The Formation of Islamic Law in Indonesia: The Interplay between Islamic Authorities and the State

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In the course of the early twentieth century, Muslim majority countries, including Indonesia, attempted to transform Sharia into Islamic law. This transformation has encompassed diverse orientations and interests of Islamic scholars and the (colonial) state. The transformation in Indonesia deserves a special inquiry as Indonesia is a nation with a high degree of cultural heterogeneity. This article addresses the extent to which the interplay between Islamic authorities and the state has shaped the coming into being of Islamic law and its judicial institutions. I argue that Islamic authorities and the state have simultaneously taken part in revising and articulating the content, meaning, and scope of Islamic law. Islamic authorities had to adjust Islamic law with modern law and national sovereignty to make its norms possible. However, for Muslims, the issue was not only the formation of the national legal system but rules on the application of matrimonial matters as stipulated in Islamic legal doctrines. Through Islamic family law, devout Muslims found it important to claim a clearer position of the relationship between Islam and state authority.

I. INTRODUCTION

Despite the multifaceted nature of Sharia either as God's will, religious law, or jurists' interpretation (*fiqh*), Muslim states in the course of the first half of the twentieth century attempted to transform Sharia into 'Islamic law.'[1] Such a modern transformation of Sharia into state law was an inevitable consequence of the rise of Western scholarship on Islamic law. The need for the transformation of Sharia into Islamic law becomes noticeable when the modern state demands a more authoritative and decisive statement of law. Given the context of colonialism, the making of Islamic law has remarkably encompassed the diverse orientations and interests of: native legal scholars, Islamic scholars, and the (colonial) state. While the native legal scholars imposed positive legal norms, Islamic scholars and local rulers served as intermediaries.[2] What is now known as Islamic law is a result of the intense negotiations of Islamic legal knowledge and the state authority in the modern period. The state left aside the plurality of legal opinions of different *fiqh* schools (*madhāhib*) and the open discourse of Sharia.[3]

Although there has never been a universal acceptance of Sharia interpretations as represented in the Islamic substantive laws, the Muslim world demonstrated varying experiences of continuities and changes in the Islamic legal system. However, the differentiation between

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[1] Léon Buskens and Baudouin Dupret, 'The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient' in Jean-Claude Vatin and François Pouillion (eds), *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-Appropriations* (Brill, 2014) vol 2, 31.

[2] Léon Buskens, 'Sharia and the Colonial State' in Rudolph Peters and Peri Bearman, *The Ashgate Research Companion to Islamic Law* (Ashgate, 2014) 209 ('Sharia and the Colonial State').

[3] Léon Buskens, 'A Medieval Islamic Law? Some Thoughts on the Periodization of the History of Islamic Law' in A. Vrolik and J.P. Hogendijk (eds), *O Ye Gentlemen: Arabic Studies on Science and Literary Culture* (Brill, 2007) 469, 472.

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Sharia and secular law has never been clear. Since the fourteenth century, Muslim scholars have been concerned with what factors determine the meaning of Sharia. The outstanding scholar Ibn Qayyim al-Jawziyya (d 1350) argued that Sharia had to do with justice. This means that any worldly attempts to bring about justice in accord with Islamic principles, including the promulgation of legal codes, can be necessarily religiously justified and part of Sharia.[4] The current situation shows that the political interest of the state is required to define and implement Sharia.[5]

In the latter part of the nineteenth century, many of the colonial states in Asia witnessed a major transformation of Sharia into a state-sponsored legal code.[6] Without a doubt, the current form of Islamic law in these former colonies is indebted to a European legal construction. After the demise of colonial power in these states, the struggle for the incorporation of Sharia into state law intensified. The institutionalisation of Sharia into Islamic law has much to do with the construction and the preservation of not only Islamic commitment, but Islamic identity. Here, the transformation of a scattered and locally-administered set of substantive laws into a state-centred and codified system has taken place. This Islamic law jurisdiction has been generally limited to personal status.[7]

This article addresses the key question: how did the power relations of state and non-state actors shape the coming into being of Islamic law and its judicial institution in Indonesia? The basic argument is that Islamic authorities and the state (the colonial state and the independent state) in Indonesia took part in the negotiation of the content and meaning of Islamic law. These powers and their relationship contributed to the remaking of definitions within, and determined the scope of, Islamic law. I expect to emphasise an understanding of the interplay between these important powers that have been involved in the process of how Sharia turns into modern Islamic law. This article aims to enhance existing scholarship on the history of Islamic law by considering it as a social and political phenomenon.[8]

This article consists of five sections. Section II addresses the role of *siyāsa shar'iyya* (the state's legal-political right) and the modernisation of law in the Muslim world. Section III analyses the development of Islamic law in the pre-colonial and the colonial periods and includes an explanation of the position of the Sultanate, aristocracy, and the institutionalisation of *penghulu* (religious scholars promoted by the state) within the formation of Islamic law in Indonesia. Section IV deals with the development of Islamic law in the post-colonial phase, including the institutionalisation of Islam, legal unification, and the establishment of Islamic judiciaries. Section V reemphasises my core argument about the interplay of Islamic authorities and the state in the formation of Islamic law in Indonesia.

II *SIYĀSA SHAR'IYYA* AND LEGAL POSITIVISM

As Muslim societies developed into nation-states, religious norms were often deemed positive law.[9] Until this development, never had Sharia been considered formally legal in nature and neither had *fiqh* been instantiated in formal law codes promulgated by legislative authorities.

