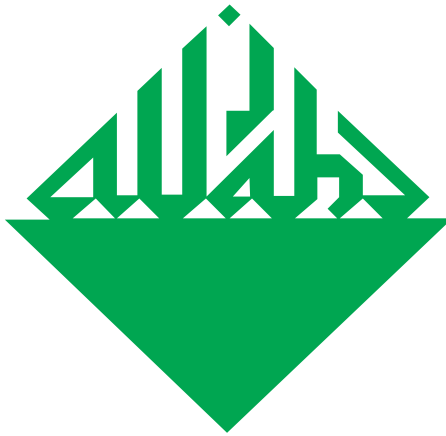


STUDIA ISLAMIKA

INDONESIAN JOURNAL FOR ISLAMIC STUDIES

Volume 20, Number 2, 2013



SOUTHEAST ASIAN *SHARĪĀHS*

M.B. Hooker

GOD'S MERCY IS NOT LIMITED TO ARABIC SPEAKERS:
READING INTELLECTUAL BIOGRAPHY OF
MUHAMMAD SALIH DARAT AND HIS *PEGON* ISLAMIC TEXTS

Saiful Umam

STUDIA ISLAMIKA

STUDIA ISLAMIKA

Indonesian Journal for Islamic Studies

Vol. 20, no. 2, 2013

EDITORIAL BOARD:

M. Quraish Shibab (UIN Syarif Hidayatullah Jakarta)

Taufik Abdullah (LIPI Jakarta)

Nur A. Fadhil Lubis (IAIN Sumatra Utara)

M.C. Ricklefs (Australian National University, Canberra)

Martin van Bruinessen (Utrecht University)

John R. Bowen (Washington University, St. Louis)

M. Kamal Hasan (International Islamic University, Kuala Lumpur)

Virginia M. Hooker (Australian National University, Canberra)

EDITOR-IN-CHIEF

Azyumardi Azra

EDITORS

Satful Mujani

Jamhari

Jajat Burhanudin

Oman Fathurahman

Fuad Jabali

Ali Munhanif

Ismatu Ropi

Dadi Darmadi

ASSISTANT TO THE EDITORS

Testriono

Muhammad Nida' Fadlan

ENGLISH LANGUAGE ADVISOR

Jessica Soedirgo

ARABIC LANGUAGE ADVISOR

Nursamad

COVER DESIGNER

S. Prinka

STUDIA ISLAMIKA (ISSN 0215-0492) is a journal published by the Center for the Study of Islam and Society (PPIM) UIN Syarif Hidayatullah, Jakarta (STT DEPPEN No. 129/SK/DITJEN/PPG/STT/1976). It specializes in Indonesian Islamic studies in particular, and Southeast Asian Islamic Studies in general, and is intended to communicate original researches and current issues on the subject. This journal warmly welcomes contributions from scholars of related disciplines.

All articles published do not necessarily represent the views of the journal, or other institutions to which it is affiliated. They are solely the views of the authors. The articles contained in this journal have been refereed by the Board of Editors.

STUDIA ISLAMIKA has been accredited by The Ministry of Education and Culture, Republic of Indonesia as an academic journal (SK Dirjen Dikti No. 56/DIKTI/Kep/2012).

© Copyright Reserved

Editorial Office:

STUDIA ISLAMIKA, Gedung Pusat Pengkajian
Islam dan Masyarakat (PPIM) UIN Jakarta,
Jl. Kertamukti No. 5, Pisangan Barat, Cirendeu,
Ciputat 15419, Jakarta, Indonesia.
Phone: (62-21) 7423543, 7499272, Fax: (62-21) 7408633;
E-mail: studia.islamika@uinjkt.ac.id
Website: studia.ppim.or.id

Annual subscription rates from outside Indonesia,
institution: US\$ 75,00 and the cost of a single copy is US\$
25,00; individual: US\$ 50,00 and the cost of a single copy
is US\$ 20,00. Rates do not include international postage
and handling.

Please make all payment through bank transfer to:
PPIM, Bank Mandiri KCP Tangerang Graha Karnos,
Indonesia, account No. **101-00-0514550-1 (USD),**
Swift Code: bmrindja



Harga berlangganan di Indonesia untuk satu tahun,
lembaga: Rp. 150.000,-, harga satu edisi Rp. 50.000,-;
individu: Rp. 100.000,-, harga satu edisi Rp. 40.000,-.
Harga belum termasuk ongkos kirim.

Pembayaran melalui **PPIM, Bank Mandiri KCP**
Tangerang Graha Karnos, No. Rek: 128-00-0105080-3

Table of Contents

Articles

- 183 *M.B. Hooker*
Southeast Asian *Shari'ahs*
- 243 *Saiful Umam*
God's Mercy is Not Limited to Arabic Speakers:
Reading Intellectual Biography of Muhammad Salih Darat
and His Pegon Islamic Texts
- 275 *Amal Fathullah Zarkasyi*
Ta'thîr al-ḥarakah al-salafiyah bi Miṣr 'alà al-mujaddidîn
bi Indûnisiyâ fî taṭwîr al-tarbîyah al-Islâmîyah
- 325 *Jajang A. Rohmana*
Makḥṭûṭat *Kinanti* [*Tutur Teu Kacatur Batur*]:
Taṣawwuf al-'âlam al-Sündâwî
'inda al-Ḥâj Ḥasan Muṣṭafâ (1852-1930)

Book Review

- 377 *Hilman Latief*
Menelaah Gerakan Modernis-Reformis Islam
melalui Kota Gede: Pembacaan Seorang Antropolog Jepang

Document

- 393 *Ismatu Ropi*
Celebrating Islam and Multiculturalism in New Zealand

M.B. Hooker

Southeast Asian *Shari'ahs*

Abstract: *The Southeast Asian materials show that the shari'ah's providing various pathways (through time and place) for individual Muslims to follow when doing their duty to God, which is fidelity to Revealed Truth. There are many paths and it is pointless to insist upon an historical 'purist' monolcgy, however attractive this might appear theoretically. The realities of life (economics, social structure, alternative philosophies, and so on) dictate otherwise. Local shari'ahs adapt realities to Revelation irrespective of whether sources of legislation or forms of government are Muslim or non-Muslim this was never an issue in Southeast Asia. The localized shari'ahs were achieved via an acceptance of legal pluralism and hybridization of laws. The result is that Revealed obligations are phrased in local terms, change over time is allowed for, and the end result is a truly original and unique set of 'Southeast Asian' shari'ahs.*

Keywords: *fiqh*, Islamic law, localized *shari'ahs*, legal pluralism, hybridization of laws.

Abstrak: *Bahan-bahan di Asia Tenggara memperlihatkan bahwa syariah menyediakan beragam jalan berbeda (karena waktu dan tempat) untuk diikuti kaum Muslim ketika melaksanakan perintah Tuhan, yang merupakan kepatuhan pada Kebenaran Wahyu. Ada banyak jalan dan akan sia-sia jika hanya menekankan pada warisan tunggal sejarah yang 'murni', betapapun mungkin itu menarik secara teoretis. Realitas kehidupan (ekonomi, struktur sosial, filsafat alternatif, dan lain-lain) memperlihatkan sebaliknya. Syariah-syariah lokal menunjukkan adaptasi Wahyu atas realitas terlepas apakah sumber-sumber legislasi atau bentuk-bentuk pemerintahannya Muslim atau non-Muslim—ini tidak pernah menjadi persoalan di Asia Tenggara. Syariah-syariah lokal diperoleh melalui penerimaan atas pluralisme hukum dan hibridisasi hukum. Hasilnya adalah bahwa kewajiban-kewajiban yang diwahyukan difrasekan dalam istilah-istilah lokal, perubahan diperbolehkan, dan hasil akhirnya adalah serangkaian syariah Asia Tenggara yang benar-benar asli dan unik.*

Kata kunci: fikih, hukum Islam, syariah-syariah lokal, pluralisme hukum, hibridisasi hukum.

الخلاصة: تُظهر المواد في جنوب شرقي آسيا أن الشريعة كانت تتيح أنواعا من الطرق المختلفة (بحسب الزمان والمكان) لاتباعها المسلمون عندما يطبقون أوامر الله، التزاما بالانقياد إلى حقيقة الوحي. هناك طرق كثيرة ومن العبث التركيز فقط على التراث التاريخي الخالص وحده، وإن كان ذلك قد يكون مثيرا من الناحية النظرية. يشير واقع الحياة (اقتصاديا وبنية اجتماعية وفلسفة بديلة وما إلى ذلك) إلى العكس، فالشرائع المحلية تثبت تكييف الوحي مع الواقع بصرف النظر عن المصادر الشرعية أو أشكال حكوماتها. فالحال عما إذا كان المرء مسلما أو غير مسلم لم يكن ذا بال في جنوب شرقي آسيا. وقد تم اكتساب الشرائع المحلية من خلال تقبل تعددية القوانين وتهجين الأحكام. والنتيجة أن الواجبات التي يفرضها الوحي يتم التعبير عنها بمصطلحات محلية، والتغيرات المسموح بها، بحيث كان الحاصل النهائي هو سلسلة من شرائع جنوب شرقي آسيا كانت أصيلة حقا و متميزة.

الكلمات الاسترشادية: الفقه، الشريعة الإسلامية، الشرائع المحلية، تعددية القوانين، تهجين الأحكام

Variation and variety are the defining characteristics of Islamic law in Southeast Asia, hence “*shari'ahs*”. In this they are typical of the laws in this region, which are all variations and varieties of some other law(s). The eleven states¹ comprising Southeast Asia constitute one of the most complex law areas in the world. Collectively they are heir to ten written law traditions² as well as to dozens of chthonic (“customary”) traditions. It is only recently that we have been able to come to some general understanding of the whole of this material. While much remains to be done we do now know that there are two fundamentals for all Southeast Asian laws. First, as a consequence of the area wide pluralism, we are presented with varieties of hybrid laws. A hybrid is more than elements from two or more systems existing in parallel or as a “mixture”. It is instead an original creation, a variation or variations on a progenitor resulting in something new. Second, the process is one of purposeful reflection and selection from different traditions. Selection is the key to successful hybrids; they are thus localized to the area and the people. Earlier generations of European scholars and colonial administrators found this difficult to grasp and much administration as well as comparative law was vitiated by this failure; the 19c-20c historiography³ reflects this failure.

These comments are especially apposite for Islamic law. Much of the European literature of the 19c – 20c is full of misunderstanding. We see descriptions of local varieties of *shari'ah* described as “folk law”, “folk religion”, “corruption” of doctrine, and so on. Even local Muslims do this, often in the name of restoring “purity” to the local *shari'ahs*. They have been doing it for three hundred years; variation thus has a long history of creation and an equally long tradition of reaction. But what the purifiers always fail to realize is that variation is not an attack on Revelation; it is instead an attempt to translate the Divine imperative into a form which is usable and suitable to local conditions. The *purpose* of local *shari'ah* text is always the key to understanding it. This is nowhere better illustrated than in the pre-modern texts where use and purpose are primary.

Varieties of Pre-Modern *Shari'ahs*

There is a widespread tradition of law texts produced under the aegis of Sultans. The purpose of these texts was to show that the text patron was a proper Muslim ruler, whose rule was justified by reference to

the Qur'ān and sunna and who was legitimate because he exercised authority in a way congruent with that of Muslim rulers in West Asia. These elements have given rise to a large and complex literature⁴ directed toward the ultimate purpose – legitimation. It includes aspects of what we call ethics, morality, doctrine, history and tradition, and *fiqh*. Some examples follow.

The Malacca laws: this written tradition (from ca 16c) is the archetype and founding document for a later extensive Malay *ms* tradition. The (now) established text is in four parts: the first and most important for the present purposes is the general or “proper” law which is preceded by a preamble which states its purpose. It salutes “God the Compassionate, the Merciful”, and describes the text following as a “*kanun*” written to preserve the customs (*adat*) of the villages and also the “laws of God” (*hukum Allah*) – both are the gift of the Sultan who is “Caliph of the Faithful”. We then have provisions on sumptuary rules, required forms of address and correct conduct in public. The whole is clearly derived from West Asian models. One may think of the preamble as rather formulaic, and so it is at a superficial level, but the following provisions on punishment and penalties disabuse us of this opinion.

The whole discussion on the wrongdoing or as we would say now, public law (crime, challenge to existing institutions) recognizes two sources. These are; “laws of God”, and “laws of the country”. The text recognizes that each has a different source, that each is justifiable but ultimately the Sultan must decide priority. This he does, as “Caliph of the Faithful”, and his answer (or the answer ascribed to him) is that law is of three types: the *shari‘ah*, the law given by reason (*akal*), and local custom (*adat*). These are all from God and represent the same truths, with only superficial differences as to the correct circumstance for implementing one or another. In short, opposition of rule is avoided in principle. Instead *akal*, which is neutral as to source but can accommodate all varieties of source becomes the decisive condition. This is the great achievement of the Malacca law text, *akal* is the primary cause, and thus the actual rules which follow are always conditional.

“Conditional” is always difficult; it can be as simple as dependant or as complicated as intrusive to various degrees. The Malacca laws show both in its two following parts which are “Muslim marriage law” and “Muslim law on contracts”. These two reproduce *fiqh* but they do not stand alone; on the one hand they are decisive *via* the Islamic reference,

on the other they are written into a *local* law text. The text is a text of its time and, therefore, its history cannot be the same as that of the Arabic *shari'ah*. The intellectual conditions are quite different. We often do not realise this, nor its implications.

For example – the *Acheh laws*: the material from this state has always had a special place in Southeast Asian Islamic history. The intensity of the theological and doctrinal debates from the 17c onwards were and are famous. This applies also to its main law texts – known variously as the “*Adat Aceh*”, “*Majelis Aceh*” and “*Makota Alam*”. All these *ms* describe the nature of power, the exercise of sovereignty and the religion of Islam from the point of view of the Sultanate. The *Adat Majelis* paints a highly idealized picture of the Muslim sovereign; one of his most important characteristics is his scrupulous performance of his religious duties in public. This is essential as demonstrating true royal conduct – a royal Muslim orthopraxy. The bulk of the *Adat Majelis* is taken up with describing the monarch *via* a complex symbolism. Thus, the title “Rajah” is analysed by taking each letter making up the word and giving it a religious reference (e.g. God’s mercy, wisdom, wishes and so on). This is followed by “the ten regulations for all [Muslim] rulers, *i.e.* strength in government, authority in command, mercy in anger, to raise the humble, to lower the great, to bring life to the dead, to kill the living, to be just to all, and to be famous in all countries”. The text also lists out the rules for the correct conduct of the Muslim ruler; these include having an efficient treasury, the proper number of ministers, a sufficient population which must be increased, to build fortifications, and to “succeed in all his actions”. Finally, there is a large section on the ceremonial procession of the Sultan from his palace to the mosque for the “*Ied*” prayers. There is a very detailed and highly repetitive description of the participants in the procession, their numbers, rank, dress and ceremonial. The Sultan’s dress and ritual duties are described in exhaustive detail. It is this complex which makes up the *Adat Majelis*. This *ms* is not a *fiqh* textbook; instead, it is concerned to demonstrate that order and proper conduct by the Sultan ultimately derive from God. It is the religious truth which exemplifies the ideal regime.

The same is true, of course, for the Malacca laws which are to the same effect. But the Malacca text (and the later versions in the Malay states)⁵ also includes *fiqh* elements which, as indicated above, it attempts to harmonize *via* the use of *akal* in its widest sense. This is a consistent

feature of the Malay material until the late 18c and into the 19c when “pure *fiqh*” was increasingly introduced (see below). The best example of *akal* is found in the Minangkabau *mss* complex from West Sumatra and central Malaya.

The Minangkabau texts: we have just seen “*Adat*” used in Aceh to mean “Royal Conduct/ceremonial”. In the Minangkabau *mss*, by contrast, *adat* means something like ‘*urf*’, i.e. a custom or customary practice. It is always used in opposition to Islam; the reason is that Minangkabau society was and is organized on the basis of matrilineal descent groups. Rules for the transmission of property on death privilege the female lines and thus are in direct conflict with the *fiqh*. The law texts are concerned to manage the possibility of actual conflict which is an endemic feature in Minangkabau society. The underlying premise, of course, is that the *fiqh* inheritance rules cannot make any practical sense in peasant societies where the chief form of wealth is land. A strict application of these rules results in excessive fragmentations – the *adat* is the only economically practical system. At the same time the Minangkabau are devout Muslims, indeed they pride themselves on their strict adherence to the Qur’ān and sunna; they have in fact produced outstanding scholars of Islam.

