionalism were the different outlooks of the Islamic streams (especially between the traditionalist wing and the reformist one), an unsolved internal political bargaining within the federation and the ever-changing condition of Indonesian governmental structure and ministries.³⁶

³⁵ Abu Hanifah, *Tales of Revolution* (Cremome, Sydney: Angus and Robertson, 1972), pp. 161-162.

³⁶ Maarif, *ibid*, pp.114-121.

Considering the relevance of this study, it is necessary to analyse the goal of the establishment of Masyumi political party. As it was described in the Basic Definition (*Anggaran Dasar*) and its interpretation, the goal of Masyumi was: "The goal of the party was the application of Islamic teaching and law in the individual life, society and the state Republic of Indonesia, towards the blessing of God".³⁷

In the interpretation of the Basic Definition, it was formulated in detail as follows: "We are towards the "good state and the blessing of God", the glorious state filled with God's blessing, the state perform its power based on the deliberation principles through its representative choosed by its people; the principle of people sovereignty, freedom, equality and tolerance, justice as it is instructed by Islam are applied; the Moslem people have the opportunity to govern the individual and societal affairs in accordance with the teaching of Islam and its law as reflected in the Quran and Sunnah; the other people from other denominations choose the freedom to believe and apply their religious teachings and their civilizations; in the state, where all citizens can live based on the pluralism; everyone has his own right. It included the principle of justice in social, economy and politics. There is freedom of thought, freedom of expression, freedom of applying religious principles which do not obstruct the state constitution and moral principles".³⁸

Another aspect which should be paid attention in the context of Islamic political activism in Indonesia is: how far the real Islamic political power in Indonesia after independence ?. The answer can be seen at the procentage of vote after the first general election in Indonesia (1955). From the free and democratic general election can be seen; from 257 seats in the competed parliament, the six Islamic political parties get total vote of 116 (45%). The other seats got by the Indonesian National Party (PNI) was 57 (22%). The Indonesian

³⁷ Maarif, *ibid*, pp.113.

³⁸ *Ibid*, pp.113-114.

Communist Party (Partai Komunis Indonesia -PKI) got 39 seats (15%), the other small political parties got 13%. From 45% of total vote got by Islamic political party, the two Islamic political Parties Masyumi got 57 seats (22%), Nahdlatul Ulama (NU) 45 seats (17,5%).³⁹

The seats and the background of political anatomy as reflected in the first general election had a significant influence in deciding the future of Islam in Indonesia in general and in the debate of Constituent Assembly which was formed based on the result of the election in particular.

The result of the election could form the parliamentary government based on the coalition of PNI-Masyumi-NU. The Constituent Assembly was also formed. But the debate on the basis of the state in the Assembly could not result anything until 1959. Therefore, Sukarno dissolved the Assembly issued the Presidential Decree. One of the content of the decree was dissolving the Assembly and Indonesia should refer back to the Pancasila and the 1945 Constitution as the basis of the state.⁴⁰ Thus, until the historical moment, the ideological friction within Indonesian nation was ended by the Presidential Decree. The decree has the emergency character. The continuation of Sukarno's leadership from 1959 until 1966 was coloured by the centralistic and authoritarian type of leadership. It was full of leftist political symbols and jargonism. The influence of such a leadership was the dissolution of Masyumi.⁴¹

Social Change, Public Discourse and Islamic Intellectualism: Continuity and Change (After 1970s).

³⁹ Alfian, *Hasil Pemilihan Umum*, p. 1.

⁴⁰ Maarif, *Studi*, pp.176-182.

⁴¹ *Ibid*, pp.187-192.

The fall of Sukarno and the dissolution of Indonesian Communist Party (*Partai Komunis Indonesia* -PKI) in 1966, gave the hope of freedom to the Muslim political activists. However, the hope did not come true. Soeharto with its political military power isolated themselves from any outsider's influence, though in the beginning of his leadership, Soeharto had a political support from Islamic political power in order to diminish communist influence radically.

The dissatisfaction of Muslim political activist began. The effort of its prominent leaders to reestablish the Sukarno's banned Masyumi was not permitted. Moreover, the effort of Muslim leaders from all political streams (traditionalist and reformist one) by any means to legalize the Jakarta Charter (*Piagam Djakarta*) had negative respond. Allan Samson described the Islamic policy in the era of Soeharto and the pesimistic situation of Islamic leaders as follows:

"In effect, the government was following the policy of Snouck Hurgronje, the eminent Dutch Islamologist of the late nineteenth and early twentieth century, who urged that Islamic religious activities be encouraged and political activities restricted".⁴²

"By 1971, all of this served to intensify a perception of politics which defined political participation as unremitting struggle, ideology as imperative demand, the "Islamic struggle" as a zero-sum political competition, secular political power as only semilegitimate, and the ummat Islam as a politically exclusivist concept".⁴³

In such a pesimistic condition, the political movement and the breakthrough of cultural religious discourse emerged. The political movement was introduced by HMS Mintaredja, the

⁴² Allan Samosn, "Indonesian Islam since the New Order" *m Readings on Islam in Southeast Asia*, compiled by Ahmad Ibrahim, Sharon Siddique and Yasmin Hussain(Singapore: ISEAS, 1985), p. 167.

⁴³ *Ibid.*

leader of Partai Muslimin Indonesia, the Islamic party which was dominated by Islamic modernist wing and under the influence of ex-Masyumi members. He criticized the political approach of the old Muslim political activists, who emphasized too far in using formal approach under the issue of bringing back the Jakarta Charter (Piagam Djakarta). Instead, he offered the new formula of a realistic political approach. Mintaredja stated:

"Where is the proof of the Perjuangan ummat Islam during the twenty-five years we have been free ?. It seems the public is already bored waiting for the results of the struggle which have been promised by leaders who only consider formal ideological struggle important. This (formal political approach) is empty; what is waited by the public and the ummat Islam especially are the (material) results of the political struggle. To achieve this result... we need to implement development in all fields, especially in the field of the economy..."⁴⁴

"Partai Muslimin Indonesia does not desire to carry out the formal political approach as formerly. Partai Muslimin Indonesia has already decided... to cooperate with the armed forces and get in line with the development group (program-oriented order). In other words, Partai Muslimin Indonesia will carry out a political material approach without forgetting its base, namely Islam".⁴⁵

In 1973, the political appearance of Indonesia changed. That was due to the governmental policy to simplify and reduce the quantity of political parties. Such a simplification caused to the integration of Islamic political leaders under Partai Persatuan Pembangunan (PPP). The president of the party was KH. Idham Chalid (NU), the chief of the Central Board was HMS Mintaredja (Partai Muslimin Indonesia) and the chief of the Consultative Assembly was KH. Bisri Syansuri (NU). Relates with the study, in the following periods, the role of the Partai

⁴⁴ Samson, *Ibid*, p.168.

⁴⁵ *Ibid*.

Persatuan Pembangunan (PPP) was dominant in the process of legal drafting of the Marriage Law (*Undang-undang Perkawinan* 1974). The law which was dominantly influenced by Islamic legal family concepts. The prime role was played by the mentioned KH Bisri Syansuri (NU).

On the cultural level, in 1970s emerged the public debate on the relation of Islam and state. The debate was pioneered by Nurcholish Madjid from the Islamic Student Association (HMI), one of the biggest student organizations traditionally under the strong influence of the late Islamic political party Masyumi. The focus of the debate were around: the historical necessity for the Indonesian Islamic community to further move towards the process of rationalization, to leave the apologetical character under the slogan of "Islamic state", to think the new formulation concerning the relation between Islam and state under the issue "Islam yes, Islamic political party no", and the Islamic "secularization" process.

Madjid's opinion caused warm and various reactions. From the old Masyumi, such issues were rejected. However, the influence of the issue in the coming Islam in Indonesia was great. Since then, began (especially in the young Muslim circle) the process of political reorientation, Islamic rethinking process even the reformulation of relationship between Islam and state. The ideas of those younger generations suggest the process of Islamic deideologization and Islamic depolitization under the main thema of modernization and pragmatism within the nation-state framework based on *Pancasila*.⁴⁶

In line with the new trend and the coming of the mentioned ideas of younger generation, in 1980, the process of mutual-understanding and even mutual accommodation between Islam and state December 1984 explicitey declared its socio-political

⁴⁶ Madjid, Nurcholish, *Islam, Kemodernan dan Keindortesiaan* (Bandung: Mizan, 1989); Rasjidi, M., *Koreksi terhadap Drs. Nurcholish Madjid tentang Sekularisasi* (Jakarta: Bulan Bintang, 1972); See also, Effendy, *Islam dan Negara*; Schumann, "Dilema Islam Kontemporer".

position: "the Republic Indonesia with its state basis Pancasila is the final form of their willingness".⁴⁷

Regarding this matter, Abdurrahman Wahid, leading figure of the NU stated:

"... NU should be directed towards creating a new "national consensus" concerning the position of Islam in the life of the state and nation. It could commence with the complete acceptance by the "Muslim side" of the state ideology, as proved by the acceptance of the Pancasila as the only principle in the life of public organizations in Indonesia. This is in turn need to be followed up with the integration of the "Muslim struggle" with the "national struggle" by gradually placing the "Muslim struggle" itself in the context of democratization. There should be no disturbing of the peace or weakening of the process of national integration which is presently becoming consolidated".⁴⁸

That was a short description of social context of Islam in Indonesia. The effort of formalization of Islamic law in general, in the structure of Indonesian government had been made by all of Islamic leaders (either reformist leaders or traditionalists) in 1950s without sufficient results. Realizing the failure, the coming generation (especially the generation in 1970s), made the new breakthrough and corrected the interpretation concerning the relationship of Islam and the existing structure of state by emphasizing that Indonesia should remain as a nation-state and not an Islamic state. The nation-state based on a national consensus (Pancasila) agreed by the founding fathers of the nation in 1945. To what extent the new interpretation can influence the process of the institutionalisation of Islamic family law and its codification in the future, can be seen in the next chapters.

⁴⁷ Abdurrahman Wahid, "The Nahdlatul Ulama and Islam in Present Day Indonesia" in Taufiq Abdullah and Sharon Siddique (eds.) *Islam and Society in Southeast Asia* (Singapore: ISEAS, 1988), pp.175-185.

⁴⁸ *ibid*

The history of Islamic law in Indonesia in the next chapter will focus on the relation between Islam and power in the years of its spreading, the network of Islamic relations between the centers of its early development (Mecca and Medina) and Indonesia and on the Islamic legal school of thought which dominated the Islamic legal character thereafter.

D. The History of Islamic Law in Indonesia

The Nusantara (Indonesia) was the Hindu and Buddhist region. The coming of Islam brought new values which in turn coloured public life. However, the Islamic stream which came to Indonesia was mystical (sufism). Mystical Islam was not radical in combating the existing Hinduized practices, rather it can accommodate which resulted in the emergence of syncretic Islam.⁴⁹ Thus, the coming of Islam to Indonesia did not bring about a social and cultural revolution of the existing local religious practices. Therefore, Islam took a very long time to spread and penetrate all aspects of life and it was accepted gradually and peacefully.⁵⁰

Compared to Egypt which is geographically close to Mecca and Medinah, Indonesia is far from the both early centers of Islamic development. The coming of Islam to Indonesia was mainly brought by the Gujarat Muslim traders and some Arab merchandts especially from Hadhramaut (Yemen). The direct

⁴⁹ Syed Naquib Alatas, *Preliminary Statement on General Theory of Islamization of the Malay-Indonesian Archipelago* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1969); Brian Horrison, *Southeast Asia; A Short History* (London: McMillan & Co, 1957). A.H.Hill, "The Coming of Islam to North Sumatera," in *Journal of Southeast Asian History* vol. 4, no. 1, March, 1963).

⁵⁰ Johns, Anthony H. "Sufism as a Category in Indonesian Literature and History," in *Journal of Southeast Asian History* 2 no. 2 (July, 1961); Harry J.Benda, "The Structure of Southeast Asian History: Some Preliminary Observations," in *Journal of Southeast Asian History* (March, 1962), p. 120.

Islamic network between Indonesia and Mecca developed very slowly.

The succession to power in the Aceh kingdom in 1636 from Sultan Iskandar Muda al-Tsani following following Sultan Iskandar Muda (1636) marked the beginnings of Islamic influence. Both Sultans had different religious advisers. Iskandar Muda had a religious adviser Shamsuddin al-Sumatrani, who was known as an advocate of pantheistic ideas, whereas Iskandar al-Tsani had Nuruddin al-Raniri, who was known as more legalist religious adviser and an opponent of al-Sumathrani's support for pantheism.⁵¹

The legalist stream of Islam in the region was empowered by increased contact with the Arab region and direct communication with the early centers of Islamic development. The coming of Abdul Rauf to Aceh in 1661 after studying more than twenty years in Yemen, Mecca and Medina was an important signal. In the next century, the coming of other prominent religious scholars such as Abdul Shamad and Kiemas Fachruddin from those centers of Islamic learning, who also wrote books on Islamic law, was another indication of the growing trend.⁵²

In the XIXth century, the transmission of Islamic legal ideas from those centres was stronger. A whole group of Indonesian muslim students were studying in Mecca; this group also very active in communicating ideas between that center and Indonesia by having regular correspondence with Muslim countrymen. One of those students was Nawawi al-Bantani, who wrote books on Syafiite Islamic legal commentaries, which, even today are read widely in Indonesia and other parts

⁵¹ Mudzhar, Mohamad Atho, "Fatwas of the Council of Indonesian Ulama: A Study of Islamic Legal Thought in Indonesia, 1975-1988" Ph. D dissertation (University of California Los Angeles, 1990), pp. 34-41.

⁵² Mudzhar, *Fatwas*.

of the Malay Muslim world.⁵³

The growth and spread of Islam in Sumatera followed-in the same way in both Java and Sulawesi. Although the process of Islamic legal penetration in Java was slower than in Sumatera, some Islamic Kingdoms already existed in Java at the beginning of XVth century (Demak, Mataram, Cirebon and Banten). In Sulawesi there were Islamic kingdoms in Goa and Ternate.⁵⁴

As Hooker stated, in those Islamic kingdoms, the influence of Islamic law could be detected. The minimal influence was restricted to Islamic family law especially related to marriage, repudiation and the like. The influence of Islam on other aspects of law (outside family law) could not be clearly defined. That was due to the dominan customary law (*adat* law) and to the growing influence of Dutch law.⁵⁵

The practice of Islamic family law in those Islamic kingdoms could also be detected in the terminologies such as *Kaum*, *Amil*, *Modin*, *Kayim* or *Lebai* which indicated that there were accepted religious functionaries who assisted the village leaders in their administrative duties. Those functionaries guide the people administratively as well as religiously in order to get legal legitimation of marriage, repudiation or the like. Beside that, they also assisted people to in their religious ceremonies

⁵³ Johns, "Islam in the Malay World," pp. 131-133; Mudzhar, *Fatwas*, p. 41.

⁵⁴ Hooker, M.B., *Islamic Law in Southeast Asia* (Singapore: Oxford University Press, 1984), pp.8-15, pp. 27-29; Basri, *CikHasan, Peradilan Agama di Indonesia* (Jakarta: Rajawali Press, 2000), pp. 113-121; Lev, Daniel S, *Islamic Courts in Indonesia: A Study in the Political Base of Legal Institutions* (Berkeley, Los Angeles, London: University of California Press, 1972), p.10.

⁵⁵ Hooker, M.B., *Adat Law in Modern Indonesia* (Kuala Lumpur: East Asian Historical Monograph, Oxford University Press, 1978), p. 104.

and rituals such as before burying the dead.⁵⁶

Though, such religious functionaries had more religious-cultural functions than politico-structural ones, the existence of a hierarchy of functionaries indicated that their functions were not only on the symbolic-cultural level but also at administrative and political ones.

Let us take the administration of Java Kingdom and its political system of government as an example. The hierarchy of religious bureaucracy of the kingdom was: *penghulu naib* for a place larger than a village or equal with a *kecamatan* (higher rank of *modin* at the village \t\Q\|*penghulu kabupaten* for the region equal to *kabupaten* (larger than a *kecamatan*}. Whereas for the central government of the Islamic Mataram Kingdom in Surakarta or Yogyakarta there was the *Kanjeng Penghulu* or *Penghulu Ageng*. Moreover, the local practice of Islam was expressed in the symbolic title of the King in Java *HingKang Sinuhun Senopati HingAlogo Sayidin Panotogomo Kalifatullah* which signifies the ruler of administrative power, the chief commander of armed forces and religious leader, the shadow of God.

E. The Politics of Law in Indonesia

Before the coming of Dutch colonial power in 1602, there were many local kingdoms whose power structures were based on their own ethnic and local traditions. In the era of those local kingdoms, the politics of law of the legal institutions designed to integrate local traditions and Islamic elements.⁵⁷ Which one

⁵⁶ Noeh, Zaini Ahmad, "Kata Pengantar Pnterjemah" in Lev, Daniel, S., *Peradilan Agama Islam di Indonesia: Suatu Studi tentang Landasan Politik Lembaga-lembaga Hukum* (Jakarta: Intermasa, 1986), p. 3.

⁵⁷ Johns, A.H. "Islam in Southeast Asia: Problems of Perspective" in *Readings on Islam in Southeast Asia*, compiled by Ahmad Ibrahim, Sharon Shiddique and Yasmin Husain (Singapore: ISEAS, 1985), pp.20-24; Puckelfs, M.C. "Six Centuries of Islamization in Java" in *Conversion to Islam*, edited by Nehemia Levtzion (New York: New York Inc., 1970); Winstedt, R.O., *The Malays: A*

was dominant and influential in the making of law was determined by how far local tradition could resist the penetration of Islamic law in the process of acculturation.

In general, in the Islamic kingdoms both within Java and outside of Java, elements of Islamic family law influenced local customs and local tradition.⁵⁸ However, the existence of legal institutions (courts) in those kingdoms was not entirely independent of the sultan (executive power), they were a part of the central power subordinate to the king in the feudal system. Thus, the separation of powers as we know it today did not exist.

The Era of Colonial Power

In the era of Dutch colonial power, the politics of law was discriminatory. The main aim was to strengthen the hegemony of colonial power, to split social integration within Indonesian society and avoid the emergence of a strong nationalist movement through vertical as well as horizontal social segregation and diversification. The basic colonial formulation of law divided the residents of the Dutch East Indies into many groups in accordance with horizontal and vertical conflict potential. For each group there existed a special standard of law.⁵⁹ The classification and grouping of people and their laws are as follows:

Cultural History (London: Routledge & Kegan Paul PLC, 1947); Alfian, "The Ulama in Acehnese Society" in *Southeast Asian Journal of Social Science*, Vol. 3, No. I, 1975, pp. 27-41.

⁵⁸ Mackeen, Abdul Majeed Mohamed, *Contemporary Islamic Legal Organization in Malaya* (New Haven: Yale University Southeast Asia Studies Monograph Series no. 13, 1969); Benda, Harry J., "Christiaan Snouck Hurgronje and the Foundation of Dutch Islamic Policy in Indonesia" in *The Journal of Modern History*, 30 (1958), pp. 338-347; Abdullah, Taufik., "Adat and Islam: An Examination of Conflict in Minangkabau" in *Indonesia* Vol. 2 (1966), Cornell Modern Indonesia Project, Ithaca, New York.

⁵⁹ Benda, "Christiaan", *Ibid.*

- a. Laws which were enforced only for Dutch or for people of foreign oriental origin or who were regarded as equivalent to Dutch,
- b. Laws which were promulgated for the native Christian people
- c. Laws which were promulgated for the native Muslims or Muslim foreigners
- d. Laws which were promulgated for native people who practiced local customs (*adat*)
- e. Intergroup Laws which were promulgated only for people from those different groups⁶⁰

Because of the various groupings of people before the law, the law enforcement and the judicial competence of legal institutions were complicated in ways which were sometimes not obvious. Underlyingly, this grouping meant that such laws were merely an instrument of colonial administration with the aim of hampering the rise of unity among native peoples and of decreasing the spirit of nationalism.⁶¹

Concerning the court system where the laws were enforced, there were five different courts:

- a. *Gubernemen* Court which were located in all big cities in the Dutch East Indies. This court is the main court of the colonial power; it was very influential and at the same time part of the legal engineering system supporting the system of Dutch colonial power,
- b. The court for native people: this kind of court was set up outside of Java and Madura, in the regions of Sumatera, Kalimantan, Sulawesi, Maluku, Lombok and Bali. The legal base of the court was local customs (*adat*).
- c. The court of *Swapraja*. This was located in many regions

⁶⁰ Supriadi, *Hukum Perkawinan*, p. 64; Gautama and Hornick, *An Introduction*, p. 9; Kansil und Kansil, *Pengantar*, p. 192-199.

⁶¹ Benda, "Christiaan" Ibid; Suminto, Aqib, *Politik Islam di Hindia Belanda* (Jakarta: LP3ES, 1986).

outside of the *Pakualaman* region (Solo) and Pontianak. This kind of court can be called pseudo-formal court. In fact, it was a place of mediation either between or among litigants (a forum of arbitration),

- d. The Religious (Islamic) court. This was a section of the Swapraja court or native court. The main legal substance promulgated in the court was Islamic family law.
- e. The village court. This was spreaded all over Indonesia. The main function was the solving of litigants' problems (forum of arbitasion).⁶²

Following Indonesian Independence (Old Order)

Like other nation-states who had just gained their political independence the priority of Indonesian government after independence was to consolidate and modernize its internal governmental system. Beside that, the aim of all leaders of the Indonesian independence struggle was to defend the Indonesian independence through physical as well as diplomatic efforts, because the Dutch colonial power seemed to seek every opportunity to return and recover effective control.

Historically, after Indonesian independence and during the old order system under Sukarno Indonesia had four consecutive constitutions: a. 1945-1949: The 1945 Constitution; b. 1949-1950: Constitution of the Federal Indonesian Republic (Republik Indonesia Serikat/RIS); c. 1950-1959: the Temporal Constitution (Undang-undang Dasar Sementara); d. 1959 and later: The 1945 Constitution.⁶³

Both international and domestic politics conditioned the ever changing constitutions. The main characteristics of the politics

⁶² Supomo, *Sistem Hukum*, p. 20; Gautama and Hornick, *An Introduction*, pp. 2-14.

⁶³ Zaini, *Pengantar*, pp. 111-178.

of law during Sukarno's era was revolutionary-nationalistic. The main theme of such a policy was to strengthen the national integration of Indonesia and to build a revolution aimed at protecting Indonesia from the capitalistic global system, i.e. the return of colonialism or its power.⁶⁴

It is necessary to state that in the years between 1950-1959, Sukarno always tried to apply a liberal system of politics. However, the internal factions of Indonesians themselves, especially the conflicts concerning actual power-interest and power-sharing on the one hand, and the deadlock of debate in the constituent assembly on the basis of the state (in the way they had before independence, e.g. the Piagam Jakarta case) remain unsolved. Thus Soekarno saw himself forced to make a presidential decree dissolving the constituent assembly and declaring Indonesia must return to the 1945 constitution in order to save the nation from chaos and uncertainty.⁶⁵

As consequence, after the presidential decree of 1959, the practice of politics and government was 'guided democracy'. The 'guided democracy' was lead by Sukarno himself. After this decree, Indonesian politics was monopolized by Sukarno and tended to be very centralistic, left-oriented and sloganistic.⁶⁶

The Era of the New Order

⁶⁴ Boland, B.J. *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1971). Federspiel, Howard M., "The Military and Islam in Sukarno's Indonesia" in *Pacific Affairs* Vol. 46, No. 3, (1973), pp. 407-420; Kahin, George Me T., *Nationalism and Revolution in Indonesia*, Ithaca, New York, (1952); Feith, Herbert, *The Decline of Constitutional Democracy in Indonesia*, Ithaca, New York, (1962); Samson, Allan A., *Islam in Indonesian Politics*, in *Asian Survey*, December 1968, Vol. VIII, no. 12.

⁶⁵ Anshari, *The Jakarta* (Kuala Lumpur: Muslim Youth Movement of Malaysia, 1979). Feith, *The Decline*; Abdulgani, Ruslan, *Nationalism, Revolusiton and Guided Democracy* (Melbourne: Monash University, 1973).

⁶⁶ Feith, *The Decline*; Abdulgani, *Nationalism*.

After the fall of Soekarno in 1966, Soeharto came to power in 1968. In the beginning of his leadership, Soeharto tried to consolidate political power and resources by widening public participation and focusing on the economic program of the government.

Until 1980 Soeharto's politics of law was designed to consolidate the oligarchical structure of political as well as legal power. The law derived from the will of state with restricted reference to the will of people in order to achieve political stability, social harmony and avoid social conflict.⁶⁷ Within such a framework, Soeharto hoped that economic growth could be achieved. Political factionalism, different political views and legal debate about Piagam Jakarta would be minimalized.

The first legal policy which affected the national legislation was the 1970 law governing the structure and basic format of the court-system. The law declared that there were four court-systems operated: a. the public court; b. the religious (Islamic) court; c. the administrative court; d. the military court.⁶⁸

In the following period of his government (1980-1990), Soeharto reoriented his political strategy. In this era his politics of law was more pragmatic and realistic. Unlike the period before and after considering the political changes within the Islamic community, (e.g. the issue of reform by Nurcholish Madjid and the like), Soeharto tried to balance power within the streams of Indonesian politics from abangan oriented policy

⁶⁷ Mahfudz, MD, Mohammad, *Politik Hukum di Indonesia* (Jakarta:LP3ES, 1998), p. 9, pp.13-14, pp.24-25; Nusantara, Abdul Hakim Garuda, *Politik Hukum Indonesia* (Jakarta: Yayasan LBH, 1988), p. 19; Joeniarto, *Sejarah Ketatanegaraan Indonesia* (Bandung: Alumni, 1974); Samson, Allan, A., "Indonesian Islam since the New Order" in Karl, D. Jackson and L. W. Pye (eds.), *Political Power and Communications in Indonesia* (Berkeley: University of California Press, 1978), pp. 196-226.

⁶⁸ Zaini, *Pengantar*, p. 80.

towards santri-oriented.

As in Sukarno's era, Soeharto monopolized the political scene. In order to gain political support from the Islamic community and seeing that his former political bases during 1970-1980 (the military, the ruling party Golongan Karya) might not support him for the following presidency, Soeharto accommodated the aspirations of the Islamic community . This involved legal as well as political support for the improvement of the religious (Islamic) court, the better enforcement of Islamic family law and its codification. In practice, the policy encouraged the institutionalization of Islamic law; the 1970 law governing the structure of the court-system, the promulgation of the Marriage Law 1974, political as well as legal protection of the religious (Islamic) court by law No. 7 (1989). A detailed of this topic is found in the next chapter.

Comparative Analysis on Islam in the Egyptian and Indonesian Social Context: Differences and Similarities

Seeing the relevance of this study, deeper analysis on the above mentioned description implies that there exist differences and similarities in the social context of growth and development of Islamic law especially related to the process of its institutionalization and codification in line with socio-political dynamics which occur in both countries.

In regard with the differences, there are seven main differences which influence the process of institutionalization and codification of Islamic family law in Egypt and Indonesia. First, the strong historical roots of Islam and its earlier coming to the former than to the latter influence more clearly and greatly the social structure of Egyptian society than of the Indonesian one. From the beginning days of the coming of Islam and culminating in the tenth century with the establishment of Shiite-Fatimite dynasty, the process of massive and extensive Islamization and Arabization had occurred. According to the historians, since this time, what happened in Egypt is not only the massive conversion of Coptic to Islam and the coming of more Arab immigrants from the neighbouring places but also the religious ceremonies of Coptic-Christian had been held in Arabic language.⁶⁹

The process of Islamization and Arabization had occurred faster because of close contact between Egypt and some centers of Islamic spreading and civilization. Compared to Indonesia, the geographical distance between Egypt and Madina is nearer. Furthermore, in the context of political rivalry between Umayyad dynasty and its proponents in Damascus *vis-a-vis* Abbasid and its proponents in Baghdad, Egypt could develop itself into the new center of Shiite Islam in the tenth century and had grown into another alternative center of Islamic growth.

⁶⁹ *Imara*, Indama ashbahat, p. 5.

In such a milieu the historical roots of Islam are deeper, moreover had been institutionalized in the system of governmental administration. It is also necessary to mention that the shiite governmental concept and leadership had its own type. It is more exclusive and resembles the closed concept of leadership which maintains the genetical preference (prophet Muhammad heredity). Therefore this type of leadership and governmental system could enhance the process of Arabisation. Let a lone, since this time Egypt has never fallen to non-Islamic dynasties.⁷⁰

Because of these strong Islamic historical roots, in modern times when Egypt proclaimed itself as a nation-state and preferred unitary concept of its judicial system of courts by abolishing Religious court and Millet court and integrating these courts into public court, caused non-problematic reaction as in Indonesia. The reason is for the Egyptian Muslims the integration of Religious court to the Public Court will never threaten them and out of their imagination that it could abolish the application of Islamic family law which had been traditionally practiced in the court system dealing with the matters.

Seeing from this historical perspective, the spreading and development of Islam in Indonesia had occurred differently. The historical proof indicated that only after XIIth century Islam as collective identity had grown stronger, crystallized and institutionalized in the system of government. The institutionalization of Islam had only taken place in one place called Samudera Pasai (Aceh). It had not taken place as massive conversion to Islam or rapid institutional change in all Sumatera.⁷¹

⁷⁰ Imara, *ibid*,

⁷¹ Woodward, Mark R., *Islam Jawa: Kesalehan Normatif versus Kebatinan*

The island Java which later became the most populous and significant region socially and politically had been penetrated marginally by Islam in the XVth century onward.³ The penetration of Islam in the region grew slowly, partially and occurred through patterns of non-Arabian style. Instead it grew through sufistical mode of spreading which try to accommodate and combine the sufistical elements of Islam, pre-Islamic theosophy (Hindu-Buddistic elements) and local customs.⁷²

In short, Islam appears as a syncretical form of belief as result of the process of acculturation. Moreover, until the recent time, the psycho-religious condition of the Java society is still dominated by this syncretical type. In such a social condition, it differs from the Egyptian Muslim society, the 'pious' Muslim in Indonesia (often called as *santri* as antonym of 'non-pious' Muslim or *abangan*) demand and feel more secure if the state try to accommodate their reight to protect their Islamic identity by creating a religious court (Islamic court) which affirm practice Islamic family law in solving the cases.

This psycho-religious condition and demanding self-identification by explicit social grouping in the form of religious court (Islamic court) can be interpreted as their worriness due to their knowledge of the weak Islamic historical roots in forming public discourse, in influencing public institutions and creating Indonesian values at large. Therefore it is not comparable to the Egyptian Islamic society. At the same time such a kind of psychology and public demand due to their bitter experience in the process of national debate on the basis of Indonesian state before and after independence and realizing that such a demand is realistic political concession and agreement within the existing Pancasila based nation-state Indonesia.

(Yogyakarta: LkiS, 1999), p. 80.

⁷² Peacock, J., *Muslim Puritans: Reformist Psychology in Southeast Asian Islam* (Berkeley: University of California Press, 1978), p. 43.

The second difference, the difference due to the geo-political setting. In regard with the Islamic intellectualism and discourse from the beginning of Islamic spreading at the time when the Islam was in the position of confronting European colonialism (modern time), Islam in Egypt can be seen as Islam in the 'central area' whereas Islam in Indonesia is in the 'peripheral' one. As the consequence of this geo-political setting, 'peripheral' Islam needs to borrow and to some extent to make a kind of normative standard judgment from the 'central Islam'.⁷³

Such a case happened with Muhammadiyah which had borrowed many ideas from Muhammad Abduh. Furthermore, until recent time, the ideas which had grown in Egypt literally and scripturally were borrowed by the so called *salaf-circle* in Indonesia without any consideration of their different context and milieu. Another consequence of this interrelationship is the process of Islamic norm standardization is also influenced by Egyptian Islam especially by its centre al-Azhar. Because thousands of Indonesian students have been studying at the university. In turn, when they return to Indonesia they will copy and transmit the ideas, Islamic discourse and standardization of the Egyptian style. How far they can make general and parallel standard can be seen in the next chapter. One also should not forget that as the owner of the 'central' Islam, Egypt was earlier than Indonesia in responding the process of modernization in the era of Muhammad Ali.

The position of being the bearer of 'central Islam' like the Egypt is not possessed by Islam in Indonesia. Until in the beginning of XXth century, the Indonesian Muslim community is still in the peripheral area in terms of their intellectual discourse or their record as the inspirator of Islamic socio-political movement against colonialism. There were indeed local ulama who had social influence but it was restricted in Sumatera area,

⁷³ Hefner, Robert W., "Islam in an era of Nation-States: Politics and Religious Renewal in Muslim Southeast Asia" in Hefner and Patricia Horvath (eds.), *Islam in an Era of Nation-States* (University of Hawai'i Press, 1997), pp. 8-11.

Java island or maximally in Malay peninsula.

The contact between Indonesian Islamic intellectualism and modernity was also not carried out without mediative and intellectual brokerage of Egyptian Muslim reformists. Indonesian Muslim society was very weak in making direct contact with the central area of modernism mainly Europa. Therefore, it can be said that from intellectual and social capital perspective, Islam in Indonesia was in a weaker position than in Egypt.

Because of this intellectual and social capital weakness, historically Islam in Indonesia could not make any serious rivalry as an agent of social change and nationalistic movement guard in the early twentieth century (1920s onward) through Sarekat Islam against the secular movement such as ISDV (*Indische Socialistische Democratische Vereniging*) -the origin of the Indonesian Communist Party (*PKI*)-- which tended to promote the same issue but with more progressive means and clearer paradigm of struggle. In turn, it caused internal split in Sarekat Islam and made the latter be in a weaker position.⁷⁴

The third difference, compared to Islam in Indonesia, Islam in Egypt has exercised and practiced the institutionalizing process of Islamic family law, especially of the Hanafite school of thought in longer term. To some extent, the Hanafite school of thought is different from the Syafiite. The main difference lays: the former uses more logical elements in deriving the substance of laws from the sacred texts whereas the latter seems to be more rigid and shows inflexibility. Besides along the Islamic history, the Hanafite was also longer and more frequent as the formal school of thought of many Muslim dynasties than the Syafiite. Logically, the Hanafite has long historical precedence and experience in acting as a formal school of thought of

⁷⁴ Noer, *Gerakan Modern*, pp. 267-315.

certain political powers.⁷⁵

The fourth difference, the power of colonial characteristics in Egypt was more 'ethical' than in Indonesia. The first European colonial power in Egypt was France for only short time and then Britain for several years. The colonial powers which had been in Indonesia were Portuguese and Japan for a short time and the Dutch colonial power for more than three centuries. The short term of France colonialism in Egypt had brought about the attractive progress which motivated Muhammad Ali to follow. Whereas the British colonial power—to some extent—had introduced and built a good social and legal infrastructure by which the Egyptian powers could improve in the post-colonial era.⁷⁶

Such a condition differs very much from the situation in Indonesia. The Dutch colonial power was wellknown for its extrem capitalism. In gaining its own benefit, the power was only busy with how to exploit the colonialized land with building economic as well as social infrastructure which could maintain its short term goal that was economic benefit for The Hague and not for the Indonesians or for the future of Indonesia (Dutch East Indies). The infra-structural condition of the social welfare was very far from being good. The above mentioned condition in turn will however influence the basic capacity and social basis of both states in the process of the institutionalization and codification of Islamic family law in both countries.