[4] Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawai'i Press, 2008) 12–13.
[5] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2008).
[6] Buskens and Dupret (n 1) 41.
[7] Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (University of Chicago Press, 2016).
[8] Buskens, 'Sharia and the Colonial State' (n 2) 210.
[9] Buskens and Dupret (n 1) 36.

Colonial discourse and doctrine led to the reformation of Sharia, replacing it with a Western legal conception.[10] Nevertheless, the cooperation of *ulama* (experts in religious law and practice) remained important. Their presence provided legitimacy to the state codification of Sharia.[11] The production of state Islamic law incorporated multiple aspects. For example, it incorporated the reformation of traditional Islamic precepts[12] through *ijtihād* (deriving laws from the sacred legal sources) that included the process of selection (*takhayyur*) and harmonisation (*talfīq*)[13] and it also promoted the notion of public interest (*maṣlaḥa*).[14]

With the development of *fiqh*, *madhāhib* (schools) of *fiqh* and *uṣūl al-fiqh* (legal theories),[15] the introduction of institutions into this process was unavoidable. The Umayyad period (661-750) witnessed the rise of the so-called judicial officer (*qāḍi*s), standing independently from the caliphate's power. In the 'Abbasid period in the late ninth century, the task diffusion between the *qāḍi*s and the political ruler became more obvious. While the former played the role of the guardian, arbitrators and administrators of the Sharia, the latter took charge of the implementation of Sharia'.[16]

In contradiction to the formal duties of *qāḍi*s, another unofficial legal institution, namely *muftī*, also emerged. It involved legal experts who produced non-binding legal decisions and worked beyond the administration of the officialdom. The assortment of the political authority and the *qāḍi* institution in the enforcement of this Islamic law necessarily shows that the development of Sharia is indeed a worldly, rational process. Yet, Islamic piety and moral behaviour also co-determine the epistemic quality of legal authority. At this juncture, even though legislation was unacknowledged in Islamic history, the state had the right to make and apply rules and regulations with an indirect initiative to provide 'uniformity of the law' among different legal schools.[17] It is safe to suggest that such a legal-political right which belongs to the ruler, popularly known as *siyāsa shar'iyya*, requires the incorporation of legal knowledge, legal authority, and religious piety.

As a consequence of the interference of the state in the legal domain, scholarly discussions of Islamic legal interpretations tended to converge. As remarked by Western scholars like Schacht,[18] Coulson,[19] and Anderson,[20] the rise of the caliph's legal authority went hand in hand with the idea of closing the gates (*insidād bāb*) of *ijtihād* by the end of the ninth century. This condition generated the spirit of *taqlīd* (following or imitating). *Taqlīd* has been believed over centuries to be the symbol of the stagnation of the Islamic scholarly tradition and to have

[10] Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University Press, 2009) 2 ('*Sharia: Theory, Practice, Transformations*').
[11] Aharon Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World' [2004](1) *Die Welt Des Islams* 85, 89.
[12] Buskens, 'Sharia and the Colonial State' (n 2) 211.
[13] J.N.D. Anderson, *Islamic Law in the Modern World* (State University of New York Press, 1959) 28; Anver M. Emon, 'Shari'a and the Modern State' in Anver M. Emon, Mark Ellis, and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 66.
[14] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (2005) 12(2) *Islamic Law and Society* 182.
[15] Wael B. Hallaq, 'The Development of Logical Structure in Sunni Legal Theory' (1987) 64(1) *Der Islam* 42; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge University Press, 1997).
[16] Hoexter Miriam, 'Qāḍī, Muftī and Ruler: Their Roles in the Development of Islamic Law' in Ron Shaham (ed), *Law, Custom, and Statute in the Muslim World* (Brill, 2007) vol 28, 67.
[17] Layish (n 11) 87–88.
[18] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1964).
[19] Noel Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964).
[20] J.N.D. Anderson, *Law Reform in the Muslim World* (Athlone Press, 1976).

limited Muslim jurists' ability to produce new legal ideas. Due to this situation, Islamic law was widely considered unable to attain modern ideals—a view that gained impetus from Weber's suppositions regarding Islamic law as lacking rationality and systematisation and being inadequately developed.[21]

But subsequently, Wael Hallaq demonstrated that this conception of *ijtihād* was theoretically and practically incorrect.[22] Hallaq showed the extent to which reinterpretations of substantive law, through its interaction with social practices and the process of fatwa-giving (*iftā'*), contributed to the development of statutory law.[23] Another scholar affirming the productivity of *fiqh* reasoning is Baber Johansen. His work is concerned with the land-tax practice in early Ottoman Egypt, which ceased the concept of payment of *kharāj* (*'ushr*) in the Hanafite law and, instead, developed the concepts of tenancy, through *ijāra*, and cultivation partnership (*muzāra'a*).[24] With respect to such changes, albeit done under the strong influence of a certain legal school, it is clear that substantial reforms of legal doctrines were made in order to meet the challenges of social circumstances.