The text answers to the conundrum are as follows. First, to advance the proposition that law is not a monolith; instead, there are different laws and thus different sources of law. The early *mss* (called *Undang-undang* “laws” or *Tambo* “history”) were primarily concerned with elaborate classifications of types for law. Thus, we have; “original”, “created”, “four laws”, “laws of the four states”, “old *adat*”, “new *adat*”, and so on. The most important for practical purposes was the “four laws” class which describes the structure of lineage, clans, land ownership and rules as to marriage and divorce. This is the *adat* complex, and it is contrasted in the *mss* with the *fiqh* complex, which is family law (Shāfi‘ī school). This whole is the law(s) for the Minangkabau. The variety of classes provides a range of alternative choices of law for disputed cases. The system as a whole purposely allows for negotiation, selection and compromise. The second answer is a development from multiple choices. Given that there are obvious differences and given also that these differences occur as the result of the nature of law itself, it follows that each is justified because each has its own particular *function*. This is discoverable through correct *akal* which leads one to the propriety

of the natural order and, ultimately to the source of law which is the moral and physical universe founded by God.

Adat and Islam, therefore, both originate in God and any inconsistency is apparent rather than real. They are but different aspects of the same moral universe. In practical terms it allows for debate and negotiations on a spectrum of obligation – thus we often read “Adat is nothing different, nothing other than the teaching of our Faith, our Islam.” The reality of conflict was of course rather different from this stated ideal, but that ideal was important particularly from the early 19c. At that time the first wave of Islamic reformism arrived in West Sumatra and the religious cause immediately took the form of political conflict between traditional (“*adat*”) power holders and the newly active ‘*ulama*’ class. The 19c texts thus reflected the theological and *shari’ah* differences. The later 19c Malay texts certainly reflect a political Islam.

The best examples are the *Maguindanao and Sulu Codes* of the southern Philippines. The Muslims (“Moro”) of this area were in a constant state of war first with the Spanish and later (early 1900s) with the Americans. For the Moro, Islam was essentially an identity, an ethno-nationalism (as it remains today, see below pp. 45-50) and this is reflected in the law texts. The major text – the *Luwaran* (“Selections”) dates probably from the late 18c early 19c. It has a rather artificial form, being essentially a fines list for public order offences (murder, assault, theft and so on). Each offence is validated by an Arabic citation in the margin of the text which confirms the offence and the appropriate penalty. The Arabic citations are short and mostly accurate summaries from standard *fiqh* texts which are actually named in the preamble to the *Luwaran*.⁶ In addition to public order offences, the *Luwaran* also has provisions on debts, loans, family law and inheritance as well as comprehensive tables setting out compensation and blood money.

The *Luwaran* is unique; it is the only example of a law text in the form of a fines list with accompanying Arabic validations. It is “artificial” and by this I mean that while the author was knowledgeable as to *fiqh* he was also writing to a commission. This is clear from the public order emphasis and the stress on the preservation of status markers and rank order with the Sultan at the apex. Of course these features are also present in the other Malay law *mss* but the *Luwaran* is not part of a law text tradition as in the other Malay material. Instead, it stands alone; there is no discussion of the nature and sources of law and the

Arabic citations, while accurate, are so minimalist as to be impractical for consistent use on a day to day basis.

Something similar can be said also about the second example of Moro texts, the *Sulu Codes* of the late 19c. These are political status documents consisting of fines lists for offences against the occupants of power and position. There is no Islamic reference except as acknowledgement of the Majesty of Allah and the sacred nature of the Qur'ān. There is no serious attempt to engage with *sharī'ah*.

The phrase “engage with *sharī'ah*” seems clear enough but, with reference to the *Java texts* it is quite difficult to use accurately. There is no law text as such (with a minor qualification, below) comparable with the Malacca, Aceh or Minangkabau *ms.* Instead, “Islamic law” presents us with two *sharī'ah* traditions and one Indian-Javanese law text. The first of the traditions consists of the standard textbooks of the Shāfi'ī school which circulated in Muslim Southeast Asia from the 16c (see below). These were confined to a small circle, the '*ulama*' who translated and commented upon them to an audience of specialist students (*santri*) in *pesantren* (boarding schools). Second, from the early 19c onwards and increasingly in later decades Dutch colonial administrations collected native customs (*adat*) for the purposes of administration and in so doing recorded elements of *fiqh* which occasionally formed part of the larger *adatcorpus* (below). Finally, there is a complex of digest-like texts which were recorded by Dutch administrators from the 18c onwards. These were produced by Muslim rulers in Java and consist of procedural books or manuals describing the duties and offices of high officials, rules for judicial proceedings, punishments, taxation and so on. They are a continuation of the pre-Muslim royal administrations in Java and the most that can be said about them from the *sharī'ah* point of view is that there is the occasional reference to Allah. For example, in the text called *Surya Alam* (“Light of the Universe”), sources of law are given as *hukum* (from Allah) and *perentah* (from the sovereign). The text is standard and substance is actually a manual of the then Javanese administrative procedure. There is no *fiqh* reference.

In short the Java texts show us discrete and separate legal universes; what we have are *options for identifying laws for Javanese Muslims*. The options do not have set forms, now are they consistent in content. There may have been some prioritization but without supporting evidence the suggestion remains speculative. The whole nature of

Javanese law is complicated by the prior Indian philosophical and legal heritage. There is still argument over *ms* provenance and when this is combined with the deeply negative treatment of *shari'ah* by the colonial administrations of the 19c – 20c we have serious difficulties with the historiography (below).

We are on much firmer ground with our last *shari'ah* source texts. These are the Arabic textbooks of Shāfi'ī *fiqh* which have circulated in the region since at least the 17c. They are the standard books⁷ for which there are many translations and commentaries in the main languages of the area.⁸ There is a long tradition of technically sophisticated local scholarship.⁹ In other words, to do justice to this material we must approach the Arabic originals with the local scholarship (editions or commentaries) in mind. Not to do this would be to distort the historical record. On the positive side, the Arabic texts, editions and commentaries were universal across Southeast Asia and in the years before the colonial and post-colonial boundaries they provided a unity of thought and method of comprehension across a variety of ethnicities and languages. Because the religion was universal, its local legal expressions were also part of this common universe, linking Southeast Asia to West Asia. The universal aspect has always been a problem for secular authorities whose statist views require political, state boundaries. Too often this has led to boundaries for knowledge – and so we come to some historiographical assessment of the pre-modern texts.

Historiography:¹⁰ we are now far enough away in time from the 19c and early 20c for commentary to understand the position of the Dutch and British scholar-administrators. Of course we are hugely in debt to them for text rescue, classification and philology; at the same time they were much constrained by the then quite undeveloped states of comparative law and legal history. In addition there were the realities of colonial administration which demanded certainty, consistency and predictability. How did the law texts compare – were they really “laws” at all? In terms of 19c secularism and Darwinism (extended to theories of “evolution” of laws) the answer was no they were not. However, explanations varied.

To take the Malay-Muslim texts first; for the British the texts were regarded as historical and literary artifacts, not as laws or regulations comparable with English law. Their main focus for attention was on grammar and vocabulary, combined with similar studies of other

literature (history, philosophy and so on). In short, they were part of Malay cultural studies. However, in the 1880s some of the Malay *mss* were used as sources for the study of Malay law but not with the intention of promoting it, rather with showing its unsuitability for contemporary administration. For example, its provisions as to property and slavery were deemed unsuitable, because they were backward and represented an outmoded “patriarchy”. So far as the *fiqh* elements in the Muslim and other Malay texts were concerned, they were “artificial” and could not be given any credence. It must be remembered that at this time, the colonial courts were creating an Anglo-Malay Muslim law on the basis of peasant custom and practice. This was the “true Islamic law”, the texts were irrelevant.

The Dutch in the same period, and later into the 20c had a rather more complicated approach. The scholar administrators were quite willing to recognize *shari‘ah* as a proper law, with complex doctrines and so on, but they found that *as a matter of fact* it was not the operative law in the Netherlands East Indies. It was not the “living law” or as the then influential German school of legal history insisted; it was not the “*volksrecht*”. The historiography in the 1920s-1930s was contradictory; thus for the Java-Muslims the Arabic texts were sidelined, restricted to the *pesantren* and the pre-modern *mss* became the preserve of philologists and historians. (See also below on colonial laws.)

In both the British and Dutch possessions the *shari‘ah* as written in the pre-modern texts failed the efficacy test. From this, however, the 19c-20c legal historians (which includes comparative law, it is a branch of legal history) came to the unjustifiable conclusion that the Muslim *mss* were not really law at all. While we see now that the efficacy test was far too narrow and limited to allow for definition of law, we also must realize that the scholar-administrator did have pressing practical problems. The Malay-Muslim *mss* were not law texts in the sense of codes or statutes, that was not their purpose or function. The 19c search for law in the Western sense was thus mis-directed. Instead, the Muslim *mss* were part of a complex literature which included genealogies, histories, commentaries and explorations in theology and philosophy. The whole was “Islamic” and was commissioned by or written under the auspices of rulers (Sultan, Raja). The whole complex was an explanation of and justification for the text patron’s sovereignty and rule.

The law text was the most important part of this complex and it did two things. First, it referenced its patron back to Muslim rulers of the great traditions and empires of West Asia (including Alexander); in addition it referenced the ruler in some way to a place in a Prophetic descent. Both references were contrived in genealogies which were either in the law text or in exactly contemporary *mss*. Second, as to the technical law context of the law text; the 16c scholar-administrator saw this as a haphazard choice of a few rules – a corruption of the “great tradition”. If we read the texts carefully and as an historical narrative we can see that the selections made were purposeful, they were not haphazard. Instead, there was an accommodation between local practice and the Revealed imperative – the local *shari'ah*. A conscious attempt at synthesis was made and whether successful or not a range of alternative rules was always stated. This was not a “corruption of pure doctrine” as the 19c-20c historiographer supposed.

Instead, if we adopt the internal view of the *mss*, i.e. from the Southeast Asian perspective and look directly at the texts from this angle we see that the *shari'ah* is one source of law, that it can mean personal obligation in some circumstances, that it is a partial definition of sovereignty. In short, it is variable, possessing multiple referents. As yet, these are not fully explained or understood in detail, much more *ms* study is required.

Colonial *Shari'ahs*: New Hybrids

The Dutch and the British were the only two colonial powers in the area to deal with *shari'ah* in any detail.¹¹ The Dutch policy was suppression, the British developed a policy of accommodation; both denied Islam any political status.

The Dutch:

The Netherlands East Indies (NEI) colonial law was a 19c development to take account of (a) the existence of different racial groups in the NEI, (b) the perceived separate economic and social interests of each group and (c) the imperative for stable government necessary to prioritize the economic interests of the metropolitan Netherlands. The respective balances between (b) and (c) varied through time and obviously had important legal consequences. But overall the Dutch law had itself inherited the principle of sovereign indivisibility from its

French progenitors (the Codes Napoleon). The result was the invention of a set of discrete legal universes – thus Dutch law for Europeans and persons assimilated to that status; *adat* law for the native populations (19 “*adat* law areas” were identified); and finally laws for “foreign orientals” – (Arabs were excluded, they were governed by *adats*), this class was actually Chinese by race but they were largely assimilated to the European group by the 1920s. The system was complex and a special set of laws, *intergentiel recht* (“interracial law”) was developed to deal with conflict of law as to personal status, land, property and commercial law. Each law group thus constituted a separate legal universe on analogy with the laws of nation states and interracial law was actually a version of private international law although applied within the territory of a single colonial state. The system did not work. The economic and social changes of the 19c-20c were too complex.¹²

The system had two consequences for *shari’ah*. First, it did not allow it any room as a separate law – it was “selected out”. At the most it had a minimal presence in that if a rule or rules of *fiqh* had been accepted into and become a part of an *adat* then it might be recognized in the *Landsraad* (“Native Court”). This, the so-called *teori resepsi* (“reception theory”) was anathema to Muslim scholarship. In short, the *shari’ah*, as a system, remained in the classic textbooks and was the preserve of the scholars in the *pesantren*.

However, the NEI government granted a minor concession to Islam in 1882 with the establishment of the *Priesterraad* (“Priests’ Court”) consisting of a Bench of three to eight “priests” (i.e. ‘*ulama*’) with jurisdiction to decide disputes in marriage, divorce, revocation, inheritance and *wakaf*. However, the court could not enforce or implement its own decisions, for that to happen an application to the secular Native Court was necessary. That Court could and often did refuse enforcement. In short, the *Priesterraad* was a very minimalist institution, it was not even NEI wide, being confined initially to Java-Madura. Later amendment in 1937 did little to alter this state of affairs but this institution persisted into post-independence Indonesia.

The second consequence followed from this: the *shari’ah* known and studied in Muslim intellectual circles of the 1920s-40s was pure text book *fiqh*. In its reformist and traditionalist guise,¹³ it came to form an important part of the independence movement at that time. That movement was divided into secular nationalists and promoters of

Islam as the foundation of a state “based on *shari'ah*”. The politicization of *shari'ah* in this way has had important consequences for post independence Indonesia (see below).

The British:

The general rule in British territories was the English law was the law of general application for all – subject, however, to an exception in favour of the “religions, manners and customs” of the native inhabitants. This is an old rule (first established by Warren Hastings in the Bengal Regulation of 1781) and now has over two hundred years of judicial interpretation. It forms the basis of a number of “personal laws” (Anglo-Hindu, Anglo-Chinese, Anglo-Burmese and so on) including the “Anglo-Muslim [Muhammadan]”. These hybrids have proved remarkably successful and still form the basis of laws for Muslims in South and Southeast Asia. It may be that the common law is peculiarly fitted for incorporating foreign principle into its own precedent form. But incorporation and thus “hybridization”, “localization” was never unfettered. A principle (in this case) *shari'ah* was always qualified by reference to “justice, equity and good conscience”; if it failed that test then it formed no part of the developing precedent. The words used in the exception and in the proviso are all words whose meanings are very much fact and circumstance dependent; they also allow for judicial innovation or, contrary-wise, prejudice. In short, they occasionally require legislative correction but, of course, that also is eventually subject to judicial interpretation.

The other factor relevant here, is that the British possessions did not share the same legal status and this affected the substantive laws applicable. For Southeast Asia we have:

a. British Burma:

1826-1936 part of British India, from 1936 separately administered, independent 1947. The Muslim population was never more than 4% (mainly in Rangoon) but they were markedly litigious being engaged in money lending and commerce. The vast majority had the Madras or Bengal versions of Anglo-Muhammadan law¹⁴ as their personal laws. In addition, there were the “Arakan Mohammadans” who were actually ethnic Bengali included in Burma only by accident of imperial boundaries (in this case the 1824 boundary agreement which closed the first

Anglo-Burmese war). They had the same law although local custom was important – there is no legal history written for their group. The bulk of the Muslim population, therefore had the Anglo-Mohammadan law applied to them and this was formally promulgated in section 13 of the Burma Laws Act 1898.

However, there was one further group of Muslims which led to difficult problems for the judiciary. These were the *Zerbadi* (or *Zurbadee*), the mixed offspring of an Indian Muslim father and a Burmese mother who had converted to Islam. The question was; to what extent, if any, could Anglo-Burmese law (“Burmese customary law”) apply to any matrimonial proceedings – divorce, custody, inheritance and so on? There was a complex precedent (1880s – early 1900s) which decided that Burmese custom could not be allowed to apply. The decision is clearly a policy one, the courts would not permit the indiscriminate application of two different and separate personal laws to any one suit. A choice had to be made and it was in favour of the Anglo-Muhammadan law as the law governing the initial marriage. Apostacy by the wife (not uncommon apparently) did not open the way for Burmese Buddhist law. This was a major cause for nationalist resentment in the 1930s; it was seen as denigrating the Burmese woman in favour of the foreign Indian man. Agitation eventually succeeded in forcing through the Buddhist Women Special Marriage & Succession Act (No. XXIV/1939) which overrode the Anglo-Muhammadan form of *shari’ah* in favour of Burmese Buddhist law.