The fifth difference, the growth of nationalism in Egyptian context is not like in Indonesia. In the eve of the XXth century, the nationalistic concept of Egypt has begun from the feeling of an Ottoman-islamic entity. The feeling has motivated people that in order to strengthen their socio-organizational power to protect their communal interest and identity from out-side

⁷⁵ Mahmassani, *Falsafah*, pp.39-46.

⁷⁶ Compare with Heftier and Horvatich, *Islam*, p. 24.

threat (in-group feeling), people from the same religious roots (Islam) should unite in one nation and protect their own interest in the name of Islam. Whereas in Indonesia, the vision of nationalism originated from ethno-symbolic expression, in which Javanistic ideas of power and social relation commonly dominated and coloured the nationalistic awakening signaled by the emergence of the elite under the "Budi Utomo" movement. The next evolutionary process of nationalistic ideas in Egypt has developed as follows: between 1900 and 1930s, another type of nationalism that was territorial nationalism has emerged. The territorial nationalism underlines that people originated from the same geographical territory should defend the territory together. In the year between 1930s and 1940s the nationalistic trend has changed and became Pan-Arab-Islamist-nationalism. After 1952 the trend had become another type that was Arab-socialist-nationalism in which Gamal Abdul Naser tried to maintain his revolutionary concept of change and defend his left wing strategy in governing his country.

After Naser's era until the 1990s, the vision of nationalism is a pragmatic-realistic nationalism which tries to reconsiliate all factions and social groups within the nation under the banner of economic development and political stability.

As mentioned earlier the growth of nationalism in Indonesia originated from ethno-primordial sentiment. The Budi Utomo was the main founder and later has developed became trans-ethnical nationalism in which Islamic elements have played a significant role in defining nationhood and nationalism. After 1920, the growth of Indonesian nationalism has become more secular; Sarekat Islam could no longer serve as the leading factor in defining and forming Indonesian nationalism. Instead, the more progressive left wing under the leadership of Semaun, Alimin and Darsono and other secular national movements under the leadership of Sukarno and Hatta such as PNI activist played another important role in enhancing Indonesian

nationalism.⁷⁷

In the era of the 1960s, the form of Indonesian nationalism is defined as nationalism coloured by the three elements of ideologies: secularism, Islamism and communism. In 1966, communist ideology was formally banned because of its mistake by a 'coup d'e tat' movement and the rest are secularism and Islamism. However, in the era of the 1970s until the 1990s, both of secularism and islamism under the strength of state's apparatus and pragmatic planning of national development should cooperate and stay together in order to enhance economic development of the country as well as to maintain political stability.

The sixth difference is the different social capital and democratic experience relating to the process of democracy and finding national-consensus. Though Egypt has its own historical heritage, but compared to Indonesia in modern time, Egypt has not enough experience in defining and exercising its democracy and finding the social solution in which the interrelated interest, antagonistic one and common interest among the individuals and social groups under the system of nation-state could find stable solution and fair share. The intellectual discourse in Egypt especially on Islam versus state could not be seen as a live and realistic anatomy of power sharing by which the proponent or the opponent of certain ideas agreed to come to the real and fair conclusion. That is due to its lacking experience of exercising democracy. After the 1950s Egypt was always under the real militaristic regime. It introduces monopoly of power and restricted public participation in the process of decision making of any political and legal issues as well.

On the other hand, Indonesia with its own pluralistic social

⁷⁷ Hefher und Horvatic, *ibid*, pp. 3-42; Niel, Robert van, *The Emergence of the Modern Indonesian Elite* (The Hague: W. van Hoeve, 1970), p. 2; Kahin, *Nationalism*, p. 28.

groups and multiple orientation of the society, has tried its own experience of democracy and transparency soon after it declared itself a nation-state. That is the fair and adjust general election of 1955. Though the result of this election could not satisfy any group and could not contribute to a significant structural reform towards a better governmental performance, but the experiences which had been made can be seen as a precious social capital and reflect the real anatomy of power in the Indonesian society at large. Based on the result of the general election, each group of the Indonesian society is aware that no political power and political reconciliation could be gained without alliance and consensus. To achieve the consensus, each group should go hand in hand with others regardless any difference among them.

The seventh difference is regional stability. Egypt is located in the main area of conflicts, especially conflict between Arab and Israel. The conflict caused serious disturbances in the Egyptian agenda of strengthening the concept of a nation-state. The conflict forced Egyptian state to form quickly an ideological framework for balancing and countering the external threat through coming back and jumping to the roots of the national spirit, especially Islam which has its strong historical ties with Egyptian nationalism. The process is also strengthened by internal force within Egyptian society especially the scriptural and textual Islamic movement such as al-Ikhwan al-Muslimun, which ties its existence and main theme of struggle to defend Arab and Muslim people from Israel and at the same time propagated people to apply *ṣarī'ah* as one of the main Islamic identity.

At this point, Indonesia differs from Egypt. Islam in Indonesia is more concern in its domestic problems than in external agenda. Despite some regional conflicts in the neighbouring country which involves Islamic symbol, such as in Moro Philippine, but compared to Egypt, Indonesia is situated in peaceful surroundings. Thus, the alienatioi Islam in Indonesia with domestic agenda is easier than in Egypt. The influence of international issue concerning Islam is minimal compared to a

domestic one.⁷⁸

However, another aspect of the ongoing conflict between Arab and Israel creates the potential possibility for the military elite to maintain the emergency condition and at the same time the conflict becomes a source of legitimacy to apply restricted democratic procedure of governance.

Beside those differences, both states and societies have common similarities. The first similarity is the role of Islam in social as well as cultural aspect cannot be neglected. How far Islam can influence the state and society depends on other variables which interact with Islam and how Islam corresponds to the need of people in the area. In Egypt, Islam was very influential until the end of the XIXth century. That was due to the reality that Islam was strongly interrelated with state and power. Egypt as part of the Ottoman empire could not escape from the paradigm that the political structure and power were based on the concept of *ḥilāfah*. On the contrary, the social and political situation of Egypt in 1920 until 1930 were signaled by the reform process in which the secularisation process had begun to take place. In line with this process, the idea of a new nationalism rose that is a territorial nationalism. This new type of nationalism defines that the communal identity of Egypt is not only identified by co-religionism (Islam) but by sharing and bounding together the community into a single geo-historic as well as geo-political similarities among the people from different ethnical and confessional background.⁷⁹

Therefore, due to this process, after its independence, the role of Islam in Egypt was marginalized more than before. Moreover when Naser came into power in 1952, instead of Islam he declared that Arab-socialism was the ideology of state.

⁷⁸ Gershoni and Jankowski, *Egypt*, pp. 3-22.

⁷⁹ *ibid.*

What was the role of Islam in Indonesia ?. From 1912 to 1920s, the influence of Islam as a national symbol of struggle against Dutch colonialism was strong. But by the spreading of secular and left nationalism together with the internal split within the Islamic community between a traditionalist wing (NU) and a reformist one (Muhammadiyah), the role of Islam began to become weak.

The culminative moment of the degradation of the social role of Islam could be seen that before Indonesian independence, there were three main proponents of nationalism: the secular nationalist, Islamic nationalism and left nationalism.⁸⁰ The three proponents of nationalism have more or less equal proponents in Indonesian society. The years between 1945 and 1965 were competitive years among the proponents of the three. From 1966 until 1980, the secular nationalist wing dominated the political landscape of Indonesian society whereas communism was banned in 1966. After the 1980s, the effort of maintaining his political supremacy over the military elite and searching a new alliance to back his power, Soeharto tried to use the Islam as his social and political legitimacy. Hence, Islam played a greater role in politics, law and in cultural aspects of the nation.

Within the context of the social role of Islam in Indonesia, it is necessary to mention that despite Islam could penetrate almost all the Indonesian society but Indonesia remains an un-arabized region, in terms of its language and cultural symbols. Some Arabic words indeed had become elements of the national vocabulary of politics and legal language, even in the national ideology the Pancasila. In the Pancasila we can find words such as "keadilan" derived from Arabic "adil" or "adalah"; Word "beradab" derived from Arabic word "adab", "rakyat" derived from "ra'iyyah", "hikmah" derived from "hikmah", "permusyawaratan" derived from "musyawarah" or "syuro", "perwakilan" derived from Arabic "wakil". Thus, the role of

⁸⁰ Heftier and Horvatich, *Islam*, pp. 3-42.

Islam in the nation-states of Egypt and Indonesia is a real phenomenon.

The second similarity is the dominant Sunnite Islamic tradition in Egypt and Indonesia. Compared to the Shiite tradition, the concept of communal leadership of the Sunnite is more inclusive, realistic and cooperative to the surroundings. The Sunnite concept of leadership is marked also by its definition that leadership is not the clerical privilege.

What is the relevance of this concept to the modern situation of both states? By knowing this inner cultural split of Islamic concept of leadership, theoretically both states and societies have spiritual openness and flexibility in adopting the current demand, especially related to the process of a more 'secularized' pattern of social leadership as well as communal interrelationship with the emergence of the nation-state concept.

The third similarity is along its history the concept of leadership of Sunnite Islam in Egypt or Indonesia failed to create a systematic contribution in enhancing the understanding of Islam within the boundary of a nation-state. In both states and societies, the application of Islamic law was the most manifested agenda in their struggle towards the process of Islamization. Thus, the agenda of the dialectical process between Islam and reality (the emergence of the nation-state) could not been applied. In turn, Islam was articulated as a. Law and not as a symbol of a spiritual guidance for all of citizens.

Within the Egyptian context, the concept of leadership is still dominated by Ibn Taimiyyah's view on Islamic legal revivalism and not on the reinterpretation of Islam (as a set of belief) within the rapid changing of society. Indeed Muhammad Abduh and some Egyptian intellectuals have tried to do so but Egyptian tradition and culture could not allow the process of reformation going further. As mentioned above, it could be assumed that the regional destabilizing conflict has hampered

the process.

The same happened in Indonesia in the beginning of independence. But after the 1970s, a new concept of Islamic leadership and a new trend of modifying the Islamic platform of struggle within the boundary of a nation-state have emerged within the Muslim elite. The discussion on Islam is not merely the discussion of applying Piagam Jakarta but it embraces the wider aspects: the process of democratization, strengthening of the cultural element towards civic education for young people in the universities etc. Indeed, the result is promising: Islam is more accepted culturally as a living religion in Indonesia and the process of public dialectics between Islam and state went smoothly without violence and mass-accusation.

The fourth similarity is the establishment of the dominant Islamic legal school of thought (*madhab*) in the nation-states (Egypt and Indonesia). The Islamic traditional thought in both societies were bound by only one school of thought (*madhab*). Egypt was Hanafite whereas Indonesia Syafiite. The eclectic model of Islamic legal thought by combining some thoughts of different schools was not popular. Such a tradition of thought is not allowing wide creativity for jurists in order to adjust the legal rigidity within a more complex and rapid changing of society. Instead, it implicates legal conservatism and rigidity.

The fifth similarity, after their independence, both states did not declare themselves as theocratic states (Islamic states), though the majority of people are Muslims. On the contrary, they prefer to be nation-states and adopt extensively political as well as legal institutions derived from western (secular) tradition. Of course, in doing so and seeing the cultural relevance of their societies, they made some adjustments and modifications, such as by establishing Department of Religious Affairs and maintaining cultural ties with religious symbols in governing society. The different variants of the adjustment and modification will be explained in the next chapter.

The next similarity is the effect and consequence of Islamic reform movement. In Egypt, the Islamic reform movement was introduced and pioneered largely by Muhammad Abduh. The agenda of reform were rejecting the strick binding tradition of sacred textual interpretation (*al-Qur'ān* or *ḥadīth*), opening the gate of legal reasoning as well as reinterpreting the sacred texts, proposing dialectical immitating and creativ innovation in social as well as scientific inquiry by absorbing the new methods, especially from Europa. Abduh's influence on Indonesian society can be detected from certain publications especially in West Sumatera and in turn it comes to Java by the establishment of Muhammadiyah.⁸¹

In the following phase of Islamic reform (either in Egypt or Indonesia), the movement caused dual effects simultaneously. On the one hand, opening and destructing the heretical practice on Islamic tradition of thought by encouraging people to be dare of immitating and making some innovations by reinterpreting the sacred texts in accordance with the social demand dialectically. The intellectual elite which closed to be 'secular' elite are the proponents of this approach. To some extend, they can achieve synthetical understanding between Islam and progressive ideas. On the other hand, the reform movement have caused more rigidity, scripturalism and textual orientation in the name of reinterpreting sacred text by abandoning the tradition of Islamic practice which was considered heretics (*bid'ah*). This second effect is predominantly results in Islamic revivalism under the banner of Islamic scripturalism and conservatism. In turn, both dual effects of Islamic reform take their different ways (even antagonistic ways) vis-'a-vis the process of further modernization carried out in both nation-states.

⁸¹ See Abdul Shamad, M.A., "Modernism in Islam in Indonesia with Special Reference to Muhammadiyah" in M.C. Ricklefs (ed.), *Islam in the Indonesian Social Context* (Munash University: Centre of Southeast Asian Studies, 1991), pp. 57-68; Hefher, Robert W., *Civil Islam: Muslims and Demoralization in Indonesia* (Princeton University Press, 2000).

In the Egyptian context, the different ways of scripturalism and neo-reformism can be explained as follows: on the one hand, in the name of Islamic revivalism, Hasan al-Banna and his followers, tried to build al-ikhwan al-muslimun to make a counter attack of westernization or any program associated with or viewed as "bringing Egyptian society towards liberalism" by trying to introduce all aspects of Islamic law to be applied. On the other hand, in the name of dialectics between Islam and modernization, Thaha Husein tried to make further development of the action plan of 'mutual symbiosis' between Islam and modernization in the nation-state context.⁸²

In the Indonesian context, the same came true. Masyumi and its followers tried to defend Piagam Jakarta as a manifestation and a way to apply all aspects of Islamic law in the public sphere. But on the other hand the effort of Masyumi was interrupted by the younger generation by declaring that the Islamic platform of Masyumi was unrealistic and tended to be very formalistic in defining the interrelation between Islam and nation-state.

What is the significance of the debate on the process of the institutionalization and codification of Islamic family law in both states will be explained in the next chapter.

⁸² Compare with Barton, Greg, "The International Context of the Emergence of Islamic Neo-Modernism in Indonesia" in M.C. Ricklefs (ed.) *Ibid*, pp. 69-82.

CHAPTER III

Institutionalization of Islamic Law: Egyptian Civil Court and Indonesian Islamic Court

III. Institutionalization of Islamic Law: Egyptian Civil Court and Indonesian Islamic Court

A. The History and Development of Civil Court in Egypt

Based on the chronology of events which can influence the existence of legal system in Egypt, the history and development of the Civil Court can be classified into three chronological periods:

- a. the period before 1875
- b. the period after 1875 until 1955
- c. the period after 1955 until 1990¹

Before 1875: Muhammad AH, Restructuring the Court System and Secularization

Because of the richness of Egyptian history and its socio-political role in the previous era, Ottoman dynasties regard Egypt as an autonomous region. However, the centralistic bureaucracy of Ottoman still tried to penetrate and control the whole system of Egyptian government in the era before Muhammad Ali. In the name of bureaucratisation and harmony of the central power to the peripheral one, the central power made any opportunity to place its judges in the strategical position of Egypt-With such a framework of relationship, it was not easy for Egypt to define and make systematical reform in order to reconstruct the performance of Egyptian court system. In the end of XVIIIth century, the court system of Ottoman as whole was stagnant, contaminated with the practice of corruption.²

In 1798 Napoleon Bonaparte with his troops occupied Egyptian territory. The coming of Bonaparte marked the beginning of structural reform and governmental changes. Shortly after his

¹ Compare with, Salim, *al-Nizām*.

² Salim, *al-Nizām*, pp. 15-50.

coming to Egypt, Bonaparte established a special court for commercial cases. The court was headed by a French judge and the members of judges were elected by the society of commerce in Egypt.

After the return of Bonaparte and all of his troops to France in 1800, the socio-political situation of Egypt was chaotic. Many groups competed with each other to dominate the power. There were at least three major powers which were involved in the competition: a. the power of Ottoman; b. the British power; c. the power of *Mamālik* troops. After consolidating the army and with the support of some local powers (outside the above mentioned), Muhammad Ali could combine his capability of army leadership and politics and was emerged successfully as an alternative power to determine the future of Egypt. In 1805 he came to power and brought many ideas of reform in the Egyptian landscape of political as well as governmental affairs, under the protection of Ottoman Empire.³

Although Ali was regarded himself as a part of Ottoman empire he could get autonomy for his governmental leadership from the former. From the beginning of his leadership Ali stressed that he wanted to reform the appearance of his governmental power and judicial power as well. The first step of his reform to judicial power was his instruction of establishing the "Governmental Board" (*Dīwān al-Waliy*). The main duties of the Board was to maintain political stability, conduct the judicial power and judge the legal conflicts between the foreigners and natives. In doing so, AH still regarded Islamic law as source of legal authority. The members of the Board were the experts of four Islamic School of thoughts.

In 1831, Ali made a special regulation concerning the law of procedure in the court. After some years (in 1837) he regulated the political order of his government by issuing the General Regulation on Politics (*Qānūn al-Siyāsah al-Ammah*). In

³ *Ibid.*

drafting and making the two laws, Ali tended to adopt some fundamental laws from France, instead of from the Islamic law or Islamic tradition of governmental system. In 1842, Ali made a further step in the process of adopting the France law in the Egyptian governmental system. He established a special body called The Society of Legal Assembly (*Majlis Ġam'iyyah Haqqāniyyah*). The main duties of the Assembly was to translate some France law to the Arabic language in order to adopt the former in fulfilling the agenda of reform for the bureaucracy and judicial power as well.⁴

Thus, the trend of reform in Muhammad Ali's era was marked by adopting the legal and governmental system from France. The reform—though slow—but indeed caused the process of marginalisation for Islamic Law. Islamic law which was theoretically and traditionally practiced in the court system for judging all problems of state before Ali's era was then practiced in matters related with the legal cases in the family conflict.⁵

Abbas: His Government, Successors and Continuity of Reform

Muhammad Ali died in 1848. The dominant role of his successor in the following era of Ali's dynasty was in the Abbas era. In the era of Abbas, the program of institutional and structural reform carried on the basis of the policy of Ali. The reform continued by Abbas with the publication of the law in Arabic language. The law consisted of 90 articles concerning the law on agriculture, public order, politics etc. In the judicial

⁴ Anshari, *al-Muġmal*, pp. 215-242; Toledano, Ehud R., *State and Society in Mid-Nineteenth Century Egypt* (Cambridge: Cambridge University Press, 1990), pp. 170-177.

⁵ Compare with, Brown, Nathan J., *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge Diversity Press, 1997), pp. 23-60.

power, Abbas divided Egypt into five regions.⁶

Abbas was succeeded by Said Basya (1854-1863). Said Basya tried to reformulate the worsening condition of judicial power by establishing the new legal institution called The Egyptian Commission. The idea behind the establishment of the Commission was to solve the commercial conflict between the Egyptian and foreigners. Theoretically, it was an Egyptian Court but practically it was a Mixed Court, where the foreign interest was very dominant and became the main agenda of concern. Generally from 1854 to 1863 the judicial power had deteriorated. The capability of political leadership decreased, the program of reform was disoriented. The judicial power was misused by growing amount of manipulation and corruption done by people in power. The economic condition of the country was in decline. Economically and politically, Egypt was dependent on the foreign power which was increasingly dominated by the British.⁷

Thus, before 1875, the condition of Egyptian judicial power was characterized by overlapped authority of courts. Formally, Egypt as part of Ottoman dynasty was still applying Islamic law. But on the practical level, Islamic law was replaced by other laws, especially adopted from France. Islamic law was only promulgated in the court as long as it was related with Muslim's family law. The influence of foreign law in Egypt would be greater in the future. It was due to the impracticality of Islamic law in coping with the situational demands and social change. Above all, copying the laws from France was easier than deriving Islamic laws, because the France model of reconstructing governmental and legal institution was formerly done. However, until 1875 the principle of power separation (judicative, executive and legislative) had not existed in Egypt. Hence, the judicial power was still part of the inseparable

⁶ Al-Anshari, *al-Muğmal*.

⁷ Salim, *Al-Nizām*; Brown, Nathan J., "The Precarious Life and Slow Death of the Mixed Courts of Egypt," *International Journal of Middle East Studies*, 25 (1), 1993, p. 33.

apparatus of executive authority.⁸

After 1875

Since 1875, the development of judicial power was marked by the two significant movements: a. the formal establishment of the Mixed Court in 1875; b. the establishment of the Civil Court (*al-Mahkamah al-Ahliyyah*) in 1883.⁹

The Mixed Court

The Mixed Court was defined as an Egyptian Court but it was designed for judging the conflicts between Egyptians and foreigners, especially in commercial cases. In the beginning, the laws promulgated in the court derived mostly from France but later on from Britain. The court was designed as temporary in nature. But on the practical level, due to the incapability of Egyptian political leadership, its economic dependence and growing influence of foreigners, Egyptian authority (Muhammad Ali's dynasty) could not escape from dominant foreign political as well as economic influence. Thus, the development of Mixed Court served many extra ordinary rights for foreigners.

The Creation of the Mixed Court

The existence of the Mixed Court could not be separated from the famous Egyptian jurist Nubar Pasha. Since 1860 Nubar Pasha saw that there was a chaotic situation in the judicial power of Egypt. The chaotic situation was further deteriorated by the overlapping existence of many court systems or pseudo-court systems as a result of governmental policy in the judicial power and the ambivalent condition of applying Islamic law. Moreover, the real demand told Nubar Pasha that it was very difficult for the dynasty to isolate from foreign influences because Egypt was in urgent need of foreign capital

⁸ Compare with, Brown, *The Rule of Law*, pp. 25-26.

⁹ Brown, *Ibid*, pp. 26-30.

investment. According to Nubar Pasha, to solve the problems Egypt should establish the Mixed Court. For him the establishment had also historical precedence in the central power of Ottoman. The central power had made many judicial agreements with foreign governments in order to share their own commercial interest. One of the agreements was to establish the Mixed Court. Then the proposal of agreement came from Said Pasha and Ismail Pasha (both were the kings of Ali's dynasty in Egypt).¹⁰

The Administration and System of The Mixed Court

As cited above most of the laws promulgated in the Mixed Court were derived from France. The reference book in the court was divided into two parts. The first book was related with commercial and civil laws, outside the family laws. The first book explained also the existence of the court in relation with local authority and foreign consulate as well. The second book related with public laws and order. It explained further the duties and rights of every legal practitioners: public servant of court, public prosecutors and lawyers as well.¹¹

The administration of the court was divided into two levels. The first level of the court consisted of seven judges. Four judges were foreigners and the rest were Egyptians. The chair of judges was headed by a foreigner. The second level of court consisted of eleven judges. Seven judges were foreigners and four were Egyptians. The chair of judges was also headed by a foreigner.¹²

The formal languages of court were Arabic, French and Italian. On the practical level, during nearly fifteen years the running language in the court was French. After the coming of British in Egypt in 1882, the British tried to enforce English. The

¹⁰ Brown, *The Rule of Law*, pp. 27-28, 29, 36,49; al-Anshari, *al-Muğmal*.

¹¹ Salim, *al-Nizām*, pp. 53-200.

¹² *Ibid.*

Arabic language itself was not used. When one of the parties involved in the court used Arabic, there was a translator.¹³

The development of the Mixed Court in the following years dominated the judicial power of Egypt. After 1882 the British power tried to use the court as one of its instruments in order to maintain its colonial influence and hegemony. The struggle of Egyptian national leaders in abolishing the court was one of the national agendas inspired by the feeling of nationalism. The result was not always promising. But in 1937, both Egyptian government and foreign authorities in Egypt made an agreement in Switzerland (Montreux Agreement). The agreement stated that from that year the role of the Mixed Court would decrease gradually. In fact, the total abolishment of the court took place in 1949.¹⁴

The Civil Court

The feeling of legal sovereignty of Egypt and the experience with the Mixed Court, urged the national leaders to establish the Civil Court in 1883. In turn, the development of the court was a starting point of legal rivalries, especially between the Mixed and Civil Court. By creating the Civil Court the Egyptians felt more confident before the Mixed Court and more optimistic to reconstruct their future of judicial power. Thus, the Civil Court was a national symbol of legal sovereignty.¹⁵

However, in the beginning of its existence, the system and administration of the Civil Court resembled the Mixed Court. The judges who were in charge of the administration were the judges who had previously worked in the Mixed Court or who had enough knowledge of the European law. Because of the shortage of judges, in the first level of the Civil Court, there was one foreign judge and in the second level of court there were two foreign judges. In all level of courts the formal and

¹³ *Ibid*; compare with, Brown, "The Precarious Life".

¹⁴ Brown, *The Rule of Law*, p. 68.

¹⁵ Najib, *Al-Tanqīm*, pp. 55-60; Salim, *al-Nizām*, pp. 205-225.

running language of court session was Arabic. The legal materials were derived from those applied in the Mixed Court, with the exception of the law of public order.¹⁶

Between 1889 and 1891, the influence of British colonial power was growing. The British colonial policy saw that the court could be dangerous for their interest. Some regulations on the system and administrations of the court were controlled by the colonial power. However, the court survived and played a dominant role as means of legal empowerment within the Egyptian governmental structure before and during the Egyptian independence.¹⁷

The *Millet* Court

The Islamic Court traditionally existed in Egypt. But under Muhammad AH and his successors, its influence in the judicial decision decreased. The Islamic Court could only gradually become a place for solving legal family conflict. The decrease of the judicial authority of the Islamic Court was due to Ali's policy which tend to be more secular, separating the state from religion and looking for and adopting the new laws governing the commerce and politics in order to look for the new strategies to cope with the new challenge that was the decline of the Egyptian economic sector. However, the process of secularization in the Ali's era in the XIXth century was not easy. Ali's dynasty realized that the cultural basis of Egyptian society was not wholly prepared for the programme.¹⁸

Realizing the difficulty and to balance the internal power within Egyptians themselves, in 1852, the *Millet* Court was established. The *Millet* Court was designed to promulgate the family law related with Coptic and non-Islamic family law. Because the structure of Egyptian government was deeply influenced by Islam, politically the establishment of the court

¹⁶ Sali, *al-Nizām*, pp. 285-301.

¹⁷ Salim, *Al-Nizām*, pp. 337-368.

¹⁸ Brown, *The Rule of Law*, pp. 3-4, 62, 63-69, 92.

was also aimed at responding the social demand from the non-Muslim community.

The growing influence of the Civil Court and secular-national ideology in Egyptian political development made both the separated *Millet* and *Šarī'a* (Islamic) Court unnecessary. Under the state regulation number 462 year 1955, they were integrated into the system of the Civil Court.¹⁹

B. Basic Principles and Operational System of the Civil Court in Egypt

In the following writing, the process of institutionalization of Islamic law in the structure of Egyptian government will be studied from how the Islamic law is integrated within the operated court system: what would be the basic and principles of operational norms and procedure, how the court is organized, how far the judge can be functional and how will the conflicting parties be treated in the court before the law as well. From knowing these all, then we can arrive at the analytical survey and comparison in the end of the chapter.

Basic Principles

The basic principles and operational system of Egyptian Civil Court are:

a. Two Hierarchies of Court Organization.²⁰

¹⁹ *Brown, Ibid*, p. 68.

²⁰ Abu Thalib, Hamid Muhammad, *Nizām al-Qaḍā al-Miṣrīfī Mīzānī al-Šar‘iyyah* (Cairo: Dar al-Fikr al-Arabi, 1993), p. 36; Najib, Muhammad Fathi, *al-Tanzīm al-Qaḍā’i al-Miṣr* (Haiah Misriyyah al-

In judging the legal matters among the litigants, the conflicting parties should at first bring the case to the lowest hierarchy of court. If the decision from the court can not be accepted, the case can be brought to the higher level of court (appeal court). However, there are some exceptional cases which only can be brought in the lowest level of court, not to the higher. The legal decision of the case must be final in the lowest court. Such a case happens when its nominal value is approximately between 500-5000 Egyptian pound.²¹

In addition, in the Egyptian system of court we find also the Supreme Court. Legally, the function of the court is not as the third stage of court hierarchy but it is the final resort where the final examination of legal cases could be carried out. Therefore, the court is called as court of cassation (*Maḥkamah al-Naqd*) and not as the court of the third stage. According to the principles and procedure of Egyptian legal judgement, the other duty of the court is also to check and investigate the correctness of legal procedure and measurement applied in solving the problems of the first stage and second stage court (*Maḥkamah Ibtidā'iyyah* and *Maḥkamah Ġuz'iyyah*).²²

However, the procedure of dealing with the legal case in the court of cassation is not the same as in the lower courts. The judges have no right to deal with the case from the beginning as by summoning the conflicting parties for hearing or cross-checking information's of litigants before the court, but they ought to merely examine the correctness of legal procedure and mechanism applied by the lower judges before the case brought to the cassation process.

Ammah li al-Kuttab, 2001), p. 77; Jumai, Abdul Basith, *Mabādi' al-Murāfa'āt* (Cairo: Dar al-Fikr al-Arabi, n.d.), p. 183; Fahmi, Muhammad Hamid, *al-Murāfa'ah al-Madāniyyah wa al-Tiğāriyyah* (Cairo: Maktabah Abdullah Wahbah, 1947-1948), p. 37.

²¹ Abu Thalib, *Nizām al-Qaḍā*, p. 39; An-Namr, Aminah Musthafa, *Qawānīn Murāfa'āt* (Iskandaria: Mansyaat a)-Maarif, n.d.), p. 28.

²² Najib, *Al-Tanqīm*, p. 77; Abu Thalib, *Nizām al-Qaḍā*, pp. 39-40; Fahmi, *al-Murāfa'āt*, section 39; Jumai, *Mabādi'*, p. 186.

b. The Openness of Court Session

One of the basic principles in the operational system of the Egyptian Civil Court is every legal procedure and treatment to deal with the conflicting case brought before the court must be seen directly by the parties involved in the court session. There is no hidden legal step for any litigant.²³

This basic standard operational system aims at avoiding the unfair legal treatment among the parties by favoring one side and ignoring another or by performing the court session which tend to be partial, due to the absence of public control or one party's awareness. Some exceptional cases can be judged differently. The conditions for the alternative process are when the judges see that by bringing the open court session, it will jeopardize and obscure the legal principle or when the case relates closely with the individual dignity, moral and psychological pressure as in the family legal conflicts or special court session related to the crimes done by children under the age of maturity.²⁴

c. Legal Independency

Legally, the basic principle of independency of the Egyptian legal court plays a very central role. None of the Egyptian constitution which had ever existed ignored the principle of legal independency. The Constitution 1971 (the present constitution) states: "The judges are independent. In the process of legal judgment, no power above them exists outside the law itself. It is not allowed for any other power to interfere the court process or the process of searching justice".²⁵

In the normative sense, based on such an assumption the

²³ Abu Thalib, *Nizām al-Qaḍā*, p. 33; Najib, *Al-Tanqīl*, p. 78.

²⁴ Najib, *Al-Tanqīl*, pp. 79-80; Abu Thalib, *Nizām al-Qaḍā*, p. 27.

²⁵ Abu Thalib, *Nizām al-Qaḍā*, pp. 12-14.

principle of *Trias Politico* which declares the separation of power within the state to the judicative, executive and legislative is applied in the Egyptian system of governance.

d. Free Financial Cost of Court

The judges can not charge any payment for the litigants in the legal process and court system. The judges receive their salary from the national budget of the state. This principle aims also at the financial accessibility of the court for the society of all economic status. Thus, the right of every civilian in the Egyptian nation-state can be guaranteed.²⁶

e. The Quantity of Judges in the Court depends on the Case

The lowest levels of court is divided into two parts. For the case with financial values lesser than 5000 Egyptian pound, the case will be handled by one judge in the small court system called *Maḥkamah Ġuz'iyyah*. Whereas for the case with the financial values more than 5000 Egyptian pound, the case is judged by more than one judge in the court system called *Maḥkamah Ibtidā'iyyah*. The assumption underlying behind the division is to make the legal procedure quicker and cheaper.²⁷ Besides that, to reduce and minimalist the negative impact of greater extensive growing for the legal case more than the quantitative numbers of judges.

f. Equality before The law

Every Egyptian citizens regardless his or her social and cultural background must be treated equally before the law. Like the notion of legal independence of the court system, this basic principle is also stated in the Egyptian Constitution 1971. Article 68 from the Constitution declares: "Bringing the cases before the court is the protected and maintained right for

²⁶ Abu Thalib, *Nizām al-Qaḍā*, pp. 19-22.

²⁷ *Ibid*, pp. 23-24.

humankind. Naturally every citizen has right to depend on the law. The state is obliged to ease the court system and speed the process of solving the legal problem. The law must protect the continuity of legal process and secure the court decision as well".²⁸

g. The Direct Process of Court Session before all of Litigants

The process of court session must be conducted before all parties involved in the legal conflicts, so that every party can follow, respond and clarify what he or she regards as urgent to do so. By doing the process the court can guarantee its impartial stand before all parties. The court also can show its main duty as the bastion of justice. The process of court session which is only attended by one conflicting party could almost obscure the principle of justice and in turn can only satisfy one side of the conflicting parties.

The principles also state that the technical procedure in the court such as questioning the litigant and confronting the arguments among each other, asking the proof and deepening the chronology and historical background to understand the legal case in the court session must be a state of balance. No one will be given the time to defend his legal argument longer than others.²⁹

According to the Egyptian procedural law, in the court session the judge must clearly define what the legal demand or accusation is before the physical presence of both parties in the court session. The law also urges the judge to give enough opportunity to the accused to analyze, respond and make counter opinion. The law prohibits the judge to declare another accusation outside what has been read before the court.

However, in certain conditions the law allows the judge to run a

²⁸ Abu Thalib, *Nizām al-Qaḍā*, pp. Pp. 23-24.

²⁹ Najib, *Al-Tanqīḥ*, pp. 83-86; Jumai, *Mabādi*, p. 189; An-Namr, *Qawānīn*, section 24; Abu Thalib, *Nizām al-Qaḍā*, pp. 30-31.

court session without the presence of one or both parties (*in absentia* court).³⁰

h. Written court session and oral court session.³¹

In the court session, most of the procedure is done orally and in some cases can be done with writing. The main goal of oral procedure is that all personnel (judge, the conflicting parties, advocate, witness and expert witness) can freely and easily express their opinions. If all of arguments must be discussed with writing (written) it could hamper them and make the court session dull and not communicative. Unless the court session is done orally, the cross checking argument, the process of searching the legal proof etc. will become great obstacles and the judge will be unable to analyze, derive the legal logics and conclusion from the debate precisely.