According to Hallaq, the evolution of Islamic law since its early development resulted in the so-called 'great rationalist-traditionalist synthesis.'[25] By this, Hallaq means that Islamic law has incorporated traditionalism: ideas and norms indicated in the sacred texts, the Quran and prophetic traditions, and rationalism in the form of scholarly consensus and analogical reasoning. Other scholars emphasised the aspects of Sharia that comprise traditional Islamic values.[26] For the sake of legal uniformity and certainty, state legislation incorporated the power of 'ulama' to define Sharia by codifying preferred *fiqh* doctrines. This legal conception of Sharia was influenced by the European studies of Islamic law that tended to employ a hierarchical, administrative understanding of the law.[27]

Contemporary scholarship often understood the implicit sense of religion within Sharia by placing it in opposition to rationalism. How Sharia actually functioned in the socio-political domain of a nation lacked serious scholarly concern. Due to this narrative, the ideology of reform in some ways shaped the construction of the modern state and its system of administration.[28] It was in this realm that the nineteenth-century Ottoman Empire started to launch the ideas of legal reform in the sense of European legal codes. Although since the fifteenth century a number of ordinances (*qānūn*) on land, finance, and crimes had been enacted by the Ottoman sultan, the introduction of law reform occurred during the *Tanzimat* period (1839-1876). Centralisation, legal positivism, and legal unification were important concepts accompanying the process of legislation. Codification was also unavoidable. The codification could be performed in two models, either modernising the existing traditional *fiqh* doctrine or imposing Western legal codes. The Ottoman civil code, the *Mejelle*, exclusively deriving from the Hanafi law and the Penal Codes of 1840 and 1851, represented the first model.[29] Both

[21] Mohammad Fadel, 'State and Sharia' in Rudolph Peters and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate, 2014) 93.
[22] Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) *International Journal of Middle East Studies* 3.
[23] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge University Press, 2001).
[24] Baber Johansen, *The Islamic Law on Land Tax and Tent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (Croom Helm, 1988).
[25] Hallaq, *Sharia: Theory, Practice, Transformations* (n 10) 55.
[26] Rudolph Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified' (2002) 7(3) *Mediterranean Politics* 82; Layish (n 11).
[27] Fadel (n 21) 94.
[28] Hallaq, *Sharia: Theory, Practice, Transformations* (n 10) 4–5.
[29] Peters (n 26) 88.

legislation and codification were believed to be in accord with Sharia, although the source of authority lay in parliament. The notion of Sharia was degraded in the eyes of the State to something simply symbolic. Frequently, however, *qadi* ignored the codified law which, in their view, might seem to deviate from Sharia. They persisted in relying on traditional religious-legal authorities rather than the new statutory codes.[30]

In line with the above discussion, scrutinising the history of Islamic law in Indonesia, political scientists and socio-legal scholars have developed the thesis that the formation of state-sponsored Islamic law in a country primarily involved power relations. Modern scholarship has called out the need for an understanding of the multifaceted social, political, and legal narratives in the studied country. Buskens emphasised that the implementation of modern law was only made possible by the modern state, and the other way around.[31] Meanwhile, Hussin asserts the notion that "Islamic law was an arena for politics, a space whose scope, boundaries, rules, and content underwent a remarkable transformation during the late eighteenth and nineteenth centuries…"[32] Diverse powers in politics strove for the transformation of the content, scope, and rules of 'unofficial' religious precepts into state-promoted Islamic law. Within this framework, it is thus important to emphasise the importance of critically contextualising the study of the legal system and institutions in ever-changing historical situations.

The next section will address the practice of Islamic law during the pre-colonial and colonial periods. It emphasises the role played by colonialism in the conceptualisation of Islamic law. This development results in the notion of colonial legal modernity and of colonial Sharia.[33] My argument is that although the national legal framework of the colonial state was often decisive for the formation of Islamic law, the participation of local rulers, who played an important role as intermediaries, was crucial.

III PRE-COLONIAL AND COLONIAL PERIODS: SULTANATE, ARISTOCRACY AND THE INSTITUTIONALISATION OF *PENGHULU*

The making of a new state cannot completely escape its colonial past. Institutions and legal reforms display well-preserved evolutionary continuities from kinship and colony to sovereignty as an independent state. Daniel Lev, referring to other scholars like Benda, Anderson and Sutherland, has shown the extent to which the legal history of a nation reflects the distribution of political, social and economic realities in that nation.[34] Although legal institutions involve power relationships, it is also significant to address dynamics beyond the law itself.

Historical studies of Islamic law in Indonesia usually set the arrival of the Dutch East Indies Company, Verenigde Oost-Indische Compagnie ('VOC'), to the Archipelago as the starting point of analysis. To be more precise, the narrative starts with an explanation of the legal and political development which took place after the establishment of the city of Batavia in 1619[35]

[30] Layish (n 11) 97.
[31] Buskens, 'Sharia and the Colonial State' (n 2) 210.
[32] Hussin (n 7) 7.
[33] Buskens, 'Sharia and the Colonial State' (n 2) 209.
[34] Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40(2) *Indonesia* 57 ('Colonial Law and The Genesis of the Indonesian State').
[35] Stijn Cornelis van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba' (PhD Thesis, Leiden University, 2015) 30.

and the issuance of the 1642 Statute of Batavia ('*Bataviasche Statuten'*).[36] Historians working on the formation of law in other colonies, such as India, also made the creation of a state, imposed by the East India Company in the latter part of the eighteenth century, as the starting point.[37] It was the second period of the VOC (1650-1798) in the East Indies where their activities exceeded commercial trade in the sense that the idea of colonising territories had also been included.[38] With consideration of the need for effectiveness and social stability, the VOC and other colonial powers elsewhere found it necessary to acquire the local knowledge and the cultural and religious norms adhered to by the indigenous inhabitants of the area. Nevertheless, historians generally conclude that from the beginning the VOC, despite its mercantile nature, sought to respect local laws.[39] The VOC did not interfere in the application of Islamic law by native Muslim communities.

