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NEW APPROACHES IN INTERPRETING THE QUR'AN IN CONTEMPORARY INDONESIA

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MUSLIM RESPONSES TO THE COMMUNIST REVIVAL IN INDONESIAN POLITICS

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Ratno Lukito

Sharī'ah and the Politics of Pluralism in Indonesia

Abstraksi: *Artikel ini secara komprehensif menelaah prospek legal pluralisme dalam struktur hukum Indonesia semenjak era Orde Baru sampai sekarang. Secara sederhana legal pluralisme mengandaikan kemungkinan hukum moral (*moral laws*) yang berasal dari agama maupun adat (dan biasanya dianggap sebagai hukum tak tertulis) untuk menjadi hukum positif formal di suatu negara. Itupun bisa terjadi setelah melewati serangkaian aturan main dalam proses legislasi yang dilakukan negara. Sebab, secara prinsipal, institusi negaralah yang memiliki kekuatan penuh dalam pembuatan dan legislasi hukum. Di sini, betapapun dalam prosesnya* state law pluralism *itu dimungkinkan karena terjadi proses meminjam dari tradisi atau hukum moral yang berkembang dalam masyarakat tadi, namun dalam praktiknya negaralah yang menjadi agen utama, untuk tidak mengatakan satu-satunya, yang berhak dalam proses katalisasi dan legislasi hukum itu sendiri. Dengan kata lain, betapapun nilai-nilai adat dan hukum moral agama itu memang diakui, ia tetap dalam posisi pinggiran, dan hak eksistensialnya bergantung pada faktor sosial politik seperti kemampuan* bargaining *dan hal-hal lain yang berada di luar koridor hukum.*

Persoalan yang mengemuka adalah, dalam konteks Indonesia, apakah kecenderungan ini juga kentara ketika terjadi kontestasi dengan hukum Islam dan hukum adat vis-a-vis uniformitas hukum negara? Dan, apakah memang negara berhasil dalam proses unifikasi tersebut secara menyeluruh? Inilah yang menjadi salah satu pokok bahasan utama artikel ini. Menurut penulis, sebagai sebuah prosedur, proses unifikasi ini bisa dikatakan sukses tapi tidak untuk substansinya. Karena itu, penulis melihat terdapat perbedaan perlakuan yang dilakukan negara khususnya dalam menyikapi perkembangan hukum Islam dan hukum adat itu. Ini terjadi semenjak berdirinya republik ini, ketika negara mulai mengadopsi sistem uniform hukum yang lebih homogen untuk mengintegrasikan berbagai sistem nilai yang ada dalam masyarakat. Sebagai

contoh, artikel ini membandingkan perlakuan hukum yang berbeda dalam hal yang berkenaan dengan kasus undang-undang perkawinan dan undang-undang pertanahan. Dari dua kasus itu, betapapun uniformitas prosedur menjadi homogen, namun pada kenyataannya aspek substantif dari hukum dari kedua regulasi cenderung berbeda. Pada kasus pertama, terlihat negara 'membiarkan' terjadinya polarisasi dan pluralisasi penerapan substansi hukum perkawinan yang memang sejak awal berbeda. Namun hal itu tidak terjadi pada kasus yang kedua. Menurut artikel ini, jelas semenjak awal terjadi kesenjangan antara filsafat hukum moral (baik bersendikan agama atau adat itu) dengan prinsip-psinsip unifikasi ideal hukum nasional yang ingin dikembangkan dalam masyarakat yang heterogen seperti Indonesia.

Lalu, apakah masalah mendasar ini dapat 'diselesaikan' seiring dengan pergantian rezim? Secara lugas, penulis artikel ini menyimpulkan, tidak. Sebab, terlihat bahwa kebijakan yang ditempuh tidak lebih baik dari apa yang pernah dilakukan rezim sebelumnya. Dan sekali lagi, kasus yang menjadi perhatian artikel ini adalah undang-undang perkawinan dan pertanahan yang baru. Pada kasus pertama, betapapun terlihat upaya kuat negara untuk melakukan unifikasi substansi hukum perkawinan pada awal pemerintahan Orde Baru, negara tetap tidak bisa berbuat banyak karena kerasnya oposisi dari kalangan aktivis Islam pada waktu itu. Sekali lagi sejarah berulang pada kasus yang kedua, yakni dalam regulasi pertanahan utamanya masalah hak ulayat. Di sini rezim terlihat cukup berhasil dalam praktik-praktik unifikasi prosedur maupun substansi hukum bagi hak ulayat yang dipegang kelompok adat tanpa terlalu banyak kompromi dan tawar-menawar.