However, the written procedure and conditions cannot be neglected in the court session. In some cases, the demand of written procedure is necessary when it is related with the process of presenting legal accusation which declares the focus of accusation and related legal proof. On the other side, from the accused will be given the opportunity to negate and to give the written counter-proof of negating. In addition, the written procedure is also needed when the legal process arrives at the conclusion of the necessity for giving the written document or written report of temporary court session or temporary legal conclusion of the court session.

i. There is no court session without legal accusation

No legal conflict can be judged without any legal accusation from a certain party who regards the case as illegal or transgressing the law. The judge can not act as public prosecutor or freely bring the accusation from his own perspective. In accordance with the principle is also the case

³⁰ Abu Thalib, *Atafcam*, p. 31.

³¹ Najib, *Al-Tanqīm*, pp. 80-81.

when the legal accusation is demanded to be postponed or omitted by the accusator, the judge cannot continue to discuss the case. The judge has no right to punish outside the legal claim and accusation or to punish someone who is not mentioned as the accused in the case. Therefore, based on this principle the accused and the focus of the accusation must be clearly defined and restricted by the judge.³²

Administration and Ethical Codes

Concerning administration and ethical codes, the following description will focus on : a. the hierarchy and judicial competence of the court; b. the form of court session of every court hierarchy; c. Infrastructure and ethical codes of judges. The basic standard of the system, administration and ethical codes were formulated during the post-independent period of the Egyptian nation-state. By describing the above points, we can arrive at the critical and comparative analyses more comprehensively at the end of the chapter.

The Hierarchy and Judicial Competence of the Court

The Civil Court has two hierarchies and levels. The first and the second level. The Egyptian legal experts have made the hierarchy with the aims: a. to minimize the error in the process of legal decision making; b. the hierarchy urges the judges to be more careful in concluding legal judgments, because they will be analyzed meticulously by the conflicting parties; c. to give appropriate opportunity for the parties involved in the legal cases to read and see the court decision critically; d. the conflicting parties realize that the system of court is based on the sound and professional procedure. Hence the parties should try to see that their legal problems have been decided correctly and in accordance with the basic principles of sound legal system.

The two levels of civil court in the Egyptian systems are: the

³² Najib, *Al-Tanqīm*, pp. 81-83.

first level is *Maḥkamah Ġuz'iyyah* or *Maḥkamah Ibtidā'iyyah*, The *Maḥkamah Ġuz'iyyah* can only deal with cases with the financial value approximately under 5000 Egyptian pound. Though the court was elementary (the first level court) but its decision was binding and final. The court session was held by only one judge.³³

According to the Egyptian law, the legal conflicts which can be judged in the *Maḥkamah Ġuz'iyyah* are:

- a. legal conflict related with agricultural problems, such as the use of hydro-irrigation process in farming
- b. legal conflict related to the use and boundary of land
- c. legal conflict related to wealth share
- d. legal conflict related to merit system in the labour case

Besides those conflicts, the *Maḥkamah Ġuz'iyyah* has also judicial authority to judge the family conflicts. In the family conflicts, the law mandated the court to deal with some cases, such as:

- a. The micro legal conflict related to the financial support (*nafqah*) for the wife and children.
- b. The micro legal conflict related to the dower (*mahr*) of marriage and other material preparations of pre-marital condition.
- c. The legal conflict related with the right of child upbringing.
- d. The legal conflict related to law of succession in the family The court can also be designed to solve the cases which must be decided in short time because of an urgent and emergency need.

For many cases which are not legally mentioned in the law, the judicial authority for such cases belongs to the *Maḥkamah*

³³ Najib, *Al-Tanqīm*, pp. 91-106.

Ibtidā'īyyah.³⁴

The second type of the elementary court is *Maḥkamah Ibtidā'īyyah*. *Maḥkamah Ibtidā'īyyah* has right to deal with cases with financial values approximately more than 5000 Egyptian pound. The structure of judges in the court is more complex than in the *Maḥkamah Ġuz'īyyah*. The judges are more than only one and sometimes they are divided into many groups of judges in accordance with their legal competence. The judicial cases of the *Maḥkamah* are wider than the *Maḥkamah Ġuz'īyyah*. In fact, many cases whose judicial authority does not belong to the *Maḥkamah Ġuz'īyyah*, belong to the *Ibtidā'īyyah*.³⁵

The second level of court is the Court of Cassation (*Maḥkamah Istitnā'īyyah*). The Court of Cassation can hold the procedure of court session as it had been done by the first level of court. Of course, in dealing with the case the Court of Cassation is free to decide. Whether it will decide precisely the same as before or with some changes. The court system of Egypt does not recognize the third level of court. But the third level of court is regarded as the Supreme Court and the duty of this court is different from the court in the first or second level. The Supreme Court only analyses the legal substance of previous decisions and the legal procedure in arriving at the decisions. The Supreme Court has no right to hold the court session from the beginning as has been done by the first or the second level of court.³⁶

Form and Administration of Court Session

The court session in the *Maḥkamah Ġuz'īyyah* is conducted by one judge, whereas the court session in the *Maḥkamah Ibtidā'īyyah* is under the control of three judges for every specific case. In the *Maḥkamah Ibtidā'īyyah*, the judges are

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid*, pp. 117-137.

devided into many groups in accordance with the legal cases which will be dealt with by the court session. Goup of judges are specified by their legal competence in dealing with particular cases. Some judges are only for trade cases, where as others are for family case and so on. The chief of the *Maḥkamah Ibtidā'yyah* is also a member of *Maḥkamah Istitnā'yyah* (the Court of Appeal).³⁷

Like the *Maḥkamah Ibtidā'yyah*, the Court of Appeal (*Maḥkamah Isti 'naflyyah*) divides its judges into many groups in accordance with the legal specification which will be dealt with in the court session. In one court session the legal case is judged by three judges. Every judge of the Court of Appeal is called *mustasyar* (literally means the consultants). At present there are eight Courts of Appeal all over Egypt. The Courts are in Cairo, Iskandaria, Thanta, Manshura, Ismailiyya, Bani Suaif, Assiut and Qana.³⁸

Unlike the two previous courts, the Supreme Court has the right only to examine the correctness and coherence of judicial application or law enforcement reflected in the legal decisions brought to the court session. The Supreme Court judges are also divided into many groups in accordance with their legal competence and legal need in the court session. The court session consisted of five judges for every case.³⁹

According to the law, the legal cases can be brought to the court session of the Supreme Court for several conditions:

- a. when the legal decisions made by the previous courts contained of legal misinterpretation or legal inconsistency.
- b. the courts have decided by using and referring to the invalid and out of date law
- c. the courts have used non-standard procedure of

³⁷ Abu Thalib, *Nizām*, pp. 66-67.

³⁸ *Ibid*, pp. 68-69.

³⁹ *Ibid*, pp. 69-70.

judgment. Specifically relates to the law of procedural court system.⁴⁰

Code of Ethics for Judges

The code of ethics of judges can influence their appearance and performance in conducting their duties. In the modern time, to determine the degree and standard of democracy from a certain society, one can conclude from the situation and measurement standard used in its judicial power. The more democratic a certain society is the more rigid and high the standard of its court administration is.

According to the Egyptian law, to be a judge in the Civil Court, one should fulfill the following qualifications:

- a. Egyptian citizenship,
- b. Minimum age of thirty years for the *Mahkamah Ibtidā'iyyah* and thirty eight years for the Court of Cassation and forty three years for the Supreme Court.
- c. Having a certificate of bachelor in law from one of Egyptian universities or from other universities which have been accredited.
- d. Never had any legal decision of the court of being judged as some one who has conducted the moral hazard or broken the public law order.
- e. Having a good conduct.
- f. Having some experiences in law and legal drafting,
- g. Having sound body and psychological health.
- h. Male.⁴¹

The law protects the rights of judges. The protected rights of judges are:

- a. For the protection of court independence, the judge can not

⁴⁰ Najib, Al-Tandzim, pp.. 122-132.

⁴¹ Abu Thalib, *Nizām*, pp. 81-81

be sentenced or removed from his position except for the regulated cases.

- b. The judges have special regulations concerning their mutation, promotion and administration of duties. The salary of judges is higher than ordinary civil servants; the judges belong to a group under special treatment in criminal cases as well as in other legal cases. The judges should also form a special group of judges in order to solve their internal administrative and ethical problems as well.⁴²

The law prohibited the judges:

- a. to do commercial business
- b. to express their individual opinion publically, especially political opinions
- c. to be a legal adviser for anybody
- d. to make a commercial agreement for buying or selling with parties involved in the court legal cases.⁴³

C. The History and Development of Religious Court in Indonesia

The existence of the Religious Court in Indonesia is the result of national consensus after the hot debate within Indonesian society as reflected before the Indonesian independence. However, the Religious Court had its own historical precedent and dynamics as well as political development long before the independence.

The following writing tries to describe the history and development of the Religious Court since pre-colonial times until 1990. One year after the issuing of Regulations concerning Religious Court (Regulation number 7,1989).

⁴² *Ibid*, pp. 92-114.

⁴³ *Ibid*, p. 115.

Religious Court in the Era of Local Kingdoms

Generally it can be explained that the promulgation of Islamic law in the society of local kingdoms (before the coming of Dutch colonial power) in *Nusantara* (Dutch East Indies—Indonesia) was dependent on the level and degree of the process of Islamization in the region: how far could Islam penetrate the structure and culture of the society, how strong was the influence of Islamic process and values within the competing milieu and the existing values such as local and customary values or Hinduistic tradition.⁴⁴

In such a condition the existence and structure of the Islamic court in Indonesia varied among the local kingdoms. Each kingdom has a different style and its own structural institution. Actually the existence of those courts were not independent. In the sense that those courts did not have independent power to exercise and judge the problem in accordance with their full judicial power, rather they were parts of the king's apparatus. However, the degree of the judicial independence among those kingdoms were various: when the king had a strong social legitimation, he had minimal interference to the court system. But on the contrary, the king with lower social legitimation used self-interest to make the court under his direct control.⁴⁵

⁴⁴ All, Muhammad Daud, "The Position of Islamic Law in the Indonesian Legal System", in *Islam and Society in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1988), pp. 187-205; Hooker, M.B., "Muhammadian Law and Islamic Law", in *Islam in Southeast Asia* (Leiden: E.J.Brill, 1983), pp. 160-181; Ricklefs, M.C., "Islamization in Java: Fourteenth to Eighteenth Centuries" in *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1985), pp.36-47.

⁴⁵ Hurgronje, C. Snouck, "Rapport van Dr. Snouck Hurgronje over de Mohammedansche Godsdienstige Rechtspraak, met neme op Java," Feb. 24, 1890, in *Adatsrechtbundels I* (The Hague: Martinus Nijhoff, 1911); J.H. van de Velde, *De Godsdienstige rechtspraak in Nederlandsch-Indie, staatsrechtelijk beschouwd* (Leiden, 1928); R.Tresna, *Peradilan di Indonesia dari Abd ke Abad* (Jakarta: Pradnya

The organization, process and procedure of judgement in those courts were also heterogenous. The heterogeneity of the administration was dependent on the general structure of government, source of political power and the framework of values-crystalization in the process of solving problem and legal judgement.

R. Tresna describes that with the coming of Islam in Indonesia, gradually the appearance of legal structure in the Indonesian society has changed. The dominant influence of local customary laws decreased and instead the influence of Islamic law (especially Islamic family law) increased.

Islamic Court in Aceh

In Aceh, the system of Islamic law integrated with the general system of court. In the vertical line, they have a hierarchy from the bottom to the top. On the base level was the village court directed by *Keucik*. This kind of court solved the small legal problems whereas the bigger would be judged in the higher level of court, that was *Balai Hukum Mukim*. If the legal decision made in the court could not be accepted by the parties involved in the legal case, they can submit the problem to the higher one, that was the *Oeloebalang* court. Higher than *Oeloebalang*, there was *Panglima Sagi* court. The legal judgement and decision made by those court was not final. The highest and final one would be in the supreme court. The supreme court judges containing of Islamic and secular judges as well.⁴⁶

Paramita, 1977), p. 17; Basri, Cik Hasan, *Peradilan Agama di Indonesia* (Jakarta: Raja Grafindo Persada, 2000), p. 113.

⁴⁶ Zainuddin, M, *Tarikh Aceh dan Nusantara* (Medan: Pustaka Iskandar Muda, 1983), p. 15; Basri, *Peradilan Agama*, p. 108; Halim, Abdul, *Peradilan Agama dalam Politik Hukum di Indonesia* (Jakarta: Raja Grafindo Persada, 2000), p. 42.

Islamic Court in Mataram Kingdom

Sultan Agung came to power in the Mataram kingdom in 1613. During his power the existence of *Pradata* court — that was court where the law with strong Hinduistic element promulgated—was changed to *Serambi* (mosque) court.

The organization of the court was thus: the sultan was the head of the court. In the daily practice, the sultan delegated his authority to the trustworthy jurist (*penghulu*). The jurist was assisted by muslim religious scholars who have wide social legitimation. However, the typical form of traditional court such as this religious court, implicate that the court could not be understood as a system of court in the modern meaning but it was part of an executive which depended highly on the personal character of the sultan. The just character of him made the court popular whereas the unjust character made it unpopular.⁴⁷

In the case of the court in Mataram, sultan Agung was known as a pious and just man. Therefore the court in his reign was popular. But when Amangkurat I came to power as sultan Agung's successor in 1645, he changed the performance of court to be unpopular. That was due to his temper and unjust behaviour. He made the court strongly under his control and influence. According to Snouck Hurgronje, in the following years after Amangkurat I the authority and jurisdiction of the court was restricted only to deal with the legal cases which

⁴⁷ *Juynboll, Th.W.*, Handleiding tot de Kennis van de Mohammedaansche Wet (*Leiden*, 1903), pp. 323-327; *Hurgronje*, Rapport, *Notosusanto*, Organisasi dan Jurisprudensi Pengadilan Agama di Indonesia (*Jogjakarta: Jajasan Badan Penerbit Gadjah Mada*, 1963); *Sabrie, Zuffran (ed.)*, Peradilan Agama di Indonesia: Sejarah Perkembangan Lembaga dan Proses Pembentukan Undang-undangnya (*Jakarta: Departemen Agama*, 1999), p. 2; *Basri*, Peradilan Agama, p. 96; *Halim*, Peradilan Agama, p. 40.

related to family laws.⁴⁸

Islamic Court in West Java

There were two famous Islamic kingdoms in West Java: Islamic kingdom of Banten and Cirebon. The influence of Islamic law in the former was stronger than in the latter. In the era of Sultan Hasanuddin, there was only one Islamic court in Banten. The court was under the direction of *qādl*.⁴⁹

In the Islamic kingdom Cirebon the system of court was influenced by legal substance derived from local values codified in the book called *Pepakem* Cirebon. The *Pepakem* Cirebon included many legal aspects of customary laws (*adat* law). However, the influence of Islamic family laws was obvious especially the laws which related to family.⁵⁰

Islamic Court in Sulawesi

Unlike in other parts of Nusantara, in the southern Sulawesi, there was a harmonious relation between Islamic and customary law. The created situation was due to the social function of the king. The king successfully mediated the conflicting factors between both elements of law.⁵¹

The first local kingdom which accepted Islam was the Kingdom of Tallo in South Sulawesi. Following Tallo was the kingdom of Goa. The latter kingdom then grew as a big kingdom. In the era of king Goa XV Malikussaid (1637-1653)

⁴⁸ Basri, *Peradilan Agama*, p. 114; Hurgronje, *Rapport*,

⁴⁹ Basri, *Peradilan Agama*, p. 114; Halim, *Peradilan Agama*, p. 44; Tresna, *Peradilan*, p. 16.

⁵⁰ Basri, *Peradilan Agama*, p. 115; Halim, *Peradilan Agama*, p. 44; Zainuddin, *M.Tarich*, p. 15.

⁵¹ Mattulada, "Islam di Sulawesi Selatan", in Abdullah, Taufik (ed.), *Agama dan Perubahan Sosial* (Jakarta: Rajawali Pers, 1983), pp. 209-222; Sabri (ed.), *Peradilan Agama*, p. 5; Halim, *Peradilan Agama*, p. 45.

began the process of institutionalizing Islamic law in the governmental structure. There were two divisions of legal functionaries. The first was religious functionaries (*parewasyard*). In the vertical manner, the religious functionaries in the central governmental board were headed by *qāḍī*. Under the *qāḍī* there were *imam* whose two assistants were *khatib* and *bilal*. The salary of those religious functionaries was taken from religious alms givings (*zakai*), donation from marriage ceremonies, religious endowment and other religious donations as well.

According to Lev, in some areas like South and East Kalimantan, the religious judges were appointed by local rulers. In other parts such as North Sumatera (in Gayo land, Alas and Tapanuli), south Sumatera and north Sulawesi, there were no single authority for the religious court. Instead, the religious functionaries have dual functions: as part of executive bureaucracy on one hand and as religious judges on the other hand.⁵²

Islamic Court in the Dutch Colonial Era

The first coming of Dutch to Indonesia was the trade mission under the banner of *Verenigde Oost-indische Compagnie* (VOC). With the leadership of Cornelis de Houtman, the mission came to Indonesia in 1596. Seeing the condition and richness of Indonesian natural resources and the Dutch intention to play a more important role in the international context in order to secure its interest, the trade mission tended to change and became more political. Thus, the Dutch trade mission became a colonial power and dominated for more than three centuries the political and legal Indonesian scene as well. Besides this political strategy, to achieve this wide goal, the Dutch had set an agenda of cultural penetration through the promulgation of some aspects of Dutch legal and governmental

⁵² Lev, Daniel, S., *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press, 1972), p. 10.

rules. Thus, with such a strategy, theoretically it was easier for the colonial power to maintain its interest and control the power centrally and completely.⁵³

Since the beginning of the Dutch coming, Indonesian society was suspicious of their motives. Local physical resistance and conflicts happened. The more the Dutch tried to make political and mental pressure, the more Indonesians rejected and resisted. The case happened in the legal aspect as well. Some aspects of daily life which was governed by the Dutch law faced serious trouble: from ignoring the existence of law to civil disobedience.

Considering the condition in the field, the Dutch were aware that one of the most serious troubles was coming from Indonesian Muslim community. To lessen and decrease direct conflict and violence, the colonial power tried to make a compromise in the legal aspect, that was the family law. The law which regulates mainly the procedure of marriage, divorce and inheritance was seen as non-dangerous for the existence of the colonial power. However, in practice, the central power was still very cautious on the matter.⁵⁴

Concerning the development of the Islamic court in this era, we can classify it into two categories: a. the era before 1919 and; b. the era after 1919.

⁵³ Benda, Harry J., "Christian Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia" in *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies, 1985) pp. 61 -69; Suminto, Aqib, *Politik Islam Hindia Belanda* (Jakarta: LP3ES, 1985); Usman, Suparman, *Hukum Islam: Asas-asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia* (Jakarta: Gaya Media Pratama, 2001); Arifin, Busthanul, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan dan Prospeknya* (Jakarta: Gema Insani Press, 1996).

⁵⁴ Benda, *Ibid*; Supomo, *Sistem Hukum di Indonesia Sebelum Perang Dunia II* (Jakarta: Pradnya Paramita, 1970); Gautama, Sudargo and Robert N. Hornick, *An Introduction to Indonesian Law* (Bandung: Alumni Press, 1983), pp. 2-14; Lev, *Islamic Courts*, pp. 1-8.

Islamic Court before 1919

As cited above, in the era of Dutch colonial power, there were five different courts operated: a. Governor/Provincial Court; b, Native Court; c. Swapraja/Otonom Region Court; d. Islamic Court; e. Village Court. Each court had its specification and characteristics.⁵⁵

Before 1882, the policy of Dutch colonial power was influenced by the Dutch legal experts such as Karel Frederick Winter (1799-1859), Salomon Keyzer (1823-1868) and LWC van den Berg (1845-1927).⁵⁶ Winter, Keyzer and van den Berg have their own theory that was *receptio in complexu*. The theory stated that after understanding the relationship between Islam and local Indonesian living law, one should consider that the acceptance of Islam signifies the acceptance of its concept of law by Indonesian society. From such a perspective, Indonesian Muslim society can be assumed that they have practiced the Islamic family law after they have been Muslims. Thus, the living laws which regulate their practical marriage were Islamic laws.

Within such an understanding of living laws in Indonesia, there were some books written by Dutch scholars in order to be manuals and guidance for the applying of Islamic family law in Islamic courts. Furthermore, in *Batavia Statuta* 1642 Islamic family law which included the marriage and inheritance law was listed and regulated in the *Resolutie der indische Regeering* dated 25 May 1760. There were also some compendiums written by colonial experts such as *Compendium*

⁵⁵ Supomom, *Sistem Hukum*, p. 20; Gautama et al, *An Introduction*, pp. 2-14.

⁵⁶ Arifin, Busthanul, *Pelembagaan Hukum*, p. 20; Sunny, Islamil, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia" in Ahmad, Amrullah, (ed.), *Dimensi Hukum Islam dalam Sistem Hukum Nasional Indonesia: Mengenang 65 Tahun Prof. Dr. H.Busthanul Arifin, SH* (Jakarta: Gema Insani Press, 1996), p. 131.

van Clookwijk. He was a governor in Sulawesi (1752-1755).

Another compendium was *Compendium Freijer* which was written in the era of Governor General Jacob Mossel (1750-1761). In 1884, van den Berg himself wrote the principles of Islamic law from Syafiite and Hanafite legal thoughts. He was also the author of Islamic Family Law in Jawa and Madura which he wrote in 1892.⁵⁷

Related to the institutionalization process of Islamic family law, the colonial power issued on June 3, 1823, the resolution of Governor General Number 12 on the establishment of the Islamic court in Palembang. Another regulation, that was *Regierung Reglement* (RR), 1855, chapter 78 point 2 stated : "in the civil legal conflicts among the native or among the people equivalent with the native they were obliged to obey the decision of Islamic judges or the chief of their tribes in the process of problem solving in accordance with Islamic law or other regulations as well".⁵⁸

After some years, the existence of the Islamic court in the structure of colonial government was further strengthened by the Royal Decree (*Koninklijk Besluit*) number 24 which was published in State Decree (*Staatblad*) 1882, Number 152. The decree recognized the existence of the Islamic Court in Jawa and Madura. The court was named *Priesterraad* or *Raad van Agama*.⁵⁹

Due to the significant meaning of the decree in the context of

⁵⁷ Sunny, *Kedudukan*, p. 131.

⁵⁸ Taher, Hadari Djenawi, *Pokok-pokok Pikiran dalam Undang-undang Peradilan Agama* (Jakarta: PT Alda, 1989), p. 4; Tim Penyusun, *Kenang-kenangan Seabad Peradilan Agama di Indonesia* (Jakarta: Departemen Agama RI, 1985), pp. 9-10; Thalib, Sajuti, *Receptio A Contrario: Hubungan Hukum Adat dengan Hukum Islam* (Jakarta: Bina Aksara, 1985), p. 7.

⁵⁹ Notosusanto, *Organisasi*, p. 10; Sabrie, Zuffran, *Peradilan Agama*, pp. 12-13.

this study, we quote the detail explanation of the decree. There are seven chapters of the decree (*Staatblad*) which regulate the existence of the Islamic Court in the colonial system of government.

Chapter I stated: "Besides the Civil Court (*Landraad*) in Jawa and Madura, the government established the Islamic Court which has the same regional jurisdiction like the Civil Court (*Landraad*)".

Chapter two stated: "The administration of the Islamic Court consists of a Muslim jurist (*penghulu*) which was also the member of Civil Court judge (*Landraad*). The *penghulu* acted as a chief of Islamic Court. The Court has a minimum three members of judges and a maximum of eight judges. They were appointed by the governor or municipal ruler".

Chapter three stated: "The Islamic court was not allowed to make a decision unless there were three members of judges including the chief. In the process of decision making, if there was no majority of voters the decision depends on the chief of judges".

Chapter four stated: "The decision of judges was written and followed by the short arguments, the date and signed by members of judges who had taken part in the decisive process. The decision should also mention the amount of cost which has to be paid by the litigants"

Chapter five stated: "The litigants must be given the copy of the court decision signed by the chief of judges".

Chapter six stated: "The court decision must be listed in the index and given to the municipal ruler every three months to obtain the authentication and recognition"

Chapter seven stated: "The decision made outside the

jurisdiction and regarded as not in accordance with the regulation in point 2, 3 or 4 was void"⁶⁰

The above regulation indicates how difficult it was for the colonial power to recognize and integrate the existence of the Islamic Court within the colonial administration system. Above all, the regulations also implied that the legal knowledge and experience of Muslim judges in the colonial administration system was bad. It could be also interpreted that the administration of the court system was distorted by corruption and mismanagement. Therefore, it could be stated that the state decree had two meanings: a. the legal recognition of the Islamic court in the colonial administration; b. restructuring legal performance and administration of the Islamic court in order to run correctly and to avoid corruption.

However, in the practical level the operation of the Islamic court was not free from problematic appearance. The problem on the one side was caused by the macro political atmosphere of Dutch colonial system, that was marked by the very cautious attitude and enmity towards the growing of Islamic political counter-power, and on the other side until that time the clear policy and strategy of colonial power against Islam in Indonesia was not clearly formulated.

In the years after 1919 emerged the new policy and strategy on Islam in Indonesia. That was the strategy of depolitizing Islam pioneered by C. Snouck Hurgronje under the banner of "*mission civilisatrice*" and the guided politics of customary law (*hukum adat*) invented by C. van Vollenhoven and B. ter Haar.⁶¹

⁶⁰ Halim, Abdul, *Peradilan Agama*, pp. 51-53; Sabrie, *Peradilan Agama*, p. 13.

⁶¹ Benda, H.J., *Hurgronje*, pp. 61-69; Suminto, *Politik Islam*, p. 199; Lev, *Islamic Courts*, pp. 8-30.

The Islamic Court after 1919

The policy of giving a better chance for Muslims to practice their own Islamic family law in the light of *receptio in complexu* theory was no longer valid. The colonial power sought another way and policy to deal with the issue.⁶²

With the new decree of colonial government *Indische Staatregeling* (IS) year 1919 chapter 134, point 2, the government declared that: "in the civil legal conflicts involving Muslim parties, the decision should be made based on Islamic law with the condition that the law had been accepted by customary law (*hukum adat*) and in so far as the matter was not regulated by other laws as well". With the decree, the decision maker would say that "Islamic law could not be practiced in the court unless it was accepted by customary law (*hukum adat*)".⁶³

C. Snouck Hurgonje, C. van Vollenhoven and B. ter Haar suggested that the government should take the new measurements related to the policy and existence of the Islamic Court. In 1922 the government established a commission with the main focus of duties to reformulate the new concept of legal promulgation in the Islamic court system.⁶⁴ The commission recommended the four important points:

- a. Only the matters which are closely linked with Islam have to be decided by the Islamic court. The matters were the validity of marriage, all kinds of divorces, dower in the marriage (*mahr*) and the duties of husband to wife.
- b. The Islamic court only consisted of only one judge.
- c. To avoid the unjust treatment of government, the judge in Islamic court received the salary from state.

⁶² Halim, *Peradilan Agama*, pp. 45-51; Basri, *Peradilan Agama*, p. 117.

⁶³ Halim, *Peradilan Agama*, p. 57; Usman, Suparman, *Hukum Islam*, p. 137.

⁶⁴ Lev, *Islamic Courts*, pp. 17-18.

- d. The appeal court for Islamic decisions must be established to check when necessary to revise the court decision.⁶⁵

The recommendation was legally binding because it was written in State Decree (*Staatblad*) in 1937, Number 116 and Number 610. Another important development of the Islamic court in the era was the establishment of Elementary Islamic Court and Higher Islamic Court (*Kerapatan Qodli dan Kerapatan Qodli Besar*) in East and South Kalimantan. Furthermore, in 1938 the government formed the Islamic Higher Court (*Hofvoor islamitische Zakeri*) in Jakarta based on the above recommendation.⁶⁶

The latter development was caused by a new colonial policy concerning Islam. In practical manner, the policy resulted in maintaining the legal existence of Islamic court and strengthening the position of customary law (*hukum adat*). In addition, the policy also had a narrower limitation over the legal jurisdiction of the Islamic court in dealing with some legal problems in the society. The narrower restriction was to the authority for cases related with inheritance and religious endowments (*waqf*) falling under the Civil Court jurisdiction (*landraad*) and no more under the Islamic Court.

Against the restriction came several reactions from The Association of Islamic Judges (*Perhimpunan Penghulu dan Pegawainya*) in its congress in 1937. The more or less same reaction came also from The Indonesian Islamic High Commission (Majelis Islam A'la Indonesia - MIAI) in its congress of 1938.⁶⁷

⁶⁵ Basri, *Peradilan Agama*, pp. 118-119; Usman, *Hukum Islam*, pp. 137-138; Notosusanto, *Organisasi*, p. 7; Lev, *Islamic Courts*, pp. 18-26.

⁶⁶ Lev, *Islamic Courts*, p. 19; Basri, *Peradilan Agama*, p. 119; Halim, *Peradilan Agama*, pp. 62-63.

⁶⁷ Lev, *Islamic Courts*, pp. 18-30; Halim, *Peradilan Agama*, pp. 63-65; Benda, H.J., *Hurgonje*, pp. 61-69.

Islamic Court in the Era of Japanese Occupation

In the era of Japanese occupation, the actors of national awakening in Indonesian history had the time to consolidate their political influence effectively. The pro- independence movement of many different political streams in Indonesia went hand in hand to take advantage of the condition and to some extent cooperate with the Japanese colonial administration.⁶⁸

There was no significant change of policy towards the Islamic Court. In order to maintain its interest and domination against its rival (the Dutch), the Japanese made every effort to be close to all groups in Indonesian society, including to some Islamic leaders. Furthermore, the Japanese authority paved the broader way for the process of accommodating Islam within governmental structure by creating the High Commission of Islamic Affairs which aimed to mediate between the public interest of the Islamic community and the Japanese colonial power. In short, because the Japanese had only a short time to occupy Indonesia, the existence of Islamic court remained at the same position as before.⁶⁹

Islamic Court after Indonesian Independence

Generally we can classify the development of the Islamic Court in this era into two periods: a. in the beginning of Indonesian independence and the Old Order's time; b. during the New Order. The next description of the Islamic Court in the Old Order will focus on the legal struggle of Islamic community to strengthen the legal existence of the Islamic court in the context of pluralist political orientation of Indonesian society and in the middle of searching for national identity for the

⁶⁸ Lev, *Islamic Courts*, p. 32; Noer, Deliar, *Administrasi Islam di Indonesia* (Jakarta: Rajawali Press, 1983), p. 87.

⁶⁹ Lev, *Islamic Courts*, pp. 31-61; Noer, *Administrasi Islam*, p. 87.

newly horned nation-state, whereas the explanation of the New Order's era will concentrate on the process and development of legal consolidation, empowering the infrastructure of the Islamic court and the changing political attitude of the state towards Islam in general and towards Islamic family law in particular.

After Indonesian Independence and in the Era of Old Order

The study of the Islamic court in Indonesia cannot avoid the object from the history of institutional basic structure of Indonesian government as it was reflected in its operated constitution. Since Indonesian independence until the collapse of Sukarno's Old Order, Indonesia was under the four consecutive constitutions: a. from 1945-1949 under the Constitution 1945; b. from 1949-1950, under the Constitution of United Indonesia (*Konstitusi Republic Indonesia Serikat—Konstitusi RIS*); c. from 1950-1959, under the Temporal Constitution (*Undang-undang Dasar Sementara*); d. 1959-1966 under the Constitution 1945 again.⁷⁰

Practically, the ever-changing Constitution with its socio-political background had never caused the Islamic court to perish.⁷¹ Concerning the administrative power of the state apparatus, on March 25, 1946, the governmental administration of the Islamic court was mandated from the Ministry of Justice to the Ministry of Religious Affairs. In accordance with the Constitution 1945, the basic job and authority of the Islamic

⁷⁰ Zaini, Abdullah, *Pengantar Hukum Tata Negara Indonesia* (Jakarta: Pustaka Sinar Harapan, 1991), p. 111-178; Mahendra, Yusril Ihza, *Dinamika Tata Negara Indonesia* (Jakarta: Gema Insani Press, 1996).

⁷¹ Lev, *Islamic Courts*, pp. 41-61; Halim, Abdul, *Peradilan Agama*, pp. 69-78.

court remained the same as before independence.⁷²

In short, during the critical times of defending Indonesian independence from the reemerging of Dutch colonial power, the history and position of the Islamic court in the context of Indonesian governmental structure can be summarized as follows:

- a. due to the changing situation and the development of a new legal consciousness among the Indonesians, the *Huwelijkordonantie* S. 1929 No. 348 and S. 1931 No. 467 *Huwelijkordonantie Buitengewesten* 8. 1932 No. 467 was revised and declared as invalid. Instead, on November 21, 1946, the new Indonesian government declared the new regulation that was Regulation Number 22, 1946 concerning marriage, repudiation and *rujuk*. The regulation was valid in Jawa and Madura. The practical implication of the regulation was a separation between the process of administration for marriage and repudiation with the administration of the Islamic court. Therefore, after this regulation the government established in every municipality two places concerning the legal process of marriage. One was a special section for marriage registration. Another was the Islamic court.⁷³
- b. Regulation number 19 years 1948 revised the previous regulation (number 7 year 1947) on the structure and authority of Supreme Court and State prosecutors. The regulation was declared by the Vice President on July 8, 1948. Concerning the existence of the Islamic Court, there was a radical legal change. The existence of the Islamic court in the Indonesian governmental structure was no longer recognized. According to the Regulation, there were only three court-systems in Indonesia: a. Civil Court; b. Court of State Administration; c. Military Court. There was no specific dictum on the Islamic Court. Even though,

⁷² Zaini, *Pengantar*, pp. 111-139; Halim, *Peradilan Agama*, p. 69.

⁷³ Halim, *Peradilan Agama*, pp. 70-71; Sabrie (ed.), *Peradilan Agama*, pp. 20-21.

the Regulation mentioned the necessity for the courts to apply Islamic law in the areas of private matters in accordance with the living law standard. The promulgation of the law was carried out in the Civil Court and not in the specific Islamic Court.⁷⁴

The case caused a severe criticism from the Islamic community especially from West Sumatera, Aceh and South Sumatera. The criticism stated that such a regulation was not needed. Therefore, the Regulation should be abolished and instead the practice of the court should be based on the previous one. Lev mentioned that at the practical level, the abolishment of Islamic Court in the Regulation did not have any significant influence.

Hence, due to the emergent condition of Indonesian state bureaucracy and the legal content of the Regulation which could not accommodate the living aspiration of all levels and groups of Indonesian society, the existence of such a regulation caused no substantial and legal change in the practical operation of the court-system of Indonesia.