Post-independence Burma has had a difficult history; many Indians, including Muslims left in 1947-48 and 1962-64. The military government has destroyed the legal system and the fate of Muslim personal laws cannot be a happy one. There are no data from 1964.

b. The Straits Settlements¹⁵

1826-1858 administered from Bengal, 1858-1865 from the India Office in London, 1865-1942 a colony under the Colonial Office. As a colony the three Settlements (Penang, Malacca and Singapore) were held to “receive” English law in addition to or occasionally replacing the existing Indian regulations. Reception was by way of Royal Charters and these

provided for the recognition of native “religions, manners and customs” (or similar phrases) as in India. However, while the Straits Settlements judges took note of the Indian precedent they actually emphasized local rules of *shari'ah* as these were presented to them by local “experts”. From about 1810 to the end of the 19c this resulted in a distinctly “Straits *shari'ah*”. Another factor was that much of local Straits legislation was based on English statute and hence *shari'ah* rules became considerably altered through being made to conform to those statutes. This was especially true in matters of property and trust, and conflicts of laws, mainly affecting the wealthier class of Muslim (Arabs and Indian Muslims). There was no attempt to legislate for Muslim affairs until the Mahomedan Marriage Ordinance (later Mahomedans Ordinance) of 1880 which provided merely for registration of marriage and for the protection of a married woman's property, *i.e.* she had full control over it. The impact of this was to direct the courts to secular legislation dealing with contracts and conveyancing. In effect *shari'ah* rules were excluded by the Ordinance (and its successors) and in fact there was specific provision to this effect; it said, that in the absence of special contract Mohammedan law was to be recognized *only insofar as expressly enacted*. It is in this phrase that the long process of secularizing *shari'ah* began – it continues to this day (below pp. 36-42 on concurrent jurisdictions). The Ordinance was amended and expanded in 1923 and 1936 (renamed the Muslims Ordinance). It did not enact substantive *shari'ah*. From the purist *fiqh* point of view it was held to be very negative legislation; it introduced considerably complex regulations, encouraged even demanded the use of English law precedent and severely limited any discretion still retained by the *kathi* (qadi). In effect, for subjects such as marriage, divorce, women's property it is difficult to find much more than lip service being paid to “Muslim law”.

c. The Federated & Unfederated Malay States & Brunei¹⁶

1874-1942, these were the Sultanates of the Malayan peninsula and Brunei in Borneo. They were Protectorates which meant that in theory the Sultans remained sovereigns but they

ruled with the “advice and consent” of the British Adviser. Whatever the political realities, the status of Protectorate had and still has very important consequences for Islam in general and *shari‘ah* in particular. Protectorates were established by treaty between the Sultan, as sovereign ruler and the British government represented by the Governor of the Straits Settlements. “Religion and (Malay) custom” were two subjects reserved for the Sultan only, to exercise power, the British Adviser had no jurisdiction in these matters.

In short, Islam and Malay custom had constitutionally protected positions and, therefore, a public law presence. Stated like this the proposition seems simple enough but the Protectorate was much more complex in its operation. In the first place, the forms of state legislation (brought forward by the Adviser) required the Sultan’s signature in State Council as a matter of administrative routine. Not infrequently this had reference to Muslim matters such as collection of *zakat*, permits to build mosques and schools, appointments of civil servants and so on. In other words, the religion in the sense of doctrine became separated from the Sultan’s supervision; naturally the extent and severity of this trend varied from state to state, it was quite markedly less in the former Unfederated States. But it did occur and was even the subject of formal complaint by some *British* officers in the 1930s who expressed outrage at the disparity between the terms of the treaties and the realities of administration. However, the process was irreversible but not to the extent of extinguishing completely the Sultan’s role as guardian, nor the status of Islam as an element in the state constitution(s). Both these characteristics have persisted into the post-independence era.

But the status of the Sultans did undergo change. While they remained “sovereigns”¹⁷ their status was re-defined to something akin to a constitutional sovereign on Westminster lines. There was always a certain amount of inconsistency here not least because the status of Islamic law was uncertain – was it in fact and in theory the law of the Malay states? There was no clear answer; on the one hand it was clear that the *fiqh* was not, *in practice*, the actual law. On the other, the constitutional status of

the Sultan seemed to imply a “Muslim” sovereign, *ie* his position was founded on the fact of religious adherence. There was no solution in the colonial period and the question has remained into independence.

So far as “Muslim law” was concerned, it was a law personal to those who were Muslims – it was not the law of a territory or area. This at least was the position in FMS-UFMS precedent. The most that the courts would concede was that the *shari'ah* was “local”, *ie* not “foreign”. However, there were difficulties in proving its contents and special legislation had to be passed to allow the appropriate evidence to be brought forward. The problem then was to distinguish between *shari'ah* proper and Malay custom – the mass of the ordinary peasant proprietors made no such distinction, all was “Islam”. From the 1890s, therefore, special state legislation had to be introduced in all states, and some states also introduced religious courts. These gave rise to their own problems, most importantly their functions and jurisdiction *vis-à-vis* the secular courts. By the late 1930s the constitutional and legal aspects had become hopelessly confused and in the early 1950s, the years immediately preceding independence (in 1957) a drastic reform of the whole question of Islam – Muslim sovereignty and Muslim law was undertaken. However, it did build on the preceding Protectorate policies as to Islam in its sovereign aspects, plus the personal law nature of Muslim law (below).

It should be understood that the comments just made apply in the main to Brunei¹⁸ as well. There are variations in detail but the sovereignty and contents of Muslim law issues and answers to them are very similar.

d. Sarawak [Borneo]¹⁹

The Brooke dynasty 1841-1942: this state (part of Malaysia from 1963) had a most peculiar government. It was personal rule by three generations of the Brooke family (the “White Rajahs”) from 1841 to 1942. The first two, Rajah James and Raja Charles firmly believed that Western laws were most unsuitable for the Native populations of Sarawak (including the Muslims – about 18% of the total). Instead, they formulated their own laws

(called “Orders”) and policy was that each ethnic and religious group should have its own law. For Muslims, there were minimal Orders from the late 19c providing for registration of marriage and divorce. As to substantive principles these were a mixture of some simplified *fiqh* on marriage and local custom (*adat*) with the latter clearly the superior source. There was a basic written text, the *Undang-undang Mahkamah Melayu Sarawak* (“the laws of the Singapore Malay Courts”) dating from 1915 and implemented as subsidiary regulation under the Native Court Orders. It deals with betrothal, marriage, divorce and sexual misconduct. In form it is essentially a fines list for specified contracts and offences. There is a *fiqh* presence but very slight. The text of the laws was debated and agreed upon by the Rajahs and their administrative officers and the leaders of the Muslim community. This form of law making was standard throughout the Brooke period. Likewise, administration of Native laws was an administrative rather than a judicial matter – judges and lawyers were late arrivals in the Sarawak administration, none of the Rajahs had much time for the legal profession.

This system of personal and administrative application of Native laws did not survive the demise of the Brookes and the post-war Colonial Office administration (1946-63) introduced the more formal system, with which it was familiar. Nevertheless, until very recently “Native law” meant actual customs practised and this for Muslims meant “Malay law and custom”, “Muslim custom”, “Mohamedan law as modified by *adat*” and similar phrases. The precedent through which these phrases were developed and applied is still in the law reports and it is in sharp contrast to the recent trends in Malaysia (of which Sarawak is now a constituent state) which are towards formal (classical Arab) *fiqh* (see below).

e. British North Borneo²⁰ [now Sabah] 1877/78-1942

This state (part of Malaysia from 1963) provides yet another odd form of government. This time though a Chartered Company – the British North Borneo Company (est. 1881). It had power to make its own laws, which it did to some extent but it mostly contented itself with adopting large parts of the Straits

Settlements Ordinances. So far as Muslims were concerned (about 2%-3% of its population) they were “Natives”, as in Sarawak, and their laws and customs were applied to them on the same basis as other Native laws. The Company issued various “Village Administration Proclamations” (based on Burma regulations). Legal administration was haphazard and it was not until well into the 1930s that a workable Native Courts Ordinance came into force. As in Sarawak, the law for Muslims was essentially *adat* with some *fiqh* references. The main effect of the Ordinance was to organize effective registration of marriage and divorce. The Ordinance was amended and elaborated during Colonial Office administration (1946-63) but the law for Muslims remained the same *adat* as earlier.

However, since the 1970s there has been an increasing emphasis on the “purity” of Islam, including especially *shari'ah*. Sabah and Sarawak, as constituent members of the Federation of Malaysia have not been immune. In Sabah the Administration of Muslim Law Act 1977 brought in the formal Peninsula system although there was uncertainty as to Native Court jurisdictions. In Sarawak the Majlis (Incorporation) Ordinance, 1954 and its later amendment in 1978 also looked toward a system of dedicated religious court. However, the “*Undang-undang*” or “Malay custom” is supposed to continue as law, but of course that is a matter for future precedent. In both the Borneo territories, therefore, the “purity” of *shari'ah* is on the reform agenda and there is no doubt that “Islamization” of *shari'ah* is on the way just as in the Peninsula (see below).

The Americans:

The United States occupation of the Philippines (1898-1942) lasted just four decades and came very late in general imperial history in Southeast Asia. The existing empires were in fact facing increasing demands for independence by their subjects. The Americans, ideologically opposed to empire – after all their founding Constitution is anti-imperialist – were in fact an imperial power in the area. This was something of a conundrum and the American solution was to adopt the idea of “guardian” or “trustee” of the subject peoples for their temporary benefit, tutelage and protection. Independence was the

ultimate aim but in the meantime a legal administration to replace the deficient Spanish system had to be put in place. Naturally, the law and legal thought of the US was the answer and in a very short space of time – just ten years or so – the laws and political institutions of the US were firmly entrenched.²¹

The US administration of the Muslim south went through a number of bureaucratic incarnations (War Dept, Moro Province, Insular Government). But whatever the scheme of administration the issue remained the same – in the contest for sovereignty could the Moro Sultanate's view have any place in the new secular United States administration? As we have seen (above p. 5) the Moro view was expressed through the law texts – late 18c to early 20c – in which the classical Arabic thought on the nature of Muslim rule was unusual.

American imperialism rejected the Muslim view; the US authorities could not accept such a radically different definition of government. This was partly because of a certain naivety and partly because of the demands of a hastily formed colonial legal policy and of their own Constitution. As to the former, the official position was that the US occupation was temporary, a period of tutelage after which and upon the attainment of the appropriate competence, a full independence would be granted. In the meantime, democratic institutions were to be introduced; these included municipal self-government, land reforms and a considerable law reform.

The main feature of law reform was the effective Americanization of Philippine law which was carried out through insular legislation. It was early established that the Philippines were “a territory of the United States over which civil government could be established”. In effect, this meant the American version of common law (including the technicalities of precedent) and, as well, US constitutional law principles. These are the two important legacies of the US *imperium*.

The other aspect of the US government was its colonial legal policy. So far as the Moro were concerned, the US administration proceeded by recognizing the “Sutans and datus...” and provided that “religious culture should be respected...”. This did not last for long and within only three years of occupation (by about 1904) the administration had rejected special laws for the Moro in favour of general (American) laws current for all the Philippines. There were a few concessions (e.g. polygamy was permitted or, more accurately, was held not to be bigamy

and thus criminal!). The most important consequence, however, was that Sultanate and *datu* authority, which rested on Islamic concepts of rule and obligation, was formally rejected by 1915. However, minimal courts (“agama”, “tribal”) were established and had some viability at a low level of jurisdiction. But sovereignty based on Islam had disappeared from the formal legal system. In one of the ironies of colonial history, the Moro arguments of the turn of the 19c have now come back to haunt the present Philippine government (see below).

On the other hand, the private law legitimacy of the Moro *shari'ah* was very early questioned by American officials. They doubted it was really “Muhammadan law”, instead, they thought it was either corrupt or corrupted on a regular basis for personal benefit. While the US administration did authorize the appointments of “*kalis* or *panditas* or such persons as are versed in the local laws ...”, nothing much came of it especially since the general official view was that the Moro laws were fundamentally “in conflict with the basic principles of the laws of the United States of America”. The result was that the Moro *shari'ah* lapsed as a formal recorded colonial system of law. The only evidence as to its content is the collection of “Moro customary laws” which is part of a wider set of Philippine material collected by Henry Otley Beyer (1883-1996).²² The material was collected and organised on the principles established by Dutch scholars for their collections of *adat* law. To my knowledge, the Beyer material has not been examined in full or even in part. I am very happy to be corrected on this observation.

Most of the scholarship on the Moro for the past decades has been on the politics of the ongoing insurrections in the Muslim areas and the attempts to find lasting resolutions to the conflict. Islam and the *shari'ah* has played some part, primarily in discussions focussed on Moro ethno-nationalism. These are discussed later (below pp. 45ff.) but we would do well to remember that the discussions today are very similar to those between the Sultans and *datu* and the Americans one hundred years ago, legal history, especially colonial legal history often exercises a very long reach which politicians of today would do well to remember.

Varieties of Nation State *Shari'ahs*

The Japanese invasion and occupation of Southeast Asia (1942-45) saw the demise of the European colonial possessions. The British accepted the fact and within ten years or so had transferred sovereignty, peacefully,

to the successor states (Borneo, Malaya/Malaysia, Singapore and Brunei). The same was true for the Americans in the Philippines. Only the Dutch resisted and Indonesia did not actually gain independence until a bitter four years war had been fought. It is important to remember that the nature of the respective transitions, peaceful or violent, did have an effect on the *shari'ahs* in the new nation states.

Indonesia: Political Shari'ah

In the decade leading up to WWII the independence debates were polarized between secular nationalists (of a leftward tendency) and the religious of various tendencies. The latter looked to some form of state in which or (ideally) to which Islam was fundamental. As events transpired, their hopes were not realized. The closest they came was in the so-called "Jakarta Charter" (1945) in effect the draft preamble to the independence Constitution. It called for a state which was based on, *inter alia*: Belief in the One Supreme God *with the obligation to carry out sharia for adherents of Islam*. The passage emphasized was omitted in the Constitution of 1945 and the "missing words" have haunted all successor governments since that time. Government policy toward Islam has been to keep it at arm's length; the Muslim mass movements and political parties have, in reaction, consistently attempted to bring "Islam" – hence *shari'ah* into the institutions of state. Balance oscillates over time but is always conducted in terms of the politics of the day, often in a less than edifying manner.²³ Despite this we can now see a fairly consistent improvement but rather tardy improvement in *shari'ah* jurisdiction. There are three clearly distinguishable phases from 1945 to the present, all politically defined.

a. Bureaucratic *Shari'ah*, 1945-1980s

One of the first actions of the newly declared independent government was to establish a Ministry of Religious Affairs (1946). On paper it dealt with all scriptural religions in Indonesia but in fact its main purpose was to entrench Islam into the institutions of state, in this case the bureaucracy. This was achieved by controlling religious education at all levels including its administration of newly founded tertiary teaching and research institutions. This included setting the curriculum, a power which (with some amendment) it still retains. It was and is the registration body for marriage, divorce and revocation for

Muslims. Until recently (2004) it funded and administered the Religious Courts; it registered and supervised *wakaf* property and controlled the *Hajj*. These were wide ranging powers most of which it retains. It has also added to them in that (from 1973) it administers and houses the *Majlis Ulama Indonesia* ("Indonesian Ulama Council"). The Minister of Religion, acting through his Ministry, has close links with the Ministry of the Interior and the Ministry of Justice to the extent that the Ministries collectively issue "Decisions" on matters of public policy regarding religion, public morality and religious policy of government. Taken together, the powers of the Ministry in all its activities are enforced by a myriad of regulations, rules, administrative decisions, and forms (formalities). The actual powers and discretions contained in this vast corpus of regulation add up to a bureaucratic *shari'ah*; in many areas of life, therefore, the answer to the question – "what is *shari'ah* regarding such and such a matter?" is a Ministry regulation or process. Failure to comply with this reformulated *shari'ah* can have both administrative and legal consequences.²⁴

Like all bureaucracies the Ministry prefers a condition of *stasis* and it has been remarkably successful in achieving it. Thus, from 1946 to 2004 it controlled and administered the *Pengadilan Agama* ("Religious Courts"). These were in fact the Dutch colonial religious courts, just renamed and extended Indonesia-wide. The legislation on which these courts were established was heavily administrative in nature, being concerned with process and procedure rather than with substantive principle. This enabled the Ministry of Religion to control *shari'ah*, as did the Dutch, but now with the intention of advancing its own Islamic agenda. This included acting itself as an appeal tribunal, thus excluding the secular hierarchy of courts until well into the 1970s. In addition, it took over the enforcement of decrees thus further side lining the secular courts. Finally, the Ministry, through its control of Islamic education and the appointment of judges and staff was able to control the nature of *shari'ah* administered. This extended event to the courts assuming jurisdiction over subjects (eg. inheritance) formally denied to them in the original legislation.²⁵ From a formal point of view, the whole system was riddled

with illegalities and inconsistencies but it gained wide social acceptance. It was basically a divorce court and its justice was cheap, speedy and, most important in Indonesian law, relatively corruption free. The bureaucratic *shari'ah* actually worked for the first four decades of independence but by the 1980s it was collapsing under the weight of its own inconsistencies. It could no longer cope with a society engaged in rapid social, economic and political change. The late 1980s saw a peaceful revolution in politics and this included the politics of Islam.

b. Codified *Shari'ah*

In the reform (*Reformasi*) era of the late 1980s religion was an important factor. The soon to be replaced government made overtures to religious interests and one result of these was the promulgation of a new Muslim code of *shari'ah* (1991). This, the *Kompilasi Hukum Islam* ("Compilation of Islamic law") came into existence by way of a Presidential Instruction and describes itself as "a guide to applicable law for judges within the jurisdiction of the Institutions of Religious Justice in solving the cases submitted to them." The sources of law set out in the KHI are; (a) "the standard texts of the Shafii madhhab", (b) "additional texts from other madhhab", (c) "existing yurisprudensi [judicial decisions of standing]", (d) the "*fatāwá* of 'ulama"; and (e) "the situation in other countries".