Lebih lanjut, menurut artikel ini, memang semenjak paruh awal 1990-an, terdapat kecenderungan yang lebih besar untuk memberikan ruang bagi nilai-nilai agama Islam dalam bentuk berbagai peraturan formal, seperti munculnya regulasi tentang zakat atau haji dalam sistem perundangan-undangan Indonesia. Namun, hal yang sama tidak terjadi secara proposional bagi regulasi yang memperjuangkan penerimaan nilai-nilai hukum adat dalam hukum formal. Kalaupun ada, itupun tidak cukup signifikan untuk mengklaim bahwa negara memang memberikan bagi nilai-nalai itu sendiri. Karena itu, menurut penulis, jelas terlihat motif yang berbeda dari kemunculan regulasi-regulasi itu. Selain karena kuatnya bargain position *yang dimiliki para politisi Muslim sebagai kelompok mayoritas, tentu rezim yang sedang berkuasa* (ruling regime) *merasa berkepentingan untuk tetap mengamankan posisi dengan mendapatkan legalitas dan dukungan politik dari kelompok keagamaan terbesar di tanah air tadi. Karena itu, dalam perspektif rasional, artikel ini menyimpulkan bahwa pada dasarnya regulasi-regulasi yang cenderung 'pro-shariah' itu merupakan media yang efektif bagi konsolidasi politik dan stabilisasi rezim itu sendiri* vis-a-vis *kelompok keagamaan mayoritas tadi.*

Ratno Lukito

Sharī'ah Syariah and the Politics of Pluralism in Indonesia

الخلاصة: يتناول هذا البحث شاملا فى التعدّدية القانونية المتوقّعة فى الهيكل القانونى الإندونيسى منذ عصر الطريقة الجديدة Orde Baru حتى الآن. قد تتوقع التعدّدية القانونية على القوانين الأخلاقية المأخوذة من الدين والعرف التى تعرف بالقانون غير المكتوب ليتكون بها القانون المعمول رسميا فى دولة. قد يمرهذا القانون قبل تقنينه فى دولة على مجموعة اللوائح والمراحل، باعتبار الدولة من ناحية دستورية لها سلطة كاملة فى إصدار القانون. رغم من وجود اللوائح والمراحل فى إصدار هذه تعدّدية القانون الرسمية المنبثقة من العرف القوانين الأخلاقية التى انتشرت فى المجتمع لَكن الدوَلة فى الواقع تكون وكيلا أساسيا ولها حق فى تكوينها وليس منفرد طبعا فى إصدارها.. بالمعنى الآخر أنه من رغم هناك اعتراف فعلى بأهمية هذه العرف أو القوانين الأخلاقية، لكنها سيتم تهميشها. ذلك يرجع إلى عامل سياسى واجتماعى حيث تسيطر عليها المساومة والعوامل الأخرى التى توجد فى خارج المنطقة القانونية.

والسؤال المطروح فى موضوع إندونيسيا هل هذا الأمر يحدث بسبب التنافس بين القانون الإسلامى والعرف مع توحيد القوانين فى البلاد؟ هل نجحت الدولة كلية فى تكوين القوانين الموحدة؟ والاجابة على هذه التساؤلات هى من صميم البحث. يرى الباحث أن توحيد القوانين قد تحقق من ناحية إجرائية لكنه لم يكلل بنجاح من ناحية مضمونية. على ذلك فى رأى الباحث هناك موقف غير ثابت للدولة من النظر إلى تطور القانون الإسلامي والعرف الذى حدث منذ إنشاء هذه الجمهورية حيث تتبنى الدولة على نظام القوانين الموحدة أكثر تجانسا والقادرة على توحيد النظم والقيم المختلفة فى المجتمع. على سبيل المثال يقوم البحث بالدراسة المقارنة بين المواقف المختلفة للدولة من قانون

أحوال الشخصية وقانون الأراضى. ومن القاضيتين المذكورتين يتبين لنا أنه من رغم الاجراءات الموحدة أصبحت متحانسة لكن سماتها المضمونية فى القانونين ما تزال مختلفة وفى القانون الأول مثلا تبدو الدولة تدع منذ البدابة حدوث الاستقطابية والتعددية فى تنفيذ قانون أحوال الشخصية، لكن هذا الأمر لم يحدث فى القانون الثانى. يرى الباحث أن التفرقة قد وقعت منذ بداية الأمر بين فلسفة القوانين الأخلاقية التى تبنى على أساس الدين والعرف بين مبادئ توحيد الأمثل فى القانون الوطنى الذى يريد تطويره داخل المجتمع التعددى فى إندونيسيا.

ثم هل تحل هذه المشكلة الأساسية مع تبدل الحكومة؟ قد أجاب الباحث صراحة بالنفى لأن ما فعلت الحكومة الحالية لم يختلف عما فعلته الحكومة السابقة ويركز البحث فى استدلاله على الواقع القانوني للاحوال الشخصية والأراضي الجديدة، وفى القضية الأولى بذلت الحكومة جهودا فى توحيد المضمون لقانون أحوال الشخصية فى عصر الحكومة "الطريقة الجديدة" بسبب يرجع إلى تشدد المعارضة الإسلامية فى ذلك العصر، ويتكرر هذا الأمر فى القاضية الثانية لأى فى تقنين قانون الأراضى على أساس العرف ونجحت فيه الحكومة فى توحيد إجراءاته ومضمونه التى يتمسك بها أنصار العرف بدون تنازل ومساومة تذكر.