- c. It is necessary to mention that in the emergent situation shortly after Indonesian independence, emerged the sporadic and local Islamic Court or pseudo-Islamic Court in some regions. There was *Mahkamah Syariah* in Middle Sumatera, Jambi, Lampung, Aceh and Tapanuli. In West Kalimantan, emerged *Mahkamah Balai Agama*. In Sulawesi, Nusa Tenggara and Maluku occurred the same. Those in Sulawesi, Nusa Tenggara and Maluku originated from *Godsdienstige Rechters* and *Mohammedansche Godsdientige Beamte* in the colonial times. They were both parts of *Swapraja* Court's system which existed during the Dutch colonial times.⁷⁵
- d. In 1950, resulting from diplomatic negotiation between

⁷⁴ Lev, *Islamic Courts*, p. 65; Sabrie (ed.), *Peradilan Agama*, pp. 21-22.

⁷⁵ Lev, *Islamic Courts*, pp. 64-100; Halim, *Peradilan Agama*, p. 74.

Indonesia and the Dutch, the Indonesian Constitution changed from Constitution 1945 to Constitution 1950. Related to the Islamic Court, the government declared the new regulation that was Regulation Number 8 year 1950. The Regulation declared that the existence and administration of the Islamic Court in the Indonesian governmental structure was referred back to *Staatblad* 1882 Number 152 and *Staatblad* 1937 Number 116 and 610 for Jawa and Madura. In addition, *Staatblad* 1937, Number 638 and 639 for South Kalimantan and East Kalimantan.

Another significant legal development was the promulgation of Emergency Regulation Number 1 year 1951. One of the legal substances of the Regulation was a declaration that the *Swapraja* and *Adat* Court were abolished from the Indonesian governmental structure, on the contrary the Islamic Court was legitimized and would be further managed by a specific governmental regulation.⁷⁶

The specific regulation came in 1957 by the Governmental Regulation (*Peraturan Pemerintah*) Number 45 Year 1957. The Regulation legitimized and managed the existence of the Islamic Court outside Jawa, Madura, South and East Kalimantan.

Thus, the legal basic regulations of the Islamic Court's existence in Indonesian governmental system are: a. *Staatblad* 1882, Number 152, *Staatblad* 1937 Number 116 and 610 for Islamic Court in Jawa and Madura; b. *Staatblad* 1937, Number 638 and 639 for South and East Kalimantan; c. Governmental Regulation (*Peraturan Pemerintah*), Number 45 Year 1957 for the regions outside the above mentioned.⁷⁷

⁷⁶ Lev, *Islamic Courts*, pp. 64-100; Halim, *Peradilan Agama*, p. 74; Basri, *Peradilan Agama*, pp. 122-124.

⁷⁷ Halim, *Peradilan Agama*, p. 75; Noeh, Zaini Ahmad, *Sebuah Perspektif Sejarah Lembaga Islam di Indonesia* (Bandung: al-Maarif,

From the legal perspective, the Islamic Courts were legitimized, recognized and supported financially and politically by the state. In the years between 1957-1959, the sporadic and local courts which resembled the Islamic Court in many regions of Indonesian territory had transformed themselves into state-sponsored courts. It means, shortly after Indonesian independence, the process of institutional extension and legalization for the Islamic Courts had happened.⁷⁸

Islamic Courts in the Era of New Order

Because the existence of the Islamic court in Indonesia could not be separated from its legal standing, the focus of the following explanation will be on the legal perspective of Islamic family law's institutionalization within the Indonesian governmental system. A short analysis from a wider perspective will be given in the end of the chapter.

The history and development of Islamic court in the era of New Order could not be separated from the following regulations:

- a. Law number 14 year 1970 on the Principal Regulations of Judicial Authority
- b. Law number 1 year 1974 on Marriage
- c. Law number 7 year 1989 on Islamic Court
- d. Law number 1 year 1991 on the Call for Spreading of the Compilation of Islamic Law.⁷⁹

1980), p. 40.

⁷⁸ Lev, *Islamic Courts*, pp. 64-100.

⁷⁹ Basri, *Peradilan Agama*, pp. 124-134; Harahap, M. Yahya, *Kedudukan, Kewenangan dan Acara Peradilan Agama (Undang-undang No. 7 Tahun 1989)* (Jakarta: Pustaka Kartini, 1997), p. 15-24; Zaini, *Pengantar Hukum*, p. 80, pp. 82-84; Supriadi, Wila Chandrawila, *Hukum Perkawinan Indonesia dan Belanda* (Bandung: Mandar Maju, 2002), pp. 213-219; Usman, *Hukum Islam*, pp. 138-

Law number 14 year 1970 on the Principal Regulations of Judicial Authority

The succession of presidency from Sukarno to Soeharto in 1966 marked the beginning of the New Order. Gradually the New Order differed itself from the previous era by emphasizing that the New Order would uphold the Constitution 1945, focusing the program on the economic issues and opening the new harmonious relationship with the West, introducing the new concept of political stability, rule of law and social welfare.

In doing so, in 1970 the government issued the new law on the regulation of judicial authority. In articles 10, 11 and 12, the law stated on the legal legitimating and position of the Islamic Court. Thus, the Islamic Court was also recognized as one of the judicial system in the Republic of Indonesia.

Due to the relevancy of the law with the present study, especially in the case of institutionalization process, here are the detailed quotations of the articles 10 and 12, in the mentioned law:

Article 10

- (1) The judicial power is carried out by the following courts:
 - a. Civil Court
 - b. Religious (Islamic) Court
 - c. Military Court
 - d. Court of State Administration
- (2) The Supreme Court is the highest court.
- (3) The cassation of appeal decisions of the lower courts can be examined in the Supreme Court.
- (4) The Supreme Court acts as the highest supervisor for the lower court in accordance with the law.

Article 12

The structure, authority and legal procedure of the previous courts (Article 10, point 1) is regulated by specific law.⁸⁰

From the above mentioned law, can be seen that (in the legal sense) the institutionalization process of Islamic family law is obvious and even stronger than before.

Law number 1 year 1974 on Marriage

Although the court institution within Indonesian governmental structure as cited above had been clearly defined the substantive law which will be promulgated in the court was not unified, rather it had been scattered in several regulations and decrees since the Dutch colonial times (as follows):

- a. Marital regulation promulgated for the Dutch and who were regarded as equivalent, that was Book I chapter IV-XI from *Indische Burgerlijke Wetboek* (IBW).
- b. Marital regulation promulgated for the native Christian compiled in *Hu-welijk Ordonantie Christen Indonesie* (HOCI).
- c. Marital regulation promulgated for native Muslim and Muslim people with foreign East background, that was derived from Islamic family law.
- d. Marital regulation for native people who were neither Muslims nor Christians, that was derived from customary laws (*hukum adat*).
- e. Inter-group Marital regulation: that was for getting marriage done by parties originated from those above groups (*Reglement Gemengde Huwelijken --RGH*).⁸¹

In coping with those laws and seeing the legal consciousness of

⁸⁰ Zaini, *Pengantar*, p. 80, pp. 82-84; Usman, *Hukum Islam*, pp. 139-140.

⁸¹ Supriadi, *Hukum Perkawinan*, p. 64; Gautama and Hornick, *An Introduction*, p. 9.

Indonesians, the New Order tried to unite the marital law that was called Law number 1 year 1974 on Marriage (*Undang-undang Perkawinan*).

Regarding the process of Islamic Family law's institutionalization, the existence of the above law was a further step in the effort of strengthening the legal position of the Islamic Court. A specific analyses on the Law on Marriage (Number 1 year 1974) will be written in the next chapter.⁸²

Law Number 7 Year 1989 on Religious (Islamic) Court

The law came after some laws regarding other institutional courts (the Supreme Court, the Civil Court, The Court of State Administration). The law is one of the most significant laws which directly and dominantly justifies, regulates and strengthens the legal existence of the Islamic Court in the Indonesian judicial system.⁸³

From legal perspective, the existence of the law implies some important points:

- a. Redefinition and affirmation of the legal basis for the existence and operational system of the Islamic Court,
- b. Reaffirmation for the legal standing of the Islamic Court in the structure of the Indonesian judicial system.
- c. Reaffirmation for the legal standing of judges in the Islamic Court,
- d. Extension of judicial authority for the Islamic Court, which will also solve the legal problems concerning inheritance (judicial authority which was previously outside the judicial competence of the Islamic Court),

⁸² Subadio, Maria Ulfah, *Perjuangan Untuk Mencapai Undang-undang Perkawinan* (Jakarta: Yayasan Idayu, 1981); Supriadi, *Hukum Perkawinan*, p. 240, pp. 266-267.

⁸³ Harahap, *Kedudukan*, p. 15; Usman, *Hukum Islam*, pp. 140-144; Basri, *Peradilan Agama*, pp. 125-129; Halim, *Peradilan Agama*, pp. 127-137.

- e. Changing the substance of legal procedure in the Islamic Court,
- f. Changing the administrative system of the Islamic Court,
- g. Effort to protect and elevate the right of women in the Islamic Court.⁸⁴

(clear differentiation and identification of the law on marriage has been cited in the previous writing/politics of law).

A close look at the motive of the law indicates that the law exists because of changing attitude of government (personalized by Soeharto) towards Islam as has been mentioned in the previous chapter (Politics of law). However, to secure the political balance between Islamic wing and the non-Islamic one, Soeharto's government tried to explain that the existence of the law was also a part of his grand policy of securing the integration of Indonesian pluralist society within a nation-state concept and not the pre-conditions for the emergence of Islamic state.⁸⁵

The law extends the judicial authority of the Islamic Court. Before the existence of the law, the Islamic Court was perceived and legally treated unequal compared to other court-systems in the country (Civil Court, Military Court and Court of State Administration).

That was due to the problematic nature of the Islamic Court's decision: on the one hand, the Court could legally decide but - however- the decision was not final and binding. Because, to be final every decision made by Islamic Court must be examined by the Civil Court, recognized and legitimized through "justified mechanism" (*executoire Verklaring*) done by the latter. After the coming of the law, such a mechanism perished, thus Islamic Court's decision was final and binding the

⁸⁴ Harahap, *Kedudukan*, pp. 15-24; Basri, *Peradilan Agama*, pp. 125-126; Usman, *Hukum Islam*, pp. 140-144.

⁸⁵ Zaini, *Pengantar*, p. 82; Subadio, *Perjuangan*; Supriadi, *Hukum Perkawinan*; Halim, *Peradilan Agama*, p. 75.

conflicting parties.⁸⁶

In addition, by this law the judicial authority of the Islamic Court was enlarged. The court has a wider authority to judge the legal conflicts using Islamic family law which covers marriage, guardianship of family members, dower right, maintenance right (*nafāqah*), divorce, custody, testamentary bequests (*waṣiyyah*), charitable endowment (*waqf*) and succession. The last judicial authority (succession) was indeed an enlargement for the legal authority under the Islamic Court.⁸⁷

The coming of the law was also an effort of protecting the legal status of women before the Islamic Court. The legal right for women to demand her right of divorce was legalized and the procedure for achieving the right was made easier than before.⁸⁸

D. Basic Principles and Operational System of Islamic Court in Indonesia

From the Indonesian politics of law, the existence of the Islamic Court can be regarded as special case. But from the court administration system, the Islamic Court is also a normal court with its judicial technicalities and procedure like other courts as well. However, to portray clearly the position of the Islamic Court in Indonesia, especially its position between 'speciality' and 'universality' let us read the legal substance of the Indonesian Law Number 7 Year 1989. Our reading of the law will inform that the court has the basic principles and operational systems as follows:

a. The Principal of Islamic Personality: The Islamic Court's Special identity According to the principle the Islamic Court is

⁸⁶ Basri, *Peradilan Agama*, p. 127; Harahap, *Kedudukan*, pp. 32-36.

⁸⁷ Usman, *Hukum Islam*, pp. 141-142; Basri, *Peradilan Agama*, p. 128; Harahap, *Kedudukan*, pp. 25-36.

⁸⁸ Basri, *Peradilan Agama*, p. 129.

the court for Indonesian Moslem only and has no judicial authority over a non-Muslim. The Islamic Court has only the judicial competence in dealing with the cases closely related to the Islamic family law (marriage, divorce, right of guardianship, inheritance, testamentary bequest and charitable endowment). The principle also underlines that both the conflicting parties are Muslims and the legal case brought before the court was also (before) bound to Islamic law. Unless the two conditions are fulfilled, the court has no any legal competency to deal the case.⁸⁹

b. The independence of court

The law of Islamic court Number 7 Year 1989 is very closely related with the law on the Principles of Judicial Power (Law Number 14 Year 1970).⁹⁰ On the independence of court system, chapter I of the principles of judicial power stated: "The judicial power is one of the independent state's power to conduct court in order to enforce the law and justice based on Pancasila with the main aim to uphold the rule of law in the Republic of Indonesia".⁹¹ Moreover chapter I of the law stated that the meaning of court independence is: "the independence of the judicial power means the judicial power is free of any interference from other state apparatus, of any coercion, direction or influence of any other extra-judicial powers...".⁹²

c. Unless the law has been drafted specifically, the law of procedure in the Islamic Court is the same as in the Civil Court.

⁸⁹ Gautama and Hornick, *An Introduction*, pp. 2,4,23; Zaini, *Pengantar Hukum*, pp. 80, 82-84; Harahap, *Kedudukan*, pp. 25-32, 37-39.

⁹⁰ Subadio, *Perjuangan*; Basri, *Peradilan Agama*, pp. 125-129; Halim, *Peradilan Agama*, pp. 127-137; Usman, *Hukum Islam*, pp. 140-143; Zaini, *Pengantar Hukum*, pp. 80, 82-84; Harahap, *Kedudukan*; Manan, *Penerapan Hukum*; Manan and Fauzan, *Pokok-Pokok*.

⁹¹ Harahap, *Kedudukan*, pp. 40,42 and 45.

⁹² Harahap, *Kedudukan*, p. 42.

Though the Islamic Court has been recognized by state since the colonial power (1882) the law of procedure used in the court is the same like in the Civil Court with certain exceptions. Thus, the law of procedure used in Islamic Court derived from:

- a. Law number 7 Year 1989 on Islamic Law mainly Chapter IV.
- b. *Reglement op de Burgerlijke Rechtsvordering* (B.Rv.). Historically, in the Dutch colonial times, this law of procedure was used by the European group in *Raad van Justitie and Residentie Gerecht*. Although, the courts were abolished since the Indonesian independence but its law of procedure is still used in the Civil Court and the Islamic one.
- c. *Inlandsch Reglement* (IR). Historically, during the colonial times the law was used for native and foreign oriental who resided in Jawa and Madura since 1848. This changed many times and the name was changed to be *Net Herzience Indonesie Reglement* (HIR). Usually it is named also Indonesian Reformed *Reglement* (*Reglement Indonesia yang diperbarui*).
- d. *Rechtsreglement voor de Buitengewesten* (R.Bg.). Formerly the law was used for native and foreign oriental who resided outside Jawa and Madura since 1927. The law was also known as *Reglement of Outside Region* (*Reglement Daerah Seberang*).
- e. *Burgerlijke Wetboek voor Indonesie* (BW). Usually known as The Book of Private Law (*Kitab Undang-undang Hukum Perdata*) or it is also abbreviated as BW. Especially chapter IV of the book is still widely used.
- f. *Wetboek van Koophandel* (WvK). It is known as the book of commercial law, used since 1847.
- g. Some regulations which were codified after Indonesian independence, such as: Law Number 20 Year 1947 on the procedure of appeal of private law; Law on the Principles of Judicial Power Number 14 Year 1970 supplemented afterwards in 1999; Law Number 14

Year 1985 on the Supreme Court; Law Number 2 Year 1986 on the Civil Court; Law Number 1 Year 1974 on Marriage and its Applied Regulation/Governmental Regulation (*Peraturan Pemerintah, Nomer 9 Year 1975*); Law Number 7 Year 1989 on Islamic Court; Presidential Instruction Number 1 Year 1991 on the Spreading of Islamic Law Compilation.

- h. Legal Precedence. It means some legal decisions made by the Supreme Court which has been codified.
- i. Special Regulations made by the Supreme Court
- j. Legal Theories and Doctrines. In some cases the judges in the Islamic Court can use Islamic legal books as sources of their decision.⁹³

d. Judges as Agents of Reconciliation.

According to the principle, before the courts session begins, the judges should firstly give an opportunity for every confecting party to solve their legal problems outside the court room. The parties are suggested to use the more peaceful means before the legal one. Furthermore, in the mid of court session when the conflicting parties regard themselves as capable of using non-legal means before the court to solve the problems, the judges should stop the procedure of judging and instead give them a chance to reconcile. The will to reconcile and achieve agreement must be based on the sound procedure and their own will and not based on coercion of any party, including the judges. However, the process of reconciliation can be initiated by the conflicting parties and the judges can assist them or can read their agreements as a binding process of reconciliation.⁹⁴

e. The court must be held with the modest, fastest and cheapest

⁹³ Manan, *Penerapan Hukum*, pp. 5-9; Manan and Fauzan, *Pokok-pokok*; Kancil, C.S.T. and Kansil; *Pengantar limit Hukum dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka 2000), pp. 19-23 and 200.

⁹⁴ Harahap, *Kedudukan*, pp. 47-52; Harahap, M.Yahya, *Ruang Lingkup Permasalahan Eksekusi* (Jakarta: Gramedia, 1988), pp. 272-288; Manan, *Penerapan Hukum*, pp. 107-119.

procedure.

The principle states that in dealing with the legal cases, the judges must choose the modest procedure of law, and make every step of judging easy to be followed by the litigants.⁹⁵ Chapter 4 article 2 of the Law Number 14 Year 1970 on the Principles of Judicial Power states that "the court must fulfill the hope of the litigants. In every court session they try the modest procedure, the fastest way and cheapest price and just decision. There is no need of complicated investigation or using very long procedure so that the legal process takes many years or sometimes the legal process must be continued by their successors. The cheapest price means the price which can be afforded by people. That is all can be done without sacrificing meticulousity in order to seek truth and justice".⁹⁶

f. The openness of the court session

The court must be open for everybody. It means the process of court session can be attended by everyone and everyone can inform on the session. Thus by such a process the session will run justly, honestly and deserves to be controlled by any party.⁹⁷ It is intended also as public education in order to encourage legal public awareness in society.⁹⁸ However, in cases like divorce or very private matter, the law allows the judges to hold the a closed court session very closed. In considering closed-openly session of court, the judges should be very careful. Because, without any real legal standard, the court-session can be declared by the higher court as legally void.⁹⁹

h. Legality of case

⁹⁵ Harahap, *Kedudukan*, pp. 53-56.

⁹⁶ Manan and Fauzan, *Pokok-pokok*, pp. 444-467.

⁹⁷ Harahap, *Kedudukan*, pp. 57-67.

⁹⁸ Harahap, *Kedudukan*, pp. 58-61.

⁹⁹ Harahap, *Kedudukan*, pp. 62-64.

The process of judging the legal case must be based on the principle of upholding the rule of law and the superiority of law. There is no power above the judges except the law itself. Everything done by the judges in solving legal cases must be based on law.¹⁰⁰ Moreover according to the Principles of Judicial Power, the judges are prohibited to avoid examining or deciding the legal case on the grounds that the law on the matter is obscure. The law obliges judges to creatively derive the legal decision when there is a case without clear and obvious legal substance of reference. Thus, whatever the case is and as far as the case has been brought in front of court, the judges cannot avoid examining and deciding the case.¹⁰¹

i. Equality before the law

Everybody in front of the law must be treated equally. The judge can neither apply a normative discrimination (for the same case, somebody can be treated unequally by referring to other standard of laws) nor a categorical discrimination (for the same case, somebody can be treated unequally due to the different social background of the parties). Therefore the legal judgment must be based on the principles of equality before the law, equal protection on the law and equal justice under the law.¹⁰²

j. The judges should be active in assisting the litigants

In the court session, the judges lead the situation. The judges have the authority to manage the court-session based on the law of procedure and convention. Related with the duty of judges in the situation and procedural arrangement in the court, along the history of court in Indonesia, there are two systems of procedure: a. the judges have only a passive function. Such a type of judge's duty was the court procedure of *Raad van*

¹⁰⁰ *Ibid*, p. 68.

¹⁰¹ Kansil and Kansil, *Pengantar*, pp. 37-41; Harahap, *Kedudukan*, pp. 68-73.

¹⁰² Zaini, *Pengantar*, pp. 78-80; Harahap, *Kedudukan*, pp. 72-73.

Justitie in the administration of Dutch colonial court in accordance with the law of procedure called *Reglement op de Burgerlijke Rechtvordering* (B.Rv.). The judges only see and examine the procedural system of court session, mostly based on the written documentation and proof, and then determine the legal decision of the conflicting case. The more active function was the function of advocates.¹⁰³ b. the judges have an active function. In such a system the judges have to assist the litigants in order to explore the legal case, examine the legal background, lead the interrogative questions to both or many parties involved in the case, approach persuasively the conflicting parties in order to be active in giving explanation and comment related with the case. Thus, most of the activities based on the oral procedure.

The second function of judges is demanded by the current law of procedure in Islamic Court. Most of this procedural law based on *Het Herzience Indonesie Reglement* (HIR) or often called as the *Reformed Reglement Indonesia* and based also on *Rechtreglement voor de Buitengewesten* (R.Bg.).¹⁰⁴

Moreover, based on the current law of procedure, in some cases the judges are obliged to directly assist the conflicting parties in drafting and defining the legal demand for people who are not capable of writing or for people from the lowest economic class. The judges should also explain for them the focus of court session process, the focus of legal demand, the possibility of correcting the legal procedure in the court and some procedures related with the law of procedure as well.¹⁰⁵ However, the assistance of judges must be based on the law and restricted only in the technical assistance and not to the substantial one which in turn could endanger the legal justice.

¹⁰³ Harahap, *Kedudukan*, pp. 74-86; Manan, *Penerapan Hukum*, pp. 5-9.

¹⁰⁴ Manan, *Penerapan Hukum*, pp. 6-7; Harahap, *Kedudukan*, pp. 74-86.

¹⁰⁵ Harahap, *Kedudukan*, pp. 79-86.

Admininstration and Code of Ethics

To understand the system, administration and code of ethics of Islamic Court in Indonesia, we have to remember the legal and political position of the court within the governmental structure of nation-state Indonesia. It has been mentioned above that there are four courts within Indonesian judicial power: a. the Civil Court; b. the Islamic Court, c. the Military Court; and d. The Court of State Administration.

The difference between those courts lies in their legal jurisdictions. The main legal jurisdictions of the Islamic Court in Indonesia are: a. marriage, divorce and custody (*haḍānah*); b. succession; c. testamentary bequest (*waṣiyyah*) and religious charitable endowment (*waqf*). Within the nation-state principles (to differentiate from Islamic state), the legal jurisdiction of the court is closely related with the principle of 'Islamic personality'. The principle states that the legal authority of the court is to deal with those legal cases as far as the law actors are Muslims. The court has no any right to judge the cases coming from non-Muslims.¹⁰⁶

System and Hierarchy of Court

Like the system of Egyptian judicial power, the Indonesian Islamic Court system has two levels of court. The elementary and the cassation. Both of them called as factual court (*judex facti*). It signifies both courts have the right to examine the case from the beginning process and to hold the court session separately. Unlike the two courts, the Supreme Court is obliged only to examine the coherence and correctness of legal decisions and legal procedures made by the previous courts. The Supreme Court is not entitled to hold a separate court session by undertaking the process of legal proof, debate and

¹⁰⁶ Harahap, *Kedudukan*, pp. 25-28, 32-36.

inviting the conflicting parties before the court.¹⁰⁷

According to the law, as the Court of Cassation, the Supreme Court is entitled annul the decisions under certain circumstances:

- a. the previous court is transgressing their legal jurisdiction.
- b. the courts have misjudged the case.
- c. the courts have applied the wrong process of legal judgement such as by neglecting the conditions or misinterpreting regulations.¹⁰⁸

Code of Ethics for Judges

To be a judge in the Islamic Court, one should meet the following requirements:

- a. Indonesian citizenship,
- b. Muslim.
- c. Having religious piety.
- d. Loyal to the State Principle (*Pancasila*) and Constitution.
- e. Having no-political preference of the prohibited Indonesian Communist Political Party (*Partai Komunis Indonesia*—PKI) or its mass organization or had never involved in the previous *coup d'etat* of September 30 (Communist political revolt in the effort of changing the political regime) or any political preference to other prohibited political party as well.
- f. Civil servant.
- g. Having bachelor degree of Islamic law or other laws as well.
- h. Minimal age of 25 years.

¹⁰⁷ *Ibid*, pp. 105-107. ^m *Ibid*, p. 107.

¹⁰⁸ *Ibid*

- i. Just, honest and having good character.¹⁰⁹

To protect the legal independence of the judges, the judges are not allowed to have political position or any other positions in the governmental office, legal advisory groups and profession or to be merchants.¹¹⁰

Other principles, basic code of ethics of judges and administration of judicial power are almost similar with those of the Egyptian. The difference is the technical assistance (such as budgeting standardization and building the physical infrastructure) of the Egyptian Civil Court comes from the Ministry of Justice whereas the technical assistance of the Indonesia Islamic Court comes from the Ministry of Religious Affairs. Above all, the judicial supervision on conducting the standard system of court and applying the law of procedure in court session of the both Egyptian and Indonesian belongs to the circle of higher rank of judges.¹¹¹

¹⁰⁹ *Ibid*, p. 111.

¹¹⁰ *Ibid*, 118-119.

¹¹¹ AbuThalib, *Nizām*, pp.81-99; Harahap, *Kedudukan*, pp. 105-131.

Differences and Similarities: A Comparative Analysis on the Institutionalization of Islamic Family Law

There are some similarities and differences concerning the background and process of institutionalization of Islamic family law in the nation-states of Egypt and Indonesia.

The differences are as follows: first, the psycho-political factor of Islamic communities in both states. Islam came earlier to Egypt than to Indonesia. In its historical development, Islam could then create its social basis. As a consequence, Islam in Egypt had deeper roots in its cultural as well as legal aspects. In turn, at the eve of the XXth century and even before, the process of institutionalizing Islamic family law was accepted and gradually attained maturity in terms of its infrastructure basis within the state apparatus.

Hence, despite the growing need for modernization and reform (i.e., secularization process) in Egypt, the process of institutionalizing Islamic family law in the bureaucracy of the state did not come under critical scrutiny. Moreover, when in 1955 the Islamic court was abolished and instead integrated with the existing civil court, the Islamic community had a relatively positive reaction. For them, integration meant the empowerment of the Islamic legal position and not perceived as a legal or political threat against the process of institutionalization. Furthermore, integration was also understood as a step and experiment towards the application of Islamic values within the modern nation-state system.¹¹²

A different case happened in Indonesia. Due to the heterogeneity of the Islamic social basis, the unfinished and sporadic process of Islamization and the late coming of Islam, the institutionalization of Islamic family law was perceived by

¹¹² Al-Bisyri, Thariq, *al-Waḍḥu al-Qānūni*, pp. 85-98; Asad, Talal, *Thinking About Secularism and Law in Egypt* (Leiden: ISIM, 2001), pp. 8-9. Personal interviews with some Egyptian judges in Cairo (June-July 2002).

the Islamic community of *santri* variant (the proponents of the institutionalization) as under a critical moment and facing legal and political threats as well. Therefore, they asserted their duty of promoting and defending the Islamic family law (through political parties) as an essential element of Indonesian legal substance. For the *santris* its acceptance in the bureaucracy of the court system was a significant signal of political compromise with other social groups within Indonesian society and within the nation-concept of Indonesian state structure based on Pancasila.

However, this need of compromise and the feeling of being under the threat can be interpreted also as a historical continuation of the worry and disappointment of the Islamic community regarding the Dutch colonial policy on Islam, especially as related to the issue of Islamic family law and the court system.¹¹³

The Dutch colonial policy, until the end of the XIXth century, was dominantly inspired and influenced by the theory of *receptio in complexu* of Lodewijk Willem Christian van der Berg (1845-1927). The theory stated that Indonesian Muslims have accepted and applied the Islamic family law because of being Muslims. In a further development, the Dutch then changed the assumption and relied on the theory of *receptie* of Cornelis van Vollenhoven (1874-1933), Bertrand ter Haar (1892-1941) and Christian Snouck Hurgronje at the beginning of the XXth century. The *receptie* theory revised the former and stated that the interplay between *adat* law and Islamic family law made the Islamic law inapplicable unless it had been accepted and accommodated by the *adat*.¹¹⁴

Second, the enrichment of the systematic substantive law used in the courts. As a former territory of the Islamic caliphate

¹¹³ Lev, *Islamic Courts*, pp. 31-61.

¹¹⁴ Thalib, *Receptio*, p. 67; Ramulyo, M. Idris, *Asas-asas Hukum Islam: Sejarah Timbul dan Berkembangnya Hukum Islam dalam Sistem Hukum di Indonesia* (Jakarta: Sinar Grafika, 1995), p. 58-59.

system and Ottoman dynasty as well, Egypt had undergone the process of Islamic legal enrichment through a systematic process of legal drafting earlier than Indonesia.

Thus, the codification of *Majallat* in the middle of the XIXth century during the Ottoman empire had a direct impact upon the Islamic family legal drafting used in the Egyptian courts. It meant, in applying the Islamic family law, the courts of Egypt had a better historical experience and more systematic legal materials.¹¹⁵ While for Indonesian courts, such a process was not begun until 1991, when Soeharto's government needed to build a new alliance with Islamic based society (especially of the *santri* variant) in order to sustain his power by instructing the Islamic courts of to apply the codified Islamic family law which had never existed before. The lack of such an experience and systematic materials caused the un-systematized framework of legal substance used in the Islamic court in Indonesia.¹¹⁶

In regard to the similarities, they existed in the following contexts. First, the principle of the independence of the courts in the system of state and practical realities was not entirely working.

In Egypt, the independence of the court system in the times of Nasser, Sadat and Mubarak was always questionable. The court was not systematically impartial and in accordance with the principles of separation of power of the prudential governmental system. The existence of a quasi-military court, the control of managerial and administrative system of court

¹¹⁵ Bisri, *al-Waḍḥu al-Qānūni*, Ibid; Asad, *Thinking About Secularism*, Ibid.

¹¹⁶ The lack of experience of the Islamic communities in dealing with formal and standardized courts, can be traced from: Sarwono, Sarlito Wirawan, "Perubahan Sikap: Dari Hakim Kantor Agama Menjadi Hakim Negara", in *Mimbar Hukum*, Number 11 Year 4. (Jakarta: al-Hikmah dan Direktorat Pembinaan Badan Peradilan Agama Islam), pp, 59-67.

under the Department of Justice (executive power) are the obvious indications of its partiality.

Moreover, the basic operational system of the Egyptian political landscape did not entirely support the practice of democracy in its real meaning. The institution of presidency was too strong before other state institutions. Legal activities and apparatus are still under the control and supervision of the executive powers.

The same held true in Indonesia. What made the difference was, that in the Indonesian court system, there was no quasi-military court which could act as an emergency court system under certain circumstances. However, in general until 1990 the basic characteristics of the Indonesian court system remained under the big influence of executive power with its visible or invisible hands.

Second, either in Egypt or Indonesia the legal process of the application of Islamic family law was adopted from the secular (western) court system. Formally, the process and principles of the court session, the way and method of legal proofing, the rights of litigants were nearly the same as applied in any other secular or western court systems. In Egypt the adoption was dominantly taken from the combination of French and British legal tradition, whereas in Indonesia, the adoption was taken from the Dutch and American.

At the practical level, what is called as 'Islamic' was merely the substance of the family law and not the legal procedure of court sessions. The substance of the law applied was mainly derived from sociological selectivity, the interplay of political interest during the law making and legal drafting, and the principles of the system of national integration within the framework of nation-state concept. Thus, to some extent, indeed the process of secularization had occurred and influenced the dominant legal procedure of both the courts in Egypt and Indonesia.

Third, the similarity of the given space of accommodation to the Islamic community within the boundary of a nation-state concept and not within an Islamic state concept. Despite the different historical context, both states could not surrender the entire legal public space to their Islamic communities. This practice had dual motivations. On the one hand, in order to maintain the state legitimacy to bind the non-Islamic community under the banner of a nation-state concept (the un-avoided social change). On the other hand, the state would not let itself to be viewed as totally secular before the Islamic communities. In losing the latter, it will suffer the loss of moral support from the Islamic community. In turn, this loss can lead to the refusal of nation-state principles, such as the strong demand of establishing an Islamic state.

The process of such a *positive sum game* was interpreted in the sense that the demand of Islamic communities to the application of their Islamic legal family system could be accommodated within the state apparatus. But it should be restricted only to this matter (Islamic family law) and not extended to other legal aspects as well, e.g. Islamic criminal law or other Islamic public law elements.

If the last two comparative results are true, what is called as the privatization concept of religion in the context of the Egyptian and Indonesian nation-states could be defined as: the privatization was restricted to the "circle of the family" and not the "circle of individuality". What is outside the "circle of the family" must be secularized and, as such, tolerated. Thus, outside the family is the public sphere and public space, whereas inside the "circle of the family" is privacy.¹¹⁷

Concerning the matter, it seems relevant to quote Robert W. Hefner in defining the contextual understanding of the process of secularization in certain societies. After analyzing some studies on the process of secularization and nation-state concepts, he stated:

¹¹⁷ Asad, Thinking About Secularism, *Ibid*; Lev, Islamic Courts, *Ibid*.

"In half-century retrospect, then, it is clear that the secular nationalism of the postwar era was not the harbinger of a worldwide evolution, but the peculiar product of a particular historical epoch. Today, secularist modernism is being challenged in many parts of the world...".¹¹⁸

Referring to David Martin and Winston Davis studies, Hefner states also:

"Rather than seeking the causes of religious "disenchantment" in unilinear and irreversible processes of cultural evolution, then it seems more prudent to recognize that secularization or, more precisely, desacralization, is reversible and contingent, depending as it does on the political and moral forces at work in a given time and place. While criticizing mainstream secularization theory, it is important to point out that the best among the secularization theorists in historical sociology always recognized this fact. David Martin's *A General Theory of Secularization* (1978) is exemplary in this regard, exploring European secularization not as a unilinear process, but as a consequence of the struggles for and against the establishment of church and state. More recently, Winston Davis has used a related approach in a fascinating study of modern Japanese religion (Davis 1992, 8-9). For Davis, secularization models formulated in terms of the general decline of religion are so grossly cast as to be meaningless. For him, a rehabilitated interest in modern secularization begins with the understanding that secularization operates to differing degrees in different social domains, creating a highly mottled pattern of religiosity and secularity in different societies".¹¹⁹

¹¹⁸ Hefner, *Islam in an Era of Nation-State*, p. 21.

¹¹⁹ *Ibid*, p. 33, point 13 of Hefner's Notes.

CHAPTER IV

The Codification of Islamic Family Law in Egypt and Indonesia

IV. The Codification of Islamic Family Law in Egypt and Indonesia

The Codification of Islamic Family Law in Egypt: Background, Process and Style of Formulation.