The KHI is in three parts; Book I on marriage and divorce consists of a straight-forward reproduction of simplified *fiqh*, plus amended rules put into bureaucratic forms. Book II is on inheritance and Book III is on *wakaf*. These two books share the same characteristic – simplified *fiqh* in bureaucratic formulations. There is a daunting amount of paperwork involved. The result is that while the bureaucratic demands do not affect the substance of *fiqh* they subject it to a secular process which *determines whether it will be applied or not*. In other words, procedural compliance is the standard which must be met before *shari'ah* even comes into consideration. Thus, for example, divorce by *talak*; the husband must submit a written request to the court, he must appear to be orally examined, correct summons to all interested parties must be delivered, publicised, and receipted.

If the court rules the *talak* to be valid, then copies are made and registered “as evidence of the divorce”. But that is not the end of the matter. The KHI is not a stand alone Muslim family law code. It is a lower ranked body of regulation, being only a Presidential Instruction which is inferior to an Undang (“law”) in the hierarchy of legislative instruments in Indonesia. In family law matters the superior instrument in Indonesia is the secular Family Law of 1974. The KHI has to be read and interpreted with the superior law setting the conditions and rules which are decisive. In short the *shari'ah* is wholly dependant on secular law, as well as the bureaucratic forms administered by the Ministry. But we should note that the KHI is contested, not as one might expect from the classic *fiqh* side but by proponents of secular family law *from within the Ministry itself*. In October 2004 a working group produced a “Counter Legal Draft”²⁶ which in essence recommended replacing the *fiqh* elements in the KHI by purely secular laws. Naturally, it created considerable controversy and was withdrawn in a matter of weeks. But the mere fact that this was written from within the Ministry is indicative of the scope of disagreement within what was thought to be a bastion of *fiqh* orthodoxy.

The date, 2004 is also important; in that year the religious courts were finally removed from the Ministry of Religion and transferred to the jurisdiction of the Supreme Court.²⁷ This was a considerable reform because it takes the religious judiciary outside the control of the Ministry of Religion, thus allowing for a fully independent court under the aegis of the Supreme Court. Does this mean we might see a lessening of the bureaucratic character of the *shari'ah*?

To answer this question we must go back to 1989, the year in which the new law on Religious Justice was introduced. This was a comprehensive law replacing the former Dutch-based minimal regulation. The law was intended to establish a court with comprehensive jurisdiction in family law and *wakaf*, staffed by tertiary educated judges under the direction of the Ministry of Justice and the Supreme Court (the latter had sole direction from 2004). In short, the religious court became part of the national judicial system with its standard procedural rules, appeals to the

Supreme Court *via* cassation and its own enforcement processes. Since 1991 it interprets and applies the KHI. To answer the question, therefore, on the bureaucratic character of the *shari'ah* we look to the religious court *yurisprudensi* ("decisions"). Data from a variety of sources,²⁸ admittedly still incomplete, give us a mixed result.

All sources agree on the overwhelming importance of formal compliance, this is absolutely essential at all levels. Second, there are important variations in the understanding of *shari'ah* at different levels of the judiciary and even between different judges. There are some who rely on the KHI, for them its *fiqh* provisions are the *shari'ah*. For others, a recourse to standard Arabic *fiqh* textbooks is a not uncommon option. As to different levels of jurisdiction, a general rule seems to be that as a case ascends the appeal ladder so it is that secular formalities of precedence and process become more important. It also appears to be true that consistency of decision making is not a highly regarded value in itself, "certainty" is always relative. Much remains to be done on this subject.

c. "*Shari'ah* Islam"

This compound term has come into use in Indonesia in the past ten years or so and spread to Malaysia and the Philippines. It means Islamic values in the broadest sense which are (or must) be implemented at all levels of society and in all spheres of activity from the personal to the national. In Indonesia these *shari'ah* values are best exemplified by regional regulations²⁹ which claim to do this. These regulations, *Peraturan Daerah-Perda*, derive from national laws, the Regional Autonomy Laws of 1999, which devolve law making powers to regional assemblies in a variety of matters. Religion is actually excluded (except for Aceh, see below), the central government keeping a national jurisdiction. Nevertheless, the regions do issue *Perda* involving *shari'ah* Islam under various guises (promotion/defence of "social order", "public morality", "defence of our culture" and so on). Something like 70 or 80 have been promulgated Indonesia-wide; typically they deal with the following subjects: prevention and elimination of immorality – these focus on the conduct of

women in public, *ie* their dress, what they are doing, where they are going especially at night; reciting the Qur'an – this requires school children and engaged couples to be able to recite passages appropriate to age and education, students may not graduate or marriages be solemnized without the appropriate certificate; regulations on collection of *zakat* – essentially local copies of the national regulations,³⁰ used as a local fundraiser, the accounting is less than transparent.

A recent study by Dr. Robin Bush³¹ on the politics behind these regulations has shown them to be publically divisive especially with respect to women's status and rights. They are also constitutionally questionable. However, her real conclusion is that they are a use of religion, or religious symbols to deflect attention away from incompetent and corrupt local government and to advance the personal political credentials of people in power who are in fact self serving and lack the technical "capacity for good governance". She finds also, that as the electorates are becoming more sophisticated, the religious card is decreasingly effective, the voters want real results not ideological rhetoric as contained in the *Perda*.

This is also true for Aceh which has its own special autonomy legislation, but in its unique case giving the regional government jurisdiction to write Islamic laws. It has done so, the Aceh *Qanun* is a set of quite sophisticated texts³² covering such areas as religious courts, institutions to determine doctrine, *adat* and *shari'ah* religious education, *zakat*, and enforcement of the *Qanun* rules. Cumulatively, the texts add up to a coherent whole which includes a bureaucracy capable of administering, amending and enforcing the rules within the framework of the local government and its consonance with the national Constitution and the national Supreme Court. The *Qanun* are workable unlike the *Perda* which are essentially ephemera. At the same time, however, the *Qanun* also raise difficulties in the areas of state criminal jurisdiction, human rights and judicial discretion. Most important, as with the *Perda* there is always political contestation at both local and national levels which means that the *shari'ah* Islam, being essentially ideological, is always negotiable whether rationally or irrationally.³³

One way of summarizing the material in (a) – (c) is to take a brief look at a *fatwá* issued in 2005 by the *Majelis Ulama Indonesia* (MUI) (“Indonesian Ulama Council”). We know the *fatwá* form is always useful because very often it is form in which doctrine, practical law and policy all meet.³⁴ In this instance we have a text in which the national *fatwá* issuing body discusses these elements in terms of “*pluralism*”, “*secularism*” and “*literalism*”. It begins by observing that these three positions are matters of concern to peace and good order in society, to the unity of the umma and to the integrity of Islam itself. This is followed by citations from the Qur’ān which state at various levels of specificity that Islam is the only true religion, that non-Muslims may and will misdirect the faithful, and that there are those within the umma who attempt to do this. In short, those Muslims who deal in such constructions as contextual analysis, historical relativism and the acceptance of social and legal variability and equalities have fallen into the trap set by the three words. Such attitudes, therefore, are not permitted and the MUI, as the national body has the authority to so decide, Islam is exclusive. This is the nub of the problem – authority. The three (a) – (c) are all *loci* of different authorities. The MUI is another but so are the *fatwá* issuing bodies of reportable Muslim mass movements whose views carry just as much *ijaza* as do those of MMI. The reaction to the MUI *fatwá* was immediate, comprehensive and representative of a wide spectrum of Muslim intellectualism. The debate – like similar debates before it has polarized opinion and continues to the present day.

We have to conclude that these are no certainties in the politics of religion for *sharī‘ah* in Indonesia. This is hardly an original observation but it is still surprising just how often Indonesian Muslims and scholars of Islamic law fail to give it proper weight.

Malaysia: Sharī‘ah as a Constitutional Issue

Malaysia became independent (as the Federation of Malaya) in 1957 in possession of (a) a Constitution in which Article 3 said (and still does) “Islam is the religion of the Federation”; and (b) a partly completed set of “Administration of Islamic [Muslim] law” Enactments for each component state in the Federation.³⁵ For the first 30 years of

independence the administration of Muslim law was not a constitutional issue. The enactments and the Constitution inhabited quite separate spheres or this seemed to be the case. But in 1988, the Constitution was amended (a new article 121(1A)) to say that the Federal Courts "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts". To understand what this amendment means and its significance in the public law life of Malaysia we have to return to the pre-1988 status of *shari'ah*.

The *shari'ah* in the post-independence Malaysia was initially in the same position as in the Malay state Protectorates. The main features of this were its minimal but symbolically important public law presence as part of the state constitution where the Sultan was its guarantor. *The religious courts, however, were always inferior courts, and jurisdiction deriving from state legislation, not the Constitution.* The importance of this passage will become clear shortly. As to private law, the *shari'ah* had been reduced to family law, trusts and *wakaf* and *zakat*. The new legislation, 1952-66, continued this policy for *shari'ah* but in a more organized and consistent way.³⁶ The state enactments, while varying in details all dealt in the same way with three main subjects.

- a. Official determinations of Islamic principle; all the enactments provide for a *Majlis*, the function of which is to advise the Ruler on matters of religion and Malay custom. The most important single aspect of the advisory function is to issue *fatāwā*— formal opinions on questions of law and doctrine. The actual competence in Islamic matters is the minimal qualification. The rulings made are based on the orthodox texts of the Shāfi'i school although other schools' material may be used if justified. Rulings are binding on all Muslims resident in the state. The *fatwā* form is of course a historically known method for attaining certainty, and its validity depends upon it possessing the appropriate authority (*ijaza*). The authority here is the statute but the question, always in the background, is whether it is or can be binding on the *secular* courts (established under the Constitution)? The answer, (prior to 1988 at least) was always no, for the following reasons. First, the enactments themselves in no way attempted to derogate from the powers and jurisdiction of the secular courts. Obviously a state enactment cannot do this because the secular courts are constitutionally established. This is so obvious as to be hardly

worth stating but it still has to be pointed out to politicians who promote the “Islamic” cause, even to the extent of producing draft legislation which they know is unconstitutional – the purpose is purely political. Returning to the status of *fatwá*; it follows from the terms of the state enactments which validate *fatāwá*, that they are evidence only from the secular courts’ point of view. This really means that the High Courts and the Federal Court have power to determine on their own authority, what “Islamic law” is by taking the appropriate evidence. Thus the *sharī‘ah* is a “local law” but not the basic law of the Federation; the basic law is the Constitution and Malaysia is not an Islamic state.³⁷

- b. The religious courts; all state enactments establish courts of Kathi Besar and Kathi with general jurisdiction in family law. Appeals lay to an Appeals Committee in each state. But, as with the *fatwá* problem, the same issue arose again – would appeals go to the secular courts (High Courts and Federal Court)? The answer, as interpreted in the precedent to 1980,³⁸ was yes for two reasons. First, the typical enactments said “... any decision of a civil [*ie* secular] court acting within its jurisdiction ... shall prevail.” That rule was relevant because both religious and secular courts had jurisdiction in the same matters – family law. The second reason was that Courts of Jurisdiction Act, 1964 locates an overriding jurisdiction in the secular courts. This is a general jurisdiction and includes interpretation of *all* enactments, including the State Islamic ones. Further, the usual rules of evidence apply. The only limits on High Court and Federal Court jurisdictions are those imposed by the Constitution itself.
- c. Explanation of substantive (Islamic) law; this is the most comprehensive part of the initial set of enactments. It includes family law, parts of the law of property and offences against the religion of Islam. In short, the *sharī‘ah* here consists of selected rules of Shāfi‘ī, *fiqh* re-written in the English statute form. A few examples of re-writing will suffice.

For family law the basic principles as to betrothal, marriage proposals, consents were maintained but hedged about with formalities requiring written contracts and, most important, registration. Breach of formalities did not necessarily invalidate a marriage otherwise valid according to *fiqh* but was punished by fine or (rarely) in extreme cases

a prison term. The intention of the legislation was to provide certainty and to control parties' actions. This was particularly true for divorce by *talāq* where the intention of the legislation was to reduce the very high rates. Another way of bringing home responsibility to irresponsible husbands was the wide availability of divorce by *fasakh* in which the religious courts were expected to impose financial penalties and quite heavy maintenance costs enforced through secular institutions including the Magistrates Court. On custody and guardianship the interests of the child as a "Muslim child" had priority over any *fiqh* rules.

So far as property is concerned there are two main issues. First, the new forms such as insurance policies (endowment and life) and contributions into and entitlements from state and pension schemes. Each has its own particular legislation and regulations which do not and cannot take account of *fiqh*. There is not much precedent but what there is, excluded the *fiqh* inheritance rules. Various state *fatwā* committees have given rulings which are without any effect because they do not allow for the secular laws. In addition, some particular forms of title, eg. joint tenancies whose survivorship is the essence will always cause difficulty. The second issue is *adat*, particularly the matrilineal *adats* of Negri Sembilan. This was and is an ongoing problem, with the common law precedent (pre-independence) in favour of the *adats* still exercising influence. For how much longer remains to be seen.

The final subject in all the enactments is a broad rather miscellaneous class – "offences against religion". These range from sexual misconduct, non-attendance at Friday prayers to non-payment of *zakat*. The legislation attempts to convert individual morality and religious duty in indictable offences. The problem here was and is the extent of the jurisdiction and powers of the religious courts vis-à-vis the secular courts in criminal matters. It has been a constant source of tension and stress, unresolvable then, and even now an issue which has become as much political as juris-prudential.

In summary: the first 30 years saw the maintenance of a colonial *stasis*. Of course, that could not last and by the 1970s and into the 1980s the pressures to jettison the Anglo-Muslim legacy became irresistible. Two things happened; first new legislation came into effect Malaysia-wide and expanding the "*shari'ah* space". New hierarchies of religious courts (up to appeal level) were established and there were extensive³⁹

additional provisions for family law and offences against religion. In a very real sense these are natural progressions from the Anglo-Muslim legacy but in their scope and details they change the balance between religious and secular jurisdiction.

The question of balance gives us the clue to the second development. A dual legal structure always requires that one of the two (or more) has the sole jurisdiction to decide where the appropriate balance lies. So far as Malaysian *shari'ah* is concerned this is a constitutional and political question. The Malay-Muslim demographic is that this group is just over one half of the population, but it is politically divided within itself. There are two groups, one secular-accommodationist in respect of Islam, the other holding to the view that Islam must be dominant in the Constitutional sphere.⁴⁰ We turn, therefore to the Constitution. There are various articles which refer either directly or by immediate implication to Islam. These include; article 3 – “Islam is the religion of the Federation”; article 11 – “every person has the right to profess and practise his religion”; article 12 – “the religion of a person under [18] shall be decided by his parent or guardian”; article 74(2) gives power to Federal and State legislatures to enact sharia laws; article 121(1A) excludes jurisdiction of the secular courts as to matters “within the jurisdiction” of the religious courts; and article 160(2) – the definition of “Malay” for constitutional purposes is one where, amongst other criteria, the person “... professes the religion of Islam”. The issues, therefore, of who is a Muslim, what being a Muslim means in law, and which court has the jurisdiction to decide and the power to enforce a decision once made are constitutional issues. In recent years the question around the interpretation of and relationship between these provisions has been conversion into Islam or, conversely, apostasy. There is a considerable precedent; we have space here for only a few examples⁴¹ of how the respective jurisdictional spheres of the secular and religious courts are being adjudicated.

The first decision is *Lina Joy*⁴² in which a Malay woman, Muslim from birth, claimed to have converted to Christianity. She sought a formal recognition of her change in religion including the deletion of “Islam” from her Identity Card. The application was refused in the High Court and, whatever one may think of that judgement, it demonstrates three very important views in current judicial thought on “Islam”, “Muslim” and “Muslim law”.