فى الفقرات التالية يرى البحث أن فى النصف الأول من التسعينيات توجد رغبة قوية فى إعطاء فرصة أكبر للقيم الإسلامية فى مختلف القوانين المعمولة فى البلاد مثل قانون الزكاة والحج لكن لم يعط نفس الفرصة للقيم العرفية والتقاليد فى القانون الوطنى إلا قليلا وآثرها لم تذكر. من هنا فى رأى الباحث يتبين لنا أن هناك التفرقة فى موقف الحكومة من ظهور هذه القوانين. هذا الأمر لم يرجع إلى قوة موقف الصفقة للسياسيين الإسلاميين كالأغلبية فحسب، بل أيضا إلى رغبة نظام حاكم فى تأمين موقفه من الحصول على تأييد سياسي من أكبر التنظيمات الدينية فى البلاد. على ذلك يرى الباحث أن هذا الأمر معقول لأن القوانين الموافقة بالشريعة تعتبر فى الأساس من وسائل فعالة للتدعيم السياسي واستقرار مصلحة الحاكم مع التنظيمات الدينية المذكورة.

The attitude of the state towards legal pluralism in Indonesia has changed little in the last six decades. Throughout this period, the state has maintained its dominance in regulating legal pluralism. This might be just a logical consequence of the civil law system which was inherited from the Dutch. This system places the institution of law inseparable from the state. As a result, the creation of law proceeds through the state legislation, while any processes taking place beyond the state are rejected. Although in practical terms the dialogue between the state and society is always needed in the process of law making, the final decision is certainly made by the state. This is the teaching behind the ideology of state positivism. And this is what the government of Indonesia has prescribed: it will always take a role as the sole institution which ultimately makes the laws. Such an approach is known as "state law pluralism," whereby the state becomes the sole agent of law-making.[1]

Keeping in mind the Indonesian Government's policy regarding legal pluralism, this article will take a closer look at how the Government deals with the existence of both Islamic law and customary law (*adat*). The adoption of "state law pluralism", especially by the New Order regime since 1970s, has had an evident impact on the way the state handles the institution of *adat* and Islamic law (*sharī'ah*). The question is what is the motive behind employing this strategy? This is a question that necessitates more a socio-political approach in the study of comparative law, drawing on a number of regulations and acts related to *adat* and Islamic law as the primary sources.

The Continued Strategy of Legal Pluralism Throughout the Old and New Order Regimes

Although differing in some minor aspects, the strategies of the respective governments with regards to legal pluralism are relatively the same. The foundation of the principle of state law pluralism lays in granting the power of law-making fully to the state. The acceptance and implementation of any legal traditions in the society will thus depend entirely on the state policies, regardless of just how deeply-rooted they are in the everyday lives of members of the community. The choice of such an ideology might be a consequence of the formation of the state itself since the nation-state intended in Indonesia is basically a united state which can integrate all different cultural and religious values.[2]

The Old Order Government of President Soekarno was less assertive in implementing its policy of pluralism. It tended to stand aloof from many cases of law related to varied legal traditions and from making any new legal creations in response to legal pluralism, in spite of the *de facto* existence of many Dutch laws that had become entrenched in society. Take, for example, the law of marriage. Although there existed an overwhelming need for the creation of new and less-dubious marriage laws, the government did little to create unified and clear laws of marriage.[3]

Interestingly, however, the Old Order regime took a different approach with regards to agrarian laws and was more active in ensuring that such laws were more uniform. As early as 1960, Soekarno had signed the Basic Agrarian Law (Law No. 5 of 1960). With this Law, the plurality in the practice of land regulation, which in many cases was based on *adat* land law and remnants of Dutch law, was to be unified through a uniform law. The plurality was not merely a result of the influence of the *adat* tradition but also Dutch land laws which had overtime become ingrained in society.

One thing to realize is that with the implementation of Law No. 5/1960, the position of *adat* law within the national law system seemed to be in jeopardy. From the very beginning, it was evident that the government was uncertain about how it should deal with *adat* law. The main problem rested always in the gap between the philosophy of *adat* law and the ideal principle of national law that would help build a unified Indonesia. The state was thus constantly doubtful as to how to deal with the indigenous *adat* law. On one hand, there was a need to establish a system of national law independent from foreign legal traditions, with laws that reflect the values of indigenous culture.[4] The plurality and uncertainty of the unwritten *adat* law has always been a pitfall for jurists. This is none the more evident in the case of land laws as mentioned above; on the one hand *adat* law is drawn upon as an important source for making the national land law, but in some articles the existence of *hak ulayat* (communal land rights), the core teaching of *adat* land law, is simply ignored.[5]

The Old Order regime's preference for abolishing *adat* law altogether was obvious in its attitude towards the *adat* judicial system. The government had as early as 1947 tried to eliminate the *adat* courts that were spread all over the country. With Law No. 7/1947 and Law No. 23/ 1947, Soekarno effectively closed down the *adat* courts as they were seen as endangering the process of creating a unified judicial system, as a basis for national state building.

Not long after those two laws, the government again passed Law No. 19/1948 on the judicial system in Indonesia, recognizing only three judicial systems in the country, that is, General, Military and Administrative Courts, with no mention at all of the *adat* courts that had existed in the society of archipelago long before the birth of the nation-state of Indonesia itself. Such a policy was in strong contrast to the policy of the government to preserve the religious court institutions. Even though many nationalist jurists in the country were indifferent about the existence of the religious courts, the state persistently maintained them.