It was already mentioned in the previous chapter that until the beginning of the XXth century, Egypt was part of the Ottoman dynasty. In the formal declaration, the Ottoman was itself based on the principle of Islamic *ḥilāfah*. It promulgates Islamic law in daily affairs and in all aspects of life. However, history tells us that since the beginning of XIXth century the promulgation of Islamic law at the centre of the Ottoman Empire and in Egypt decreased gradually and systematically.¹

In the Egyptian context, on the eve of the XXth century the influence of the French and British system of law had replaced the Ottoman system. The Islamic law was enforced only in the matters of family and personal law. The same had occurred at the centre of Ottoman Empire. The preference of replacing the system with the European standard had grown rapidly through a series of social and legal reformations (*tanzimat* movement).

The collapse of the *ḥilāfah* system of the Ottoman dynasty in the 1920s had a direct influence upon Egypt. Before the collapse, the legal system of Egypt itself had been changed with the establishment of National Court. The establishment of the court was the starting point of the marginalization of Islamic law and the domination of French and British system of law.²

The emergence of the new secular legal institution in Egypt was in line with the coming of a nation-state discourse as an antithesis for the *ḥilāfah* system. Furthermore the arrival and domination of British power and influence forced the ruling elite of Egypt to adopt the new strategies and approaches in

¹ Salira, *al-Nizām*, pp. 25-50.

² Najib, *al-Tanqīm*, pp. 55-62.

order to solve their problems and secure their interest by looking at the European concept of law and government.

The situation was backed by the growing influence of modern Islamic movement pioneered by Muhammad Abduh and his circle, who persuasively campaign for the immediate adoption of the new Islamic horizon of thought. The movement tried also to contribute to the new interpretation of textual doctrines and teachings of Islam and to promote the reform of Egyptian educational system.³

The Process of Formulation

The formulation of the Islamic legal codification was influenced by the Ottoman model of codification, which was the *al-Aḥkām al-Adliyyah*, The *al-Aḥkām al-Adliyyah* itself which was considered as the first Islamic legal codification, resulted from the *tanẓīmāt* movement which copied and transformed the European system of legal drafting.⁴

In 1874, Egypt received the status of autonomy from the Ottoman Empire in the administration and government of legal affairs. In 1875, Muhammad Qadri Pasha tried to codify the Islamic family law, especially derived from the Hanafite tradition. The codification contains 647 articles. The codification was never regarded as the official statutory code but, until the 1920s, the codification nevertheless became the main court manual in judging Islamic family cases all over Egypt.⁵

The modern Islamic movement introduced by Abduh had given the broader Islamic legal justification for the codification of

³ Kerr, *Islamic Reform*, p. 187.

⁴ Davison, *Reform in the Ottoman*; Az-Zuhaili, *Tārīḥ al-Qaḍā fī al-Islām*, p. 453.

⁵ Esposito, *Women*, p. 49.

Islamic family law after the 1920s. Specifically, the movement introduced the new interpretation of women's rights in Islamic doctrine. This issue was never seriously touched upon before. Qasim Amin was the main spokesperson for the movement.⁶

On the other hand, in the 1940s, the development of codification of whole civil law in Egypt was carried out and influenced profoundly by the legal architect of Egyptian and Arabic legal codification, Abdul Razzaq al-Sanhuri.⁷ In general, al-Sanhuri who was trained as a jurist in the comparative study of law (Arab and France) had endeavored to analyze the legal development which grew in Islamic legal thinking from the French legal tradition. He mainly tried to approach the law from the pragmatic and realist perspective.

After Egypt had absorbed the principles of the nation-state in 1950s, the development of Islamic legal family codification was marked by intense and frequent debates on the rights of women in the family and on women's rights in general among the three main circles, mainly, the scripturalist, the contextualist and the secular wing. The debate also drew the involvement of the established and state sponsored Islamic institutions such as al-Azhar University and Darul Ifta.⁸

The Style of Codification

The historical tradition of Islamic legal codification in Egypt is longer than in Indonesia. Seeing the relevance of the study, the result of the codification which will be analyzed here is the codification which generally had a reformative character and specifically dealt with the issue of women's right in the family.

⁶ Esposito, *Women*, p. 51; Adams, C.C., *Islam and Modernism in Egypt* (Oxford: Oxford University Press, 1933), p. 231.

⁷ Brown, *The Rule of Law*, p. 55.

⁸ See Skovgaard-Petersen, *Defining Islam*; Esposito, *Women*, p. 51.

The turn of the century from the XIXth to the XXth brought Egypt to the legal transitional era. Related to the Islamic family law, the law materials which were in use were the products of the Ottoman dynasty and based mostly on the Hanafite tradition.⁹

The first Egyptian codification which brought about the succeeding changes in the procedure and substance of Islamic family law was enacted in 1897 and then further amended in 1909, 1910, 1923 and 1931. The essence of the law declared the necessity and obligation of the formal written marriage contract. The codification was enacted through the law year 1920 number 25 and year 1929 number 25. Both codifications were the main laws regulating marriage. Furthermore, both laws were promulgated until their amendment in 1985.¹⁰

The promulgation of these laws in the court brought about the necessity for technical and procedural regulations. In order to fulfill the need, some process laws were drafted and enacted. Outside marriage itself, related to the Islamic law of personal status there are also law number 77 of the year 1943 on the succession/inheritance, law number 48 and 71 of the year 1946 on charity (*waqf*) and bequest. In the latest development there are also law number 3 of the year 1996 and law number 1 and 91 of the year 2000 which merely regulate the procedure of adjudication in the courts of Islamic family law.¹¹

Compared to the process and formulation of codification in Indonesia, the codification in Egypt had occurred gradually and unevenly within very long span of time. The whole Islamic family law codification was not unified in one book of law but was drafted in various regulations. Compared to the wide range of Islamic family law, the contents of the law was drafted and

⁹ Esposito, *Women*, p. 49 and p. 137 (Note, point 2).

¹⁰ Esposito, *Women*, pp. 49-50; See al-Sahawi, Qadri Abdul Fattah, *Mausū'āt Tašrī'āt al-Aḥwāl al-Šaḥsiyyah* (Iskandaria: Mansyaat al-Maarif, 2001).

¹¹ See, al-Sahawi, *Ibid.*

focused only on certain parts of Islamic family law in a short and detailed manner.

As an example, the law of 1920 number 25 and the law of 1929 number 25 describe short regulations concentrated on the obligations of the husband related to *nafaqah*, a short regulation on divorce and on bringing up children. The law 1920 itself contains only four chapters and thirteen articles. Whereas the law 1929 contains eight chapters and 25 articles. Both laws were subsequently amended by the law 1985 number 100. Some regulations like law 1952 number 119 on the wilayah ala al-mal and number 188 on the personal wilayah (*wilāyah alā al-nafs*) and other laws on charitable donation, bequest and inheritance. The rest of laws related to Islamic family and personal status laws merely regulate the procedure of adjudication, such as the law 1996 number 3 and the latest one (the law 2000) number 1 and 91.¹²

Because the codified material law is restricted only to these laws (mainly the law 1920, number 25, the law 1929 number 25 and the law 1985 number 100), the majority of Islamic family law materials are still derived from the Islamic conventional law written especially in the books of the Hanafite. Therefore it can be assumed that the function of codification was designed to minimize some controversies regarding certain aspects of the law while at the same time introducing new interpretations of law in daily practice.

The process of codification in Egypt occurred a long time before the same process happened in Indonesia. In the Egyptian context, there was also an earlier consensus on the promulgation of the Islamic law and of some religious laws related to the law of personal status and family. Therefore though the jurisdiction of Islamic court was gradually restricted and integrated into the secular legal system of nation-state, the fear of neglecting the Islamic family law was not greater than in Indonesia. Thus, the cultural and social position of the

¹² al-Sahawi, *Mausū'āt*, Ibid.

Islamic family law in Egypt is stronger than in Indonesia.¹³

In the Indonesian context, besides the debate between secular-nationalist and muslim-nationalist, the necessity of the codification of Islamic family law was also motivated by the growing need for introducing the new system of family law. That can be seen in the enactment of Marriage Law 1974.

In such a different frame-time and context, the following description will focus generally on the new interpretation of Islamic family law and specifically on the introducing process of women right.

The Codification of Islamic Family Law in Indonesia: Background, the Compilation of Islamic Law and the Process and Systematization of its Legal Drafting

The demographic, political and cultural landscape in Indonesia as previously described caused the polarization of responses and attitudes towards the institutionalization of Islamic family law.

The continuation of such tensions and conflicts subsequently took place in the legal arena and enactment process. The enactment of such laws as the governmental regulation number 5, March 25, 1946 which declared that the administrative authority of Peradilan Agama should be handed over from the Ministry of Justice to the Ministry of Religion, law number 22, 1946 which regulates the obligation of marriage registration among Muslims by the official of Kantor Urusan Agama (Office of Religious Affairs), the regulation of Ministry of Religious Affairs, number 6, 1947 which declared the administrative separation of Peradilan Agama signal the growing consolidation as well as strength of Islamic parties in the parliamentary arena.¹⁴ Moreover, in regard to the existence

¹³ Around the issue see, Brown, *The Rule of Law*, pp. 62-69.

¹⁴ Lev, *Islamic Courts*, pp. 2-62; Halim, *Peradilan Agama*, pp. 101-155.

of Peradilan Agama, through a series of such political activities it exerted a stronger political pressure both in the centers of pivot areas (especially Java) and outside the island.

Islamic political influence strength continued to grow. Its side effect was the continuation of the legal and political backing of the institutionalization of Islamic family law through the ongoing process of the legal legitimizative process of Peradilan Agama. In 1970 the legal existence of Peradilan Agama was further recognized by law number 14. The law clearly defined and recognized the Peradilan Agama as one of the courts in the system of state administration.

Related to the process of the codification of Islamic family law, the heated debates in the parliamentary session was the law number 1 of 1974, called the Marriage Law. Substantively the essence of this law further strengthened the legal existence of the Peradilan Agama. Despite the fact that the law was designed for all Indonesian citizens regardless of their religious background, the law indirectly recognized Islamic family law as one of its substantive bases. Therefore the law can be called the evolutionary and concrete substantiation process of Islamic family law through the secular state ideology Pancasila.¹⁵

The main article which clearly and directly recognized Islamic family law as one of the substantive sources is article 2 which states: "a marriage is legitimate, if it has been performed according to the laws of the respective religions and beliefs of the parties concerned". Furthermore, the special law concerning certain processes of adjudication in Peradilan Agama was enacted in 1989.

On the other side, the above mentioned institutional and legal development of the Peradilan Agama and the enactment of the Marriage Law caused certain legal problems for the Peradilan

¹⁵ Hooker, M.B., "The State and *Šari'ah* in Indonesia 1945-1995", in *Indonesia: Law and Society*, edited by Tim Lindsey (Sydney: Federation Press, 1999), pp. 97-110.

Agama. The problem was that until the 1990s, the Peradilan Agama had no standardized Islamic legal reference and codification which could be used as legal guides in the daily practice of adjudication.

Due to the absence of such a book providing legal references, the judges in the Peradilan Agama referred heavily to the classical formulations of Islamic books (*fiqh* books) or the treatises which had been publicly circulated. Those *fiqh* books which were used most frequently by the judges were:

1. *Ḥaṣiyyah Kifāyah al-Aḥyār* by Ibrahim Ibn Muhammad al-Bajuri
2. *Fath al-Muṭn* by Zayn al-Din al-Malibari
3. *Šarqāwī 'Alā al-Taḥrīr* by 'All Ibn Hijazi ibn Ibrahim al-Sharqawi
4. *Muḡnī al-Muḥtāḡ* by Muhammad al-Sharbini
5. *Nihāyah al-Muḥtāḡ* by al-Ramli
6. *Šarqāwī 'Alā al-Ḥudūd* by 'AH Ibn Hijazi ibn Ibrahim al-Sharqawi
7. *I'ānah al-Ṭālibīn* by Sayyid Bakri al-Dimyati
8. *Tuḥfāt al-Muḥtāḡ* by Shihab al-Din Ahmad Ibn Hajar al-Haytami
9. *Targīb al-Muṣtaq* by Shihab al-Din Ahmad Ibn Hajar al-Haytami
10. *Bulḡāt al-Sālik* by Ahmad Ibn Muhammad al-Sawi
11. *al-Farāid* by Shamsuri
12. *al-Mudāwanāt al-Kubrā* by Sahnun ibn Sa'id al-Tanukhi
13. *Kanz al-Rāḡibīn wa Šarḥuhu* by Jalal al-Din Muhammad al-Mahalli
14. *Fath al-Wahhāb* by Abu Yahya Zakariyya al-Ansari
15. *Bidāyāt al-Muḡtahid* by Ibn Rushd
16. *Al-Umm* by Muhammad Ibn Idris al-Shafi'i
17. *Buḡyāt al-Mustarṣidīn* by 'Abd al-Rahman ibn Muhammad al-'Alawi
18. *Aqīdah wa al-Šharī'ah* by Mahmud Shaltut
19. *Al-Muḥalla* by 'Ali ibn Muhammad Ibn Hazm

20. *Al-Wajīz* by Abu Hamid al-Ghazali
21. *Fatḥ al-Qadīr 'Ala al-Hidāyah* by Muhammad ibn 'Abd Wahid al-Siwasi
22. *al-Fiqh 'Ala Maḍāhib al-Arba'ah* by Abdurraman al-Jaziri
23. *al-Fiqh al-Sunnah* by Sayyid Sabiq
24. *Kaṣf al-Qinā' 'an Tadmīn al-Sanā'i* by Ibn Rahhal al-Ma'dani
25. *Maḡmū' al-Fatāwā Ibn Taimiyyah* by Ahmad Ibn Taimiyyah
26. *Qawānīn al-Šar'iyyah* by al-Sayyid 'Uthman ibn Aqil ibn Yahya
27. *al-Muḡni* by 'Abd Allah ibn Muhammad Ahmad ibn Qudamah
28. *Hidāyah Šarḥ Bidāyah al-Mubtadi'* by 'Ali ibn Abi Bakr al-Marghinani
29. *Qawānīn al-Šar'iyyah* by Sayyid 'Abdullah ibn Sadaqah Dakhlan
30. *Mawāhib al-Ġalīl* by Muhammad ibn Muhammad Hattab
31. *Ḥaṣiyyah Radd al-Muḥtār* by Muhammad Amin ibn 'Umar Ibn Abidin
32. *Al-Muwatta'* by Malik Ibn Anas
33. *Ḥaṣiyyah al-Dasūqi 'alā al-Šarḥ al-Kabīr* by Ibn 'Arafah al-Dasuqi
34. *Badā'i' al-Sanā'i' fī Tartīb al-Šharā'i'* by Abu Bakr Ibn Mas'ud al-Kasani
35. *Tabyīn al-Haqāiq* by Mu'in al-Din ibn Ibrahim al-Farahi
36. *al-Fatāwā al-Hindiyyah* by al-Shaikh Nizam and other ulama
37. *Fatḥ al-Qadīr* by Muhammad ibn Ahmad al-Safati al-Zaynabi
38. *Nihāyah al-Zain* by Muhammad Ibn 'Umar al-Nawawi.¹⁶

Using those books as court manuals was not easy and unproblematic. Besides the language problem, the more

¹⁶ Mawardi, Ahmad Imam, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia" in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), pp. 128-9.

substantive problem was that these books were not in any real sense the books of law which were ready to be used as court manuals, rather they were the books of theories of Islamic legal discourse which referred to many ideas and perspectives. Hence the use of these books as court manuals could result in ambiguous and arbitrary decisions of the judges.

Moreover, analyzing these books lead us to the conclusion that the majority of the books were not written to cope with local Indonesian problems. Therefore the roots of the problem could be traced to questions such as: to whom do the texts and the contents of the books really speak and under which specific socio-cultural circumstances were the books written. The legal assumptions which were pointed out in the books were more or less jurist law.

However, these problems had been identified since the existence of the law number 14 of the year 1970. Since then the effort of bridging these gaps through the reconstruction and reformulation of the court's performance, structure and legal materials was undertaken through the joint operation program between the Ministry of Religious Affairs and the Supreme Court. Though the joint program appeared as a merely pragmatic move, it could also be interpreted as signifying the structural cooperation between the Ministry of Religious Affairs as the main bastion of political Islamic wing and the Supreme Court as the main bastion of the nationalistic legal perspective. Furthermore the cooperation could signal a more harmonious situation between the Islamic wing and the nationalistic one.¹⁷

The joint project was further developed in 1985 by the creation of a special team with the specific task of formulating the legal materials (named Proyek Kodifikasi Hukum Islam). The positions of those involved seemed to reflect the structure of

¹⁷ Arifin, Busthanul, "Munawir Sjadzali dan Alur Pemikirannya" in Munawir Sjadzali, *Ijtihad Kemanusiaan* (Jakarta: Paramadina, 1997), pp. xvii-xxiii.

the cooperation. The majority of the key persons in the project were from the Supreme Court while the assistant positions were held by officials from the Ministry of Religious Affairs. The cooperation agreement was signed by the chief of the Supreme Court and the Minister of Religious Affairs.

The contents of the cooperation were: 1. the team was to be led by Professor Busthanul Arifin from the Supreme Court, who would to be assisted by two other team members: one from the Supreme Court and the other from the Ministry of Religious Affairs; 2. the joint cooperation project must be finished within two years; 3. the draft and list of the project agenda must be signed and agreed upon by the two parties; 4. the budget of the project was funded by the government through the issuance of a special Presidential Decree; 5. the cooperation was to begin on 25 March 1985; 6. the main target of the cooperation was to draft a book called *Kompilasi Hukum Islam* (the Compilation of Islamic Law).¹⁸

The Process and Steps of Formulating the *Kompilasi Hukum Islam* (KHI)

On the practical level of breaking down the operational steps, the compilation project was undertaken through a four stages of approach: gathering of data, conducting interviews, comparative studies and workshops.¹⁹

In the first step the team tries to analyze and gather the legal conclusion of the books which were used as court-manuals in many of the *Peradilan Agama*. Putting aside the books of al-Mughni, Ibnu Qudamah, *Majmu al-Fatwa Ibn Taimiyah* (Hanbalite books), al-Muwattha and *Path al-Qadir* (from Malikite), *Tabyin al-Haqaiq* by al-Farahi and *Fatawa Hindiyyah* (from Hanafite), the books used as court-manuals were from the Syafiite tradition. That is due to the fact that

¹⁸ Mawardi, "The Political Backdrop", pp. 125-147; Abdurrahman, *Kompilasi*, pp. 15-62.

¹⁹ Abdurrahman, *Ibid*.

Syafiite Islamic legal theory is considered as the real Islamic law in the Indonesian context.²⁰

Aside from these books, some fatwas from Majelis Ulama Indonesia and other Islamic organizations were also gathered and analyzed, especially from the Nahdlatul Ulama and Muhammadiyah as well as those previous decisions of the Peradilan Agama.

The next step was the interview. The interview was conducted by communicating with 166 ulama scattered in more than ten big and small cities all over Indonesia. They were regarded both as a representatives of Islamic organizations and as individuals as well. The majority among these 166 ulamas were those who act as leaders of the Pesantren (Islamic Boarding Schools). The method was employed as a means of gathering more reliable information and opinions on Islamic family law within broad and heterogeneous perspectives.²¹

The third step was the drafting of comparative studies. The studies were conducted by Muslim scholars to see and compare directly the practice of Islamic family law in Egypt, Turkey and Morocco. The choice of visiting those countries was based on the assumption that Egypt is a country with a long and rich tradition of Islamic heritage which also to some extent tries to define itself as a modern state, whereas Turkey represented the application of the principle of secularism in the practice of state mechanism which at the same time reflects the Hanafite Islamic legal tradition. Meanwhile the choice of Morocco hoped to give a real picture of the practice of the Malikite stream.

The last step was the holding of a workshop. The main objective of the workshop was to formulate the conclusions of the above-mentioned efforts in the form of a compilation of Islamic family law to be used as a court-manual

²⁰ Mudzhar, *Fatwas*, pp. 19-58; Mawardi, "The Political Backdroup", pp. 131-136.

²¹ Abdurrahman, *Kompilasi*, pp. 31-52.

throughout Indonesia.

Above all, the political support for the workshop was indicated by the attendance of the head of the Supreme Court and the Minister of Religious Affairs. The social participation was reflected by the arrival of 124 ulama. They represented several Islamic organizations from all over Indonesia.

The five day workshop resulted in the book called *Kompilasi Hukum Islam* (the Compilation of Islamic Law). The book contains of 229 articles. The articles correlated with three specifications of Islamic family and personal law: a. Marriage law; b. the law of succession; 3. the law of *waqf*(charity).²²

The Formulation of the *Kompilasi Hukum Islam* (KHI)

In general, the method of dividing chapters and articles in the *Kompilasi* resembles the Marriage Law of 1974 and the governmental decree of 1975 number 9 on the promulgation of the law.

A close look at the similarity between these laws implies that the *Kompilasi* was drafted and formulated as a continuation of both regulations. To a certain degree the *Kompilasi* is also aimed at producing additional explanations, commentaries and interpretations of both in order to manifest the spirit of Islamic family and personal law.

At this point, it must be remembered that the final draft of the Marriage Law of 1974 was preceded by a series of critical moments and controversies between the proponents and opponents of the Act. The law was also designed not only for Muslim citizens of Indonesia but for all regardless of their

²² *Ibid*

religious background.²³

Seeing the relevance of the study, from these three subjects of Islamic family and personal law, the study will focus mainly on the first subject, that is the law of marriage and its derivations.

From the perspective of legal-substantive analyses, compared to the two previous regulations (Marriage Law and governmental decree on the subject) the *Kompilasi* adds some articles which were derived from conventional Islamic law. The quantitative comparison among the three, shows that the Marriage Law contains of 14 chapters and 67 articles, the governmental decree contains of 10 chapters and 49 articles whereas the *Kompilasi* contains 19 chapters and 170 articles.

Besides some new chapters in the *Kompilasi*, there are some chapters which can be categorized as redundant and repetitive. The chapters copy exactly the text and formulation of both previous regulations. Such a repetition can be found in chapter IV of the *Kompilasi*. In the Marriage Act it has been stated that: "a marriage shall be founded upon an agreement between both the aspirant bride and the aspirant bridegroom" (Chapter II, Article 6, point 1). The same statement is expressed in the *Kompilasi* "a marriage is based on the agreement of both parties (the bride and the groom)"(Chapter IV, Part II, Article 16).

Another example of the similarity can be found in the chapter of Property During Marriage. In the Marriage Law, it is expressed: "With respect to property brought in by the husband and the wife respectively, the husband and the wife have the fullest right to conduct legal actions in regard to their respective individual property" (Chapter VII, article 36 point 2). In more or less the same formulation, the *Kompilasi* denotes; "The property of the wife will always be the possession of the wife and she hold the total control over it, and so will the property of the husband in which he hold the total control over his

²³ Subadio, *Hukum Perkawinan*, pp. 3-29.

possession" (Chapter XIII, article 86 point 2).²⁴

Thus, on the one hand, the repetition can be interpreted as emphasizing the importance of the legal substance in question, but on the other hand, the function of the repetition overlap with one another in a chaotic legal hierarchy.

A. The Formal Writing of Marriage: Religious Marriage or Secular Marriage?

In conventional Islamic family law, marriage is defined as a religious legal action. Its validity and justification depends on some conditions. The conditions are:

- a. the agreement of both candidates (husband and wife).
- b. both candidates are regarded as mature.
- c. The absence of a blood relationship.
- d. The absence of a marital relationship. Thus the marriage between mother-in-law and son-in-law is not allowed.
- e. For the women, the husband must be her co-religionist.²⁵

The marriage must be held: a. Only between men and women; b. The women must be guided by the guardian (*wali*); c. There must be eye witness (*saksi*); d. The marriage is held in the oral transaction. The guardian (*wali*) of the woman declares that he wants to engage his daughter in a marriage contract and the man answers that he can accept the marriage with certain dowry.²⁶

²⁴ Abdurrahman, *Kompilasi*, ibid.

²⁵ Khallaf, Abdul Wahhab, *Aḥkām al-Aḥwāl al-Šaḥsiyyah fī al-Šarī'ah al-Islāmiyyah* (Kuwait, Dar al-Qalam, 1996), pp. 15-36; Esposito, *Women*, pp. 15-48.

²⁶ Khallaf, *Aḥkām*; Esposito, *Ibid*.

The conventional Islamic family law from any school of thought did not mention any clear necessity for the secular authority to formally record the marriage contract. From the above mentioned conditions, the marriage contract is merely seen as a religious ceremony and that it depends on the willingness of the persons involved. To some extent, the marriage is also seen from the interest of the family as a collegial ceremony. The involvement of the family as a collegial community can be detected from the necessity and presence of witness (*shahid*) and the guardian of the women. In practice this involvement is actualized by the process of decision-making in which the parents take part actively.

The understanding that the marriage contract is merely a religious ceremony is also evident from some cases of marriage. To those who held that a marriage had no need to be legitimized by secular authority (or state apparatus), marriage was considered a religious rite which its validity does not depend on the secular authority, state or whatsoever. Thus, it negates any need for registering a marriage.²⁷

However, a deeper look at the cases implies that the act of refusing a written contract has three symbolic meanings, either the family of the husband or wife are regard marriage as merely religious ceremony or they are unaware of the formal bureaucracy due to their limited knowledge and financial access or politically they do it intentionally to demonstrate their opposition to the established order and government.

The negative attitude to marriage registration by authority happened in both Egypt and Indonesia. In the Indonesian context the opposition took place with a clear political motivation directed towards the delegitimation of state power during the colonial era.²⁸ The communities under the strong

²⁷ In some rural areas either in Egypt or Indonesia the practice is still exist.

²⁸ The non-cooperative strategy of some Kiyais in Java rejected whatever comes from the Dutch colonial government. The attitude

influence of Islamic leaders generally opposed the colonial administration including the act of opposing marriage registration by penghulus (marriage registrar). Instead they felt that the legitimating of their marriage is guaranteed merely by fulfilling the religious conditions of marriage. Such cases still happened in the era of the Old Order and the New Order.

In some rural areas in Egypt the tradition of customary marriage (*nikāḥ ‘urfī*) is still practiced. The practice ignores the formal procedures of marriage based on state regulations and is instead based only on a mixture of traditional and religious standards and norms and without the formal secular registration. The custom is generally motivated by the simple financial requirements of rural life as well as the feeling of merely religious motivation. The rural life does not demand the high standard of financial and administrative technicalities. Thus, marriage is seen as merely religious matter and no secular authority could determine its moral validity.²⁹

In Egypt the necessity of marriage registration in the legal document by state authority was first introduced in 1897. It was stated in the document called the procedure and administration of Islamic court system. The document declares that the marriage contract which was based merely on oral proof like customary marriage (*nikāḥ ‘urfī*) caused serious problems for the court when dealing with cases regarding the validity of marriage and its legal effect. Therefore the necessity of written legal proof for marriage is obligatory.³⁰

The textual expression of the document is as follows:

was a symbolic protest towards the later.

²⁹ Interviews and discussion with some Egyptian judges in Cairo (August-2002); Nassar, Nagla, "Legal Plurality: Reflection on the Status of Women in Egypt" in Baudouin Dupret, Maurits Berger and Laila al-Zwaini (eds.), *Legal Pluralism in the Arab World* (The Hague: Kluwer Law International, 1999), pp. 205-218.

³⁰ Khallaf, *Aḥkām*, pp. 29-35; Esposito, *Women*, pp. 49-101.

"It is permitted for the court to deal with cases related to the validity of marriage when the marriage occurs before 1897. In such cases the proof is sufficient with eyewitness and social recognition from the community".³¹

The presence of such an order is not enough in reducing the marriage based on unwritten proofs. Hence the necessity of a written document is further emphasized in 1910. The textual expression of the law describes:

"The legal conflict related to marriage and divorce or both after the demise of husband or wife which comes from the parties or a third party which occurred after 1911 could not be brought before the court without the written document free of falsification."

It seemed that the order was still ambiguous and could not decrease significantly the number of unwritten marriages. Therefore the order was further enacted: "It is not permissible for the court to accept the legal conflict of marriage coming from either husband or wife or from a third party when the marriage occurs after 1911, unless the marriage was accompanied by a written document signed by the groom".

However, those orders were not strong enough to minimize the incidences of unwritten marriage. Under such conditions, came the new decree in 1931. The textual decree explains: "Marriage conflicts after 1931 could not be resolved before the court, unless it was accompanied by a formal marriage certificate".

The development of technicalities regarding the written document of marriage urged the Egyptian government to form the institution for registration of Islamic marriage in 1955 called "al-ma'dzun al-syari".³²

³¹ Khallaf, *Ibid*; Esposito, *Ibid*.

³² The evolutive character of the regulations and their explanation can be read in Khallaf, *Aḥkām*, pp. 29-35 and Esposito, *Women*, pp. 49-101.

From the gradualness and evolution of the legal expressions in the decrees, it can be assumed that the secular authority (government) had encountered some difficulties in reducing the uses of unwritten proof related to unregistered marriage. But on the other side, the government was aware that the validity and legitimation of marriage on the societal level were not based on the formal secular procedure, instead it was measured by the Islamic standard of norms. In order to find the solution, the legalization of marriage through registration process was facilitated, but the order did not relate the registration to the notion of marriage validity or legitimation. Instead, the orders state that the marriage has no legal effect unless it is accompanied by the formal writing proof.³³

However, from the perspective of integrating secular and religious values, such a type of decree could cause lack of legal assertiveness. Furthermore, it can also be concluded that the secular authority could not replace any religious measurement and standard of norms.

Compared to the conventional Islamic family law, the new element of the codification is the urgent need for a secular registration of religious marriage. Though the process of marriage registration could be seen as a merely technical issue, but a deeper reading of the case implies that a new normative standard in seeing the validity of marriage is gradually being introduced through the registration procedure.

Over and above the legal purpose of such a registration, the marriage registration by the secular authority could gradually become a symbolic expression of social recognition from the Islamic community regarding the authority of the government in legitimizing the validity of religious marriage. Thus, the marriage is not perceived as being merely religious but also as binding and legitimate because of the secular authority. In such a condition, secular and religious affairs united and

³³ Interviews and discussion with some Egyptian judges in Cairo (July 2002); see Nassar, Nagla, "Legal pluralism", pp. 205-212.

integrated.³⁴

The process of marriage registration by the government apparatus in Indonesia is regulated by law number 22 of the year 1946 and law number 32 of the year 1954. The registration is further explained in the governmental decree number 9 of the year 1975 and the Kodifikasi Hukum Islam (KHI). Seeing the essence of those rules and decree from the interrelationship of state and Islam, it can be assumed that the basic formula of the regulation is the same as in Egypt: a compromise between the elements of secular authority (government/state), legal certainty, and the Islamic standard norm of religious marriage validity. Nevertheless, before the state law, unregistered marriage was not regarded as void but was categorized as a marriage without any "legal effect" (*tidak memiliki kekuatan hukum*).

The Indonesian governmental decree number 9 of the year 1975, explains the process of marriage registration in the special chapters of II and IV in 12 articles. Whereas in the KHI the process of marriage registration and its legal effect are stipulated in articles 5 to 7. Like in the Egyptian case, before the state law, unregistered marriage was not regarded as void but was categorized as a marriage without "fixed legal effect" (*tidak mempunyai kekuatan hukum tetap*).³⁵

What is the legal solution for the cases of unregistered marriage? Article 7 KHI stipulates that such a marriage can be brought to the court by initiating the "legalization of marriage" (*itbāt al-nikah*). Some judges of Sumatera and Jawa confirm that the demand for "a legalization of marriage" was still done until recently. Though the number is always decreasing.³⁶

³⁴ For Indonesian context, see Noeh, Zaini Ahmad, "Kata Pengantar Penterjemah" in Daniel S. Lev, *Peradilan Agama Islam di Indonesia* (Jakarta: Intermasa, 1986) pp. 2-18.

³⁵ Subadio, *Perjuangan*, pp. 33-55.

³⁶ Interview with Khalilurrahman, an Indonesian judge of the High

On the registration of marriage, it can be stated that though both the Egyptian and Indonesian governments seek to prevent and reduce maximally unregistered marriage, the facts tell us that there was no marriage which was postponed because it was done without formal registration.³⁷

On the other side, responding to the necessity of marriage registration, some ulama of Egypt and Indonesia see the process of marriage registration as positive policy. In seeing the matter, the ulama based on the doctrine of *siyāṣah šar'īyyah*, which actually has no any direct and explicit formulation either in *Al-Qur'ān* or *ḥadīth*.³⁸

B. The Minimal Standard of Age for Getting Married: The Ruler's Administrative Policy

In the conventional Islamic family law the minimum age for getting married is closely related to the one who has right to marry on the basis of maturity (bulugh). On this topic the conventional Islamic law tends to restrict the standard of maturity based on psychological criteria and the development of the sexual organ.³⁹

In accordance with the standard of such a criteria the male who is regarded as capable to understanding his responsibilities and is attracted to a female or has had a sexual fantasy, can be counted as being mature. Hence, he is eligible to get married and responsible for any outcomes from his own decision.

For the female the criteria is softer and looser. She is

Islamic Court (Pengadilan Tinggi Agama) Yogyakarta and Zainuddin the judge of Pengadilan Agama South Jakarta (Jakarta, September 2002).

³⁷ Interview with some judges of Egypt and Indonesia (July-Sept. 2002). For Egyptian cases, see Nassar, "Legal Pluralism", pp. 205-212.

³⁸ Noeh, and "Kata Pengantar" pp. 2-18; Esposito, *Women*, pp. 49-101.

³⁹ Khallaf, *Aḥkām*, pp. 15-36.

regarded as mature (balighah) and therefore eligible to get married as soon as she has had menstruation. Furthermore, in the case of marriage, it is better for the female to get married earlier than later.⁴⁰

Based on such an understanding the marriage of couples (especially in the case of the female) who are still in early of adulthood became a part of tradition in Egypt and in Indonesia. In the Egyptian cases, the practice can still be found in the rural areas. Especially among the peasants and people of low standard of economics and education.⁴¹

Aware of the practice and of its consequences, in 1931, the Explanatory Act of the Egyptian Administrative Regulation of the *Šarī'ah* Court, point 5 article 99, declared: "The legal conflict cannot be solved in the court, if the female had gotten married at the age of less than 16 years and the male with less than 18 years...".

Since the enactment of the regulation, Egyptian early marriage has been restricted formally but at the practical level the practice is still going on. Moreover the enforcement of such a regulation faces several difficulties. The difficulties are not only due to cultural barriers like in the case of *nikah urfi* but is also related to administrative difficulties such as those involved in the issuance of birth certificates. The absence of an adequate system for the issuance of birth certificates could lead to the uncertainty of age measurement for the population.⁴²

Lacking an adequate system, the people who want to get married seek a birth certificate from the Department of Justice.