The first judicial opinion is that the Federal Constitution is essentially “Islamic” because, when all its articles on Islam (above) are read together (as a “living piece of legislation”) then it follows that:

“Article 3(1) has a far wider and meaningful purpose than a mere fixation of the official religion. One of the natural consequences from the fact that Islam is the religion of the Federation is the limitation imposed on the propagation among persons professing the religion of Islam in article 11(4). Other consequences which emanate from the pronouncement of Islam in article 3(1) is the establishment of Islamic institution for the furtherance of the religion of Islam with funds to be expended for the advancement of the Islamic religion ...”

Article 3(1) of the FC declare that ‘Islam is the religion of the Federation but other religions may be practised in peace and harmony in any part of the Federation’. The very fact that people professing religion other than Islam are constitutionally guaranteed the right to practise their faith in peace and harmony, must necessarily meant that Muslims are also similarly guaranteed the right to practise Islam in a like manner. Being the religion of the Federation, Islam has a special position in Malaysia. ... Applying the principle of harmonious construction is to read arts. 3(1), 12(2), 74, 121(1A) and 160 so as to give effect to the intention of the framers of our constitution.”

The “effect” with reference to the individual Malay Muslim is, in this interpretation, a rather limiting one so far as individual choice of religion is concerned. Thus (at p. 132-133 of the judgement):

“Article 11(1) must be construed harmoniously with the other relevant provisions on Islam, namely arts 3(1), 74(2), 121(1A), 12(2) and 160 (where a Malay is defined as a person who professes the religion of Islam). When construed harmoniously, the inevitable conclusion is that the freedom to convert out of Islam in respect of a Muslim is subject to qualifications, namely the Syariah laws on those matters. Only such construction would support the ‘smooth workings of the system’, namely the implementation of the Syariah law on Muslims as provided by the constitution.”

But this is not purely an individual matter. The Constitution is a public document and the whole (all the clauses) of article 11 is:

“treated for the harmony and well-being of the multi-racial and multi-religious communities of this country. Furthermore, there is a specific statute which provides for the law concerning the enforcement and administration of Islamic law, the constitution and organization of the Syariah Court and related matters in respect of the Muslim community. When a person wishes to renounce/leave his original religion, he/she

has first to resolve the issue of renunciation of religion with the body/ authority which protects and preserves the well-being of people professing that religion based on the laws or provisions relating to that religion. This is in accordance with art 11(3) of the FC. Therefore in the instant case, based on the facts stated herein, it is clear that the plaintiff as a Muslim at all material times who purportedly wished to leave/renounce the religion of Islam must resolve the issue of renunciation of Islam with the authorities which protect and preserve the affairs and interests of Muslims first and foremost before raising the issue of constitution with this court.” [judgement, at p. 133]

What is being searched for is “... the correct balance between individual fundamental rights and the interest of public order”. The context for the search is actually wider than the Constitution itself; because religion is “in” the Constitution and, therefore, “in” the law and, thus, “in” (i.e. defines) the obligations of the individual Muslim; it is, therefore, primary. The judgement actually emphasizes the primacy of Islam by citing and commenting on seven verses from the Qur’ān (Q 109:1, 29:46, 2:62, 4:137, 18:29, 10:99, 9:6) to the effect that Islam is primary, at least so far as the individual is concerned. It is not clear why these verses are interpolated here in the judgement. They are actually not necessary to the argument. That argument is, as I understand it, that the “correct balance” can only be determined by the Syariah courts which have the proper jurisdiction as given in article 121(1A). Earlier decisions are cited in support.⁴³ The Qur’ānic references can only be understood as, in some way, supporting the primacy of Islam *with reference to* the Constitution.⁴⁴ The nature of the reference is uncertain as to foundation, but, on the other hand the *fact* of reference occurring, whether justified or not, may carry its own authority in the view of some. This appears to be the judge’s position; it is not an argument that sits easily, if at all, with statutory interpretation which demonstrably rests upon its own internal authority.

The same judge appears in the contemporaneous case, *Shamala v Jeyaganeshi*;⁴⁵ here the Hindu husband converted to Islam but his wife did not. This gave the wife the right to petition for divorce under section 51 of the Law Reform (Marriage & Divorce) Act of 1976. There is no reference to the Constitution here, but in interpreting section 51 the judge says (at para. 13 of the judgement):

“I am of the opinion that the defendant husband, now a Muslim though [he] cannot file a petition for divorce against his plaintiff Hindu wife, can

take another wife – a Muslim wife because the defendant husband being a Muslim is now practicing [*sic.*] a polygamous marriage. His wife by Hindu rites remains his wife. He has to support her and the children until and unless the civil marriage is dissolved and the petition for dissolution of that Hindu marriage may only be presented by the unconverted wife under s 51 of the Act. The word used in the Section is 'may', i.e. to maintain the status of the civil marriage (Hindu marriage) if the unconverted wife wishes to remain the wife of her converted husband although the converted husband can take another wife if he can do justice as the Holy Quran *Al-Nisa* (IV) Ayat 3 states and which reads, 'if ye fear that ye shall not Be able to deal justly With the orphans, Marry women of your choice, Two, Three or Four; But if ye fear that ye shall not Be able to deal justly (with them), Then only one, or (a captive). That your right hand possess, That will be more suitable, To prevent you from doing injustice.' (see the meaning of the Glorious Quran Text, translation by Abdullah Yusuf Ali p. 100)."

The Qur'ānic references have been understood⁴⁶ as rhetoric directed to several audiences and this may well be so. Whether it is true or not, the references suffer from the same deficiencies pointed out a little earlier. Where is the authority and what are the criteria for correctly characterizing it? An answer which is no answer at all is given, in rather intemperate terms, in the later decision, *Subashini v Saravanan*.⁴⁷ The plaintiff had here applied for an injunction to restrain her husband from pursuing a course of action in the Syariah Court (he had previously converted to Islam and also arranged for the conversion of the children of the marriage). One judicial answer, though not by the majority, said (at para. 59 of the judgement):

"[H]ow more brazen could a party be against a creature of the constitution [the syariah court] ... when the matter of jurisdiction had yet to be resolved ... [followed by Q45: 18]"

While there are many more examples,⁴⁸ we should not assume that the proposed primacy of Islam, with reference to the Constitution, has become the unchallenged authority. An alternative view says it has not, because embedded within the "Islamic" context is a real authority which consists of statutory interpretation and precedents. The leading case, invariably cited since its published decision, is *Latifah Mat Zin v Rosmawati Sharibun & Anor*⁴⁹ and as the judge there noted early in his judgement ... "[conflict of jurisdiction] has become more serious over the last two decades ... until a judgement settles the case ... it creates other problems in subsequent cases." In fuller terms and later much cited he said (judgement at pp. 116-17):

“The point to note here is that both courts, civil and Shariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statu[t]es i.e., Constitutions, federal law or state law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Shariah Court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if a civil court does not exist, the Shariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place, in the case of the Shariah Courts in the States, by referring to the relevant State laws and in the case of the Shariah Court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a non-Muslim, the Shariah Court does not have jurisdiction over the case, even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the civil court has jurisdiction over the case if the subject is not within its jurisdiction.”

This is a very long way from an all or nothing “Islamic” answer but it does not prevent a recourse to it. Nor is it without its own complications: the reader will notice that the possible jurisdictions are described as personal (i.e. Muslim) or subject based (as defined in the statute being interpreted). This is and always has been the essential problem in personal laws and from its history we cannot expect any real consistency in the precedent which in any case is still being developed. We have to leave Malaysian *shari‘ah* in this unsatisfactory state. The *shari‘ah* in respect of the Constitutional issues is as one commentator has said a “judicial imbroglio”.⁵⁰

This last observation must be properly understood. Article 121(1A) in 1988 (and now for that matter) means that the syariah courts have exclusive jurisdiction over the subjects within their jurisdiction as these are conferred by the relevant State and Federal enactments. The secular courts do not have jurisdiction in these matters. On the contrary, the function of the secular courts (at the High Court and, especially Federal Court [appeal levels]) is to defend the integrity of all the law. That is its constitutional duty and it performs this duty through exercising its jurisdiction in choice of law where two or more laws are possible. Article 121(1A) does *not* give the syariah court(s) this power. The power

to choose the appropriate law, i.e., in the technical language of conflict of laws, to “characterize” a suit or an action, is part of the inherent jurisdiction of the secular courts under the Constitution. However, the uncertainty surrounding characterization is within the same territorial state and so, obviously, neither of the two usual conflict of law solutions – the *lex loci* or the *lex causae* can apply. What is the answer? The classic conflicts of laws recourse is to find “general principles of universal application”, i.e. a return to first principles of jurisprudence. One does actually suggest itself; it is that it is not open to an individual to evade or vary obligation/duty, freely entered into, by changing one’s religion. There is actually an Anglo-Muslim version of this.⁵¹ To permit such an option would strike at the integrity of *all* laws, religious or secular and especially at the Constitution. That is the Malaysian difficulty.

Singapore: Secularization of Shari’ah?

The Muslim population of Singapore (mostly ethnic Malay) constitutes only 15% of the Republic’s population. In contrast to neighbouring Malaysia and Indonesia, Islam has no public law or political significance in the senses that it is not constitutionally entrenched nor are there political parties promoting it. To add to this context we should also remember the policy of the Singapore government which is to minimize difference and to control dissent, especially that based on race and/or religion. There is even legislation on the “maintenance of religious harmony” which provides heavy penalties for actions defined by the government as endangering social order.

These are the contexts for *shari’ah*. On the formal law side, Singapore is heir to the Anglo-Muslim precedent and to the legislation developed in the former Straits Settlements. In other words, *shari’ah* was a private law confined to family, trusts and *wakafs* and since independence the government of Singapore has pursued the same policy. The main instrument has been the Administration of Muslim Law Act – AMLA – (1966). This was both a successor to the colonial Muslims Ordinance (1957) and a real advance in that it established a *Majlis Ugama Islam Singapura* (“Singapore Islamic Religious Council”) – MUIS – modelled on the Malaysian enactments for administrative matters⁵²but, of vital importance, also acting as an Appeals Board for Sharia Court decisions.

From 1966, therefore, there are three *fora* defining *shari’ah*; these are the decisions in the first instance Sharia Courts, the MUIS Appeal

Board decisions and decisions in the secular High Court of Singapore (which includes any still relevant colonial precedent). These materials are all different and carry varying significance for Singapore *shari'ah*. The first instance decisions in the religious court are not precedent. Instead, they must be taken *en masse* to show trends, characteristics and the like over a range of subjects for quite lengthy periods. Some work along these lines has been done by local scholars and this is summarized by Professor Lindsey and Dr Steiner.⁵³ They conclude, on the basis of this evidence, that the *corpus* of cases are characteristically “conservative”, “traditionalist” in orientation. What this means is that there is little in the way of extended reasoning and decisions conform very closely to legislation and regulations. Where the decisions do have recourse to *fiqh* textbooks, the local research finds the references to it “conservative”, “dogmatic” and “narrow”.⁵⁴ These are interesting comments but they can be by no means decisive as yet; much more needs to be done.

Coming now to the MUIS Appeal Board, can we detect a “Singapore *fiqh*” and, if so is it “classic” or “secular” in character? The answer so far seems to depend on the cause being litigated. For example, applications to take a second wife are dealt with consistently; the great majority are refused. The ground for refusal is always ostensibly the fairness provision of the *shari'ah*, the “classical” criterion; but the elements establishing the criterion are purely mundane matters of finance. The proof and substance of the criterion is a matter of fact, there is no reference to any *fiqh* authority because none is needed, the process requires none. In the case of divorce the difficulties seem to be uncertainty in choosing the appropriate authority – the choice is from amongst various versions of *fiqh*, the Arabic textbooks, Anglo-Indian textbooks, modern commentaries, such as Syed Sabiq and the Board’s own previous decisions. The choices made seem to be opportunistic, there is no real method apparent which one can identify. A further factor is that the Board has become more conscious, from the 1970s, of the need to comply with practice rules and the rules of procedure. There are instances where relevant classical *fiqh* is excluded on the basis of these rules.

There is little room, therefore, for any creative *fiqh* although in the important topic of child welfare (including custody) we do find a conscious attempt by the Board to develop the concept of a “Muslim

child". In this, the Board seems to distinguish between (a) preserving the child's faith in Islam and (b) the actual *fiqh* rules as to custody. Provided the former is protected then the "Singapore *shari'ah*" can accept the irrelevancy of the latter. I do not wish to push this suggestion too far but it is certainly apparent in Board decisions from the late 1980s. What is certain, however, is that the *fiqh* has a reduced status, perhaps just a formulaic one ("Islamic justice") at the appeal level. It is only one factor in the process because the Board is clearly deciding with one eye on the secular High Court.

This brings us to the High Court. While the legislation in Singapore clearly separates out the respective subject jurisdictions of the Appeal Board and High Court, the latter also has a crucial role in establishing principles for the new *fiqh*. In a series of decisions, particularly from 1990 to 2009, the High Court has focussed on the general issue of authority, specifically on jurisdiction, powers and personal status, and on choice of law. The High Court has found no difficulty in accommodating the new *fiqh* as a part of that branch of the common law we now call "Muslim law". The problems arise in the interpretation of what "power" and "jurisdiction" mean in the AMLA and in the Supreme Court of Judicature Act (latest edition, 1999). To be brief: the question is one of statutory definition. By the late 1980s and into the 1990s it had become clear that there were serious deficiencies in the drafting of the AMLA, particularly with respect to custody and matrimonial property. In a series of somewhat difficult cases⁵⁵ the High Court differed from the Appeal Board on the root causes of disputes. For example, in one of these cases,⁵⁶ the Appeal Board saw an application to vary a custody order as being appropriate given changed circumstances which made variation reasonable. The High Court, on the other hand, construed it as part of the original divorce suit and not separable from it. This gave a different result and the High Court view has since prevailed.

The same situation occurs in respect of matrimonial property where the main issue has been the enforcement of Sharia Court orders. Until the AMLA amendment of 1999 the Syariah Court had no power to direct its Registrars to sign documents transferring property as directed by the Court. This was a drafting deficiency but before its repair in 1999 litigants approached the High Court for redress. The result was a series of judgements which, while clearly attempting to fill the drafting *lacuna*, also resulted in inconsistent precedents on powers and jurisdiction in

the High Court itself. By now the issue had become the powers of the High Court to make declaratory orders in respect of matters within the jurisdiction of the Syariah Court. The new *fiqh*, as stated by the Syariah Court, has become dependent for its implementation on the High Court interpretation of its own practice and procedural rules. This was not just a matter of interpretation but became a matter to be decided as a matter of legal policy. Essentially, what was the status of the Sharia Court's new *fiqh* to be – a final judgement, or could the merits of the case be considered again elsewhere? The long standing policy answer is to prefer the former, that once a final judgement has been made a second judgement in the same cause is not possible.

This leads us to the second policy argument relevant here. It is that because the Syariah Court cannot enforce its orders (in one instance) its authenticity is deficient and the High Court must intervene. However, for the High Court to do this would undermine the jurisdiction of the Syariah Court – the High Court would become a tribunal to cure defects of powers in another tribunal. Where does this leave the new *fiqh* and the whole question of accommodation? One answer was to turn to equitable doctrine, *ie* because there was a decision of the Syariah Court as to the distribution of matrimonial property this created an equitable interest and thus allowed for a mandatory injunction through the High Court under the appropriate *Rules of Court*. This solution, now no longer of any relevance, avoided the jurisdiction problem and the relationship between the Sharia and High Court but it smacks of desperation. It can hardly be a satisfactory answer to accommodation of the new *fiqh*.

The High Court has also been unsuccessful in the last major question of principle, this is the choice of law, particularly as it relates to the theory and practice of succession. The AMLA is not very helpful, it effectively says “Muslim law”, leaving it to the courts to decide what this means. I might as well say now that there is no definitive answer, nor is there likely to be one.⁵⁷ This means a wide variety of choice but such is no bad thing provided we all understand the choosing must be done with prudence; choosing is not an undisciplined free for all. Most particularly the subjective element must be controlled.

In 1999 the AMLA was considerably amended: the new sections 52(8) and 14 directly imported provisions from the secular Women's Charter relating to the division of property on divorce.⁵⁸ In effect, this

means that the law in this matter is now wholly secular. The Sharia Courts now have no power to invoke *fiqh*, even the Anglo-Muslim texts are excluded. In addition, the 1999 amendment attempted to regulate the increasingly common practice of Muslim litigants of indulging in concurrent actions. The scenario was as follows; because of a serious backlog of cases in the 1980s and 90s the practice was for litigants to apply to the Sharia Courts for divorce but also to the secular Family Court for personal protection orders and maintenance. The respective laws are now substantially similar in respect of the incidents of divorce. The amendment was met with much opposition by professional Muslim groups who, rightly, feared a further diminution of the whole system of religious justice. They wished to confine Muslim family law matters to the Sharia Courts as a “defence of Islam”, and to maintain ethnic Malay-Muslim identity.⁵⁹ But ordinary Muslims preferred the convenience and speed of the secular courts, the law was almost the same in any case. Whether one wishes to call this “secular *shari'ah*” is really irrelevant from that point of view.