Interestingly, the change of power following the rise of General Soeharto did not bring with it a change in attitude towards both Islamic law and *adat* law. Although Soeharto was well-known for his overwhelming preference to see the state – and not religion – dominate all spheres of life in the country, he seemed no different from his predecessor in dealing with non-state legal institutions. What was different, however, was the New Order regime's assertiveness in dealing with the national marriage law. The government did have to deal with some challengers to their efforts to implement a uniform national marriage law. In this case, Muslim groups were apparently the main protagonists opposing the government plan to unify the marriage law. Although they did not fully reject the idea of nationalizing marriage law, their complaint was that the government sought to secularize the divine teachings of Islamic marriage law. Indeed, this has been the main problem that has haunted the government from the very beginning: how to create a unified marriage law that does not alienate Muslims by attacking – even if unintentionally – their religious values or doctrine.

To the New Order's credit, the government was finally successful in its efforts to create a national marriage law. This was achieved through the agreement of secular nationalist and Muslim groups, who finally agreed to relinquish their demands to have some articles in the bill removed. The most important point here is the success of Muslim groups to have religion infused as the basis of marriage; the marriage contract in Indonesia is therefore not merely seen as a civil contract, but more as a legal agreement of a religious nature.[6]

No more than one year after coming to power, the New Order regime passed Law No. 5 of 1967. This law principally regulated the dominant role of the state in managing forests throughout the country. The passing of this law illustrates the somewhat severe attitude of the state toward *adat* law. It was with this law that the teaching of *hak ulayat*, especially with regards to *adat* forest rights which were

still recognized by many *adat* communities, was replaced by the role of the state to control the Indonesian forests. This law was of course a continuation of the Old Order policy that sufficiently restricted the rights of the *adat* communities to manage the forests by practicing the teaching of *hak ulayat*.[7] Three years later, Law No. 14 of 1970 on the judicial system further strengthened the institution of religious (Islamic) courts throughout the country. According to this law, the state formally recognized only four judicial institutions, that is, general, religious (Islamic), military and administrative courts.[8]

Intriguingly, many experts regard the role of the legislative at that time to be just a rubber stamp of the executive's dominant function to create laws. This is absurd, since any efforts to build a modern legal system in Indonesia would most certainly have been hampered by the deep interference of the executive in the process of law making. We note that many important regulations in the New Order era were mostly in the form of Government Regulation (*Peraturan Pemerintah*) and not that of the Laws or Acts (*Undang-Undang*), evidence that the executive was surpassing the role of the legislative assembly in the country's law-making.[9]

Soeharto continued to improve the position of Islamic law in the country when he passed Government Regulation No. 28 of 1977, which essentially ensured that the Islamic law of endowment (*waqf*) became part of the national law system. The introduction of this regulation was largely a result of the need to complement the Basic Agrarian Law of 1960, especially with regards to land owned by individual parties,[10] yet many jurists simply viewed the *waqf* regulation on land to be a positive sign for the future of Islamic law in the country. The future was viewed to be considerably more optimistic than that of *hak ulayat* on *adat* land law, which the government had done away with at the birth of the Republic.

Understandably, the relationship between the state and Muslims has influenced the production of laws and regulations in Indonesia. Throughout Soeharto's rule, the dominant consideration for the government was the political battle between Muslim and secularists; most secular nationalists worried that Muslim groups were pushing for the creation of an Islamic state. In the sphere of law, secular jurists mostly feared the revival of Shari'ah teachings reflected in the Jakarta Charter of 1945. Most secular nationalists believed that the implementation of Islamic law in Indonesia could not be undertaken without sacrificing the "state law pluralism" which had already become acceptable for all religious groups in the country.

A number of factors, primarily two, contributed to maintaining this divide between Muslims and secular nationalists: *First*, until the early 1980s, Soeharto's government failed to formulate a clear strategy in dealing with the fact of legal pluralism in the country. *Second*, both Muslims and the secularists could not in fact forget the past conflict over the Jakarta Charter. As a result, to what extent Islamic law could be streamlined with national law was always influenced greatly by Islam-State relations. In the 1980s, for instance, Islam-State relations were not so harmonious. At the time, Soeharto remained sceptical of the sincerity of Muslim groups to not continue their struggle for the establishment of an Islamic state. And this was in conjunction with the struggle of the New Order to make Pancasila (the Five Principles) the sole ideology of the state. During the 1980s, therefore, Soeharto's government tended to be a lot more prudent in handling the issue of Islamic law.

Interestingly, the "positivization"[11] of Islamic law appeared to be a factor in the waning of Soeharto's popularity since the end of the 1980s. This led him to start thinking about Islam as an alternative to support his power. It is in this context that we see the strong willingness of the New Order to promulgate the Law No. 7 of 1989 on the Religious Judicature. The birth of this law was so surprising for most nationalist jurists because they felt that they were winning the President's favour in the Muslim-Secularist debate. Again, we see here that the Islam-state relationship ultimately decided the case: although the debate on the draft law was so strong – both within and outside of the parliament - the protagonists of the religious courts finally won.

The strengthening position of the religious courts continued furthermore after the promulgation of Law No. 7/1989. In 1991, President Soeharto, through Presidential Instruction No. 1, issued the Compilation of Islamic Law in Indonesia, which basically served as the primary source of reference for judges in the religious courts in deciding the family law cases. The religious court is now not only strengthened in its institutional legal standing but also in its substantive jurisdiction. This is in strong contrast to the position of *adat* law recognition of which largely depends of the judges at the general courts. This policy towards *adat* law was maintained by New Order up to its very demise in the late 1990s.