⁴⁰ Khallaf, *Ibid.*

⁴¹ Interview with Hasan Manshur, an Egyptian judge for family legal cases of Iskandaria (Cairo, August 2002). Interview with Hasbi Hasan, an Indonesian judge of Pengadilan Agama in Lampung (Jakarta, September 2002).

⁴² Interview with some Egyptian judges in Cairo, August 2002. See also, Nassar, "Legal Pluralism", pp. 205-212.

Hence the Department issued many birth certificates for the purpose of someone's marriage. The dates in the certificate were based only on the oral explanation of the parent or family of the seeker. Moreover in the absence of birth certificates, in the rural areas the birth certificate is substituted with the certificate of adulthood issued by doctors. Through such a zig-zag mechanism, it is hard to believe that the certificates are based on reliable and accurate data as well as being free from any falsification. Thus, it is hard to restrict the marriage of very young female.⁴³

Though the practice can be considered semi-illegal, no marriage based on such certificates is ever annulled. However, according to some researchers, the core problems of the early marriage are rooted in the masculine perspective of family building. This doctrine spreads the notion that after marriage, the parents of the female can be regarded as being free from any dishonour based on the social taboo of having a daughter getting married at a late age.

Besides this taboo—on the other hand— the people are also aware that the burden of financial support shall be placed on the shoulder of the male after marriage. Therefore, it is very safe for the parents of the female to decide earlier in the case of their daughter's marriage.⁴⁴

Like in Egypt, in the Indonesian context, before the enactment of Marriage Law 1974, there are some marriages in the early youthhood. It is confirmed that especially for female the age is around 12 to 15 years old. The practice of this kind is oftenly can be found in the rural areas of Madura, East, Central and West Java as well as in South Kalimantan and South Sulawesi. Such cases are mainly regarded as managed marriage because the inisiation of marriage comes especially and mainly from

⁴³ Nasser, "Legal Pluralism", *ibid*; Karam, *Women, Islamism and the State*, p. 146, 144-151; 192-3.

⁴⁴ Nasser, *Ibid*; Karam, *Ibid*.

parents.⁴⁵

To cope with this situation, Indonesian Marriage Law of 1974 states; "a marriage shall be founded upon an agreement between both the aspirant bride and the aspirant bridegroom", (article 6 point 1). In the following article it is stated: "Marriage shall be permitted only if the male aspirant has reached the age of 19 (nineteen) years and the female aspirant has reached the age of 16 (sixteen) years". And "in order to enter into matrimony a person who has not attained the age of 21 (twenty one) years shall obtain the consent of both parents" (articles 7 and 6, point 1).

The KHI also restricted the minimum age and the agreement of parents for the couple (articles 15 and 16). Moreover, in article 17, KHI emphasizes that before beginning marriage ceremony the duty of marriage registrar is to ask formally and directly the willingness of marriage from the couple themselves. If one of the couple denies his or her willingness, it is the right of the marriage registrar to annul the marriage.

In the Indonesian context, it can be concluded from the assertiveness of these laws that: a. either the Marriage Act or KHI had reinterpreted the conventional legal substance of Islamic family law and had instead proposed a new standard of measurement for adulthood (*bulugh*) and eligibility in conducting marriage; b. the laws tried to propagate the new orientation of the family law, from the patriarchal-based law towards the parental-based law. The laws required not only the agreement of the male before marriage but also the agreement of female. The laws open the legal possibility of cancelling arranged marriages or of marriages which are based merely on the willingness of the parents and not of the couple themselves.

Based on point b, the institution of marriage guardianship (*wall nikah*) was also transformed from being a superior body in

⁴⁵ Interview with an Indonesian judge Abdul Manan of Pengadilan Tinggi Agama Sumatera Utara (Jakarta, September 2002).

relation to the female towards an egalitarian level between the couple and the parents. Theoretically, it creates the new possibility for the female to express her right and willingness before the legal institution as well as her parents.

However, it must be noted that arranged marriages and early marriages still exist, especially in rural areas. Like in the case of Egypt, the main factors are the cultural, financial as well as the distorted bureaucracy of state administration.

C. The Ownership of Goods during Marriage : Local Tradition and the Invention of Law

How is the Egyptian law on the subject? In the text of the Egyptian family law we cannot find the right of collective ownership between husband and wife in a family. In the whole of Egyptian family laws which deal with the ownership concept in a family, the discussion is more focused on the division of labor in the family based on the concept of sexual differences: the husband is responsible for acquiring the financial resources whereas the wife is bound to do the domestic works. The law maintains that the individual belongings of the husband or wife before marriage remain under individual ownership.⁴⁶

Based on such a law, theoretically the wife does not have chance to own any belonging during the marriage insofar as she does not work outside the house. But to work outside house the wife is obliged to obtain the permission of her husband because through marriage the wife is bound to loyalty to her husband (bay'ah al-tha'ah).⁴⁷

In such a legal scheme, the position of women is financially under the control of husband. Due to the strict concept of domestic and non-domestic works, the access of women to ownership is systematically restricted by law. The husband has

⁴⁶ See al-Sahawi, *Mausū 'āt*; Khallaf, *Aḥkām*.

⁴⁷ Karara, *Women, Islamism*, pp. 140-8.

a superior right to women because he has many privileges. He is entitled to work and to earn a livelihood and at the same time all of the products of his labor belong to him. His belongings cannot be shared with wife, though the wife had participated in helping her husband by doing domestic works.

In general, the principle of collective ownership (between husband and wife) of some goods during marriage in the conventional Islamic family law is also not known. The ownership in the Islamic family law is based on the principle of individual character. After marriage, husband and wife continue to own their pre-marital belonging as personal belongings. However, the structure of the family is based on the division of duties: the husband is obliged to work and earn money to support the family while the wife is obliged to take care of children or to maintain the household. But the whole product of the husband's effort during marriage cannot be called as a collective property of the husband and wife. It only belongs to the husband.⁴⁸

Thus, after marriage the dominant family structure in the concept of conventional Islamic family law is that the husband should be responsible for financial support of all the members of the family and the wife acts as an assistant for the husband to deal with the domestic matters such as bringing up children, etc. During marriage the wife is not entitled to own goods earned by the husband in her own name. She is only entitled to have a personal guarantee of welfare and affection of the husband or to have a part of the goods after the death of her husband through inheritance.⁴⁹

Contrary to these concepts, in the sociological phenomenon of Indonesian society there is a concept of collective ownership

⁴⁸ The logics and structure of the Egyptian Family Law indicates explicitly on the matter, see al-Sahawi, *Mausū'āt*, *ibid.* For Islamic conventional explanation, see Khallaf, *Aḥkām*, pp. 69-76, 104-113, 119-120.

⁴⁹ Khallaf, *ibid.*

during marriage. In the tribal customary law of Aceh, Kalimantan, Sulawesi and Java the concept of collective belongings exist.⁵⁰ The concept denotes that the belongings which are earned by the couple during their marriage is shared based on the principle of collective ownership. During marriage itself the belongings are not divided and it is only divided after one of them is dead.

In Indonesia the legal recognition of collective ownership is stated in Marriage Law of 1974 chapter VII, articles 35, 36 and 37. These articles explain that whatever earned after marriage can be called collective property. On the contrary the pre-marital goods are still counted as individual belongings.

Article 85 until 97 of KHI recognize collective ownership and state that there must be a clear distinction between individual and collective belongings. After marriage, the individual belongings are still under the authority of the individual whereas collective belongings must be under the authority of both. The husband is not permitted to use and utilize the wife's belonging und vice versa without the permission of the owner.⁵¹

Why must the concept of collective ownership be discussed? The analysis of the subject will enable us to know how and in which milieu the interplay and interaction between husband and wife in a marriage is created and conceptualized. Knowing the subject can also give valuable clues as to the position of women. The more the right of women to own goods in the family is recognized the more freedom, self confidence and equality she will have in family. The principle of collective ownership in the family is also essential in creating equal treatment and balancing rights in family.

In the context of Indonesian law, compared to the concept of conventional Islamic family law, the recognition of collective

⁵⁰ Subadio, *Perjuangan*, p. 44 ; Bowen, *Islam Law and Equality*, p. 160.

⁵¹ Subadio, *Ibid*.

ownership in the family is a new approach and interpretation. The concept of conventional family law strongly tends to make women more dependent on her husband but through the introduction of the concept of collective ownership the position of women is more equal with her husband. Nevertheless, the general position of women in the Indonesian scheme of family law is not placing the women in the full equivalency to the men. The case will be discussed and showed in the later part.

D. The Definite Position of Husband and Wife in Family: Inequality, Ambiguity and Ambivalence

Generally, in the description of conventional Islamic family law the strong tendency has been to restrict the role of women to domestic affairs. The wife is obliged to be responsible for the duties in the home such as bringing up the children and other affective and sexual duties as well. As a consequence, the wife is entitled to financial support from her husband. This idea originated from all of the four Sunnite legal schools of thoughts.⁵²

Differing from the law in Indonesia, the Egyptian law does not include a special chapter and article on the position of husband and wife in family. Nevertheless the structure and pattern of legal substance from all the laws concerning the family and the position of women indicate that there is clear and sharp definition on the role of women in the domestic affairs, a clear definition of the superiority of men as the holders of leadership, financial access and ownership. Thus, the position of wife is nearly in total dependence to her husband.⁵³

In the context of Indonesia, related to the position of husband and wife in the family, the reading of Chapter VI, Articles 30-34 from the Marriage Law 1974 and KHI Chapter XII Articles

⁵² Khallaf, *Aḥkām*.

⁵³ Interviews with some Egyptian judges in July and August 2002. See, al-Sahawi, *Mausū'āt*, Karam, *Women and Islamism*; Nasser, "Legal Plurality".

77-84 indicates that the legal statement of these laws is ambivalent: on the one hand it emphasizes the equality and balance of husband's and wife's rights in the family but on the other hand it continues to emphasize that the main duty of husband is to be the head of the family and its financial protector whereas the wife is obliged to be his partner.

The Article 31 point 1 and Article 79 point 2 of KHI states that: "the rights and duties of the wife are equal to the rights and duties of the husband in the family and social interaction in society". Point 2 of the Marriage Law and point 3 of KHI state: "Everyone (husband and wife) is entitled to act legally".⁵⁴

Nevertheless, the equal and balanced position of husband and wife in these explanations is followed by the description of article 31 point 3 of the Marriage Law and article 79 of KHI that: "the husband is the head of the family and the wife is the mother of the household". The connotative meaning of the statement is that the husband is the main manager of family whereas the wife is the counterpart who should manage the internal and domestic affairs of family.

It can be assumed that one of the reasons of the ambivalent attitude in the definition of the inter-relationship between husband and wife in the Marriage Law of 1974 was the actual constellation of the ideas during the process of legal drafting: on the one side the representation of the Islamic wing had demanded the application of conventional Islamic family law which originated especially from the Syafiite, the main Islamic school of thought for the Indonesians.⁵⁵ On the other hand, the secular wing proposed the new counter- draft of the law which will enhance the process of more equal treatment of women. The result is the compromise and eclectic draft of the ideas.⁵⁶

⁵⁴ Subadio, *Perjuangan*, pp. 7-30.

⁵⁵ Noeh, "Tambahan Perkembangan Setelah Undang-undang Perkawinan" in Daniel S. Lev, *Peradilan Agama Islam*, pp. 326-347.

⁵⁶ Noeh, *ibid.*

Related specifically to the KHI, in fact the legal drafting of KHI did not involve a significant segment of women. Only one woman among more or less twenty key men participated in the process of legal drafting or at least mentioned as members of the committee.⁵⁷ Though the involvement of women could not be a guarantee for the content of law, the symbolic meaning of the involvement of women is without doubt significant.

However, if we compare this to the normative standard of conventional Islamic family law, the content of the above-mentioned law indicates a new interpretation. Though the law has dual faces, the positive meaning of the law is that it opens to many interpretations and approaches. The dominant interpretation and application of the law will depend on how the dominant legal discourse as well as other relevant social factors will lead to a single legal conclusion. Therefore the role of women in the public life will more or less refer to the clash of opinion buildings from the concerned parties.

Thus, related to the Indonesian context, at least in the theoretical level, the whole article concerning the position of women in the family does not describe exclusively the superiority of the husband but open up the new legal approach. In the practice of adjudication, the legal culture, the courage of women and legal activists can become important influencing factors in motivating the judges to be daring in upholding the new approach in order to maintain the spirit of equal treatment among sexes. Once the judges have done this, it will become the new standard of interpretation.⁵⁸

⁵⁷ The members of the committee, see, Abdurrahman, *Kompilasi*, pp. 98-101.

⁵⁸ According to Syamsu Hadi of the Indonesian Supreme Court and Abdul Manan of the Islamic Court of Sumatera Utara, some Indonesian judges have interpreted in line with the spirit of gender mainstreaming in the cases of inheritance and the role of women in family in general (interview in Jakarta, September 2002). For more

On the sociological level the existing law indicates that the influence of conservative Muslims in defining the Islamic family law is still very dominant and significant, though the Secular wing and the contextualist feminists continuously criticize the substance of such a law. The criticism of the last two wings only resulted the revision of minor subjects such as the application of more strict measures and restrictions on child-marriage, the rigid interpretation of polygamy and the more equal treatment of the wife in the process of divorce.⁵⁹

E. Polygamy: the Denied Woman's Right

The conventional Islamic family law recognizes polygamy. Though in the textual expression of *Al-Qur'ān*, monogamy is preferred⁶⁰ and polygamy is allowed with the condition that the husband can guarantee justice among the wives, the practice and interpretation of polygamy is ambiguous. Moreover the practice and interpretation of polygamy is often seen as absolutely unconditional.⁶¹

Such basic assumptions and practices tended to hamper the equal treatment of women. Aware of such a tendency the reformist's interpretation of the *Al-Qur'ān* is heterogenous. Some of the Quranic exegeses propose that the basic formulation of the *Al-Qur'ān* is monogamy while others state that the conditions for polygamy must be based on strict criteria. With such strict criteria, polygamy is almost

theoretical approach and data of some cases, see Bowen, *Islam, Law and Equality*.

⁵⁹ The discussion on more wider topics in the Indonesian context, see Saimima, Iqbal Abdul Rauf, *Polemik Reaktualisasi Ajaran Islam* (Jakarta: Panjimas, 1988); Bowen, *Islam, Law and Equality*. For the Egyptian context, see Karam, *Women, Islamism*; Nasser, "Legal Plurality".

⁶⁰ Esposito, *Women*, p. 49, 137.

⁶¹ Karam, *Women and Islamism*, p. 176.

impracticable and it could be done only in emergency cases.⁶²

In the Egyptian codification, there is no clear statement prohibiting polygamy. On the contrary the legal statement for someone who wants to polygamies is to fulfil some conditions, mainly to get the permission of the first wife and to be financially capable of supporting the family as whole (Law Number 100 of the year 1985). In practice, the wife can sue the husband due to polygamy if she considers that by practicing polygamy the husband had injured the wife physically or mentally or because of polygamy the husband has neglected his duty in fulfilling the needs (in the wide interpretation) of the wife.

Nevertheless, in the practical adjustment of the legal substance, the right for the wife to sue the husband due to polygamy is not easily performed. The difficulties lie in the law of procedure. The law of procedure requires the wife to prove convincingly before the court what the wife means by the insulting attitude of the husband. Moreover the court should also meticulously see whether the attitude of husband is the main cause in the incident or it is only caused by the previous attitude of the wife. In short, the procedure and process of proving the husband's deed and the court's decision on the matter are crucial and too burdening for the wife.

However, in the Egyptian context the act of polygamy itself is not preferred by many. Although it is legally allowed, not more than 2.8% practice polygamy. This relatively small number of cases of polygamy is mainly caused by the tight financial condition presented to anyone who wants to polygamies.

In the text of Indonesian Marriage Law 1974, it is stated explicitly that "in principle in a marriage a male person shall be allowed to have one wife only. A female person shall be allowed to have one husband only" (article 3). Thus, the basic

⁶² Esposito, *ibid*.

assumption of marriage is monogamy.⁶³ Articles 4 and 5 of the law contain some regulations and conditions for the husband who intends to practice polygamy. It is explicitly stated that the conditions which have to be fulfilled before polygamy is allowed are: a. when the wife cannot perform her duties as wife; b. the wife suffers from physical defects or an incurable disease; c. the wife is incapable of having descendants.⁶⁴

The procedure of polygamy is also mentioned as follows: a. the approval of the wife or wives; b. the assurance that the husband will guarantee the necessities of life for his wives and their children; c. the guarantee that the husband can act justly in regard to his wives and their children.

Articles 40 until 43 of technical regulations concerning polygamy state that the previous possibility of polygamy depends on: a. the judge's decision before the court; b. the agreement of the first wife.⁶⁵

In practice, though the agreement of the first wife is mentioned in the regulations, the judge's decision is more influential and powerful. The possibility of polygamy in many cases does not depend on the agreement of the wife but refers solely to the judge's decision.⁶⁶

⁶³ Subadio, *Perjuangan*, p. 22.

⁶⁴ Subadio, *Perjuangan*, pp 55-72.

⁶⁵ Subadio, *ibid*.

⁶⁶ Some Indonesian judges said that to decide and allow polygamy they are often trapped in difficult position: on the one hand, the man who wants polygamy based on the real condition that is the existing interrelationship between the man and women on the basis of mutual and sincere love (at least on the theoretic level) but on another side, it will however harm the first wife. (Interview with judge Khalilurrahman of the Islamic High Court of Yogyakarta and Hasbi Hasan of the Islamic Court Lampung, September 2002). In an interview with a women judge of Islamic Court of Sumatera Barat, she expressed that whatever the condition is she will never allow any man to do polygamy unless she had personally seen the real case that

In those cases, the judges refer mainly to article 43 of the law: "when the court decides that the legal proof for polygamy is sufficient, the court can give its permission for the purpose".

Concerning KHI, articles 55 until 59 are in line with the previous legal substance. However, on such a significant subject, the KHI does not explicitly define that monogamy is the original form of marriage. It can be assumed that the absence of an explicit legal formulation indicates: a. an effort to avoid redundancy with respect to the subject. Because the same formulation had already been mentioned in the Marriage Law of 1974; b. the strong resistance of the main legal drafters of KHI. This is due to the fact that some members of the religious elite are themselves polygamists.⁶⁷

Looking at the structure and substance of Marriage Law 1974 on polygamy, we may assume: a. there is a tendency to restrict the practice of polygamy. But the strength of this tendency is depends on the awareness of the judges in deciding the case; b. the feminist opinions of either the secular or contextualist wing were not influential in the process of legal drafting and in the practice of the court. The case is proved by the fact that any objection which comes from the first wife in the adjudication is regarded as a secondary and marginal factor compared to the decision of judges. It is without doubt that most of the cases are presided upon by male judges; c. the definition of monogamy as the original form of marriage is not coherent with other articles of the law or other technical regulations which tend to be permissive in allowing polygamy.

the first wife is suffering from permanent and serious physical incapacities (cacat selamanya).

⁶⁷ The attendants on the seminar in order to create a final drafting of the KHI are some Islamic leaders (kiyai) of many pesantren. Without doubt, so far I know that those Kiyais of especially of Java region are polygamists. See, Abdurrahman, *Kompilasi*, pp. 1-86.

F. Divorce: Problem of Procedure and Women Right

As in the case of marriage registration, the procedure and right of divorce in the conventional Islamic family law is difficult to apply in the daily practice of today's life. The core problem is that the procedure of divorce cannot be objectively measured because it depends on the intention (*niyyah*) of someone's deed. The legal effect of intention is the deciding factor. The intention itself is not easily ascertained. Another difficulty is that the right of divorce according to all legal schools of thought is exclusively for men. Thus, the woman has an unequal right in initiating divorce.

According to Islamic family law, outside death the cause of divorce can only be: a. personal willingness (exclusively the willingness of husband); b. through the process of *šiqāq*, that is the unresolved conflict between husband and wife; c. through the process of *fash*, that is the divorce due to the judge's decision. The judge's decision itself is based on his conclusion that the marriage is void because it cannot fulfil the condition of marriage; d. violating the marriage contract which is written in the conditions of *ṭalaq* (*ta'liq ṭalaq*); e. khulif that is, the wife demands divorce by giving back the financial amount (*iwāḍ*).⁶⁸

The description in the conventional Islamic family law is generally focused upon the divorce done by the husband. According to the Syafiite school of thought, the exclusive right of husband is something unquestionable. Hence the husband is entitled to divorce the wife even without any logical and sound background.

According to the Islamic conventional law, there are two kinds of divorce in such a perspective: a. the revocable divorce, which gives the man an opportunity to reconsider the decision; b. the irrevocable. This does not give the man any opportunity to reconsider his decision.

⁶⁸ Khallaf, *Aḥkām*, pp. 128-165; Esposito, *Women*, pp.13-48.

The second sort of divorce is different from the first. The second is measured by the serious intention of the husband to divorce his wife. The seriousness is seen from how often he pronounces the word divorce or a word of similar meaning. When he pronounces it three times then he seriously wants to divorce his wife and therefore he has done the second kind of divorce.

In the context of Egypt, the structure of all the laws and regulations concerning family had granted the right to divorce exclusively to the husband to possess. Furthermore textually the husband is entitled to divorce his wife without any logical background.

The case is different for the rights of the woman. The woman is given the right of divorce in the restricted sense. One of the methods of granting this right to the woman is when she is given the opportunity to make a special agreement during the process of marriage. In the agreement the women can propose a special stipulation which declares that the woman is entitled to demand divorce legally if the husband breaks the agreement. It is generally called *isma*.⁶⁹

In practice however, the right of *isma* for the woman is very rarely used. The main reason against the use of *isma* is that the woman and her family feel embarrassed due to a social taboo against it. According to the Egyptian tradition, it is humiliating for the family of the woman to demand too much in the course of marriage. Thus, the practice of *isma* does not effectively work.⁷⁰

⁶⁹ Nassar, "Legal Pluralism", p. 197; Karam, *Women, Islamism*, p.146.

⁷⁰ Nassar, *ibid*. According to some Egyptian judges from Cairo and Iskandaria, most of Egyptians are still regard that men are the protectors of family. The women in the urban area are more critical in demanding their rights whereas in the rural areas are traditionally more passive and accept the given rights of women such as in the Marriage Law as biological consequence and part of Arabic as well as

The continuing protests of the secular and contextualist feminists urged the government to enact special regulations concerning the right of women. The law number 100 was enacted in 1980. The law recognizes the woman's right of divorce more explicitly. According to the law the women can demand divorce from the husband under the following conditions.⁷¹

First, there is no longer harmony in the family due to prejudice. The non-harmonious situation and prejudice are seen in the wider meaning. It includes physical, social, cultural and sexual disharmony.

Though the definition of disharmony is wide, the main problem is that disharmony should be: a. proved (before the court by women party) as disharmony originating from the husband and not from the condition of wife herself or disharmony caused by the wife's deeds.

The mentioned point and the way of proofing is serious burden for the wife. In practice, it is difficult for her to prove that the main cause of disharmony is the real attitude of her husband and not caused by her. In the daily interaction of family it is hard to find that a certain action is merely the action of one party (either the husband or wife) and not correlated to each other.

Such a perspective of understanding makes the stipulation unworkable for the real interest of women. Moreover in the practice of court, the feeling of disharmony is seen differently by the judge depending upon the social standing of the litigants. When the litigants are come from a low economic

Islamic tradition (interviews and discussion with some senior judges in Cairo, July-August, 2002). For historical background of Women's awakening in Egypt, see Beth Baron, *The Women's Awakening in Egypt* (New Haven-London: Yale University, 1994).

⁷¹ Nassar, "Legal Pluralism", pp. 198-203; Karam, *Women, Islamism*, pp. 147-148.

class, the court will see the problem as not sensitive. In the sense that the court will conclude that the problem is an ordinary case due to the social difficulties of litigants. On the other hand, when the litigants are from the established high-class society the court will treat the case in a more sensitive manner. Thus, in the later case, the reason of disharmony in the family will be seen as a serious case.

As in the Indonesian court, before deciding upon divorce as a solution for the case, the court will try to mediate. In the final effort of mediation, the court will ask both the husband and wife to send their delegations from their own families to help resolve the problem brought to the court.

In the case of mediation through such a method, the main problem is that both delegations of the husband's and wife's family are not trained to resolve and mediate the case. The mediators are normally trapped by the patriarchal and male-oriented tradition as the main frame of reference. Thus, the process of mediation heavily tends to be partial. It tends to secure and legitimate the interests of the husband. Therefore, in practice, using the meditative method as means of resolving the problem is not effective in helping the wife. Second, without informing the first wife, the husband has gotten married with another woman. In such a condition, the wife is given a legal right within a year to sue the husband. The legal demand could be based on material jealousy or the existing psychological injury due to the marriage.

As in the first case, though the legal content of the stipulation tends to defend the woman's right, the core problem is that the existing operational legal framework does not match this legal substance. According to the legal framework, the wife is obliged to prove maximally her legal demand before the court. Furthermore in the Egyptian court system the judges consist of males only and there are no female judges even in cases of family conflict which directly involve women.

Third, the absence of the husband for a year. In legal practice this reason is the most effective one. That is due to the simplicity of proving the case. Among the existing reasons which women use to assert their legal right for divorce, this reason is also the most frequently used.

Fourth, the husband cannot support the financial needs of the family or he has a chronic and critical disease preventing him from engaging in sexual intercourse. In practice, though this reason is legally legitimated both in Islamic family law and the codification but sociologically it is rarely practiced.

However, in general, the living tradition prevents the law from being effective. A wife who demands her right to use the stipulation is considered unloyal or materialist. The marriage contract which should be interpreted on its affective character is steered by her to be based only on financial needs.

The practice of the stipulation also shows that the enforcement of this point is not easily accepted by the judges. However, in contrast to this legal logic and its application, when the reverse problem happens with the wife, it is easy for the judge to accept and decide the case in favour of the male interest. There will be no sociological burden in such cases. The social norm will regard that what has been done by the husband is normal and legitimate. Like in other cases, the enforcement of the law is more than a legal application but it involves a certain sociological measurement. The patriarchal and masculine oriented society will not easily be changed by means of legal formulations alone.⁷²

In the case of divorce in the Egyptian court, it should be mentioned that the procedure of the adjudication is not easy and simple. It is a complicated and long procedure. Moreover when the divorce is demanded by the wife. The side effect of

⁷² Nassar, *ibid*; Karam, *ibid*. More theoretically oriented discussion, see Karl Renner, *The Institutions of Private Law and Their Social Functions* (London: Routledge & Kegan Paul, 1949).

the matter is that many women avoid such a complicated matter. They prefer to maintain their marital status though they suffer domestic violence in their daily life. Such cases happen in many families especially from the low socio-economic level.⁷³

The case will be different when the wife comes from a middle class family with a sufficient standard of education. Generally, some wives who hold such a social standing possess a specific profession through which she personally can earn money. Because they are educated and have a certain social legitimation, they will be more assertive and conscious with respect to their rights, especially the right of divorce granted by the law. In practice, before the court, the position of such women will be strong and she can oversee the case more meticulously.⁷⁴

Related to the legal effect of post-divorce, there are two things which generally become a problem for wife. The bringing up of children and the residence of the wife. According to the Egyptian legal stipulation, the genealogy of family comes from the male and never from female (patrilineal system). Therefore, the wife can only bring up the children but she will never possess them.⁷⁵

Concerning the matter, the legal consequence for the divorced wife is when they have a son, the wife will be granted a right to bring him up until the age often but for daughter she will be granted this right until the age of 12. This legal right for the ex-wife can be prolonged until the son is 15 years old and until the daughter gets married. However the genealogy will remain in line with the patrilineal system.⁷⁶

In practice the right for bringing up a child and to have an

⁷³ Nassar, *ibid*.

⁷⁴ Nassar, "Legal Plurality", p. 199.

⁷⁵ Nassar, *Ibid*, pp.202-3.

⁷⁶ Nassar, *ibid*.

access to visit and maintain a contact with him or her become the most frequently debated and demanded before the legal authorities and court. The conventional Islamic family law does not declare anything explicitly on the matter.⁷⁷

Seeing the case, the secular and contextualize feminists urge that the right for bringing up a child for an ex-wife should not only defined in terms of the physical right but also as an affective one. According to them, it is not logics why the ex-husband treated differently in the case.⁷⁸

The most burdensome problem for the ex-wife after divorce is her place of residence. As it has been mentioned, after marriage, the women possess only their personal belongings prior to their marital engagement. During marriage the women are preferred to be housewives with no legal access to shared ownership with her husband. As an economic guarantor in the family, the husband earns money. But the money and belongings earned by the husband is legally only for the husband. Hence when the marriage is broken, the woman faces severe financial difficulties, because she cannot earn money on her own.

Generally, in coping with the case, the ex-wife will return to the house of her parents. She stays once again with her parents and spends her life there until she gets married with another man. Thus from the very weak position of women in the family comes the more difficult problems after they are divorced. The women are trapped between the two difficult choices.⁷⁹

In the Indonesian Marriage Law and the daily practice of court, the divorce which is originally the dominant right of husband is replaced by the dominant right of court. In the conventional Islamic family law the husband is free to do so whenever he

⁷⁷ Nassar, *ibid.*

⁷⁸ Karam, *ibid.*

⁷⁹ Nassar, *ibid.*

wants to divorce his wife.⁸⁰

But now the husband cannot use the right. Instead, he must support his argument for divorce logically and the court examines whether the argument is acceptable. The pronouncement of divorce is also must be done before the court. The husband is not allowed to pronounce divorce outside the courtroom. The procedure aims at reducing the arbitrary practice of divorce.⁸¹

In the process of divorce the judge plays a vital role. He is obliged to make the standardization of the conditions of divorce based on the interactive process before the court between husband and wife. The judge is also entitled to examine the reason and argument of divorce. Hence the individual right of divorce is transferred to the court right of divorce. Thus, the process of concretion of the subjective norms has been done (article 38 until 40 of Marriage Law and article 14 until 36 of its application).

Some articles on divorce in the KHI (article 113 until 148) have the same spirit. The divorce has been transferred to the judge's law and decision.⁸² Thus by transferring the divorce to the court system it has become the actual norm. It is not only the religious and subjective norm but it becomes more 'secular'. In the context of divorce, the governmental decree of 1975 on marriage and the KHI do not exclusively restrict the right of divorce as the husband's right. The regulations add divorce as also the right of wife. In doing this, the regulations tend to interpret more extensively the legal substance of conventional legal symbols such as *šiqāq*, *ta'liq ṭalaq* as mentioned above.

The new approach and interpretation of *šiqāq*, *hulu'* and *ta'liq ṭalaq* had modified the legal substance from a masculine orientation towards a feminine one. The interpretation aims at

⁸⁰ Esposito, *Women*, p. 31.

⁸¹ Subadio, *Perjuangan*.

⁸² Abdurrahman, *Kompilasi*, pp. 63-85.

giving a wider latitude to women for divorce.

Thus, the process of introducing the wider right of divorce for women is thorough: she may argue that the husband committed an act that activates a *ṭalaq* (*ta'liq ṭalaq*); she may demand the judge to grant an annulment (*fasah*); or she may argue that the couple has irreconcilable differences (the *ṣiqāq* procedure).⁸³

The *ta'liq ṭalaq* is a kind of "conditional *ṭalaq*" agreed to before the marriage. Today's Indonesian practice, is that when a Muslim couple marries, the marriage registrar from the local Religious Affairs Officer (Kantor Urusan Agama Kecamatan) may ask the groom to read aloud a statement printed on the reverse side (or an additional page) of the marriage contract stipulating that the husband shall be considered to have divorced his wife (through *ṭalaq*) if he leaves or neglects her for six months consecutively, fails to provide maintenance for three months consecutively, or physically abuses her.⁸⁴

Just after the wedding the marriage registrar from the local Religious Affairs Officer makes the couple sign the book which henceforth serves as the marriage certificate. By signing it, it implies that the groom did indeed recite the list of conditions at the wedding and that he understands the written text. The book specifies that if he commits one of these acts, his wife can go to court and pay a symbolic sum (*iwāḍ*). At that moment the first step of *ṭalaq* automatically occurs.⁸⁵

According to the Indonesian law of procedure, the process of conflict resolution through *ṣiqāq* is begun by showing the existing proof of unresolvable conflict or disharmony between husband and wife. The showing of evidence is done either by the husband or the wife. The judge is obliged to make every

⁸³ Abdurrahman, *Kompilasi*, pp. 63-85.

⁸⁴ Bowen, Islam, *Law and Equality*, pp. 14, 179, 182, 200-24, 205, 209, 256.

⁸⁵ Bowen, *Ibid*.

effort to mediate the conflict by any necessary means. When the compromise is not reached from both parties (husband and wife), the judge should order both of them to form a delegation representing both families in order to seek the best compromise. When the compromise is not reached, the decision depends on the judge.⁸⁶

The long procedure of *ṭalaq* and effort to mediate the conflict could lead the judge to see the best solution for the case. When the judge arrives at the conclusion that there is no possible way to solve the problem, he gives to the husband a chance to declare *ṭalaq* before the court or the judge himself decides that divorce is the solution. Thus, the binding legal solution is made.⁸⁷

Through these methods, the right of women to demand divorce is guaranteed. The extensive use of the mechanism is a new approach and interpretation of the Islamic conventional legal maxim in order to recognize wider the legal right of divorce for women. How far is the mechanism useful? Can the method solve the real case? From the following data it can be concluded that the interpretation and application of the legal solution is promising. Some divorce cases initiated by women are appreciated by the court and judged in accordance with the demands of the women. The data denotes also that the legal consciousness of Indonesian Muslim women on their rights in

⁸⁶ Bowen, *Ibid*.

⁸⁷ Some judges have different experiences in dealing with the effort of mediation. From the interviews, it can be assumed that the more senior judges take longer time to decide the case. On the contrary, some junior judges seem to be in hurry in deciding the case. The junior judges argued that most of the litigants who come to the courts have the unsolved problems. They will not be able to decide by themselves or by the mediating parties coming from the families. The way of mediation is not always effective but it is oftenly only delaying the case and they regard as kind of the strategy of buy ing time (Interviews with some judges of Islamic Courts of Sumatera Utara, Surabaya, Banjarmasin, Makassar, South and East Jakarta, Yogyakarta and Lampung in Jakarta, Sept. 2002).

the family is high and increasing.

Table I

Cases decided in the Takengon Islamic Court (Aceh) 1992, 1993, by type⁸⁸ and the Comparasion between divorces due to husband's and wife's petition.

Type of case	1992	1993
Marriage		
validation of marriage	28	25
approval of polygamy	11	4
petition for husband's support	3	2
Divorce		
husband's petition	110	99
wife's petition	95	102
child custody	2	0
Property division		
Post-divorce property division	0	3
inheritance	12	5

In another report of divorce cases in the Islamic Court year 1993 in one of the most Islamized places, Takengon Aceh, the incidence of divorces due to the wife's petition is higher than that of husabnd's. The detail data are as follows:

Table II

Divorces granted by the Takengon Islamic Court, by type, in

⁸⁸ Bowen, *Islam, Law and Equality*, p. 73. According to Daud Sofyan of the Acehnesse High Islamic Court, the number of divorce inisiated by the wife's petition in Aceh is always increasing (interview in Jakarta, September 2002).