However, the MUIS does not have the luxury of debating relevance; instead it has to balance *fiqh*, theology, the AMLA and High Court and the practical administration of a judicial system in a secular state. The Appeal Board's judgement in *Zainuddin & Sharifah v Registrar of Muslim Marriages*⁶⁰ is the perfect example: the plaintiffs married, and applied to the Registrar to have the marriage registered. He refused on the ground that because they were Ahmadis,⁶¹ they were “not Muslim”. In this one suit we have theology, foreign precedent (from Pakistan) and the internal politics of religion in Singapore. The AMLA is no use, it merely says that a Muslim is “a person who professes the religion of Islam”. The issue was and is serious, any deviance has the potential for scandal at best and for serious public disorder at worst. While the arguments presented to the Appeal Board were lengthy and intense, the conclusion was actually forgone at the very beginning – Ahmadis are not Muslims.

The Board's judgement considered three main issues. First, the Anglo-Muhammadan precedent from British India. This is of course justifiable in terms of the doctrine of precedent. As heir to the laws of the Straits Settlements, the Anglo-Indian precedent is part of the laws of Singapore provided it has not been judicially over ruled or replaced by statute. The Anglo-Indian precedent on the Ahmadi

community (1900-1930s) recognized its members as Muslims. In this the Indian courts followed the long established practice of refusing to enter into doctrinal disputes and accepting a profession of faith at face value (excepting of course obvious fraud or criminal intention). MUIS Appeal Board certainly read and understood the pre-war Indian decisions because there is enough in these judgements which can be selectively extracted so as to show that it is in the general interest not to recognize the Ahmadi as Muslim. For example, it raises issues in theology which are divisive and inimical to *intra* Muslim harmony.

The theology, then, is the next topic for the Board; doctrine was in fact the subject of a MUIS *fatwá* given in 1969 and the findings of that *fatwá* form the basis of the Board's view. It is a straight forward exposition of the Qur'án and hadith sources on the finality of the Prophethood of Muhammad. The other elements of deviance (that the Prophet Isa had died, that Mirza Ghulam Ahmad is the Prophet Isa in his second reincarnation, and is also the awaited Imam Mahdi) are dealt with in the same way. The Board also cites a Malaysian *fatwá* to the same effect and, finally, an updated *fatwá* from Al-Azhar which mixes the same points on the same reasoning. It also orders the effective punishment of all Ahmadis where ever they might be.

Concurrently with these *fatāwá* the Board discussed contemporary Pakistan precedent, the Pakistan Constitution and the policy of successive Pakistan governments on the Ahmadiya movement. As is well known, successive Pakistan governments have used the Ahmadiyya movement as a political football (as indeed Islam itself), and this has had the severe consequences of constitutional amendment, which says that the Ahmadis are not Muslim. Changes to the criminal law, consequent on this, were also made. There was objection by the Ahmadi community through the courts but despite one or two morally outstanding judgements, the results merely confirmed the constitutional position. This is the precedent cited in the MUIS decision. One must question the MUIS understanding of *sharī'ah* in its broadest sense; there seems to be a failure to understand that precedent from a national judicial system is not the same class of text as classical doctrine.

Doctrine does not recognize or rely on national, state boundaries but its formal expression now does need a state expression – the state determines the law. This applies to the issue of who is or is not a Muslim. We have here a contradiction between doctrinal purity and

the politics of religion. But this is not all; the two MUIS decisions rest upon precedent from outside Singapore. The Pakistan precedent relied upon was developed in the particular constitutional and political contexts of that state and can only be understood within these contexts. Thus, Pakistan describes itself as an “Islamic Republic”. Islam is entrenched in its Constitution, statutes must be congruent with *shari'ah* principles as these are defined and redefined from time to time. None of these characteristics or features is found in the Constitution and laws of Singapore but the MUIS, through precedent, has accepted these particular place and time specific principles as basic in its two decisions. At best this shows that MUIS lacks confidence in its own ability to reason out the doctrinal issues for itself. At worst it can be read as a supine capitulation to a foreign “Islamic authority” which is not an authority at all. This can hardly be a comforting conclusion for the Attorney-General of Singapore.

*Brunei:*⁶² *Shari'ah as State Value*

The small oil-rich Sultanate of Brunei is a peculiar not to say anachronistic state – it is a personal autocracy with a Muslim sovereign who claims a genealogy dating back to the 15c. Until recently it was also a British Protectorate (1888-1984) which has left a residue of English law. Islam is its ultimate justification for existence and as to its government – religion is truly its basic value. The official ideology of Brunei explains this – in its official state enunciation, Brunei is: *Melayu, Islam, Ber-Raja* (MIB): respectively ethnic Malay (the majority, just, in Brunei), Islam, the religion of the Malays and monarchical (lit. “the condition of having a ruler”). The trio is a whole, purposeful construction which is self-referencing. Thus, the Malays are Muslim and owe obedience to the Ruler; the ruler is a Malay, Muslim and is the guardian of the religion and protector of the Malays; he also acknowledges that his sovereignty is from Allah. No one of these three elements can be altered without the others being affected. Islam is the basic value and the *shari'ah* must, therefore, be certain in both expressing and maintaining the religion as the foundation of the MIB.

The certainty of the *shari'ah* is expressed in the Anglo-Muslim form derived from Brunei's years as a British Protectorate. In the early 1900s there were minimal regulations on registration of marriage, divorce and revocation, plus directions to “Kadi Courts”. It was not until 1955

that comprehensive legislation was introduced – this was the Religious Council, State Custom and Kathis Courts Enactment, closely based on existing Malaysian models. This remained the law for the next thirty years but was largely modified in 1984 by a much more elaborate Religious Council and Kadis Court Act. However, this was felt to be somewhat lacking in that it did not properly reflect the “Islamic character” of Brunei. By this was meant that the secular courts still retained their dominant position, especially where one of the parties to a suit was not a Muslim (eg. inter-religious divorce). There were also difficulties over the rules of evidence, minimal jurisdiction of the religious courts and the staffing of an Islamic legal profession. To a large extent these concerns paralleled those in Malaysia and the remedy was very similar. It was to entrench Islam in the Constitution and, *via* the MIB, in public life and to introduce the appropriate laws extending the jurisdiction of religious institutions (including the courts) generally. The laws already administered (family law, property, criminal law) are much elaborated. There is a strong emphasis on offences against “morality” which, as in Malaysia, bear heavily on women, especially with respect to forms of punishment (caning, imprisonment) in relation to human rights.⁶³ So far as we can tell the private law *shari‘ah* coming out of the religious courts is pretty much the same as in Malaysia, these may in fact be a common developmental process.

Turning now to public law, both Brunei and Malaysia have entrenched Islam for political ends to underpin a particular form of government. In Malaysia the context is political party competition around the Constitutional interests of the ethnic Malay as these are stated and defined by the judiciary. In Brunei there are no political parties, there is no need for judicial adjudication, the “Islamic Sultanate” as the present form of government does not need it – the MIB is enough. It is its own public law *shari‘ah*.

How does it work? The “Independence Declaration” (1984) says:

“Brunei shall be forever a sovereign, democratic and independent Malay Muslim Monarchy [founded upon] the teachings of Islam according to Ahlis Sunnah Waljamaah ...”⁶⁴

This is the MIB in embryo. In addition various constitutional provisions were introduced which actually extended and consolidated the Sultan’s position as the sole authority; any derogatory comment about the Sultan, royal family or the MIB is prohibited. The Sultan is

also absolutely free from any civil or criminal proceedings, his actions are not subject to judicial review, nor does he need to provide reasons for any decision. The appropriate legitimation is Islam; the Sultan is Head of Islam, Chairman of the Religious Council, “Caliph” of the *umma*, and he also delivers *khutbah*. These are all aspects of the Sultan’s practical expression of the values in the MIB. An important aspect from the value point of view of the claim that the MIB is actually quite old as a component part of Brunei history, it has existed “from time immemorial” until suppressed in the British Protectorate period. Since independence, therefore, it has re-emerged especially embodied in the Sultan as “Caliph”. It is the Sultan in effect, who says what true Islam is and how it is to be understood, thus (hopefully) forestalling any contrary interpretation. The Office of the Mufti, the Department of Religion and the Sharia Courts all represent the same state endorsed Islam, in effect an “MIB *shari’ah*”.

Ideologies, whether secular or religious, do not have satisfactory legal histories. They always implode under the weight of their own internal inconsistencies. These in turn are caused by the inability of the ideology, in this case the MIB *shari’ah*, to respond to or adequately reflect change in any form. Ideologies require *stasis* and absolute, unquestioning state institutional support; neither is ever permanent, at best they have a few years.

The final point about religious ideologies is that they are never stable; they always vary according to circumstance, they are never doctrinally coherent. This means that the *shari’ah* value of MIB is always open to re-statement and re-interpretation and, ultimately replacement by other values equally *shari’ah* – perhaps a “democratic” *shari’ah*. One has only to recall the history of Pancasila in Indonesia to understand this. In short, the Sultan of Brunei is wasting his historical time.

The Philippines: Shari’ah as Ethno-Nationalism

Historically, Islam in the Philippines has always been an ideology of resistance – first to the Spanish, then the Americans and, latterly, to the central government of the Republic. Put more positively Islam or, as they now say, “*shari’ah* Islam” is the essential character of a “Moro”⁶⁵ ethnic nationalism. It carries the connotation of separate or different and, politically, is shorthand for a separate type of sovereignty amounting either to autonomy or secession. This is the main focus of

the contemporary *sharī'ah* Islam. It is not a new concern, the United States Moro war of the early 20c was a classic clash between a traditional Muslim polity and a militarily superior secular state, with the inevitable outcome. But this did not mean the permanent demise of the Islamic state idea in the Muslim south.

By the third quarter of the 20c Moro ethno-nationalism re-asserted itself under the pressure of poverty, land dispossession and a changed demographic into minority status consequent on an unrestrained immigration of non-Muslim settlers. It took violent form, armed insurrection, considerable loss of life and population displacement.⁶⁶ Unrest including endemic banditry continues to this day. There have been a number of responses.

The first, in 1978, was the promulgation of the Code of Muslim Personal Laws by President Ferdinand Marcos in February 1977 (Presidential Decree No. 1083).⁶⁷ This Code had been preceded by an earlier, quite different draft; this text was modelled on the Singapore and Malaysian enactments, *ie* it provided for a Majlis, a religious court and contained substantive provisions of a selected *fiqh*. It was rejected by the Judiciary Code Committee of the Supreme Court who found that "... it constitutes a rather complete system. ... Are we not tending to have a state within a state?" This is essentially a policy criticism, the Code "... leads to a peculiarity ... leading to devisiveness." These fears still persist today. The successful version, the redrafted present Code, specifically sets out to avoid the separateness issue. The provision for a Majlis was dropped; it was perceived at the time as an institution which would, on its own initiative, create legal policy in opposition to such secular sources as the Ministry of Justice and the Supreme Court. The form of the Code, likewise, is very closely modelled on the civil law forms which are characteristic of the Philippine laws. In other words, every effort has been made to formally integrate the Code into the general law.

This is true also for the religious courts; they are at two levels. Shariah District Court, Shariah Circuit Court which correspond to the secular municipal courts. Their procedure is taken from the secular model. In addition there is an "Agama Tribunal"; this is a mediations/arbitration body similar to the municipal arbitration tribunals. The qualifications for appointment as judges and attorneys are the same as for appointment to the secular courts with some additional *sharī'ah* qualifications. The important qualification, however, is that the person to be appointed is

a member of the Integrated Bar of the Philippines – this is the primary requirement. There is a provision for a Shariah Appeal Court but none has been established, lack of finance and, realistically, political will are to blame for this state of affairs. There are in fact very few appeals and those that do occur go to the Supreme Court; they are almost all on technical matters, jurisdiction is the most important, and to date no decision on substantive *shari'ah* has been given. In fact there is only one published survey of the Shariah Courts as yet available⁶⁸ and this, while useful is very preliminary.

The substantive contents of the Code are much simplified versions of standard Sunni *fiqh* rules. They are confined to family law and *wakaf*. The most striking feature in this part of the Code is the denial of *adat*. In contrast to the first draft, *adat* has no independent existence; at most it *may* be consulted if not contrary to human rights. How effective this has been in judicial decisions is not as yet known on a comprehensive basis.

There is a further interesting and peculiarly Philippine practice in respect of the Code. This is the publication of treatises or textbooks which, in the civil law tradition, take each section or article in the Code and, through argument, establish its meaning. This is the so-called “professors law” and it does have authority, especially because many of these textbooks are written by judges in the Shariah Courts. There are many examples⁶⁹ but they all share a common recourse to two sources in interpreting the Code. These use (a) Qur’ān and ḥadīth (the standard Sunni sources) and (b) the textbooks of Anglo-Muhammadan law from British India. In point of fact and so far as authority is concerned the latter source is the more important of the two. It says what *shari'ah* is, the Qur’ān and sunna are consulted for *examples*.

The private law *shari'ah* in the Code, therefore, is rationalizations of standard *fiqh* in code form, interpreted *via* citations from the Qur’ān and explained through the Anglo-Indian textbooks which are themselves summaries of 200 year old judicial precedent. This has to be one of the most striking examples of legal hybridization known to Islamic law scholarship.

The public law aspect of *shari'ah*, the *shari'ah* Islam, is equally striking. While the Code was a response to the politics of conflict it was not the only new development intended to solve the “Moro problem”. This occurred at a more fundamental level. The Moro

problem was that, as a minority (about 5%) they were simultaneously citizens and “Muslims”, hence separate as an “ethnic nationality”. How were these perceived contradictions to be reconciled, was a form of reconciliation even possible? The answer was for the government and Moro representative groups⁷⁰ to engage in negotiations initiated *via* a selection of “Islamic” states; these included such paragons of Islamic thought as Saudi Arabia, Libya, Senegal and latterly Malaysia. The result was a series of agreements⁷¹ which provided a framework for the Philippine Congress to establish a degree of autonomy for the Moro. This, the Autonomous Region for Muslim Mindanao (ARMM) was established by Organic Act 9054 in 2001. It gave the Regional Assembly power to legislate for *shari’ah*, including the compilation of the customary laws of the Muslims.” This never happened nor were powers relating to the Shariah Courts ever exercised. The most controversial part of the Act is article X which introduced Moro sovereignty over “ancestral domain, ie the lands or natural resources possessed or occupied by indigenous cultural communities.” The Moro is one such and are defined as:

“Citizens who are believers in Islam and who have retained some or all of their own social, economic, cultural and political institutions” (Art. X 3(6)).

While the Organic Act looked neat enough on paper, it did involve considerable difficulties in practice. Funding from the central government was inadequate, the regional government was incompetent; most important there was no agreement as to the scope of ancestral domain and the actual territorial boundaries of the ARMM were unclear and demographically disputed. In short, the Act did not work, there was a high degree of public disorder, armed clashes, and population displacement through the succeeding years. There were further negotiations between government and the MILF which culminated in a “Memorandum of Agreement on Ancestral Domain (MOA-AD)” (2008) which effectively gave the Moro side a degree of self-government amounting practically to independence.

The MOA-AD is in four parts; “concepts and principles”, “territory”, “resources”, “governance”. Formally, it is written as a “Treaty” between two equal sovereign powers which seems a little premature given that the MILF is not actually in possession of any territory, the preamble to the agreement actually describes itself as a:

“compact rights entrenchment emanating from the regime of dar-al-mua’hadah (territory under compact) and dar-al-sulh (territory under peace agreement) that partakes of the nature of a treaty device”.

This was obviously drafted by the MILF side and is actually a confused reference to the doctrine of *dār-al-ṣulḥ* held by some schools (especially Hanafi) to be intermediate between *dār al-ḥarb* and *dār al-Islām*.⁷² It was a part of the argument developed for justifying treaties with non-Muslims. Transfer of territory to Muslims by this means converted it into either (a) *wakaf* for Muslims or (b) it would remain with the original owners who then became *dhimmi*s. In the case here, the MOA-AD must mean (a). I am sure the government side in the negotiations had no idea of the ramifications of the doctrine. Coming now to the four parts of the Memorandum: “concepts and principles”, these say that the Bangsamoro are the original inhabitants (including descendants whether “mixed or full blood”). They have the right to self-governance because they descend from the former self-governing Sultanates or independent principalities. As a people they constitute the “Bangsamoro Judicial Entity (BJE)” – the body which has authority and jurisdiction over Ancestral Domain.