In conjunction with the greater interest in agricultural commodities, any laws made by the VOC were used to secure their commercial interests. They were aware of the vital position of economic and political relationships which served as the fundamental sources of laws. In other words, they made and executed laws to attain their trading goals. For half a century after the founding of the Dutch colonial government in 1800, Islamic precepts were enforced legally. This practice was perceived to be justified by the view that the Netherlands Indies had been entirely subject to Islam before colonial rule.[40]

Throughout this pre-colonial period, mainly during the Islamic kingdom of Mataram in seventeenth-century Java, the comparability between the sultan ordinance and Islamic jurisprudence (*fiqh*) was a matter of incorporation. The influence of *fiqh* on the sultan ordinance was notably strong, particularly in matters pertaining to family law. To give an example, the present Indonesian *taklik talak* (conditional divorce) formula, signed by a husband at the time of marriage and enclosed on the last page of the marriage certificate, is an obvious result of the interplay between *fiqh* authority and the power of the local ruler.[41] As one of the divorce procedures, it is believed to derive from the classical tradition of *fiqh* which is the concept of delegating the right to divorce to the wife (*tafwīḍ al-ṭalāq*).[42] Scholars believe that the *taklik talak* was inspired by the sixteenth-century Shafiite book, *Taḥrīr*, written by Zakariyyā al-Ansārī (d 1520) and subsequently elaborated by the Egyptian scholar al-Sharqāwī (d 1812) in his book *Ḥāshiya al-Sharqāwī.*[43]

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[36] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam University Press, 2010) 44.

[37] Bernard S. Cohn, 'Law and the Colonial State in India' in June Starr and Jane F. Collier (eds), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press, 1989) 131.

[38] Ratno Lukito, 'Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia' (PhD Thesis, McGill University, 2006) 132.

[39] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 58.

[40] Sebastiaan Pompe, 'Islamic Law in Indonesia' (1997) 4(1) *Yearbook of Islamic and Middle Eastern Law* 180, 182.

[41] Mark Cammack, Helen Donovan and Tim B. Heaton, 'Islamic Divorce Law and Practice in Indonesia' in R. Michael Feener and Mark Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Harvard University Press, 2007) 99.

[42] Lucy Carroll, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife' (1982) 16(2) *Modern Asian Studies* 277.

[43] Azyumardi Azra, 'The Indonesian Marriage Law of 1974: An Institutionalization of the Shari'a for Social Changes' in Arskal Salim and Azyumardi Azra (eds), *Shari'a and Politics in Modern Indonesia* (Institute for Southeast Asian Studies, 2003) 76; Hisako Nakamura, *Conditional Divorce in Java* (Islamic Legal Studies Program, Harvard Law School, 2006).

The old practice in Java demonstrated that this Islamic legal tradition was adopted and enacted by Sultan Agung, the third ruler of the Islamic kingdom of Mataram, and practised with a sort of modification. The earliest form of this *taklik talak* was called *janji dalem* or *janjining ratu* (the royal promise). This means Islamic law had to negotiate with local customs. The word '*dalem*' represented the relationship between the ruler and the groom.[44] The Islamic official appointed by the ruler with the authority to administer marriage and divorce read out the promise and asked for the groom's confirmation of acceptance or rejection.[45] The groom only needed to give a 'yes' or 'no' answer, although rarely did the groom refuse. Different regions had their own wordings, (thirty versions were noted) although most of them shared essential conditions, such as desertion for a certain period and failure to provide food, clothing and lodging for a few months.

In addition to substantive law, the collaboration of different authorities has been evident in the establishment of legal institutions. It is worth noting that the development of *penghulus*, religious officials promoted by the state, was done to handle and administrate Islamic affairs and justice. Since the Demak Islamic kingdom, the *penghulu* had the same functions as the local Islamic judicial (*qadi* or *kadi*). The *penghulu* took charge of not only Islamic affairs but diplomatic matters. This development had two causes: it was a consequence of the emerging commitment of the local ruler to Islam and it served the purpose of keeping the loyalty of Muslim subjects. The *penghulu* was a collegial member who had a good comprehension of Islamic doctrines and whose position was as important as a prime minister and a military commander.[46] In the 1750s, after the division of the Islamic Mataram kingdom into the Yogyakarta sultanate in the west and Surakarta in the east, the *penghulu* enjoyed a more hierarchal position. *Pengulu ageng* (great *penghulu*) enjoyed the highest level. This individual chaired the Islamic court, namely *Surambi*. The function of Islamic affairs at the lowest village level was run by *modin* or *kaum*. The substantive laws applied in the court derived from several prominent Shafiite *fiqh* texts, such as *al-Muḥarrar fī fiqh al-imām al-syāfi'ī* by Muḥammad al-Qazwīnī al-Rāfi'ī (d 1226), *Tuḥfat al-muḥtāj* by Shihāb al-Dīn ibn Ḥajar al-Haytamī (d 1566), *Fatḥ al-wahhāb bi sharḥ minhāj al-ṭullāb* by Zakariyyā Muḥammad al-Anṣārī (d 1520), and *Fatḥ al-mu'īn bi sharḥ qurrat al-ʿayn* by Zayn al-Dīn al-Malībārī (d 1567).