1993.⁸⁹

Type of case	Number of cases
<hr/>	
husband's petition (<i>ṭalaq</i>)	99
wife's petition, total for all categories:	102
breakdown; <i>ta'liq ṭalaq</i>	66
<i>fasah</i>	34
<i>ṣiqāq</i>	2

From the two tables, we can conclude that the legal consciousness of women is quite high on the part of the women's right. The women do not hesitate to sue the husband for divorce if they find the marriage is not giving them happiness or they feel oppressed due to the marriage. In the year 1992 the number of divorces which were initiated by the husband in the Islamic court was 110, whereas the divorce which was initiated by women was 95. In the year 1993 of the same court, the number of divorces which were initiated by husband were 99, whereas by wife were 102. Related to the divorce and the financial independency of women, one of the problems for women before the Islamic conventional law is the portion of their inheritance right. The women's right is recognized but the share of their right is equal to half of what the male receives. Therefore a son inherits twice what the daughter inherits.

According to the logic of Islamic law jurists, the share of

⁸⁹ Bowen, p. 204. The data is confirmed by the interview with judge Daud Sofyan. For a broader perspective on the role of women in Indonesian family, see Gavin W. Jones, "The Changing Indonesian Household", in Kathryn Robinson and Sharon Bessell (eds.), *Women in Indonesia: Gender, Equity and Development* (Singapore: ISEAS, 2002), pp. 219-234.

women is half that of the daughter because basically the structure of Islamic family law places the male as a leader in family. It implies that the male is the main financially responsible individual of all the members of family. He is the main manager and every member of the family basically depends heavily on him in dealing with daily and financial problem.⁹⁰

In present-day Egypt, the codification of inheritance law of the year 1948 is still used as the basic reference for adjudication. Most of the content of the law is derived from conventional Islamic family law. Therefore the stipulation that the son inherits twice compared to daughter is part of the legal substance.

The strong protest against this comes from the secular feminists. The protest is represented especially by Amira Bahiy al-Din from the secular feminist movement. In one of her statements she stressed that the philosophy of Egyptian family law is incomprehensible.⁹¹

In the Indonesian context, the Marriage Law of 1974 and other governmental regulations do not give specific details on shares with respect to the law of inheritance. The actual practice of Peradilan Agama in dealing with the problem is by referring to the KHI. The mentioned stipulation of the chapter III in the article 176 of KHI is that: "a daughter, if she is the only one, will get half of the portion, if two or more altogether they will get two third, and if there is also a son, the portion of the son is twice the size as of the daughter's".⁹²

However, in the practical adjudication of some cases, such an exact stipulation is not implemented. In those cases, the litigants have an objection to accept the formula as a just solution. To cope with the situation the judges look for another

⁹⁰ Khallaf, *Aḥkām*, pp. 104-113.

⁹¹ Karam, *Women, Islamism*, p. 144.

⁹² Abdurrahman, *Kompilasi*, pp. 63-87.

way of dealing with it by exercising the pre-emptive strategy. That is, offering an opportunity to all members of the concerned family to negotiate and find the formula which they consider as a just and acceptable one by using the *hibah* strategy that is voluntarily giving a certain amount of wealth on the basis of self-willingness.⁹³

Some judges tell that in dealing with the cases, they refer to chapter III, article 183 of KHI which denotes: "the heirs may make a certain agreement on the distribution of the inheritance, after each of them knows their real portions".

Furthermore, in an interview with one judge of the Islamic High Court (*Pengadilan Tinggi Agama*), he claimed that he has never judged the conflict of inheritance with reference to the unequal basic formulation between the son and daughter. In one case, he urged the parties to solve the problems based on the principle of collective deliberation (*musyawarah kekeluargaan*). When the parties refused, the judge then decided that both son and daughter receive their portions equally. And when he was asked: "Is your decision in accordance with the KHI ?". He answered: "Yes, because in the case I saw the female was in the very weak position: she was divorced and had some children who financially depend on her".⁹⁴

Outside the legal matters, the issue of unequal portion between daughter and son in family has even provoked public debate. Munawir Sjadzali, the Minister of Religious Affairs in an article and formal speech of ministry has even declared that related to inheritance law, in general Indonesian people have abandoned the idea of two shares for a man and one for a women, this includes the ulama. According to him, the practice

⁹³ Bowen, Islam, *Law and Equality*, pp. 89-122; Sjadzali, Munawir, "Reaktualisasi", in Saimima, *Polemik*, pp. 1-11.

⁹⁴ Interview with Abdul Manan, a senior judge of Islamic High Court (Pengadilan Tinggi Agama) Sumatera Utara (Jakarta, September 2002).

is the clear indication that they have understood the temporal side of Islamic law.⁹⁵

G. Husband, Wife and the Right of Children: Who should be the Real Mother and Father?

The conventional Islamic family law classifies the duty of husband and wife into the domestic and non-domestic affairs. The duties in non-domestic area is categorized as husband's affairs whereas the duties in domestic area is wife's authority. In such a framework of job description, the bringing up of children in daily life depends heavily on the wife. The husband is obliged to earn life.

Furthermore, in the practice of Islamic conventional law, the wife is under the authority of husband. The wife is territorially restricted to the house. When the wife leaves the house, she is obliged to obtain the permission of her husband. Without his permission the wife is categorized as transgressing the law and even transgressing the contract of marriage. In the general legal formulation of Indonesian Marriage Law of 1974, the right and duty of both husband and wife in domestic and non-domestic affairs are categorized as balanced (article 31, point 1 and 2). But the balanced role is followed by a statement declares that the "husband is the head of family", whereas wife is "the mother of household".

Moreover the article 34 declares that: a. the husband shall have the responsibility of protecting his wife and provide her with all the necessities of life in accordance with his capabilities; b. the wife shall have the responsibility of taking care of the household to the best of her ability.⁹⁶

Meanwhile the articles 45 until 49 emphasize that the duty of

⁹⁵ Sjadzali, "Reaktualisasi", pp. 1-11.

⁹⁶ Subadio, *perjuangan*, pp. 43,45, 46-9.

bringing up and educating children younger than 15 years of age is the duty of both parents. The duty cannot be abandoned so long as the parents are still engaged in a marriage contract.

When the divorce occurs, article 41 states that the father is obliged financially to support the ex-wife and the son whereas the right of bringing up and educating the child is culturally the role of the ex-wife. In cases of conflict between the parents in deciding the right of bringing up the child, the court decision is the solution.

The articles 104 and 105 of the KHI mentions that the financial burden of family is the responsibility of father. Whereas the definition of the adult child is the child who has reached the age of 21 (regardless the different sex) as long as he or she is unmarried. The adult child is independently entitled to perform legal action on behalf of her or himself (articles 98 and 107).

Articles 105 and 156 mention that before the child reaches the age of 12, either pre- or post-divorce, the child is entitled to be educated and brought up by the mother or the relatives from the mother. After the age of 12, the child has personal right whether he or she will follow the mother or father. However, before the child has reached the age of 21, his or her the financial support is still the husband's responsibility (either during marriage or after divorce).⁹⁷

The above explanation implies also that there is no concept of rigid genealogical system in the Indonesian family law. Though in most legal cases the child will be identified as belonging to the patrilineal genealogy but in reality the child can also follow the matrilineal system of genealogy.

Thus the right of child had a strong correlation with the framework of job distribution and the sharing of responsibility in the Indonesian family system. In the context of children's rights, the basic postulate of the law still recognizes the job

⁹⁷ Subadio, *ibid.*

distribution and the sharing of responsibility in the family based on the conventional sex and biological difference. However some points of the law had reflected the new legal element which places women in a more equal position to men.

As cited above, the Egyptian family law recognizes the sharp and rigid distribution of works between husband and wife. The husband is responsible for the non-domestic matters whereas the wife is for domestic. The loyalty to husband is symbolized by the willingness of wife to stay in her domestic area, that is house. Women are bound to be guardians of their children in terms of psychological maintenance. Men are given their rights to be mobile because they are responsible for the finance and other physical protections for the family.

According to the Egyptian law, a child is genealogically belonging to father. The divorced wife is entitled to the rights, such as the collection of her deferred dowry pursuant to the marriage contract, '*iddah* financial support for one year and *mut'ah* alimony which may be awarded for two years following the divorce. The amount of these financial supports is calculated on the basis of the husband's financial standing. In addition, she has right for the custody of children: for boy until he reaches the age of 10 (which court may extend to 15) and girl until 12 (which court may extend until marriage). The rest custodian right after these ages remain as the right of father. Visitation rights are also awarded to the non-custodial spouse.⁹⁸

However, with those shames of obligations and rights, for some feminists in Egypt, the enforcement of the law has treated mothers as 'foreigners' to their children (especially after divorce): the are paid only to nurture the children as divorced women and they can not be the real possessors of their children.⁹⁹

⁹⁸ Nassar, "Legal plurality", p. 202; Karam, *Women, Islamism*, p.147.

⁹⁹ Karam, *ibid*, p. 149.

The Codification, Gender Equality and Contextualisation of Islamic Values: Responses and the Development of an Alternative Discourse in Egypt

The general and predominant tendency of the Egyptian codification is to place women economically, culturally and mentally dependent on men. That is the phenomenon on the surface. Under the surface it should be analyzed and shown how such ideas could be sustained and supported by some groups, and at the same time how these ideas dialectically interact or correspond to the way of thinking of the people or how they have been opposed by others.

The general identification of the codification and its correlation with the basic cognition of its supporters can lead us to the conclusion that the codification resulted in order to satisfy and fulfill the needs and interests of conservative groups. However before concluding with this remark, it should be noted that like in Indonesia the debate on the role of women in the family and on gender equality is still going on and will not end simply because of a legal formal process such as codification. Furthermore, what seems to be strange is that some feminist groups (the conservative, secularist and some contextualist feminists) sharply challenge and demand amendments of the present existing codification. To this group, the result of the codification could not be accepted.

Like in Indonesia, the development of the feminist movement was marked by the existence of three groups: a. conservative feminist; b. contextualist feminist; c. secularist feminist.¹⁰⁰ In

¹⁰⁰ See, Badran, *Feminist*; Abdel Kadir, S., *Egyptian Women in a Changing Society 1899-1987* (Boulder-London: Lynne Rienne Publishers, 1987); Margot Badran and Miriam Cooke (eds.), *Opening the Gates: A Century of Arab Feminist Writing* (Bloomington and Indianapolis: Indiana University Press, 1990); Karam, *Women, Islamism*; Badran, "Gender Activism: Feminists and Islamists in Egypt", in Valentine Moghadam (ed.), *Identity Politics and Women*:

the context of Egypt, the conservative feminist derives their ideas on feminism textually and scripturally from *Al-Qur'ān*, *ḥadīth* and the practice of Arab tradition.

The main concern and issue of the conservative is that women are facing the pressure of the contemporary women's liberation movement. According to the conservative the women today are forced and called upon by the liberalism to go outside the boundaries of their area (house), to compete in male activities and to leave their main duties as mothers and housewives.

According to this conservative circle, the women will have a high standing and value if they can be good housewives and partners of their husbands. In short the domestic role of women is highly appreciated. Moreover the present situation concerning the role of women in today's reality must be changed and reconstructed.

In general, such a view on the role of women is the dominant perspective of many nongovernmental organizations which focus their daily activities on conducting social and charitable programs. Zainab al-Ghazali, Safinaz Qasim and Heba Rauf are among the main speakers of the movements.

Differing from the conservatives, the contextually movement tries to see the expected role of women in family and society in general from the secular perspective. But they differ from the secular approach, in spreading their ideas they use the reinterpretation of textual dogmas of *Al-Qur'ān* and *ḥadīth*.

According to this movement, this different approach was chosen because they see that a merely secular approach is not effective and could lead unnecessarily to misunderstandings. To them, the secular approach is not easily understood and it is

Cultural Reassertions and Feminism in International Perspective (Oxford, San Francisco and Boulder: Westview, 1994); Badran, *Feminists, Islam and Nation: Gender and the Making of Modern Egypt* (Princeton, NJ: Princeton University Press, 1995).

strange to the dominant and popular culture since it is hardly influenced by Islam and local culture. Therefore, the method of reinterpreting the authoritative texts with a more secular-oriented view will more effectively influence and compete with the ideas of the conservatives.

The main contributor to the contextualist's ideas was the disciple of Muhammad Abduh, Qasim Amin. Following Qasim Amin, Huda Sya'rawi was called the "woman of action" for the group. The more recent groups which can be regarded as the disseminators and proponents of these ideas are the Nasserit feminist movement led by Amal Mahmud and the non-governmental organization Bint Al-Ardl under the leadership of Jihan Abu Zaid.

The secular feminist group tries to approach the issue of gender equality by bringing forward a new cognitive domain and discourse which are separated totally from the religious and local cultural background. They introduce the issues of women on the basis of a purely new approach of rational feminist ideas with a more western orientation. Bahiy al-Din and Nawal Sha'dawi are the most famous spokespersons of the group.

In the context of Egypt, what is slightly strange is, related to the role of women and family law, the opinions of the three groups (conservative, contextualists and secular) see that what has been codified in the recent family law is not in line with their demands and aspirations. For the conservative, the codification resembles the secular law.

The opinions of the conservatives can be traced to Zainab al-Ghazali and Muhammad Mutawalli al-Sha'rawi's opinions. According to them, the women's right of demanding divorce before the court is not part of Islamic teaching and it will contradict to the basic notion of Islamic family law. In one of his speeches, Muhammad Mutawalli al-Sha'rawi stated:

"A woman asking her husband for divorce is a crime that deserves punishment, for is there anything more terrible than a

women threatening the nest of her marriage and her motherhood?"¹⁰¹

Furthermore he explains that in Islamic teaching there is no such term as feminism. This terminology is the product of ideologies outside Islam. The terminology and practice of such ideologies cannot be applied to Islamic society.

On the contrary, for the secular feminist group, what is codified in the family law is not sufficient to defend the rights of women. Moreover, according to the group, the codification is merely a kind of camouflaging tactic to avoid the real implementation of enhancing women's status, defending women's rights and upholding gender equality. These tactics can be seen from what has gone on in the courts.

Bahiy al-Din showed in the real practice of the law before the court that the reason for demanding the right of divorce from the husband is the feeling of discomfort due to the husband's behaviour. The wife must be able to show the proof of her claim. But the real problem can be seen: most of the women (especially in rural areas) are trapped in patrilineal and patriarchal culture which give ample opportunity for the male to be very dominant in the life of the family. How can such a procedural regulation can be applied? For those women, the dominant and terrible behaviour of husbands are culturally a part of their daily lives. Furthermore the irritating behaviour of the husbands is done in the private area which is almost impossible to prove.

The criticism of the secular group is also addressed towards the right of child guardianship (*haḍānah*) for the ex-wife. The group stated that Egyptian society attribute to women a very important role because of their feeling of motherhood. But according to them, in practical life, the contrary to the idea! happens: how can the Egyptian people imagine the right of child guardianship when the ex-wife is always restricted by the

¹⁰¹ Karam, *Women, Islamism*, p. 185.

law to certain periods and years as far as the child still need the affection of mother. These all imply that the role of women in the legal sense is regarded no more than baby sister's function in families.

Related on the matter, Bahiy al-Din stated:

"I am not for raising legal awareness of women... because if we look carefully at the texts of the Egyptian laws, we will find that these treat women's issues -in my opinion - in an unsuitable manner... so that knowing these unpalatable facts will lead to widespread depression. I want to remove this depression from women, and thus I am for the propagation of the ignorance of the law and against the awareness raising among women of these laws!".¹⁰²

Aside from this fact, according to Bahiy al-Din, what is illogical is the absence of female judges in the court. Most of the conflicts in the family involve women directly. But the fact is, female judges cannot be found in any Egyptian court because a woman is not allowed to be a judge. Moreover in dealing with conflicts the legal system gives great authority to the judges to lead the court session and actively mediate the conflicting parties. Therefore, according to Bahiy al-Din, from the feminist perspective, how can the male judges act impartially in the court session which directly involves the interest of women? It is indeed the delegalization and obscuring of women's rights before the existing law.

Another demand of the secular feminist is the necessity to increase the minimal age as one of the legal conditions of getting marriage. To them, the minimal age of marriage for female should be 18 years and, for a male, 20 years. Last but not least, any marriage conducted between those considered, as minors should be punished more serious than what is being applied today. According to them, increasing the minimal age and harsher punishment for breaking the law in this regard is

¹⁰² Karam, *ibid*, p. 143.

necessary because:

"This would help solve the population problem and would also assist in decreasing cases of divorce resulting from early marriage, particularly according to a study carried out by the Central Agency for Mobilization and Statistics published in 1983. 25% approximately, of the total married females have been married at an age below 15".¹⁰³

Apart from the ideas of conservative and secularists, the contextualist feminism tries to combine the ideas of both wings. At the theoretical level, it implies that the contextualist feminists try to reinterpret the texts of some Qur'ānic and prophetic traditions within the new vocabularies of secular idiomatic expressions. Jihan Abu Zaid's as well as Amal Mahmud's opinions may represent such a trend.

In one of her speeches, Abu Zaid stated that she surely can integrate her understanding of Islam and the awareness and need of gender equality, women right and justice. She stated:

"I do not see any problem with, or relevance, as an activist, of being called a feminist. To be referred to as such will not affect my ideas or convictions. I am an Egyptian woman fighting against the oppression of women in our society. Our whole society is oppressed by a great many injustices, women are very often worst affected by these injustices, but they can also be, and are, very capable of identifying and fighting injustice".¹⁰⁴

Meanwhile related to the specific phenomenon of scripturalist and conservative Islam she explains:

"Part and parcel of the general wave of religious conservatism (exists) in our society. It is difficult to determine which encourage the other, political Islam or religious conservatism. Both complicate fighting for women's issues because both look at the women in a very one-sided

¹⁰³ Ibid, p. 150.

¹⁰⁴ Karam, *ibid*, pp. 129-130.

manner. Women are the 'vitrine' of their ideas. Some women are attracted to them because they are disillusioned with everything else and attracted by the capacity of some of the leaders of the Islamist movement to speak well and convincingly. They provide them with a sense of purpose, a tool of fight injustices"¹⁰⁵

Abu Zaid can be grouped with her contextualist feminist such as Amal Mahmud. According to Amal Mahmud, Egyptian secular feminism has two main negative tendencies: a. the tendency of looking at the women issue as an exclusive struggle of women's affairs related to gender equality before men; b. as far as the public cognition and imagination are bound to and limited by the Islamic discourse and its symbol, the secular feminist will find obstacles in getting public attention and appreciation.

According to Amal Mahmud, however, the balancing Islamic discourse is needed to cope with scripturalist and conservative Islam. She states:

"I see that within Islam Islamist ideas can be countered, since I am Muslim. I do not deny that others have different ideas but I do not see them possible on the basis of my faith, and I also do not see the feasibility of the implementation of such ideas (which are not from within Islam) from a situation in which Islam is the religion of the state"¹⁰⁶

However, to her the emerging tendency of scripturalist and conservative Islam is not only caused by women's issue such as gender equality but also by a wider reason:

"This extremism is not a woman's issue. Its concern with women is aimed as a diversion from the real issue at hand. Extremism is a phenomenon which has developed in the Egyptian reality, and in a backward reality, as a result of economic and social problems. And at the heart of these

¹⁰⁵ *Ibid*, p. 130.

¹⁰⁶ Karam, *Women, Islamism*, p. 113.

problems in which youth feel a loss of hope in the future, where a specific national project is missing. So youth look to a continuity with the past. Those who have an economic problem have an ideological vacuum...".¹⁰⁷

The Codification, Gender Equality and the Contextualisation of Islamic Values: Responses and the Development of an Alternative Discourse in Indonesia

The National Marriage Law and the KHI have already been codified. However the discourse on Islam, on the rights of women and on family law is continuing. The debate on the matter is not only among the secular and Islamic groups but also among the proponents of the Islamic family law themselves.

From the ideas which flow in the debate, there are at least three groups involved. The conservatives, which consists of Islamic oriented and custom oriented individuals. The contextualists, which consists mainly of proponents of the reinterpretation of Islamic law, and the secular group consisting of the proponents of the total separation between state and religion.¹⁰⁸

Concerning the Islamic family law, the main theme of the debate revolves around the Islamic system and the sharing proportion in the inheritance law between the male and the female, the general rights of women in society, polygamy and

¹⁰⁷ *Ibid*, p. 114.

¹⁰⁸ See, Kathryn Robinson and Sharon Bessell (eds.), *Women in Indonesia: Gender, Equity and Development* (Singapore: ISEAS, 2002); Mely G. Tan (ed.), *Perempuan Indonesia: Pemimpin Masa Depan ?* (Jakarta: Pustaka Sinar Harapan, 1991). For the comparative background of such a categorization, see Baron, *The Women's Awakening*, pp. 1-12.

the gender equality of the legal process.¹⁰⁹

For the conservative group, the right and duty of women are bound to the conventional basic formulation of job distribution, the reproductive right of women and child education. The conservative Islamists and the proponents of local tradition may differ in relation to certain specific topics related to the issue of gender equality, but the cognitive structure and practice of both wings are similar: they both base themselves on a conception of male superiority. Therefore, for both wings the male should play a more important role in the public affairs. The male should hold the position of leadership and polygamy is beyond questioning.

The assumption is proved by the practice of how both wings have built the system of family in their daily life. Some prominent figures of *kiyai* in many pesantren of East Java had continuously practiced polygamy and sustain the idea of male leadership. The same practice is also performed by many Java kings in Yogyakarta or Surakarta. The first practice represents the symbol of Islamic conservatism and the second represents local tradition based on javanism.

The contextualist group tends to view the textual formulation of Islamic family law through a new interpretation and understanding. One of the leading figures is Hazairin. As a professor of law at the University of Indonesia, from the 1950s to 1960s Hazairin introduced the new formulation of the Islamic inheritance system. The system is called a bilateral system. Through the system an equal portion and right between daughter and son in family is possible.¹¹⁰

Hazairin urges that despite the conventional Sunnite system of

¹⁰⁹ See, Bowen, *Islam, Law and Equality*; Saimima, *Polemik*.

¹¹⁰ For the writing of Hazairin, see Hazairin, *Hukum Bam di Indonesia* (Jakarta: Bulan Bintang, 1950); *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1962); *Hukum Kewarisan Bilateral Menurut al-Quran* (Jakarta: Tintamas, 1964).

Islamic law (*fiqh*) having a strong patriarchal character, the essence of the *Al-Qur'ān* introduces the just system of inheritance, mainly the bilateral system. According to him, the system is close to the sense of justice of Indonesians. In defending the system Hazairin argues that Islam tolerates the different interpretation of Islamic texts (*Al-Qur'ān*). It includes the different interpretation of inheritance as it has been shown between the Sunnite and Shiite. In one of the articles he stated that:

"The Sunni approach is correct because it is in accord with their Arab society and so is the Shii one it because it fits their society's need... I believe that had there been a Minangkabau (West Sumatran) person among the Messenger's apostles, that person would have constructed a *fiqh* for his group that would have met the demands of the *Al-Qur'ān* and Sunna but then would have favored not the agnates but to the contrary the uterine relatives according to the maternal adat of the Minangkabau".¹¹¹

The idea of Hazairin contradicts to the mainstream of the established understanding of Islamic inheritance system of Indonesian society. Though the arguments of Hazairin do not answer all questions of gender equality, he is worthy to be regarded as the pioneer of introducing the new understanding on the matter.

In the year 1980s and 1990s, the disciple of Hazairin, mainly Muhammad Daud Ali and Yahya Harahap added to the argument, maintained the spirit of reinterpretation and enriched the method which had been formulated by him.

In one of the interviews in 1994 on the concept of the ownership of wealth between husband and wife during the marriage, Daud Ali says:

¹¹¹ Cf. Bowen, *Islam, Law and Equality*, p. 156.

"We took our primary sources the text of the *Al-Qur'ān* and *Sunnah*. But in practice we were flexible because the *Al-Qur'ān*, as we all know, is not a law book, nor is the *ḥadīth*. They are the "mother books" containing fundamental messages for people everywhere and throughout time... The formulating committee (for the compilation/KHI) always considered the conditions under which verses were revealed and *ḥadīth* pronounced. In this way the general principles contained in these two sources could be developed according to the changing conditions of time and place".¹¹²

Furthermore, he states:

"The committee also used the *fiqh* principle of *al-'ādah al-muḥakkamah*, adat that is good can be made into (Islamic) law - for community property, for example, which is not regulated in the *Al-Qur'ān* or *ḥadīth*, nor in the jurist's books, but is to be found in the adat of Muslim Indonesians and lives in the legal consciousness of Muslim society in our country.

We differ from classical jurisprudence on common property. The *fiqh* texts say that the wife takes care of the house and of her husband's wealth, and if she divorces she leaves with nothing. Well may be in Arabia the wife does not do anything, but in Indonesia it is not like that. If a man takes up a machete to go out to the fields, his wife comes with him, carrying a bundle on her back. So she has contributed to the wealth, either by working on the fields or by taking care of the family, and she should receive some of the inheritance—and then we set specific amounts. Here we differ from *fiqh*, we take account of culture".¹¹³

Related to the share of inheritance between son and daughter, Yahya Harahap emphasized that in coping with today's practice, it is necessary to make a critical interpretation of two sides simultaneously: the existing local, tribal and customary

¹¹² Cf., Bowen, *Islam, Law and Equality*, p. 158.

¹¹³ Cf., Bowen, *Islam Law and Equality*, p. 158.

tradition like in Bugis, Batak, Bali, Bima and Toraja and the differentiation in the understanding of Quranic texts. Some Quranic texts have temporal legal substance while others have a universal one.¹¹⁴

As cited above, the critical comment on the equality of shared portions between son and daughter is also elaborated by Munawir Sjadzali. In a more theo-normative character of argument, Sjadzali urged:

"But the *Al-Qur'ān* was revealed argument in a certain society and in a certain culture. Back then, in Arabia, women received nothing, in fact they were disinherited. Then the Prophet Muhammad said that girls and boys were the same. But back then, and even today, even Arab societies only the man goes out to the market and buys things; his burden is greater and so it is fitting there, even today, that the division is 2:1. But here it is different. In Solo (the central Javanese city of Surakarta), for example, in my family we run a batik industry, and it is the women who run everything, buy everything, are managers, while the men are just assistants. The head of the Majelis Ulama for Solo said: "The 2:1 ratio is not fitting for Solo." The *Al-Qur'ān* says that we must be just and good. Just! So 2:1 is fitting only when the man really leads the women".¹¹⁵

Some women activists of the younger generation more broadly criticize the conventional job description in the family, an idea embodied in the 1974 Marriage Law, Article 31 and its effect in practical life. In one of the interviews, Ratna Batara Munti who graduated from the State Islamic University Jakarta and actively participates in the Legal Aids of the Association of Indonesian Women for Justice (*Asosiasi Perempuan Indonesia untuk Keadilan—APIK*) stated:

"Labour discrimination is promoted by this clause; for example, wives do not get the same social assistance

¹¹⁴ Saimima, *Polemik*, pp.124-148; Bowen, *ibid*, p. 160.

¹¹⁵ Bowen, *ibid*, p. 166.

(tunjangan nafkah) as do husbands, because they are assumed to have a working husband. Nor do they receive tax identification numbers (nomor wajib pajak), for the same reason. Without that number, a businesswoman must work through her husband to borrow money, for example; divorced or widowed women need to get a letter from their village head that says that they have no husbands. The woman is not seen as standing by herself'.¹¹⁶

In a different context, Cici Farha Assegaf, a muslim woman activist who joined the Association for the Development of Pesantren and Society (Perhimpunan untuk Pengembangan Pesantren dan Masyarakat) expresses her experiences of socializing gender equality during the interaction with the grass-roots level of the muslim community:

"For example regarding polygamy, we start by "theorizing practice," starting from their experience, "oh yes, my elder sister, my neighbour experienced polygamy." "OK, was there a problem?" "Oh yes, problems with inheritance, the first wife was abandoned, she was struck...". So, we look at polygamy from all these aspects, but through the lens of religion, because that is their language... What we are doing here is *fiqh siyasah*, how to look at political issues from a religious point of view, and taking into account the religious heritage but with reaktualisasi, fitting it to the times..."¹¹⁷

She adds:

"Even when we work on secular issues such as income-generating projects for women, the *kiyais* say "but the man is the leader", so we have to work through a religious interpretation. So all these aspects of gender are related: the

¹¹⁶ Cf, Bowen, *Islam, Law and Equality*, p. 166.

¹¹⁷ Cf., Bowen, *ibid*, 169. See also, Edriana Noerdin, "Customary Institutions, Syariah Law and the Marginalisation of Indonesian Women" and Lies Marcoes, "Women's Grassroots Movements in Indonesia: A Case Study of the PKK and Islamic Women's Organisations", in Robinson, *Women in Indonesia*, pp. 179-186; pp. 187-197.

husband hits the wife because she is involved in income-generating efforts, and the husband leaves to look for work, and attracts a sexual disease, and then passes it on to his wife; she does not know anything".¹¹⁸

The sharp criticism against polygamy in the Marriage Law of 1974 is also expressed by Munthi:

"Polygamy contradicts the sexual rights of women and is discriminatory. The reasons given for it, that the wife cannot have children, that she does not receive her husband sexually, are all very stereotyping of women; it's disgusting. We want to do away with polygamy entirely. But is hard because we face Islamic leaders, so we work with the Fatayat, a younger women's organization within NU..."¹¹⁹

Some critical comments on the Marriage Law of 1974 and the KHI from the internal Islamic circles themselves as mentioned above indicate that the recent process of codification is far from being accommodative to the aspiration, ideas and interests of all groups existing within Indonesian society. In such a condition the ideas which tend to be more and more gender equality oriented will gradually replace the established perception on the role of women in society at large and in the family. On the cultural level, the more gender equality vision and orientation is spreading slowly and has begun to have influence not only among the educated elite of secular wing but also among the Muslim women themselves.

Different from the contextualist and conservative wings, the secular group based their feminist ideas on the effort of a strict separation between religion, local tradition and daily behavioral practice especially related to state and gender equality. Instead, the group offers the universal standard of women's rights regardless of their religious background and local tradition.

Generally the feminist ideas of the secular wing concentrate on

¹¹⁸ Cf., *ibid.*

¹¹⁹ Cf., *ibid.*, p. 226.

the non-governmental organizations which are specifically designed to enhance the program of gender equality. The networks of this group in the national press, the strategic elite and urban society is stronger compared to the networks of the conservative and contextualist groups.

Nursyahbani Katjasungkana and Marwah Daud Ibrahim are the two of the central figures from the group. In one of her statement regarding the right of leadership for women, marital rape and abortion, Katjasungkana says:

"for example on the issue of whether women can become leaders. In a 1994 congress, the NU said that of course they could, but then when Megawati became a presidential candidate, a larger gathering, the Congress of Muslims, said women could not become leaders, and Islamic parties followed suit, all of them, including the NU party, and so Islam became politized, there, and regarding other issues such as abortion and marital rape".¹²⁰

On her experience in dealing with the issues in Indonesian Islam context, she explains:

"They all reject the concept of marital rape, saying it is not in accord with Islam, that is a Western concept...". However, she admitted that "in the criminal code there is a clause that prevents people from physically harming Islamic teachings that the husband must beat his wife if he is not obedient. We bring these cases to court, and publicize the cases, for 'public awareness'".¹²¹

Another women activist, Marwah Daud Ibrahim regards that there are five factors work together simulatnously in order to hamper the role of women in public life; physical image, theological, concept, socio-cultural, stereotype understanding and historical myth. Related to theological concept, she explains:

¹²⁰ Bowen, *ibid*, p. 168.

¹²¹ *Ibid*, p. 167.

"For very long time, woman is perceived as created for man. She is obliged to accompany him, entertain and manage his affairs. Moreover the widespread theological understanding had informed people that woman is created from the muscle of man. This myth has influenced many people and conserve their understanding. In turn, it becomes a direct cause for preventing woman from public as well as societal activity at large".¹²²

However, on the sociological level of grass-root communities, compared to the conservative group, the feminist secular group lacks popular support. Their ideas could not influence the way of thinking of lay people. This is due to their method of communication. They generally communicate with terminologies which are not familiar with the daily languages of the people, in addition to this, the secular feminists are also identified by the government as an oppositional group. Hence their ideas are directly or indirectly hampered by the authorities.

Though for the time being, some voices of the Egyptian and Indonesian alternative discourse (especially from the contextualize and secular wing) can be regarded only as outsider's opinion but seeing the rapid social change, these outsider's voices can lead and form themselves as the mainstream pressure in order to compete with the existing conservative interpretation of woman's role in public life or in family.

Comparative Analysis of the Codification of Islamic Family Law in Egypt and Indonesia: Differences and Similarities

Analysing the codification process of Islamic family law in Egypt and Indonesia from the legal discourse perspective, one

¹²² Ibrahim, "Perempuan Indonesia: Pemimpin Masa Depan, Mengapa Tidak?" in Tan, *Perempuan Indonesia*, pp. 13-19.

may assume that the basic article concerning the Islamic legal element in the nation-state Egypt is article 2 of the Constitution 1971 which declares that: "the principles of Islamic law is the main legal source of national legislation."¹²³

Thus, from Hans Kelsen's Grundnorm theory of law, the direct implication of the article is that the nation-state of Egypt had enshrined Islamic law as the basic Grundnorm of Egyptian national legislation.

According to the Kelsen's Pure Theory of Law, Grundnorm is defined as: "the shared source for the validity of all legal rules belonging to the same (legal) order". In such a context, he differentiates between the procedural Grundnorm of positive law as the procedure through which the legal rules are derived

¹²³ The original theory of Hans Kelsen is drawn in his book, *Reine Rechtslehre*, 2nd ed. (Vienna: Verlag Franz Deuticke, 1960). See, Kilian Balz, "The Secular Reconstruction of Islamic Law: The Egyptian Supreme Constitutional Court and the "Battle over the Veil" in State-Run schools" in Dupret, et al. (eds.), *Legal Pluralism*, pp. 229-244. In the book, Balz also mention that, though the basis of Egyptian national legislation is Islamic law, further analysis indicates that in wide and real practice the assumption is not true (Balz, p. 233). According to Nathan J. Brown, the superiority of syariah in Egyptian legal practice is not real. To support this statement Brown presents two reasons: a. the lack of financial independency of Egyptian court; b. the internal practice of bureaucracy control in the Egyptian court. For the first argument Brown states: "one leading judge did mention to me one budgetary practice that would seem to rein in judicial autonomy. In a personal conversation in Cairo in May, 1995, the judge alleged that the perceived budgetary independence of the Supreme Judicial Council is illusory. He claimed that the judicial structure as a whole is underfunded, with the result that courts routinely run out of funds before the end of the fiscal year. This forces them to resort to the Ministry of Justice for supplementary funding on a regular basis" (Brown, 1997, p. 108), whereas for the second argument, Brown writes: "one of the most senior judges in the country claimed in a personal interview in 1991 that judges who insist on the superiority of the Islamic shari'a to positive legislation will find their careers stalled" (Brown, 1997, p. 98).

on the one hand, and the substantive Grundnorm of natural law on the other. In the latter case, the substantive legal rules are only valid if they meet certain substantive requirements and standards.