Next, “territory”; this is the existing ARMM plus other “core and non-core” areas which may, by plebiscite agree to join the BJE. Third “resources” – the MOA-AD gave the BJE complete freedom to exploit natural resources and included the power for the BJE to enter into agreements or treaties with any foreign country. The BJE was also to have the right to participate in any Philippine mission abroad in respect of borders/boundaries, trade and exploitation of fossil fuels. There was to be resource sharing between the BJE and the central government. Finally, “governance”; the BJE was to have complete legislative competence internally, in fact to establish a complete territorial government. The relationship between the BJE and the central government was labelled “associative”, *i.e.* characterised by an equally shared authority.

The terms of the MOA-AD only became publically known a few days before it was due to be signed and, of course, created a political uproar with some claiming the arrival of an “Islamic state” within the Philippines, or carved out of its sovereign territory. At a more prosaic level the Supreme Court was petitioned to rule on the constitutionality of the MOA-AD. This it did in a lengthy decision⁷³ given in October 2004. There was a panel of fifteen judges who, between them, delivered

one majority judgement, three separate and concurring opinions, two separate concurring and dissenting opinions, four separate opinions, and two dissenting opinions! The result was that the MOA-AD was held unconstitutional on several grounds, but the range of opinions expressed means that future agreements are bound to involve more litigation in the Supreme Court.

True to form, a new “Framework Agreement” has been concluded between the government and the MILF (October 2012) which established a “Transition Commission” to eventually form itself into a “Bangsamoro Transition Authority” which will lead to some form of autonomy located in a “New Political Entity”. At the time of writing a Basic Law is being drafted; it must, of course, be constitutionally acceptable.⁷⁴

Assuming something actually comes of these developments, what of the *shari‘ah* Islam? The MILF does not have a comprehensive or even a draft version of what its *shari‘ah* is to be. Occasionally the “Islamic state-obedient to Allah” makes an appearance but just as often it is rejected. The leading ideologue, Selamat Hashim, was a master of contradiction. One constant, however, is that although the Bangsamoro are a minority they will eventually succeed because of “Allah’s support”. This will be fully articulated in Bangsamoro polity where “principles of Islam” will inform the whole political, legal and judicial institutions. The individual Muslims are not, as yet, capable of government by or through democratic institutions, they still need the guidance of their leaders (*ie* the MILF) who will achieve the Islamic polity for them. The leaders are true Muslims whose minds are not “mentally and morally colonized”. Later comment by the current ideologies is also along these lines – the actual details of government and judicial administration must await the attainment of self rule.⁷⁵ The nearest parallel would be the Muslim Brotherhood of the Middle East; like them, the MILF is strong on criticism but weak on building successful institutions for government.

Thailand; Another Ethno-Nationalism

The Muslim population of Thailand is only about 4% spread over the whole country but overwhelmingly concentrated in the four southern provinces. The Malay-Muslim population is the majority population here and are located in Thailand solely as a result of imperial boundaries

drawn in 1910. A treaty of that year between Great Britain and the then Siam halted the southward expansion of the Siamese but cut off and eliminated the Sultanate of Patani. But its memory lives on, not least in the impressive *corpus* of Jawi literature it left behind. Much of this is still studied today.

However, so far as *shari'ah* is concerned, we are really in the dark for the contemporary period. The necessary detailed long term study of the courts at local level has not been done. The courts themselves present a challenge. There is no separate Muslim court instead in the four Muslim-majority provinces in the south there is a "*dato' yuthitham*" (Muslim judge) who acts in concert with the secular judge in the Thai district court. His jurisdiction is quite limited; he delivers his opinion on family and inheritance cases but the actual decision is given by the Thai judge. The Muslim officer is more accurately described as an assessor rather than a judge; these officers are selected on the basis of competitive examinations and appointed by the Ministry of Justice. As to the law applicable, again we lack proper in depth information. It is probably fair to say that, like neighbouring Kelantan in Malaysia, a fairly standard Shāfi'ī *fiqh* is the operative law; there is evidence from the 19c-20c publications of Islamic literature⁷⁶ which supports this view. Included in this literature are translations and commentaries in doctrine, law and original collections of *fatāwá* which are yet to be fully understood. Indeed, the whole of this "Patani Islam" literature is still relatively unexplored.

So far as formal law administration is concerned, the policy of the Siamese/Thai governments has oscillated between repression and a grudging tolerance. Whatever the case in any particular time, the method employed by government is the same. It is to exercise a top-down bureaucratic control *via* a series of committees, commissions and public service appointments. The King, as patron of all religions, enacts legislation dealing with religion in the Kingdom including Islam. The current legislation is the Administration of Islamic Organizations Act B.E. 2540 (1997) which replaces three earlier pieces of legislation from the 1940s. The Act⁷⁷ is purely administrative and makes no mention of the substance of *shari'ah*. It begins by providing for the office of *Chularajamontri* the senior Muslim Advisor to the government, whose functions also include issuing declarations as to Islamic law and advising the correct dates for Muslim "important religious days" according

to the lunar calendar. He is also a member of the “Central Islamic Committee of Thailand” which provides advice to various Ministries (especially Interior and Education), oversees the finances and activities of Islamic Provincial Committees and in general regulates all public expressions of Islam. At the next level, the Act provides for “Islamic Provincial Committees”; their functions include general oversight of mosque committees as to finance and conduct but in addition to (a) issue marriage and divorce certificates “in accordance with Islamic law” and (b) to reconcile disputes “about family and inheritance matters according to Islamic law,” and (c) “to issue declarations and certify Islamic religious activities in the province”.

We can conclude that, even in the absence of independent Muslim courts, there is still scope for *shari‘ah* in family law matters at the local level. The precise matters of this *shari‘ah* is unknown although from my own fieldnotes (1986) there was a thriving local Jawi publishing industry which included the standard Shafii textbooks.⁷⁸

There is of course no public (law) *shari‘ah* element possible or even proposed as in the Philippines. But “Islam” is an essential component in Malay ethno-nationalism in the four southern provinces. Middle East reform movements were and are known in Patani. Their impact has varied as has the recourse to violence⁷⁹ by variously titled “Islamic” movements whose aims have included secession from Thailand so as to join neighbouring Malaysia. This is again the old problem of imperial era boundaries (as with Arakan in Burma); the Malay-Muslims have received no encouragements from Malaysia. But there is a vigorous publishing industry in Malay which claims to speak for the *Bangsa Patani Islam* (Patani Muslim People) who still live under “Thai colonization”, the Thais “one of the cruelest colonizers in the world”.

Most contemporary comment on the Malay-Muslims of Southern Thailand is, understandably, on the politics of negotiating the states of the minority in the Thai state (Buddhist by majority religion). There is no doubt that the Malay-Muslims are an oppressed minority; of course there can be no public *shari‘ah* as is possible in the Philippines. However, integral to the whole ethnic identity of the Malays in southern Thailand is the very large *corpus* of Jawi literature and the reputation of Malay Islamic scholarship. It is not stretching an argument too far if we say that these two constitute a “*shari‘ah* Islam”, of course using

this term now in a very broad sense. We can say that it is a value system internal to Malay-Muslims, owes nothing to the secular state and is quite separate from Thai values or secular values for that matter. Thai officialdom certainly holds a similar opinion; their solution to the “Muslim problem” is integration leading to assimilation and this means dealing with the Jawi tradition and Jawi literature. The method is to control Muslim education by bureaucratic means (eg. registration and the incorporation of traditional Jawi education institutions) and by monitoring Islamic contact plus requiring secular subjects (taught in Thai). The result it is hoped, will be a sanitized religious doctrine and thus a de-racinated Malay population.

The price the Malays pay, if government policy is successful, will be the loss of a unique *shari'ah* Islam. A cruel price indeed as unbiased observers realise.

*Cambodia and Vietnam.*⁸⁰ *Unknown Shari'ahs*

These two states have small Muslim minorities – the ethnic Cham -, who constitute about 5% in Cambodia and 1% in Vietnam. They are the remnants of a once powerful state, successively dismantled by the Khmer and Vietnamese in a series of wars. By the 16c the Cham were a defeated minority and many fled to neighbouring Muslim countries. The pre-modern history of Islam in the area is not well understood but Islamic inscriptions recovered by 19c French scholars indicate a sophisticated knowledge of state functionaries such as *qadi*, *mufti*, “*Seih el-Islam*”, *muhtasib* and so on. There is also evidence of Persian and Arab trading links.

As with the pre-modern period, the later *shari'ah* history of the Cham remains little understood. The French were willing to permit a separate legal regime for the Cham as was their general policy for minorities, particularly “tribal” groups. However, the situation facing the Cham after the French had been expelled from Indo-China has not been conducive to the preservation of *shari'ah*, in whatever form it might have had in the 1950s. Both Cambodia and Vietnam have little sympathy for the separateness of minority groups, assimilation was and is always the aim. The fact that Islam is a foreign religion is bad enough, but it is made worse by its international aspect and the sporadic presence of Muslim “missionaries” preaching exclusivity. All of this was and still is seen as contrary to unity of the state.

Perhaps the outstanding feature of Islam in Cham society is the fact that it has taken different forms in the different Cham communities.⁸¹ Thus, the Bani Cham in the southern part of Vietnam observe local spirit worship, have an organized “priesthood” comprised of six ranks. The priests are responsible for fasting on behalf of the community in Ramadan. Society is based on matrilineal descent groups and women have key ritual functions. Further to the south, there is a small orthodox Cham community who are Sunni Muslims, followers of the Shāfi‘ī school. They have strong connections with visiting Muslim traders and the hypothesis is that these links help to preserve an orthodox Islam.

In Cambodia, the Cham Muslims appear to be in three main groups. The first, the “Jahed”, are an offshoot of the Bani Cham. They are reported to adhere to a Shi’a influenced Islam. They are a tiny minority (about 10%) of the Cambodian Cham. The majority are divided not by doctrine – they are all orthodox Sunni – but by language. The “Cham” use both Malay and Arabic texts and speak Cham and Khmer. The remaining group, who are labelled “Chvea” (the Khmer word for Java) speak only Khmer. They have strong contacts with Malay Muslims and, during the regime of the Khmer Rouge (1975-1979) many escaped to Malaysia. The Muslim Cham suffered much during that time.

These comments and the sources from which they are made emphasize just how different a Cham *sharī‘ah* Islam might be. Every effort needs to be made to do the necessary fieldwork with particular emphasis on doctrine and formal obligation.

Conclusion: Localized *Sharī‘ahs*

Variation and variety encourage us to accept the idea that localized *sharī‘ahs* are the norm. This was certainly the view held in the 1980s, by which time the irrelevance of the “Great Tradition – little tradition” dichotomy was generally accepted. But have we gone perhaps too far in our enthusiasm for local forms? It seems to me that we must be careful. We can of course reject some of the pernicious influences drawn from the dichotomy, eg. the view (19c-20c) that local *sharī‘ahs* are “corruptions”. This is nonsense; even a brief glance at the examples in this essay will show, not corruption of Revelation and *fiqh*, but *adaption* to new circumstances. I suggest we distinguish between function and form. An over reliance on the latter is merely Arab intellectual imperialism. The *sharī‘ah*, in all its forms, is after all a universal for Muslims. We can best

understand the Southeast Asian versions as examples of this universal function. But the Arab *form* is not necessary for the proper functioning of the Southeast Asian *shari'ahs*. However, this does not mean it can be ignored. The disciplines of *fiqh* must be learned and understood; without them the Southeast Asian *shari'ahs* are in danger of losing coherence or, more exactly, having no fixed reference point against which localization can be measured. The fact that the Southeast Asian *shari'ahs* are formally different is not, of itself, deviance, a point the politically inclined fail to understand. Deviance is other than formal, it is only explicable in discipline classes and the latter, therefore, are necessary. We must accept that; the local *shari'ahs* are both sufficient and necessary expressions of obligation in the Southeast Asian context. We must also accept that the essential *fiqh* classes are a fundamental pre-condition to the integrity of the localized *shari'ahs*. Historical and contemporary *shari'ah* is thus a dynamic in constant formation and reformation.

Endnotes

- I am grateful to the anonymous reviewers who made useful comments. Faults are of course my responsibility.
- 1. From west to east: Burma, Thailand, Laos, Cambodia, Vietnam; and south to Malaysia, Singapore, Brunei, Indonesia, Timor Leste; and north-east to the Philippines.
- 2. These are: Indian, Chinese, Islamic, Spanish, Portuguese, Dutch, English, Anglo-American, French-Belgian and Socialist. See Hooker 1986, 1988 for essays and bibliographies. For more recent sources and some analysis see Black & Bell 2011.
- 3. For example, see the essays in Hooker 1986 each of which has an account of the relevant historiography.
- 4. See Hooker 1986: 347-433 on which the following comment is based.
- 5. *Ibid.*: 381 ff.
- 6. They are al-Ansārī's *Fatḥ al-Wabbāb* and Nawawī's *Minḥāj*. These are many translations and commentaries in Southeast Asia, see Bruinessen 1990.
- 7. See Hooker 1984: 279-80 for a list.
- 8. See Bruinessen 1990 for description.
- 9. See Matheson & Hooker 1988 for one example.
- 10. See Hooker 1986: 364 ff for an assessment of the Muslim material.
- 11. The Spanish never effectively controlled the Muslim south of the Philippines and the French paid almost no legal attention to the miniscule Muslim minorities in Cambodia and Vietnam. The Americans effectively dismissed it.
- 12. For a full description see Burns 1988.
- 13. Respectively *via* the mass movements Muhammadiyah and Nahdatul Ulama which published comprehensive textbooks, commentaries, social programmes and *fatāwā*.
- 14. The list at the time consists of: (a) Baillie's *A Digest of Moohummudan Law* (1869), which was based on translations of a number of Indian *fatwa* and of the *Sharā'i' al-Islām*; (b) Macnaghten's *Principles and Precedents of Moohummudan Law* (1825), a book of great authority; (c) Hamilton's translation of *al-Hidayah (The Hedaya or Guide)* made in 1791, the second edition of 1870 was that most widely used; (d) later works of authority included Ameer Ali's *Mahommedan Law*, originally the Tagore Law Lectures of 1884, Wilson's *Anglo-Muhammadan Law*, and Mulla's *Principles of Mahomedan Law*. For the importance of the early translations see M. P. Jain 1966: 701 ff.
- 15. See Hooker 1984: 84-102.
- 16. *Ibid.*: 131-143.
- 17. The reader might like to look at some rather amusing decisions of the Privy Council (the highest Judicial body in the Empire). See eg. its decision in *Mighell v Sultan of Johore* [1894] 1 Q.B. 149.
- 18. See Hooker 1984: 173-188.
- 19. *Ibid.*: 189-203.
- 20. *Ibid.*: 203-217.
- 21. See E. Edward Steiner 1988.
- 22. The whole of the Beyer Collection is in the National Library of Australia, MS 4877. Parts are also to be found in *ts* in the University of Chicago library (1962) and some was published in the *Adatrechtbundels* (1910-1955) & *Pandecten* (1914-36).
- 23. For a good recent overview see Feillard & Madinier 2011.
- 24. For example, the current definition of who is or is not a Muslim, in this case the Ahmadiyya movement involves a number of institutions. See Lindsey 2012: 401 ff on the "regulation of belief".
- 25. For a detailed description see Lev 1972, now the classic account.