The *Reformasi* Era: A New Hope

The freedoms and changes to the political system that have resulted from the "*reformasi* era" (i.e. post-Soeharto) have led many to believe that there would also be a change in the state's attitude towards non-state normative orderings, especially in its proclivity to interfere in all aspects of the lives of its citizens. Such expectations are true with regards to law, with hopes that there will be reduced domination of the executive in the process of law-making by giving more autonomy to the legislative assembly in their role of law creation. Yet, changing the tradition is indeed not as easy as the clap of a hand. The hope that the state will orient itself towards people's needs was in fact not realized; and the state has thus always tended to continue their old pattern of governance whereby the interests of the state are always the first to consider. Perhaps the only positive development has been that the role of the legislative in the process of law-making seems to have been improved.

By considering a number of laws and regulations that are in place today, it is evident the respective Governments of the *reformasi* era have done little to improve the marginalized position of *adat* law, and continued to strengthen the position of Islamic law in the society. This was particularly true of the Habibie government. Although his term was considerably shorter than other presidents, he was able to introduce a good number of new laws that upheld Islamic practices in society. In the *reformasi* era, at least five acts have been introduced, four of which were the products of the Habibie Government; the current government of Susilo Bambang Yudoyono passed the other law. The four acts passed by Habibie's government are: Law No. 41/1999, as an amendment of the forest law passed in 1967; Law No. 17/1999; Law No. 38/1999; and Law No. 35/1999. The last three laws cover issues related to Islamic law, while the newest law - Law No. 3/2006 – is an amendment to Law No. 7/1989 on the Religious Judicature. All of this illustrates the government's continued tendency to strengthen the already strong tradition of Islamic law.

As an amendment to Law No. 5/1967, Law No. 41/1999 is an improvement to the old forest law. The 1967 law regulated the management of forest, stipulating that the central government would maintain full control. This effectively meant that the communal or individual right of managing the forest (from the *adat* forest law) was therefore practically abolished. This attitude of state dominance in the management of the forests was basically maintained

by the new Forest Law of 1999, albeit with decreased powers to the state. The new Law stipulates that private cultivation of the forests is allowed. Interestingly, Article 1 of the Law mentions that *adat* forest constitutes forest owned by the state in spite of its location in communal *adat* land. Article 4 (3), further states very clearly that the management of the forests should take into consideration *adat* law, as long as the *adat* law is "recognized and not in contrary to state interests." This means that the *adat* land rights are recognized as long as they do not threaten the interests of the state. In essence, what this means is that the *adat* forestry rights are only protected as long as they do not pose a threat to the state's interests. The new Forest Law is proof that the state's policy regarding *adat* has never changed, namely because *adat* laws and rights are viewed to be a threat to the state's control over all lands in the country.

What is most intriguing is that governments that followed Habibie's government have followed his lead in regards to promoting Islamic law, despite his relatively short time in power. The three laws passed by Habibie's government during the short time of his presidency gave a strong indication of the penchant to support the existence of Islamic law in the country. Law No. 17/1999 on the management of the pilgrimage, for instance, provided non-government institutions with the opportunity to play a role in the management of the *Ḥajj* in Saudi Arabia. This was a positive step in the right direction since the management of the pilgrimage had prior to this been monopolized by the government. That was why some Muslim groups suggested that the government reduce its domination by allowing the non-government sectors to play a greater role.

Law No. 38/1999 on the administration of *zakat* (Islamic charity) was also a big step taken by Habibie in an effort to address the concerns of Muslims regarding the teachings and practices of *zakat* in society. Despite his considerably lengthy time in power—31 years in fact—Soeharto never took Muslim concerns in this regards seriously, and thus never attempted to address the issue. But in just one year in power, the Habibie Government changed all this with the introduction of Law No.38, providing formal recognition from the state on the importance of Muslims to practice the teaching of Islamic philanthropy.

The Habibie Government also passed Law No. 35/1999, amending Law No. 14/1970 on the judicial system in Indonesia. What is most important to note here is how the state gives preferential treatment to the religious courts. Basically, under Law No. 35 all judicial

systems are brought under the authority of the Supreme Court, the exception being the religious courts. For the religious courts, non-judicial (administrative) matters remain under the authority of the Department of Religious Affairs, while judicial matters ultimately fall under the authority of the Supreme Court. This special treatment of the religious courts has now, however, been amended by Law No. 4/2004. At any rate, it is evident that the Habibie government strived to maintain a prominent position for the religious courts vis-à-vis the other courts. This was, nonetheless, largely a result of the demands of the many Muslim leaders and organizations who argued that integrating the religious courts with the other courts would result in a muddling up of the religious institution with the secular one. Although the new Law No. 4/2004 has changed this policy as it regulates the single roof management of all courts in the country, five years of special treatment to the religious courts is a clear indication of the state to constantly give a better place to the institution of Islamic law.

This is certainly true of the current government. Among the more important aspects of Law No. 3 of 2006 is that the jurisdiction of the religious courts has been expanded. Thus courts are now not only dealing with the cases of Islamic family law (marriage, divorce, inheritance and almsgiving, and other related cases) but also cases of Islamic business law.[12] Article 49 of Law No. 3/2006 states that the religious courts are authorized to process and settle the cases related to matters of Islamic economy. The expansion of the religious courts' jurisdiction reflects the state's willingness to fortify the courts as the centre for implementing all aspects of Islamic law in the country, regardless of whether or not these courts have the institutional capacity to do so. This leads us to ask a critical question: What is the motive behind this preferential treatment of Islamic law?