However, on another side, to practice such an article (Islam is the only legal source in the national legislation) is out of date. Because, instead of *ḥilāfah* system, the basic infrastructure of Egyptian state itself has already changed and resembles the principles of secular nation-state. Furthermore the practice is always controlled and manipulated by the regime.¹²⁴

Therefore, it must be noted that though Egypt in its constitution explicitly declares that Islamic law is the sole basis for national legislation, almost all parts of its public and criminal law remain secular. It seems that the formulation of the article is designed politically to fulfill the demand of Islamic conservative wing in order to meet its short term goals. Besides being merely a political maneuver, the practice, application and interpretation of Islamic law in certain areas is also firmly controlled by the governmental sponsored court, called the Supreme Constitutional Court. Hence the function of the Supreme Constitutional Court is more than only to keep the coherence of all legal products of Egyptian but also to maintain the secular character of Egyptian nationhood.¹²⁵

Thus, it can be said that Islamic law as the Grundnorm concept is a matter of theoretical concept. It is indeed interpreted and applied in the personal and family laws but wider application of the concept seems will be not applicable. In this context, Balz is right in defining the result of the study on the Egyptian Supreme Constitutional Court: "The underlying strategy of the Court's decision is to gain control over the authoritative interpretation of Islamic law: the Supreme Constitutional Court pays rhetorical tribute to being "bound" by the rules of Islamic law in principle, while it reserves the right to determine the

¹²⁴ See Balz, *ibid* and Brown, *ibid*.

¹²⁵ See Balz, *ibid* and Brown, *ibid*.

substance of these rules".¹²⁶

It is also worthy to note that in addition to the Supreme Constitutional Court, the Egyptian infra structure of court recognizes the quasi-military court concept. This later court can judge what is regarded by the central power as subverting challenge to the existing legal order.

Within such a frame of thought, in order to accommodate the oppositional voices of Islamist-conservative faction, it is not strange that the result of the codification closely follows the conventional Islamic family law. The law is also characterized by its unfriendly perspective on women's rights. Though in later modifications, an effort to ratify this was made.¹²⁷

Indonesia is a different case. In the process of codification, the law makers tended to maintain the plural co-existence of legal enforcement under the secular ideological umbrella Pancasila. Within the plural co-existence of many legal values (especially the legal values derived from the local customs (*adat*) or influenced by Dutch law and Islam), each value has its autonomous and independent region.

The living law in the society is sharply differentiated from the enacted state law. The living law in the society can be regarded as positive law (*ius constitutum*) if it has been adopted as state law through a series of sociological and legal procedures, mainly through the filtering of the legal content in order to harmonize it with the existing principles of horizontal and vertical legal pluralism and heterogenous communal

¹²⁶ See, Ba'iz, "The Secular Reconstruction", p. 233. Ba'iz has examined some cases which have strong correlation with Islamic issues in the public life of Egyptian, pp. 229-224.

¹²⁷ The application and superiority of Islamic law (especially in Egyptian public law) is merely rhetoric for accommodating and domesticizing the Islamic conservative wing is also expressed by some Egyptian judges (interviews in Cairo/August 2002). See also Brown, *The Rule of Law*, *ibid*.

interests.

In such a context, the conventional Islamic family law can not erase and negate the concept of "collective ownership" in the post-marital relationship between husband and wife or the relatively balanced position between husband and wife as described in the previous writing on the codification of Islamic family law.

In other words, it can be stated that the national ideological consensus called Pancasila was able to be act as an ideological filterization process in order to guarantee that legal drafting process and authority must be carried on under or influenced by a secular interpretation within the framework of nation-state principles. Thus, the growing tendency towards the application of conventional Islamic family law can be avoided culturally.

Furthermore, in the political discourse of Indonesian society the demand for the application of Islamic law never reached its radical conclusion in the formulation of legal articles. Thus, the maximal compromise of such a struggle ended in moderate, vague, imprecise and floating expressions as in article 29 of the constitution 1945 that the state is based upon (among others) belief in One Supreme God and it will guarantee its citizen to worship in accordance with their religion and belief.

Compared to the concept of Grundnorm as applied to the Egyptian case, this concept of plural co-existence of legal system is relatively complicated and hard to grasp. Therefore the following charts, maps and description can hopefully clarify and simplify the understanding of the concept.¹²⁸

¹²⁸ In my understanding, theoretically the legal plurality in Indonesia can be categorized as closed to intersystemic relation of coexisting legal orders. The intersystemic relation defines the living law has many rooms. Every room is one among several "operationally closed" systems. Here, the law is an autonomous epistemic subject, which constructs a social reality of its own. The more elaboration of this

After the proclamation of Indonesian independence and the rise of the Indonesian nation-state, Islamic law could not become the sole resource for the national legislative process. Instead, Islamic law could only be accepted as an element of the national law through the selection of a symbolic national ideology and the empowerment of Islamic political pressure groups.

The process of selection was done by applying the symbolic national ideology (Pancasila) as a basic philosophical measurement in the process of national legal screening, whereas the empowerment of political pressure by Islamic communities was done in competition with other groups in order to interpret Pancasila in a more practical manner. In doing the latter, Islamic communities used the Islamic political parties and mass organizations, such as Nahdlatul Ulama (NU) and Muhammadiyah.

In the midst of these processes, the state's power (especially during the new order) which had an authoritarian character considered the possibility of integrating Islamic law in the national system through the process of institutionalization and codification.

In doing so, the state based itself on pragmatic calculation, mainly to avoid the coming to power of other sections of the ruling elite through the use of Islamic sentiment. At the same time, the integration was also aimed at monopolizing the public discourse on the meaning of nation-state and its administration of power.

constructive theory, see, G. Teubner, *Recht als autopoietisches System* (Frankfurt: Suhrkamp, 1989); Teubner, "How the Law Thinks: Toward a Constructivist Epistemology of Law", *Law and Society Review*, Vol. 23, 727-757; Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", *Cardozo Law Review*, No. 13, 1443-1462; Luhmann, N., *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993).

In other words the phenomenon can be described as follows: specifically related to the process of philosophical and ideological selection, the debate on the basis of the Indonesian state in the Constituent Assembly (before independence or after the general election of 1959) and their influences showed that there was a significant coherence among factors such as the establishment of nation-state principles, delegitimising of state symbols and institutions which have exclusive Islamic meaning such as the principles of *ḥilāfah* or Islam as a basis of Indonesian state, the formation of national ideology Pancasila, the process of secularization and last but not least the selection of Pancasila's interpretation as well as the restriction of the element of national law.

In addition, the socio-political process indicated that secularization, interpretation, selection and restriction of the national legal substance were dominated by the ruling regime. However, in the process of domination, the ruling regime absorbed selectively the dialectics of ideas spreading at the mass level of society.

Thus, the ruling regime did not base the paradigm of its power in dealing with administration and statecraft on the democratic standard, so that all of these mechanisms and processes were a reflection of its centralized power and its network, mainly the network of the president himself which has strong background of Javanese conservatism.

In the operational application, the network is controlled by all of the presidential institutions and their circles, such as the secretary of the state or the pseudo-social organization such as the Foundation of Pancasila Muslim Charity and Dedication (*Yayasan Amal Bakti Muslim Pancasila*).

Based on this context, the final process of the institutionalization and codification of Islamic family law was dictated by the will and political design of the central power which was already constructed or programmed.

The design of accepting the institutionalization and codification by the central power was programmed in order to maximally minimize the challenge and threat of its opponents. In doing this, the central power could gain the maximum political profit in order to secure its interest, which lay in the continuation of political centralization and the restriction of the circulation of the ruling elite.

In the Indonesian context, the process of selection and restriction of the national legal element related to the institutionalization and codification of Islamic family law within the framework of nation-state was conducted through the following hierarchy and sequence of national value screening: a. National ideology Pancasila; b. The Constitution of 1945; c. The legal-formal process of the Indonesian legislative order; d. Marriage Law of 1974; e. Law number 7 year 1989 on the Islamic Court; f. The Compilation of Islamic Law (the Presidential Instruction number 1 year 1991).

The national ideology of Indonesia Pancasila as the basic main philosophy of the Indonesian nation-state was a compromise formula of many primordial and group interests and views which backed the independence and existence of Indonesia. However, as mentioned above, the practice of Pancasila is influenced mostly by the framework of understanding of the ruling elite.

Related to the hierarchy of philosophical justification as well as legal reasoning, the Constitution of 1945 falls under Pancasila. The specific characteristics of the Constitution are the simplicity and sometimes vagueness of its articles and the points describing each legal content. Thus, due to its simplicity, some articles are ambiguous in meaning and can be multi-interpretable. In such a framework of order, the Constitution explains the general proposition of religion in the Republic of Indonesia as above mentioned (article 29 of Constitution 1945).

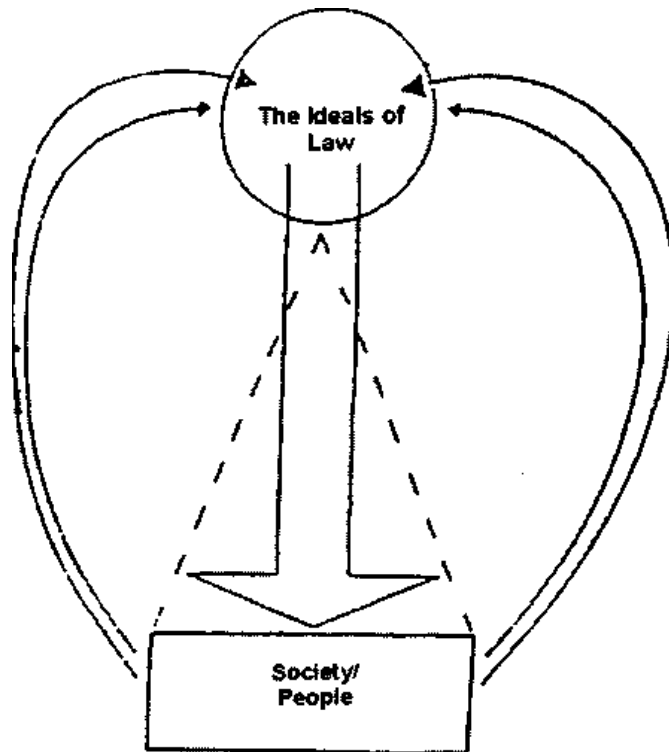
Another characteristic of the Constitution is that in comparison with the authority of legislative body, the Constitution gives more authority to the executive (especially the president as the chief of executive). The president is legitimized to act as the chief of government, the chief of state and armed forces with wide constitutional rights and no detailed explanation limiting the constitutional rights of president.

Under these formal regulations as the basic legal paradigm, the mechanism of legal drafting and decision-making in the New Order is as follows: a. Decrees of the People's Assembly (Ketetapan MPR); b. Statutes (Undang-undang) or the regulation replacing the Statutes; c. Governmental Regulation (Peraturan Pemerintah); d. Presidential decisions (Keputusan Presiden); e. Other implementing Regulations, such as ministerial decisions.¹²⁹

Thus, the logics and theoretical approaches of the process of legal substantiation and filterisation, which affected the process of institutionalization and codification especially during the Indonesian New Order (1966-1998), can be explained as shown in the following charts. The basic assumption of these charts is the law is the product of a dynamic interaction taking place within certain political, economic, social, cultural, religious and moral settings which exist in the given society.

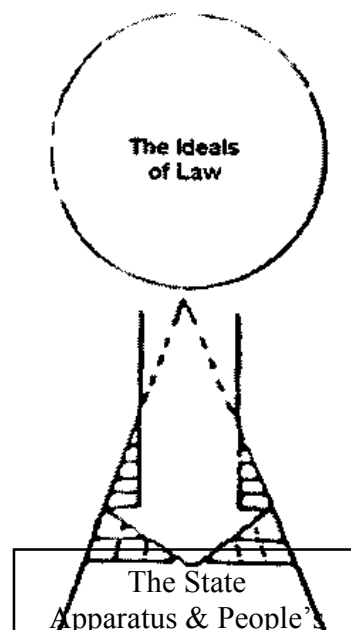
¹²⁹ The discussion on Islamic law and politics in Indonesian context can be further found in Cammack, Mark, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" in *Indonesia* 63 (April 1997), pp.143-68; Hooker, M.B., "The State and Shari'a in Indonesia", in *Indonesia: Law and Society*, edited by Tim Lindsey (Sidney: Federation Press, 1999), pp. 97-110; Federspiel, Howard, "Islamic Values, Law and Expectations in Contemporary Indonesia", *Islamic Law and Society* 5, no. 1 (February 1998), pp. 90-117. The following charts are cited from Attamimi, A.hamid S., "Pancasila, Cita Hukum dalam Kehidupan Bangsa Indonesia" in Oetojo Oesman and Alfian (eds.), *Pancasila sebagai Ideologi: Dalam Berbagai Bidang Kehidupan Bermasyarakat, Berbangsa dan Bernegara* (Jakarta: BP7 Pusat, 1991), pp. 66-67

Chart I The formation of unwritten law



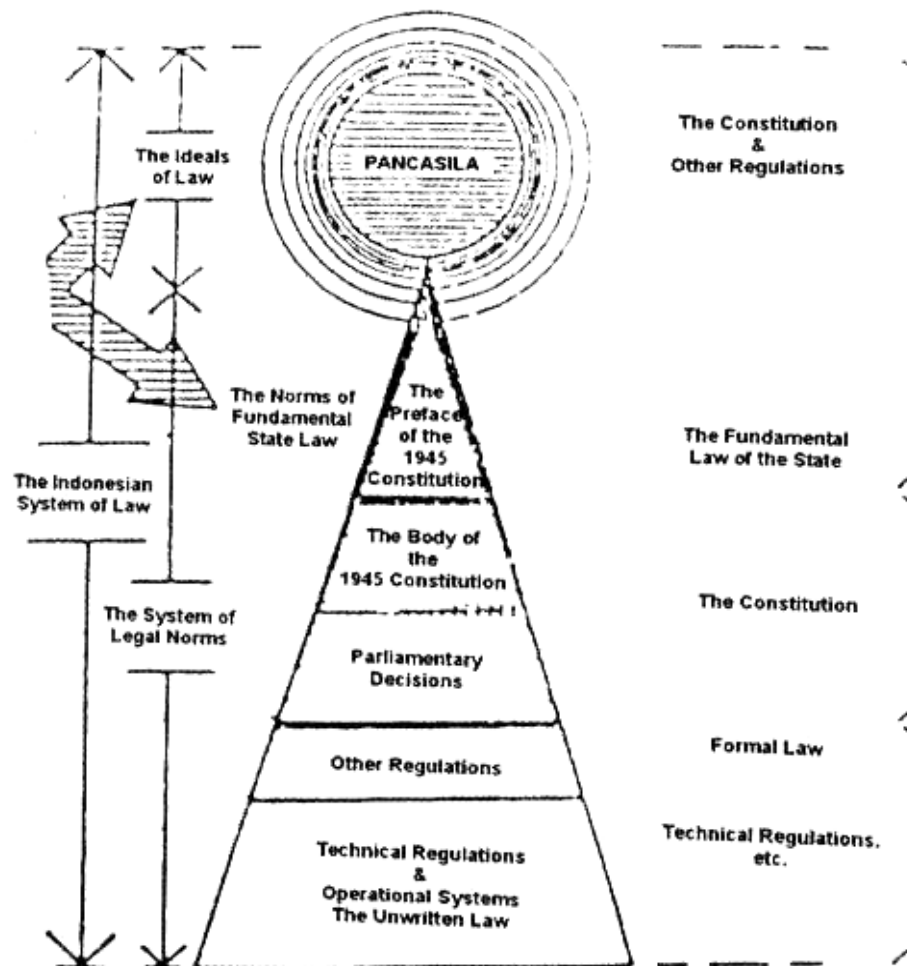
The unwritten law is created through the interactive reflection of the living values and norms. Those living norms and values then crystallize in the form of "the idealized law". The formulation of "the idealized law" is drafted substantially in the Pancasila and the Constitution of 1945 (Undang-undang Dasar 1945).

Chart II The formation of written law



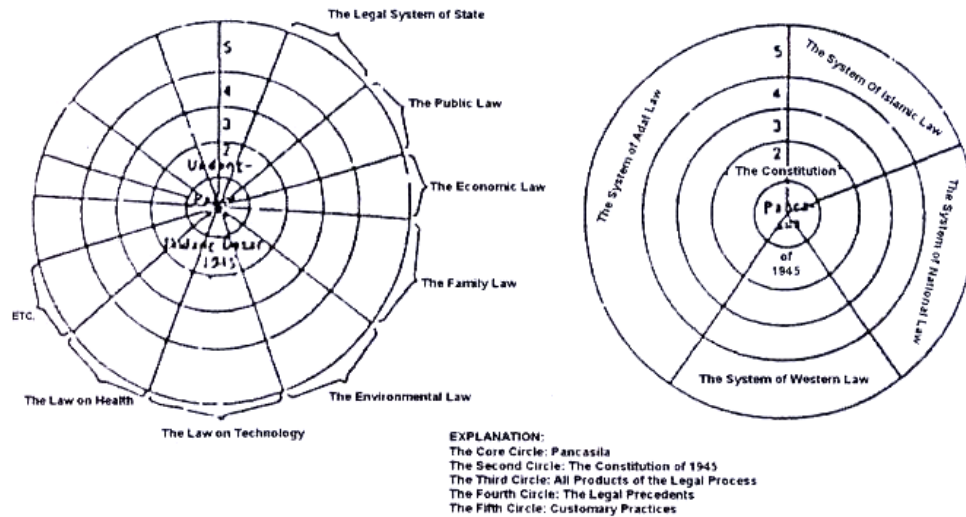
The legal drafting of written law is derived through an interactive process between the living norms and values in the society and "the idealized law".

Chart III The system of Indonesian law and the hierarchy of legal order



The law becomes concrete after a long process of crystallization. The crystallization of norms is then eclectically shared through the constitutional as well as sociological selection in the form of written legal drafting as positive laws (*ius constitutum*).

Chart IV The Pancasila's system of law



In the chart is shown the classification of law and the process of dynamic interaction between "the idealized law" and Indonesian real legal condition.

The long and complicated process of Indonesian legalization procedure resulted in the 'modified' institutionalization and codification of Islamic family law. Women are allowed to be judges, the recognition of the concept of post marital "collective ownership", the guarantee and practice of divorce right for women. Compared to the Egyptian case, those new elements can be regarded as sign of being relatively more friendly and accommodative to the rights of women.

Seen from the point of view of their similarities, the codification of Islamic family law in Egypt and Indonesia are not bound fully to only one Islamic school of thought, they coincidentally similar in representing new approaches to Islamic textual formulation, such as in the case of the necessity for the formal writing of marriage or the restriction of the minimal age for the spouse in order to get marriage, the necessity for declaring formal divorce before the court etc.

However, as cited above, in some points such as the concept of collective ownership post-marital relationship, the Egyptian codification differs sharply from the Indonesian one.

Concluding Remark

The necessity of institutionalization of Islamic family law within the frame of reference of nation-states urged the Islamic community to continuously reinterpret the conventional doctrines of their teachings especially those which are related to the traditional concepts, such as *ḥilāfah*.

The codification of Islamic family law is also done on the basis of reinterpretation: some conventional doctrines of Islamic family law such as the monopoly of divorce right for the male is reduced, the faster process of maturity for the female as one condition to be regarded in marriage was revised, the concepts of marriage and family affairs were revised so as not only to depend on the individual decisions of the male but also upon those of the female.

Concerning the theoretical point of departure of reinterpretation, the process of legal drafting both in Egypt and Indonesia, are mostly based on *siyāṣah šar‘iyyah* (the ruler's administrative policy), *tahayyur* (selection of juristic opinions) and *talfīq* (patching together various juristic opinions).¹³⁰ Through *siyāṣah šar‘iyyah*, the ruler is given prerogative right in determining the juristic preference in order to achieve public interest in areas that are not covered at all or not covered sufficiently by the letter of the law. For example, child marriages could be reduced by introducing the formal writing of marriage or creating an official marriage certificate.

Part of *siyāṣah šar‘iyyah* is an eclectic procedure through principles of *tahayyur* (juristic selection). The government is

¹³⁰ Esposito, *Women*, pp. 94-96.

entitled to select one legal doctrine from among the variant opinions of the four Sunnite law schools and to prescribe that it also be applied by the

The government is also entitled to patch the different juristic opinions together (*talfiq*). By this eclectic process the opinions of various schools or jurists are combined to form a single rule of law.

After the abolition of *ḥilāfah*, the Islamic community in Egypt and Indonesia began to adopt the nationalist theme in order to gain independence from colonialism. In the Egyptian case, the political process after independence was pursued by means of the radical symbol of secularism. However the process resulted in a big failure. Egypt adopted instead a partial secularism combined with Islamic conservatism and military regime.

In the Indonesian context, the concept of *ḥilāfah* could not clearly attract most of the Moslem leaders, but after the independence of Indonesia, a concept more or less similar to that of the *ḥilāfah* began to emerge: that is the debate whether the Republic of Indonesia should be based on Islam or radical secularism. The end of the debate is the moderate compromise as well as floating decision that Indonesia should be based on Pancasila.

Compared to Indonesia, the infiltration of Islamic law in the structure of Egyptian nation-state which culminated in the institutionalization and codification of Islamic family law happened in another way. In the 1950s there was an effort to ignore completely the Islamic element. But gradually (since 1970s), under the strong pressure of the conservative Islamic wing, Islamic law was adopted as the only source for the national legislative process.

Indonesia took a different way. The secular national ideology acknowledges and maintains the plural co-existence of each legal value. Each legal value is kept alive in society. Sometimes

the differing values happen to be in harmony but at another time they happen to be in conflict. The harmonization and codification process are done through the mediative and accommodative power of the national secular ideology. In this process, the influence of sociological as well as political mechanisms cannot be avoided. The dominant ruling elite often plays a significant role in the effort of harmonizing the actual conflicting values and parties in the daily life of the national legislative process.

Due to the particular characteristics of Indonesian society, the process of legal Islamization had taken place. However, the plural and heterogeneous living values within society itself could not allow any value system to be the most dominant. In this case, the influence of local values ('*ādah*) and of Dutch/Western values became the heavy competitors and barriers. As mentioned above, in the context of Islamic family law, the existence of some concepts which 'deviate' from Islamic law is one of the indications.

Whether in Egypt or Indonesia, the process of institutionalization and codification could not avoid the new trend of interpretation and modification of Islamic legal concepts. There is no consistent approach which is committed to only one Islamic school of thought. Moreover, in the law of procedure which is explicitly regarded as the means by which the Islamic law is applied in practice, there is no evidence that the law is derived solely from Islamic tradition or doctrine. Indeed the greater part of the legal content and practice is taken from the Western continental or Anglo-Saxon legal tradition with some modifications.

In this context, the reality seems to indicate that what is regarded as the institutionalization of the Islamic court is substantively similar to the effort of Islamic labeling. The content is derived from the secular tradition whereas the name is Islam. The core question is: why does it happen? The answer may lie two presuppositions.

First, this is done in order to maintain the political and emotional attachment of the proponents of Islamic law within the nation-states Egypt and Indonesia. The process of labeling is regarded by them as a sign of an accommodative attitude of the government towards religious symbols.

Second, the traditional practice of Islam as related to the court and system of government and law can/not be regarded as convincing enough and sufficient in order to be imitated or adopted today. What is found in the Islamic legal tradition and the practice of Islamic court is too simple to be actualized in today's legal system. After the glorious era in the early years of the coming of Islam, Islam suffered serious intellectual bankruptcy. The world of Islam is full of dictatorships and no existing example could present a prudential system of government, court management and social order. Islamic modernism pioneered by Muhammad Abduh tried to seek the solution for the intellectual problem of Islamic society by introducing the cross-border system of thought, reinterpreting the interrelationship between Islamic law and the societal progress.

In some cases, the impact of Abduh's movement is obvious. The Islamic learning society (*ulama*) feels more freedom to adopt the mixed theory of Islamic law in approaching the current problems. Moreover this done by adopting and borrowing the European way of thinking in order to define what is necessary to be reformed. The historical development shows that the impact has also reached Southeast Asian Islam.

The process of intellectual reform is always going on but before it could reach its intellectually mature character, British colonialism in Egypt and Dutch in Indonesia further strengthened their colonial power and military superiority at the beginning of the 20th century. One of the effects of this colonial policy was that Islamic intellectual reform process went back to the regressive position.

The regression was marked by the growing dominant of Islamic scripturalism and the tendency to apologetic in defining the role of Islam. Thus, the scripturalist character of Islamic thought contains a conservative ideology of refusing the new developments of human invention in response to the growing challenge of colonialism.

In line with this trend, Qasim Amin's idea of introducing the liberative Quranic interpretation on the role of women in his *Tahrīr al-Ma'ah* was not well accepted. Instead it is criticized by the more conservative Islamic feminism introduced by Zainab al-Ghazali. Furthermore the call of Abduh on *iğtihād* is later followed up by conservatism and revivalism as shown by al-Ikhwan al-Muslimun with its central leader Hasan al-Banna.

However, the effect of such an Islamic modernism can also grasp. At the beginning of the 20th century the effort of legal codification had introduced the minimal standard of age for the male and female in order to get married. The minimal age was far different from the prophetic tradition. Thus, the first menstruation of women could not be the signal of eligibility for the female to get married. But in contrast to this new approach, in the 1970s, grew a strong tendency to refuse the limitation of the practice polygamy and to abolish the right to demand divorce for women.

In the Indonesian context, there is no any single dominant trend of thought. The Islamic modernist movement introduced by the early Muslim reformist in West Sumatera and later on Muhammadiyah could not spread widely and fast. In turn, this reformist group become more scripturalist. Instead of being the speakers of Qasim Amin and Thaha Husein, as disciples of Abduh, the Muhammadiyah had chosen become the exponents of Rashid Ridha and Hasan al-Banna. Hence, the secular and conservative of adat and Islam hampered the trend firmly.

The formation of Indonesian nation-state and the challenge of

the return of the Dutch colonialism could unite the factions within the secular national ideology of Pancasila. As consequence of the formal debate and institutionalization as well as codification process of the Islamic family law could not be performed only by the Indonesian Muslims from a single faction but it should be shared together with other proponents of values such as those from adat and secular groups.

Hence, to some extent, the result of the codification of Islamic/family law in Indonesia is

not merely a copy of the conventional Islamic family law or/a derivative thought of the 'central' area of Islam such as Egypt, though Egypt had always been formerly by the South East Asian Muslims as an Islamic metropole and modern experience for Indies Muslims.¹³¹

Therefore in the Indonesian family law a women is eligible to be a judge, the family law recognizes the concept of collective ownership post-marital relationship and the growing practice of the equal sharing between women and men in the inheritance law. Thus, the heterogeneity of Indonesian society had influenced the formation of Islamic family law which can be regarded as transgressing the normal and conventional standard.

Moreover, by seeing the result of codification and current discussion on the role of women and gender mainstreaming among the Muslim activists themselves, one may conclude that in the future, Islam in Indonesian will tend to cut and reduce its dependency upon Egypt or the Middle East in general. Bowen had indicated that:

"The Indonesian case illustrates the potential and the limitations of efforts to reach a gender-equal version of *fiqh*

¹³¹ See, Laffan, Michael Francis, *Islamic Nationhood and Colonial Indonesia: The Umma below the winds* (London and New York: Routledge & Curzon, 2003), pp. 127-130.

within the context of *fiqh* reasoning itself. Nothing about these arguments or their partial legal realizations guarantees their a long-term acceptance — one recalls the exuberance of Middle Eastern law reform followed by the subsequent negative reaction. ... But against the historical background of the failure of the secular reforms earlier in the century, in other countries, this direction, of changing *fiqh* through *fiqh*, may hold out the greatest promise".¹³²

As concluding remark, it can be said that seeing the framework of the Indonesian legal drafting process as cited above, the phenomenon of the institutionalization and codification of Islamic family law within the framework of Indonesian nation-state in general and the relation between Islam and state in particular, can be understood as another way of finding mutual accommodation between Islam and state. The state is obliged to prevent maximally the principles of nation-state within the existing social grouping, whereas the Islamic community tried to adjust themselves to the changing surroundings.

Analyzing the last trend of the Indonesian New Order policy on Islamic law, Cammack states:

"Although the government's attitude toward official Islam had seemingly reversed itself, its more basic objective of acquiring control over Indonesian family law remained unchanged. Having settled on a policy of cultivating rather than confronting Islam, the government set about to assert greater influence over Islamic courts and to establish itself as the authoritative interpreter of a distinctively Indonesian Islamic legal tradition. Rather than competing with Islam for legislative authority, the government is seeking to appropriate the power to declare Islamic law. Instead of defeating Islam, the regime has decided to confiscate it".¹³³

In the Egyptian context, at a glance the relation between state

¹³² Bowen, *Islam, Law and Equality*, p. 169.

¹³³ Cammack, "Indonesia's 1989", p. 168.

and Islamic law and the definition of Egyptian nation-state can be easily read (just like what is written in the constitution). But a closer look at the practice denotes that the relation between both is defined through invisible means. Through these invisible means and mechanisms, the regime will have very little hop in keeping the principles of the Egyptian nation-state in contrast to an Islamic state.

Examining the decisions of the Egyptian Supreme Constitutional Court on matters related to Islamic issues, Bälz describes that:

"Under Articles 2 of the Egyptian Constitution, reference to Islamic law through secular courts is nothing but a strategy used by the order of secular law to maintain its autonomy. Reference to Islamic law serves as a means to legitimize state-enacted legislation. ...In the end, the question of legal validity in general and the constitutionality of laws in particular is decided exclusively by the order of secular law according to its own standards".¹³⁴

Seen from the socio-political context, in general either in Egypt or Indonesia, the process of institutionalization and codification had occurred under an authoritarian regime. The main question is: can the product of national legislation under such circumstances survive when the both nation-states undergo the democratic and transformative process ?

In the Egyptian context, the answer to such a question is not yet found. Because until the present time, the whole structure of the Egyptian political landscape remains undemocratic. But in the case of Indonesia, the recent fact of the general election of 2004 tells that slowly Indonesian statecraft and its political scene can arrive at the conclusion that the process of democracy is beginning.

Islamic political parties which are formally still declared as the

¹³⁴ Balz, "The Secular Reconstruction", p. 243.

main proponents of Piagam Jakarta find their votes are always decreasing. The result of the Compilation begins to attract criticism.¹³⁵ This shows that the framework of the secular nation-state (seen from the basic platform of the dominant and winning political parties in 2004) is enlarging. The agenda of implementing formal and broader *šarī'ah* laws remains a local agenda, which it may sometimes find many serious difficulties as well.¹³⁶

Moreover from the five candidates for a presidency, none of them mentioned explicitly that their agenda will be *šarī'ah* or Piagam Jakarta enforcement.¹³⁷ However, when the existing trend of political scene is not succeeding in bringing about a better situation, the potentiality of bringing the national issue under the banner of *šarī'ah* enforcement can/not be neglected.¹³⁸ Because for those who proposed the agenda the situation will lead towards their 'self-fulfilling prophecy'.

Regarding the methodology of codifications in both states which are based mainly on the practice of Islamic legal mechanism such as *siyāṣah šar'īyyah* (the ruler's administrative policy), *taḥayyur* (selection of legal preferences) and *talfīq* (patching together the existing legal opinions), one might argue that such tactics are only justified in order to achieve the short-range required reforms. But the long-range value of the tactics

¹³⁵ See interview with Musdah Mulia, "Kompilasi Hukum Islam Sangat Konservatif!" in *Jaringan Islam Liberal*, www.islamlib.com. (Sept. 18, 2004).

¹³⁶ "Jam Malam bagi Wanita Akan Berlaku di Sumbar" in *Media Indonesia*, (June 30, 2001); "Gairah Syariat Islam di Berbagai Daerah" in *Suara Hidayatullah*, July 2000; "Seorang Pezina Dicambuk 100 kali di Aceh" in *Media Indonesia*, Nov. 30, 1999; "Hukum Rajam bagi Pezinah dan Pencuri di Aceh" in *Republika*, Dec. 6, 1999; "Deklarasi Syariat Islam di Aceh Harus Ikhlas" in *Kompas*, Dec. 11, 2000; "Syariat Islam Hanya Berlaku untuk Kaum Muslimin" in *Kompas*, May 8, 2001.

¹³⁷ See "Capres Anti Syariat" in *Sabili*, June 22, 2004.

¹³⁸ For wider context, see Schumann, "Dilema Islam Kontemporer", pp. 48-75.

is questionable since they do not reflect a systematic rationale to contribute a consistent substantive legal change. Hence, a more explorative rationale for the legal reform and the redefinition of 'civil Islam' in both nation-states to adjust with the continuing social changes is still needed.¹³⁹

¹³⁹ See also Esposito, *Women*, p. 96.

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Suara Hidayatullah, July 2000.

Interviews and Discussions, Cairo July - August 10, 2002 (interviewees' positions at the time of the interview)

Abdul Aziz Shadi. Senior lecturer, Faculty of Economics and Political Sciences, Cairo University.

AH al-Shadiq. Director, Centre for Judicial Studies, Ministry of Justice.

Badri al-Minyawi. Former Egyptian Attorney General.

Hasan Manshur. Judge of the Alexandria Civil Court.

Hatim al-Sarbini. Chief of the High Civil Court, Cairo.

Sufi Abu Thalib. Professor of law, Cairo University.

M. Ahmed Hasan. Deputy Chief of the High Civil Court, Cairo.

Rahman Muhammad. Chief of Tanta Civil Court.

Interviews and Discussions, Jakarta August 20-September 2002.

Abdul Manan. Chief of the High Islamic Court, Sumatera Utara. Chazim Maksalina. Administrative Staff. The Supreme Court. Hasbi Hasan. Judge of Islamic Court, Lampung. Khalilurrahman. Chief of High Islamic Court, Yogyakarta. Rifyal Kabah. Judge of the Supreme Court. Syamsuhadi. Judge of the Supreme Court. Zainuddin. Judge of the Islamic Court, South Jakarta.

Ich versicherte an Eides Start durch meine eigene Unterschrift, daft ich die eingereichte Arbeit selbständig und ohne fremde Hilfe angefertigt und alle Stellen, die wortlich oder annähernd wortlich aus Veröffentlichungen entnommen sind, als solche kenntlich gemacht und mich auch keiner anderen als der angegebenen Literatur bedient habe. Diese Versicherung bezieht sich auch auf die in der Arbeit verwendeten Zeichnungen, Skizzen, bildlichen Darstellungen und dergleichen.

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