26. See Fealy & Hooker 2006: 348-52 for extracts.
27. See Lindsey 2012: 273 for full description.
28. See *ibid*: 330 ff, Hooker 2008: 11-17, Nurlaelawati 2010.
29. Lindsey 2012: 363 ff, Hooker 2008: 243 ff, Fealy & Hooker 2006: 189
30. See Lindsey 2012: 159 ff.
31. Bush 2008.
32. See Hooker 2008: 246 ff, Fealey & Hooker 2006: 189, Lindsey 2012: 297-325, 379-394.
33. There are other examples, the "MMI Draft Criminal Code" and the "South Sulawesi Draft Syariah Code"; see Hooker 2008: 259 ff.
34. Indonesia has a number of *fatāwā* issuing bodies of which the MUI is purportedly the "official" state institutions. It is located in the Ministry of Religion. See generally Hooker 2003, Indonesian *fatāwā* are issued by committees; those put out by individuals have no credibility, they come mostly from the wilder stories of theological illiteracy.
35. All state enactments completed by 1966. In 1963 "Malaya" became "Malaysia" with the accession of Sabah, Sarawak and Singapore. The latter became an independent Republic in 1965.
36. For a list of the enactments as at 1979-80 see Hooker 1984: 144.
37. The definitive argument to this end was put by Salleh Abas L.P. in *Che Omar b. Che Soh v Public Prosecutor* [1988] 2 MLJ 55 (Federal Court) – this decision just precedes the constitutional change.
38. In Hooker 1984: 149-51.
39. See Lindsey & Steiner 2012a: 45-76.
40. Over the years the Malaysian Constitution (1957) has undergone many amendments, not all of them happy. See Harding & Lee 2007.
41. For two very good and detailed discussions see Thio 2007 and Whiting 2008.
42. [2004] 2 MLJ 119.[2005] 6 MLJ 193.
43. *Dalip Kaur v Pegawai Polis* ... [1992] IMLJ 1, *Mohamed Habibullah ... v Faridah Dato Talib* [1992] 2 MLJ 793, *Soon Singh v Pertubuhan* ... [1994] 1 MLJ 690
44. There is also a reference at p. 143 of *Lina Joy* to an "anthropological classification" relevant to the definition of "Malay" in article 160(2) of the Constitution. The choice of the adjective is not at all useful or even accurate. One could perhaps read Peletz 2002: 96-97 on "shared cultural notions" and *ibid*: 219-220 on whether converts can ever be "culturally authentic", specifically with reference to marriage. The Malaysian judiciary does obviously need educating: there are many examples of ignorance in recent judgements.
45. [2004] 2 MLJ 241
46. See Whiting 2008: 250f.
47. [2007] 2 MLJ 705 at para 59 and cited in Whiting 2008: 253
48. Of varying degrees of sophistication in matters of Muslim law. In one recent decision, which must remain nameless, the judge set out the authorities on which he relied. These included (a) a list of previous secular court decisions (very useful) and (b) what he claimed to be "standard textbooks of eminent scholars in Islamic jurisprudence". While some are certainly by eminent scholars they had absolutely no utility in the use before him. The remainder of the listed textbooks were of low or very poor scholarship – quite unacceptable. Textbooks and essays/articles which might have been of use were not listed. Exactly what are Malaysian judges reading? – see n. 44 above on displays of judicial ignorance.
49. [2007] 5 MLJ 101
50. Thio 2007.

51. In Fyzee 1974: 180 ff. esp. p. 185 “evasion of legal obligations”.
52. Singapore was in fact part of Malaysia 1963-65 although the AMLA post-dates its leaving Malaysia. As to administrative and financial functions see Lindsey & Steiner 2012: 85-184.
53. *Ibid.*: 207-233 esp. 213 ff.
54. *Ibid.*: 8.
55. *Mohd. Munir v Noor Hidah* [1990] SLR 999, [1991] 1 MLJ 276; *Hafiani Abdul Karim v Mazlan Redzuan* [1996] ISLR 379.
56. *Salijah Ab. Lateh v Mohd. Irwan Abdullah* [1996] ISLR 63, [1996] 2 SLR 201 and authorities these discussed.
57. See *Re Will of Shaik Abdullah* [2003] ISLR 433 for difficulties.
58. Sections 112 & 114 Women’s Charter, 1961.
59. Report of the Select Committee on the Administration of Muslim Law Bill (1999) p. iii, paras 9 & 10 (Govt. Printer).
60. Appeal Board Decision, No. 19/1997.
61. Followers of Mirza Ghulam Ahmad who claimed to be both a “renewer” (*mujaddid*) and a Prophet. In the Sunni view, the claim is a heresy. For details of the theology see Friedmann 1989.
62. See Lindsey & Steiner 2012: 323 ff.
63. See *ibid.*: 349 ff for a summary of the legislation.
64. Kershaw 2001: 13.
65. The term, originally Spanish, used to describe the Philippine Muslims; now also “Bangsamoro”.
66. For an overview see Turner *et al* (eds) 1992.
67. See Hooker 1984: 231 ff. for an outline.
68. See Antonio 2006.
69. See eg. Rasul & Ghazali 1984.
70. The Moro National Liberation Front (MNLF) and the later Moro Islamic Liberation Front (MILF). They each represent separate ethnic groups – the former the Tausug, the latter the Maguindanaon. The political platforms and ideologies of each are erratic and confused; political opportunism is endemic on all sides, as is corruption.
71. A good summary is in Tauzon 2008.
72. Sv. EI² *dār al-ṣulḥ*
73. Those interested are encouraged to read the actual judgements, rather than some (possibly) less than accurate summary. For the sake of brevity I have put the judgement here as: [*Province of North Cotabato & ORS v [Govt of the Philippines]*] G.R. No. 183591 (14th October 2008). Those wishing to read all the judgements for themselves refer to the G.R. No. and date. The net reference is: <http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591-2008.html> accessed 1st March 2012.
74. See the ICG, Asia Report No. 240, 5th December 2012 for the latest opinion.
75. See Jubair 2007.
76. Described in Matheson & Hooker 1988.
77. An extract is in Fealy & Hooker 2006: 151-153.
78. See Matheson & Hooker 1988: 22 ff.
79. See Fealy & Hooker 2006: 81-82.
80. *Ibid.*: 31-37. See also Scupin 1995.
81. The comment which follows is taken from Nakamura 2000.

Bibliography

- Antonio, Isabelita Solano. 2003. *The Shariah Courts in the Philippines*. Davao City: Pilipina Legal Resources Center.
- Black, E. Ann & Gary F. Bell (eds). 2011. *Law & Legal Institutions of Asia*. Cambridge: Cambridge University Press.
- Bruinessen, Martin van. 1990. "Kitab Kuning: Books in Arabic Script", *BKI* 146: 226-269.
- Burns, Peter. 1988. "The Netherlands East Indies: Colonial Legal Policy & the Definitions of Law" in M.B. Hooker (ed.). *Laws of South-East Asia. Vol II*. Singapore: Butterworths, pp. 148-298.
- Bush, Robin. 2008. "Regional Regulations in Indonesia" in Greg Fealy & Sally White (eds). *Expressing Islam*. Singapore: ISEAS, pp. 174-191.
- Fealy, Greg & Virginia Hooker (eds). 2006. *Voices of Islam in Southeast Asia*. Singapore: ISEAS.
- Feillard, Andrée & Rémy Madinier. 2011. *The End of Innocence? Indonesian Islam & the Temptations of Radicalism*. Singapore: NUS Press.
- Friedmann, Johann. 1989. *Prophecy Continuous*. Berkeley, Calif.: University of California Press.
- Fyzee, Asaf A.A. 1974. *Outlines of Muhammadan Law* (4thed.). Delhi: Oxford University Press.
- Harding, Andrew & H.P. Lee (eds). 2007. *Constitutional Landmarks in Malaysia*. Kuala Lumpur: LexisNexis.
- Hooker, M.B. 1984. *Islamic Law in South-East Asia*. Singapore: Oxford University Press.
- _____. 2003. *Indonesian Islam: Social Change through Contemporary Fatāwā*. Honolulu: University of Hawai'i Press.
- _____. 2008. *Indonesian Syariahs*. Singapore: ISEAS.
- Hooker, M.B. (ed.). 1986. *Laws of South-East Asia. Vol. 1 The Pre-Modern Texts*. Singapore: Butterworths & Co.
- _____. (ed.). 1988. *Laws of South-East Asia. Vol. II: The European Laws*. Singapore: Butterworths & Co.
- Jain, M.P. 1966. *Outlines of Indian Legal History*. Bombay: Tripathi.
- Jubair, Saleh. 2007. *The Long Road to Peace*. Cotabato City: Institute of Bangsamoro Studies.
- Kershaw, Roger. 2001. "Brunei: Malay, Monarchical, Micro-State" in John Funston (ed.). *Government & Politics in Southeast Asia*. Singapore: ISEAS, pp.

1-35.

- Lev, Daniel S. 1972. *Islamic Courts in Indonesia*. Berkeley, Calif.: University of California Press
- Lindsey, Tim. 2012. *Islam, Law and the State in Southeast Asia. Vol I: Indonesia*. London: I.B. Tauris
- Lindsey, Tim & Kirsten Steiner. 2012. *Islam, Law and the State in Southeast Asia. Vol II: Singapore*. London: I.B. Tauris.
- Lindsey, Tim & Kirsten Steiner. 2012a. *Islam, Law and the State in Southeast Asia. Vol III: Malaysia and Brunei*. London: I.B. Tauris.
- Matheson, Virginia & M.B. Hooker. 1988. "Jawi Literature in Patani" *Journal Royal Asiatic Society – Malaysian Branch* LXI(i) 1-86.
- Nakamura, Rie. 2000. "The Coming of Islam to Champa" *Journal of the Royal Asiatic Society-Malaysian Branch* LXXIII(1) 55-66.
- Nuraelawati, Euis. 2010. *Modernization, Tradition & Identity. The KHI & Legal Practice in the Indonesian Religious Courts*. Amsterdam: Amsterdam University Press.
- Peletz, Michael. 2002. *Islam Modern*. Princeton, N.J.: Princeton University Press
- Rasul, Jainal D. & Ibrahim Ghazali. 1984. *Commentaries & Jurisprudence on the Muslim Code of the Philippines*. Quezon City: Central Lawbook Publishing Co.
- Scupin, Raymond. 1995. "Historical, Ethnographic & Contemporary Political Analyses of the Muslims of Kampuchea & Vietnam" *Sojourn* 10(2) 301-328.
- Steiner, E. Edwards. 1988. "Judicial Reinforcement of Empire: Philippine Law in the American Period" in M.B. Hooker (ed.). *Laws of Southeast Asia. Vol II*. Singapore: Butterworths, pp. 447-530.
- Thio, Li-ann. 2007. "Jurisdictional Imbroglia" in Andrew Harding & H.P. Lee (eds). *Constitutional Landmarks in Malaysia*. Kuala Lumpur: Lexis Nexis pp. 197-226.
- Tuazon, Bobby M.(ed.). 2008. *The Moro Reader*. Manila: Cen PEG.
- Turner, Mark & R.J. May, L.R. Turner (eds). 1992. *Mindanao: Land of Unfulfilled Promise*. Quezon City: New Day Publishers.
- Whiting, Amanda. 2008. "Descularising Malaysian Law?" in Penelope Nicholson & Sarah Biddulph (eds). *Examining Practice, Interrogating Theory*. Leiden: Nijhoff, pp. 223-266.

M.B. Hooker, *Australian National University*.

Guidelines

Submission of Articles

S*tudia Islamika*, published three times a year since 1994, is a bilingual journal (English and Arabic) that specializes in Indonesian and Southeast Asian Islamic studies. The aim is to provide readers with a better understanding of Indonesia and Southeast Asia's Muslim history and present developments through the publication of articles, research reports, and book reviews from Indonesian and international scholars alike.

Submission is open to both Indonesian and non-Indonesian writers. Articles will be assessed for publication by the journal's Board of Editors and will be peer-reviewed by a blind reviewer. Only previously unpublished work should be submitted. Articles should be between approximately 10,000-15,000 words. All submission must include a 150-word abstract and 5 keywords.

Submitted papers must conform to the following guidelines: citation of references and bibliography use Harvard referencing system; references with detail and additional information could use footnotes or endnotes using MLA style; transliteration system for Arabic has to refer to Library Congress (LC) guideline. All submission should be sent to studia.islamika@uinjkt.ac.id.

حقوق الطبع محفوظة
عنوان المراسلة:

Editorial Office:
STUDIA ISLAMIKA, Gedung Pusat Pengkajian
Islam dan Masyarakat (PPIM) UIN Jakarta,
Jl. Kertamukti No. 5, Pisangan Barat, Cirendeu,
Ciputat 15419, Jakarta, Indonesia.
Phone: (62-21) 7423543, 7499272, Fax: (62-21) 7408633;
E-mail: studia.islamika@uinjkt.ac.id or studia.ppim@gmail.com.
Website: www.ppim.or.id

قيمة الاشتراك السنوي خارج إندونيسيا:
لسنة واحدة ٧٥ دولارا أمريكا (للمؤسسة) ونسخة واحدة قيمتها ٢٥
دولارا أميركا، ٥٠ دولارا أمريكا (للفرد) ونسخة واحدة قيمتها ٢٠
دولارا أميركا. والقيمة لا تشمل على النفقة للإرسال بالبريد الجوي.

رقم الحساب:
خارج إندونيسيا (دولار أميركا):
PPIM, Bank Mandiri KCP Tangerang Graha Karnos, Indonesia
account No. 101-00-0514550-1 (USD).

داخل إندونيسيا (روبية):
PPIM, Bank Mandiri KCP Tangerang Graha Karnos, Indonesia
No Rek: 128-00-0105080-3 (Rp).

قيمة الاشتراك السنوي داخل إندونيسيا:
لسنة واحدة ١٥٠,٠٠٠ روبية (للمؤسسة) ونسخة واحدة قيمتها
٥٠,٠٠٠ روبية، ١٠٠,٠٠٠ روبية (للفرد) ونسخة واحدة قيمتها
٤٠,٠٠٠ روبية. والقيمة لا تشمل على النفقة للإرسال بالبريد الجوي.



ستوديا إسلاميكا

مجلة إندونيسيا للدراسات الإسلامية

السنة العشرون، العدد ٢، ٢٠١٣

هيئة التحرير:

- م. قريش شهاب (جامعة شريف هداية الله الإسلامية الحكومية جاكرتا)
توفيق عبد الله (المركز الإندونيسي للعلوم)
نور أ. فاضل لوييس (الجامعة الإسلامية الحكومية سومطرة الشمالية)
م. ش. ريكليف (جامعة أستراليا الحكومية كانبيرا)
مارتين فان برونيسين (جامعة أترينخة)
جوهن ر. بووين (جامعة واشنطن، سانتو لويس)
م. كمال حسن (الجامعة الإسلامية العالمية كوالا لومبور)
فركنيا م. هوكنر (جامعة أستراليا الحكومية كانبيرا)

رئيس التحرير:

أزيوماردي أوزرا

المحررون:

سيف الجاني

جمهاري

جاجات برهان الدين

عمان فتح الرحمن

فؤاد جبلي

علي منحنف

إسماتو رافي

دادي دارمادي

مساعد هيئة التحرير:

تسطينيونو

محمد نداء فضلان

مراجعة اللغة الإنجليزية:

جيسيسكا سودرغا

مراجعة اللغة العربية:

نورصمد

تصميم الغلاف:

س. برنكا

ستوديا إسلاميكا (ISSN: 0215-0492) هي مجلة دورية يصدرها مركز البحوث الإسلامية والاجتماعية (PPIM) جامعة شريف هداية

الله الإسلامية الحكومية جاكرتا (STT/DEPPEN NO 129/DITJEN/PPG/STT/1976)، وترتكز للدراسات الإسلامية في

إندونيسيا وخاصة آسيا جابوني شرقي إجمالاً. تقبل هذه المجلة على إرسال مقالات المتقنين والباحثين التي تتعلق بمنهج المجلة. والمقالات

المنشورة على صفحات هذه المجلة لا تعبر عن هيئة التحرير أو أي جمعية التي تتعلق بها. لكنها مرتبطة ومنسوبة إلى آراء الكاتين. والمقالات

الاحتوية في هذه المجلة قد استعرضتها هيئة التحرير. وهذه المجلة قد أقرها وزارة التعليم والثقافة لها مجلة علمية (SK Dirjen Dikti No.

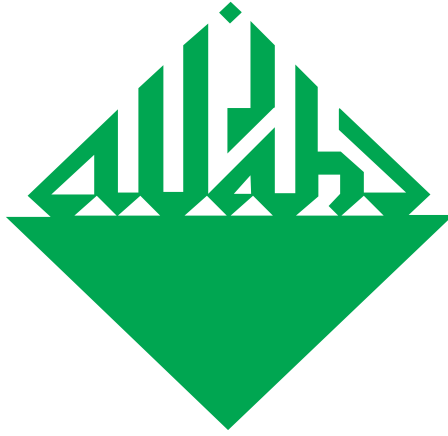
56/DIKTI/ Kep/2012).

ستوديا اسلاميا

سثوديا اسراميا

مجة إنءونيسية للءراساء الإسلامية

السنة العشرون، العدد ٢، ٢٠١٣



ءأثير الحركة السلفية بمصر على المبعء بين
بإنءونيسيا في تطوير التربية الإسلامية
أمل فءح الله زرءشي

مخطوطة [Kinanti *Tutur Teu Kacatur Batur*]

ءصوفء العالم السونءاوي
عند الحاج حسن مصطفى (١٨٥٢-١٩٣٠)

جاءانج أ. روءمانا