Rational Choice and the Strategy of the State with regards to Legal Pluralism

From the preceding discussion, we can see how the strategy of state law pluralism has resulted in *adat* law being sidelined. And while it could be said that the government has always maintained a position of supporting Islamic law – albeit in a limited manner - the teachings and character of the law derived from divine teachings have been altered so as to suit the state's secular laws. This seems to

be the consequence of the ideology of state positivism. Our question is what are the reasons for the state's strategy of upholding Islamic law yet neglecting—and at times eradicating—non-state legal traditions (i.e. *adat* law)?

Theoretically, the adoption of a state law pluralism strategy should bring a positive effect to the existence of any legal traditions living in society as the theoretical perspective of that concept dictates the state to recognize equally all non-state normative orderings. In fact, this is what is prescribed in the Theory of National Law: the state's main duty in regards to establishing a legal system is to adopt those non-state normative orderings as much as possible in line with the mission of national law. Yet, no one can deny the influence of political factors in the program of law making since the adoption of certain legal traditions into national law system is relied not only on the mere substantive aspects but also some factors beyond the normative teachings of certain legal tradition. Even in many cases, the non-substantive factors are found as deciding the whole process of that adoption. It is here that we need to understand the state's behaviour in the process of legal creation.

In the view of Max Weber, the recognition and incorporation of the state to certain non-state normative orderings are basically a logical consequence of the rationalization of the state's role itself.[13] As can be seen in the case of Indonesia, such a rationalization is basically done to maximally preserve the role of the state as the sole agent of law making. Therefore, some strategies to accommodate any legal traditions, especially Islamic law and *adat* law which, has been done so far by different regimes in the country—such as centralization, codification or even (using Weber's term) "profanization",[14]—were chosen with one purpose to strengthen the state's position. Here, we can say that the policy of incorporation of those non-state normative orderings is not seen as endangering but even strengthening the ideology of state legalism. In line with Weber's thought, Van Cott has also explained this analysis when he described the same kind of phenomenon in the Latin America. In his view, the utmost reason of the state's recognition is the need of the state to ensure its role in the society. Any strategy of accommodation towards legal traditions living in the country is taken for the sake of improving the authenticity of the state law, as well as a number of other reasons such as improving state-society relations.[15]

It is understandable, therefore, that in order to achieve legitimacy, the state must always be ready to adopt and adapt itself to the

legal traditions which find the widest level of support. Besides garnering political support[16], this accommodation of non-state normative orderings also acts to increase people participation or uphold the plurality of the society.[17] Therefore, it would not be an exaggeration to say that the policy of accommodation is always done on the basis of cost-benefit for the state itself.[18] Following this logic, the state policy of legal pluralism in Indonesia is no more than a result of the state's rational choice in the process of national law making and not just a continuation of the colonial inherited strategies.

The institution of the state is therefore merely a self-interested actor. The strengthening or declining of a legal tradition in a certain state is just a manifestation of the state's own selfishness; in this case, the process of law creation done with the cost-benefit analysis will always be consistent with the interest of the regime in power.[19] In other words, any kinds of policy given by the Indonesian government concerning the existence of Islamic law and *adat* law and to what extent the accommodation is possible towards those non-state laws is totally an expression of the regime's cost-benefit calculation.[20] Their consideration is of course not limited to merely the aspects of legal strategies, but to include also the wider spectrum of analysis, such as the factors of socio-politics and security of the state, together all compounded into one objective, namely, to avoid the conflicts that arose as a result of legal pluralism.[21]

However, it is not correct to assume that in its development the application of the rational choice strategy is static; it does in fact depend much on many different factors in conjunction with the change of the political structure as well as the state-society relationship. The tendency of the Old Order to treat Islam-state relations with more prudence than the New Order is basically just a derivation of their cost-benefit calculations in dealing with the problem of legal pluralism. It is further a result of the different socio-political situations encountered by both regimes. In the time of Soekarno, for example, the early power transition from colonial to post-colonial government had led to unstable political conditions. This led the Government to adopt a much more cautious position when dealing with a dominant legal tradition that had much support from society.

It is not a surprise therefore to see the Old Order's proclivity not to promulgate many laws related to the substance of Islamic legal teachings. In the law of marriage, as stated above, the state was understandably more concerned with the matters of procedure and not that of substance, to which the government preferred to main-

tain its plural practice. On the contrary, in matters related to the basic philosophical idea of state building, the young government had already been very forceful in upholding its ideology of legal uniformism. The *adat* land law was therefore the victim here since the *adat* teaching of *hak ulayat* was nothing but in opposition to the ideology of "modern" individual land rights, idealized to build in the country. Therefore, although the state necessitated the political support from the society in order to expand its legitimacy, it preferred to take a risk to eliminate the practice of *hak ulayat* for the sake of legal unification and uniformity throughout the country. This is clearly the reason also behind the Old Order's early policy to obliterate the *adat* courts, even though that was certainly an unpopular decision. The primary reason for the elimination of the *adat* courts was the commonly held view that the existence of this institution was contrary to the unificationist idea of the judicial system.[22]

Interestingly, such a strategy did not differ with the change of the regime from the Old Order to the New Order. Therefore, although the project of centralization and uniformation of the legal system was much more costly than maintaining the *adat* courts throughout the country, the government finally chose the first as there was greater promise in terms of achieving the ideal of national law.