The *penghulu* institution exemplified the close relation between Islam and Javanese customs.[47] The institutionalisation of the *penghulu* body was based upon a hybrid of mixed rules from both Islamic law and local custom. It is likely that for this reason the VOC found it desirable to promote the *penghulus* as the primary native legal officials in the colony. When the VOC introduced the first general court for native affairs, namely *landraad* (courts), in the city of Semarang in 1746, the *penghulu*s had the function of advisors. The *landraad* was chaired by a colonial administrator.[48] Not only in central Java but across the island, the *penghulu* and other institutions of Islamic judges played important roles in court affairs.[49] However, after having

[44] Christiaan Snouck Hurgronje, *The Achehnese* (Brill, 1906) 349; A.H. van Ophuijsen, *De Huwelijksordonnantie En Hare Uitvoering* (P.W.M. Trap, 1907) 80–81.
[45] Hisako Nakamura, 'Implementation of Islamic Law in Indonesia in Cases of "Conditional Divorce" and "Divorce Counseling"' (lecture manuscript, Harvard Law School, 2005).
[46] Muhamad Hisyam, *Caught between Three Fires: The Javanese Pangulu under the Dutch Colonial Administration, 1882-1942* (INIS, 2001).
[47] R. Abdoelkadir Widjojoatmojo, 'Islam in the Netherlands East-Indies' (1942) 2(1) *The Far Eastern Quarterly* 48.
[48] Mark Cammack, 'Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?' (1997) 63 (April) *Indonesia* 144.
[49] Martin van Bruinessen, 'Shari'a Court, Tarekat and Pesantren: Religious Institutions in the Banten Sultanate' (1995) 50 *Archipel* 165.

been incorporated into the administration of the Dutch colonial government by the end of the nineteenth century, the *penghulu*s were challenged with three competing situations that they had to maintain. Holding dual identities as devout Muslims and *qadi*, they were bound by Islamic obligation to ensure proper application of Sharia; by colonial government expectation to properly deal with with administrative matters; and, as social leaders, to set moral standards for the community.[50]

Concerning the strategies and policies made by both the VOC and the colonial government, historians and political scientists are interested in looking at the way these external powers dealt with local norms. When the Dutch colonial government took over the VOC position after its collapse in the last years of the eighteenth century, maintaining the equivalence of substantive law and the judicial institution of Islam was an essential concern. The Dutch introduced a division of the legal system. Lev has asserted that in the subsequent years a heated dispute developed over the primacy of statutory law.[51] Irrespective of the diverse views of the colonial scholars, the basic idea remained that the colonial law was intended to make colonializing efficient. However, only with the cooperation of the local elites who were involved in the colonial administration did the codification of Sharia successfully turn ideas into results.[52]

Despite the dominance of the Shafii school, the practice of Islam in society did not mean much for the effectiveness of Islamic law as it had to negotiate with the pre-existing local practices and customs.[53] The intermixture of different religious and social norms in societies created complex situations. Politically, the externally-penetrating Dutch power intervened considerably in such dynamics. For more than a century, the question of whether law in the Netherland Indies should reflect pluralism or unification was debated among Dutch jurists and Indonesian law leaders. There were opposing views at that time on whether there should be the creation of a liberal state or of an administrative system. The colonial government agreed with the latter.[54]

Ideological, political, and cultural conflicts occurred simultaneously and the struggle between Islamic law, pre-Islamic custom, and foreign law was evident. Once understood as being in opposition (domination versus resistance), more recent views understand the process as one of negotiation over different norms. From this point of view, the law issued by Deandels in 1808 can be considered to be the result of negotiation.[55] The ordinance stipulated that the native people would remain subject to their laws and it continued recognizing the role of *penghulu*, in the capacity of an adviser, in attending court hearings between Muslim parties. This law culminated in 1835 when the *penghulu*'s jurisdiction in family law and a legal mechanism to enforce the *penghulu*'s decision were formally recognized by the colonial administration.[56]

The recognition of the *penghulu* had not truly ended the complexity of the native custom and Islamic law. The colonial government was, nonetheless, still reluctant to grant indigenous Muslims any extensive recognition in the legal sphere. The political and religious power of

[50] Hisyam (n 46).
[51] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press, 1972) ('*Islamic Courts in Indonesia*').
[52] Buskens and Dupret (n 1) 39.
[53] C. A. O. van Nieuwenhuijze, 'The Legacy of Islam in Indonesia' (1969) 59(3-4) *The Muslim World* 210.
[54] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) .
[55] Lukito (n 38) 43.
[56] van Huis (n 35) 34.

penghulu was of serious concern and triggered criticism in the Dutch parliament. An outcome of this political instability was the incorporation of *penghulu* and mosque officials into the official *priesterraden* (priests' councils or collegial tribunal) in 1882. This process signified the official incorporation of *penghulu* into the state. While the colonial government separated Islamic courts from the authority of the aristocrats, it created a dual system of civil and Islamic courts. The Dutch increasingly took control over Muslim jurisdiction, and accordingly, the judges of Islamic courts had to receive approval from the general court to pronounce decisions.

In the next development, the term *priesterraden* used to name the Islamic collegial court provoked strong criticism and was deemed misleading. The term which had root in the Christian tradition was used to represent the Dutch understanding of Islamic institutions. The independence of Islamic officials from the aristocracy, in the eye of Snouck Hurgronje, was disadvantageous. This was because the Dutch could no longer drive the moderate evolution of Islam in Indonesia through the hands of the aristocracy. The failure of the colonial government to grant Islamic officials good salaries also disturbed the incorporation of the *penghulu* institution into the colonial administration.[57]

It is apparent that, subsequent to the transfer from aristocracy to the colonial administration, Islamic judiciaries did not gain support from the Islamic modernist wings nor were they connected with informal Islamic leaders whose political potential was significant. This official Islamic group, according to Lev, even took a considerable distance from other Islamic groups who not only dominated the economic enterprises in the Javanese coastal areas but created intellectual figures and political stars. Hisyam has shown the extent to which Muslim organizations in the early twentieth century stereotyped the *penghulu* as colonial-promoted civil servants with an inferior knowledge of Islam.[58] Because their comprehension of Islamic knowledge was still questionable, *penghulus* had to base their position on the support of traditional local authorities. Therefore, there was no reason to confront these traditional authorities, and the Islamic officials could preserve their status.