Surprisingly, this strategy on the part of the Government was advantageous to the position of Islamic law. The character of Islamic law as a uniform and nationalized legal tradition - as it is built on one Islamic ideology – guaranteed its survival amidst the state's ambitions to establish a uniform national legal system. Different to *adat* law which is so local and plural, Islamic law is epistemologically close to the state law since the two laws are basically developed on the idea of one law for all, i.e., all Indonesian people without provincial or local discrepancies. That is why, in contrast to the fate of *adat* courts, which were basically eliminated with the development of the state courts, the institution of Islamic courts has always been secure. Today, in fact, its position is even stronger, notwithstanding the political upheavals in the post-Soeharto era.

As explained above, another factor that can support the existence of Islamic law is the scope of its implementation. The sheer weight of Muslim support – not forgetting that Muslims constitute around 90% of the Indonesian population – for aspects of Islamic law has become a dominant factor in the effort to maintain the tradition in the face of the challenge of the secular state law. Thus, there appears to be a general rule that can be derived from the experience of Islamic law vis-à-vis the state law: the more number of people fol-

lowing this religious law, the stronger position of the law in the face of the state law. And this is an important basis for the government to consider Islamic law in the process of policy making.

Hence, the main motive of the state's support for Islamic law is clear: greater support from the Muslim population. This was particularly important for post-New Order era governments that sought political stability through wider public support. It is not a surprise therefore that despite a relatively short time in power, Habibie could pass three acts specifically improving the efficacy of Islamic legal teachings. In sum, logically, to what extent the state will accommodate certain non-state normative ordering depends to a great extent on the degree of benefit the state will acquire from such an accommodation, and less from mere substantive legal considerations.

Conclusion: A Theoretical Appraisal

The above discussion is intended to set forth a thesis that the change of political power in Indonesia over the last five decades has had impacts on differing policies with regards to legal pluralism. The strategy of state law pluralism that might be implemented without any real deliberation has resulted in the same pattern of legal strategy, that is, strengthening the position of Islamic law in the midst of the weakened *adat* law in the system of national law. The choice of such a strategy is basically a result of the state's cost-benefit calculation.

Concerning the state's attitude towards the two legal traditions, Islamic law and *adat* law, some factors may be explained here. *First*, the distinction in the normative character of these two legal traditions is ultimately what leads the state to take a different position on each of them. Islamic law is relatively more similar to state law than *adat* law is, the main similarity being that both state and Islamic law are uniform and nationally can be implemented nationwide. Islamic law can be introduced nationally on the basis that those who it would most like apply to – Muslims – form the majority in Indonesia. This is, however, not the case with *adat* law. The characteristics of *adat* law as a local and heterogeneous legal tradition are intrinsically not in line with the philosophy of national law, which is anti-localism and homogeneous. It is just impossible to make *adat* law an effective law for all Indonesian citizens.

Second, political pressure to implement certain legal traditions will obviously influence the willingness of the state to accept those traditions. The state cannot ignore the fact that Islamic law will main-

tain a dominant legal position in the country as long as Muslims constitute the majority in this country. This is different to *adat* law; its locality and plurality has made it difficult to sculpture it into a uniform and national law suitable and acceptable for all Indonesian people. As a result, the state tends to support the implementation of aspects of Islamic law, while *adat* law is marginalized.

The stark contrast in the development of these two legal traditions is in fact not merely the consequence of the state acceptance of one and marginalization of the other according to its own interests, but also a result of the nature of the two legal traditions; Islamic law does not conflict with state law to the same extent that *adat* law does.

Endnotes

1. On the basic theory of legal pluralism see John Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism* 1.24 (1986); Gordon R. Woodman, "The Idea of Legal Pluralism," *Legal Pluralism in the Arab World*, eds., Baudouin Dupret, Maurits Berger, and Laila al-Zwaini (The Hague, London & Boston: Kluwer Law International, 1999) 3, esp. at 5.
2. For a theoretical explanation of state positivism see Roscoe Pound, "Theories of Law," Yale Law Journal 114 (1912): 22. See also Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986) 107-110; and Samuel I. Shuman, *Legal Positivism: Its Scope and Limitations* (Detroit: Wayne State University Press, 1963) 14-15.
3. See a number of related acts including: Law No. 22/1946 and Law No. 32/1954. Both acts are essentially highly influenced by the Dutch regulation passed 1895 in the *Staatsblad* No. 198/1895.
4. This can be seen also in the Decision of the Preliminary People's Assembly No. II/1960 regarding *adat* law as a source for building the national legal system in the country.
5. Through Law No. 5 of 1967 on the forestry law in Indonesia, the state principally controlled the management of the Indonesian forests. These forests used to be managed through the *adat hak ulayat*.
6. For more detail on the nature of the system of marriage law see regulations complementing the Basic Marriage Law No. 1/1974, namely: Government Regulation No. 9/1975, Regulation of the Minister of Religious Affairs No. 3 and 4 of 1975, and also the Regulation of the Minister of Interior No. 221a of 1975.
7. See Kallie Szczepanski, "Land Policy and Adat Law in Indonesia's Forest," *Pacific Rim Law & Policy Journal* 11 (2002): 231.
8. See Article 10 of Law No 14/1970.
9. For instance, the data explained by Ramlan Surbakti, "Formal Political Institutions," *Indonesia: The Challenge of Change*, eds., Richard W. Baker, et al. (Singapore: Institute of Southeast Asian Studies, 1999) 61.
10. The close relation between Government Regulation of the Waqf of Land with Individual Ownership and Law No. 5/1960 on the land law is clearly reflected in that Regulation.
11. The term "posivitization" here is basically defined as a kind of strategy of the state to adopt Islamic legal tradition and meld it with the system of secular state law. The character of Islamic law as a non-formal, varied and sacred law is therefore altered to become a formal, secular and homogeneous like a state law. The procedure and substance of the religious law thus also follow the character of state positive law.
12. Compare: Art. 49 of Law No. 7/1989 that states that the jurisdiction of the religious courts includes: a) marriage; b) inheritance, bequest and gift, processed on the basis of Islamic law; and c) endowment and shadaqah, with Art. 49 of Law No. 3/2006 which expands the jurisdiction of the religious courts to include: marriage, inheritance, bequest, gift, endowment, Islamic charity, donation, almsgiving and Islamic economy. See these two laws in Mahkamah Agung RI, *Undang-Undang Republik Indonesia Nomor 3 Tahun 2006 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1989 tentang*