The great colonial concern with controlling the judicial system in the Netherlands Indies was as significant as its intervention in law. Lev underlines this striking pattern of colonialism in his sentence 'what was unusual was the way in which law was used to serve their end'.[59] Although the disputes over imposing one law or plural law for indigenous groups have come to an end with the latter view's triumph, the situation was more complicated than simply the fact that the Indies had observed a dual legal system. Internal conflicts of law and interactions between different laws were more noteworthy.[60] The new identification of *adat* (local customs) as *adat* law (customary law) created by the Dutch, and the growing awareness of *adat's* role in the late nineteenth century encouraged conservative political forces to unify and diminish Islamic forces.[61] Legislation of Islamic law was underprivileged, especially when compared with that of customary law.

The principle of 'to each his own law' in the sense of substantive law was strongly in force. Nonetheless, in terms of procedure, the practice seems more complicated. The basic principle was Dutch law for Europeans, *adat* law for those considered natives, and Islamic personal law

[57] Lev, *Islamic Courts in Indonesia* (n 51) 15.
[58] Hisyam (n 46).
[59] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 58.
[60] M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975) 257.
[61] Pompe (n 40) 182.

for Muslims (with an exception of law cases concerning maintenance (*nafkah*), the division of property upon divorce, and inheritance). This sharp legal distinction still leaves problems. The natives were fragmented into some groups, Christians requested to be assimilated into Dutch law, the local aristocracies and elites claimed a privileged procedure, and the legal classification of non-natives and non-Europeans was indistinct.[62] Still, the politics of legal pluralism of the colony worked very well. Despite enjoying judicial autonomy, *adat* and the Islamic judicial system remained controlled under colonial regulation.

The next section will explain the historical development of Sharia in the post-colonial phase in Indonesia. I argue that after independence, the institutionalisation of Islam remained an important issue for Muslims. However, the transformation was not easy because not only Sharia was incorporated into the national law, but also *adat* law. Both Islamic groups and *adat* communities seek different principles of legitimacy.

IV POST-COLONIAL PHASE: INSTITUTIONALISING ISLAM, LEGAL UNIFICATION, AND THE POLITICS OF AN ISLAMIC JUDICIARY

During the last decades of the colonial era not only were the demands for independence strongly voiced, but so too were urgings for the creation of a new legal system that met traditional Indonesian concerns on the one hand and international and modern concerns on the other. What was going on before and after the transfer of sovereignty and independence was no more than the transformation of 'the myths' of the colonies to 'the myths' of the independent state. According to Lev, the use of 'myth' here is to refer to the symbols of legitimacy which are nevertheless major bonds of social, political, economic, and legal life.[63] The transformation of governance structures of former colonies depends on the formation of new ideals, which requires changes to the legal rules that prevailed in the colony.

The demand for institutionalizing Islam remained an important issue, and Islamic law continued to matter greatly in the late colonial administration. At the same time, the escalating dynamics of elite politics and institutional structures gave rise to changes in Islamic law. The incorporation of Islamic law and *adat* law into national law had been accompanied by a certain degree of tension. The main factor was, despite Muslims forming a majority in Indonesia, both *adat* and Islamic groups searching for different principles of legitimacy.

Given the newly-launched Ethical Policy in the early twentieth century which endorsed a more visible, yet half-hearted, humanitarian concern for the natives' welfare,[64] some Islamic groups emerged and seized the opportunity to raise the spirit of anti-colonialism. A few years before, Snouck Hurgronje, an outstanding Dutch scholar on Arabic and Islamic cultures, influenced changes to colonial policy on Islam.[65] An outcome of these processes was an array of legislation transforming the jurisdiction of Islamic law which took place from 1929 to 1938. The 1937 regulation not only authorised the setting-up of an appeal tribunal (*Mahkamah Islam Tinggi*) but was directed to changing the name of the court from *Priesterraad* to *Penghulugerecht*, providing equivalent court structure in South Kalimantan and reforming the

[62] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 62.
[63] Daniel S. Lev, 'The Lady and the Banyan Tree: Civil-Law Change in Indonesia' (1965) 14 *American Journal of Comparative Law* 282, 306.
[64] Harry J. Benda, 'Decolonization in Indonesia: The Problem of Continuity and Change' (1965) 70(4) *The American Historical Review* 1058, 1060.
[65] Harry J. Benda, 'Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia' (1958) 30(4) *The Journal of Modern History* 338.

adjudication of Islamic courts.[66] The regulation defined the jurisdiction of Islamic courts comprising matrimonial matters (excluding inheritance as it had to go under the competence of the general court). At this juncture, the policy was considered to have curtailed the power of Islamic courts and to have disheartened Islamic law and Muslims.[67]

Prior to and after Indonesia proclaimed its independence, two legal traditions had been available to draw on. Some advocates and intellectuals were keen on the European-oriented legal system and the preservation of the older colonial symbol. Yet the Indonesian majority favoured the minimisation of the political influences entrenched by the colonial system and endorsed the ideas of revolutionary law. This had a historical root in the emerging feelings of anger towards the dominant influence of the colonial past. Women's organisations opposed an orthodox interpretation of Islamic law which allows a husband to divorce or marry more than one wife.[68]

For Islamic groups, the establishment of the Ministry of Religion a year after the proclamation of independence has been very meaningful. It corresponded to the feeling of organisational fragmentation and the appeal for a unitary organisation. Interestingly, notwithstanding being perceived as catering to the interests of all religious groups, the Ministry of Religion was staffed largely by Muslims.[69] According to Lev, this newly-formed Ministry was never fully accepted by non-Islamically oriented nationalists or by Islamic groups themselves.[70] In terms of legal practice, the Ministry of Religion identifies its role as mediating the lacunae between national law and Islamic law. The transfer of Islamic courts from the Ministry of Justice to the Ministry of Religion has been remarkable. Under an Islamic home, Islamic courts permit themselves to function as more than a judicial institution. They are also charged with the responsibility of giving Islamic guidance. The support of the Muslim community, the changing treatment of the kinship system, and civil law play roles altogether. Despite the absence of a legal basis for jurisdiction, the courts remain open to receiving inheritance cases.[71]

The push by some Indonesians for a unified legal system did not come to an end with decolonisation. In terms of the substantive law on marriage, an intense debate over the unification or the diversity of laws continued. Some demanded one law for all of the different religious groups, while others argued for different laws consistent with the tenets of the different religious groups. Religious political parties strived for the latter.[72] It was hardly possible to bring together the conflicting groups to a shared point. Despite the myriad proposals for marriage law reform up to 1973, none of them came into legislation.[73] It was only with the full support from the Suharto government that it was possible for the bill to be brought before the House of Representatives. The role of the Ministry of Religion was terminated at the same

[66] Nurlaelawati (n 36) 47.
[67] Mark Cammack, 'The Indonesian Islamic Judiciary' in R. Michael Feener and Mark Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Harvard University Press, 2007) 146; Mark Cammack and R. Michael Feener, 'The Islamic Legal System in Indonesia' (2012) 21(1) *Pacific Rim Law & Policy Journal* 13; Jan Michiel Otto, 'Sharia and National Law in Indonesia,' in Jan Michiel Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) 433.
[68] Cora Vreede-de Stuers, *The Indonesian Woman: Struggles and Achievements* (Mouton, 1960).
[69] van Nieuwenhuijze (n 53) 212.
[70] Lev, *Islamic Courts in Indonesia* (n 51) 45.
[71] Mark Cammack, 'Islamic Law in Indonesia's New Order' (1989) 38(1) *International and Comparative Law Quarterly* 53 ('Islamic Law in Indonesia's New Order').
[72] Nani Soewondo, 'The Indonesian Marriage Law and Its Implementing Regulation' (1977) 13 *Archipel* 283.
[73] June S. Katz and Ronald S. Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems' (1975) 23(4) *American Journal of Comparative Law* 653.

time. Muslims felt disappointed in the drafting of the bill, as if they had been left aside. Some articles proposed in the bill were perceived as violating Islamic doctrine. Both Islamic parties and Muslim youths strongly opposed it. The government had to make some careful compromises in its drafting[74] to maintain political stability and meet desires for social reform.[75]

By accommodating the ideas of reformist Muslims, the law strengthened the state's authority to regulate and control family matters. However, with respect to the degree of the influence of Islamic law in the legislation, Muslims were fairly satisfied. The law placed the state apparatus in a vital position as the guardian of marriage. By this law, substantive issues of marriage were addressed by the government through state law[76] in a way that responded to the problems of an entrenched plurality of legal systems, religious affiliations, and local ethnic attachments.[77] The law said much about the dissolution of marriage. Among the important issues were the abolition of the husband's right to unilateral repudiation (*talak*), the making of divorce subject to court review, and the grant of an equal position for both husband and wife to petition for divorce.

The failure of the earlier attempts to impose a secular marriage law enforced by the general court to a certain degree influenced the subsequent direction of the relation between Islam and the state. Instead of curtailing Islamic law and Islamic courts, the government decided to take the side of Islam.[78] From the mid-1980s there had been a seemingly radical shift in the New Order government's policy toward Islam on diverse issues.[79] Given warm treatment by the central government, Muslim scholars and institutions took the opportunity. Among other issues, the proposal of the Ministry of Religion for a legal code regulating Islamic courts was the most prominent. The proposal finally resulted in the Islamic judicature law which came into legislation in 1989.

The important role played by Islamic groups remained visible at the turn of the 1990s. The demand for a uniform substantive law to be used by judges in Islamic courts was obvious. Despite controversies over the provisions, the government agreed to a compilation of Islamic jurisprudence, officially called the *Kompilasi Hukum Islam*. Covering the laws of marriage, inheritance, and endowment, this codification of Islamic law received its legal basis in 1991 from the Presidential Instruction (*Instruksi Presiden*) endorsing all relevant state institutions to refer to it when resolving the issues mentioned.

Compared to marriage and divorce, the issue of inheritance was the most controversial topic debated among legal practitioners. Up to the present, attempts have been made to have a unified law but no single inheritance code has been passed into legislation. Despite the variety of different kinship systems across the entire country, practices of inheritance are dependent upon local features. Meanwhile, complicated issues about how norms interact with the law are usually simplified into a discourse of whether it derives from Islam or *adat*. Despite controversies surrounding the law of inheritance in the compilation, the law, as Otto has argued,

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[74] Ibid.

[75] June S. Katz and Ronald S. Katz, 'Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited' (1978) 26(2) *American Journal of Comparative Law* 309.