Peradilan Agama (Jakarta: Direktorat Jenderal Badan Peradilan Agama, Mahkamah Agung RI., 2006) 20; 61.

13. Weber himself defined the state as: "A compulsory political association with continuous organization (*politischer Anstaltsbetrieb*)...if and in so far as its administrative staff successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order." This is different to what he called the church where its staff can claim the monopoly of the use of "hierocratic" coercion. See Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York: The Free Press, 1947) at 154, 156. See also Roger Cotterrell, "Legality and Political Legitimacy in the Sociology of Max Weber," *Legality, Ideology and the State*, ed., David Sugarman (London: Academic Press, 1983) 69; 73-81, especially on the discussion of Weber's theory of legal domination and its relevance to the modern state.
14. The use of the term "profanization" here is influenced by Weber's logic in using the term *profane* (*Alltag*) in contrast to the sacred in his explanation about Charisma. See Weber, *The Theory of Social and Economic Organization*, 361. Weber used the two antitheses of *Charisma* and *Alltag* in two meanings: *first*, temporary and extraordinary in contrast to everyday and routine; and *second*, sacred as an opposite of profane. The term profanization thus can be used here to connote the government's efforts to change the tradition of non-state laws derived from a charismatic/sacred authority to become a profane law by way of permeating non-sacred factors inside the sacred law since the law is now derived from the state rational authority. On codification see Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954) 256-283.
15. Donna Lee Van Cott, "A Political Analysis of Legal Pluralism in Bolivia and Colombia," Journal of Latin American Studies 32 (2000): 210. On the example of the authenticity of law and its relation with the change in Islamic law in Malaysia, see Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change II" *American Journal of Comparative Law* 42 (1994): 543.
16. See further, for instance, Jack Spence, "Institutionalizing Neighborhood Courts: Two Chilean Experiences," *The Politics of Informal Justice*, ed. Richard L. Abel, vol. 2 (New York: Academic Press, 1982) 243-247.
17. Van Cott, *supra* note 15, page 232: "Most contemporary cases reflect the efforts of post-colonial or multiethnic states to accommodate the claims of sub-state groups in order to reduce inter-ethnic conflict, as well as to serve other state aims, such as extending the rule of law and state authority into peripheral areas." In the case of India, see Susan Hoeber Rudolph and Llyod Rudolph, "Living with Difference in India," *Religion and Democracy*, eds., David Marquand and Ronald L. Nettler (Oxford: Blackwell Publishers, 2000) 20-22.
18. On the choice of cost-benefit approach in legal pluralism see John Griffiths, "Four Laws of Interaction in Circumstances of Legal Pluralism: First step Towards Explanatory Theory," *People's Law and State Law*, eds., Anthony Allot and Gordon R. Woodman (Dodrecht: Foris Publications, 1985) 217-222.
19. See Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988) 3: "...all the actors who compose the polity, including the

policymakers, are rational and self-interested. ...they calculate the costs and benefits of proposed actions and choose the course of action most consistent with their fixed preferences. ...that actors who compose the state have interests of their own, derived from and supported by institutional power".

20. For a theoretical explanation of cost-benefit approach see Richard Posner, *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1981). On page 76 he explains: "Another implication of the wealth-maximization approach, however, is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth.... If he happens to be born feeble-minded and his net social product is negative, he would have no right to the means of support even though there was nothing blameworthy in his ability to support himself."
21. On the interest of the regime to expand its legitimacy by way of recognizing pluralism, especially through the development of a judicial system, see Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981) 22-24. On page 22, he comments: "Conquerors use courts as one of their many instruments for holding and controlling conquered territories. And more generally, governing authorities seek to maintain or increase their legitimacy through the courts. Thus a major function of courts in many societies is a particular form of social control, the recruiting of support for the regime."
22. For further analysis of the fate of *adat* law in the post colonial era of Indonesia, see Ratno Lukito, "Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia," (Doctoral Dissertation, McGill University, 2006) 226-238.

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