[76] M. B. Hooker, 'State and Syarî'ah in Indonesia, 1945–1995' in Timothy Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 1999) 97–110.

[77] Cammack, 'Islamic Law in Indonesia's New Order' (n 71) 61.

[78] Mark Cammack, 'Islam, Nationalism and the State in Suharto's Indonesia' (1999) 17 *Wisconsin International Law Journal* 27.

[79] R. William Liddle, 'The Islamic Turn in Indonesia: A Political Explanation' (1996) 55(3) *Journal of Asian Studies* 613.

almost shares the traditional conception most largely adhered to by the majority of Muslims. One of the provisions demonstrating this reproduction is the stipulation that when a decedent has sons and daughters, the sons have the right to inherit twice the share that belongs to each daughter.[80]

V THE FORMATION OF ISLAMIC LAW AND THE INTERPLAY OF ISLAMIC AUTHORITIES AND THE STATE

The hybrid mixture of Islamic legal authority and polity has played a significant role in the making of Islamic law in Indonesia. While the centrality of Islam for Indonesian culture is indisputable, Sharia in the very sense of Islamic law has been regarded as incapable of being a determinant factor in shaping decisive norms and legal institutions. Moreover, it is evident that during the colonial encounter, there were competing struggles of different groups for the European Dutch legal codes over other preceding norms (Islamic or customary) and the other way around. Instead of creating conflict, the colonial politics of legal plurality and the pattern of indirect rule were quite successful in mobilising the potential of Islam. During this process of negotiation, the colonial state was not the sole actor in the legal sphere: local elites and Islamic leaders played influential roles as well.

The making of Islamic law in Indonesia, which included the transformation of Sharia from jurists' law into state law, is therefore indebted to the interplay of different actors: colonial state, sovereign nation-state, Muslim jurists and scholars, and local leaders. After independence, the Indonesian term *umat* (Ar. *umma*) has been an important political symbol used by Muslims to negotiate their interests in the colonial encounter and the modern state. Devout Muslims had to ally with the local authorities and aristocrats who were in general nominally Islamic. Despite the very hesitancy of Muslim society to give productive meaning to the inevitable modernity, Indonesian Muslims have persistently attempted to prove that Islamic law could be modern and compatible with the concept of the nation-state.

The history of Islamic law in Indonesia has demonstrated that legal systems and judicial institutions are the instruments of not only social but political systems. On the one hand, for devout and active Muslims, Islamic law has been a symbol of the struggle for the observance of God's commands. On the other hand, it is safe to suggest that the political elements in the formation of Islamic law are unavoidable. This framework permits legal scholars or historians to understand the extent to which legal rules and formal structures are constructed, manipulated, accepted, and avoided along with other non-state structures. Islamic law has represented legal authority and polity at the same time. The authority is not necessarily forceful, but a social and political one that makes it possible to gain people's devotion and compliance. In other words, the making of Islamic law has involved political, academic and pragmatic interests.

VI CONCLUSION

The variety of factors has significantly contributed to the extent to which the making of Islamic law in Indonesia underwent substantive changes. The making of Islamic law has encompassed remarkably diverse orientations and interests of religious scholars and the state. While the latter imposed positive legal norms, the former has significantly served as intermediaries. The most important factor is the colonial construction of the category of Islamic law. The colonial power (later on the independent state) and Islamic authorities took part in the negotiation of the

[80] Jan Michiel Otto, 'Islam, Family Law and Constitutional Context in Indonesia' in Eugene Cotran and Chibli Lau (eds) *Yearbook of Islamic and Middle Eastern Law* (Brill, 2009) 82.

content and meaning of Islamic law, contributed to the remaking of definitions, and determined the scope of Islamic law. However, Islamic law needed to attain an adjustment to the notions of modern law and national sovereignty to make such substantive legal changes possible.

In Indonesia, after the demise of colonialism, the political support of the sovereign state, which involved Muslim jurists in the making of new interpretations of classical *fiqh* doctrine, was fundamental. Another important factor in the reformulation of new understandings of Islam, law and culture is the construction of political symbolism. The centrality of the substantive Islamic law, largely represented in personal status, has little effect on Muslim life up to the present day. This process has become an indispensable part of the development of Islamic law. Nevertheless, the Indonesian case had a special characteristic, since Indonesia is a nation with a high degree of cultural diversity. One day after Indonesia proclaimed its independence on 17 August 1945, the Constitution was commenced. The Constitution explicitly declares the concept of *negara hukum* (state based on rule-of-law, *rechtsstaat*).[81] This wording implies an important meaning that the rule of law is to persistently guide the further development of the nation, not the state authority. At the surface level, there have never been disputes over the state principle. The majority of the people were fairly satisfied with such a new development. However, the intense contestations over what ideology ought to lead the nation did not necessarily disappear.

The different ideological interests of some Islamic groups influenced the direction of the relationship between state sovereignty and religious laws. Therefore, the making of the national legal system has involved the processes of contestation and resolution between local cultures, colonial European law and Islamic norms for centuries. However, for Muslims, the issue was not only the formation of the national legal system but the rules about matrimonial matters as regulated in Islamic legal doctrines. Through Islamic legal matters, which have been broken down to stipulations on a private sphere or personal status, devout Muslims found it important to claim a clearer position of the relationship between Islam and state authority. For them, Islamic personal status has turned into a fundamental Islamic identity.

[81] Daniel S Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat' (1978) 13(1) *Law & Society Review* 37, 43–44.