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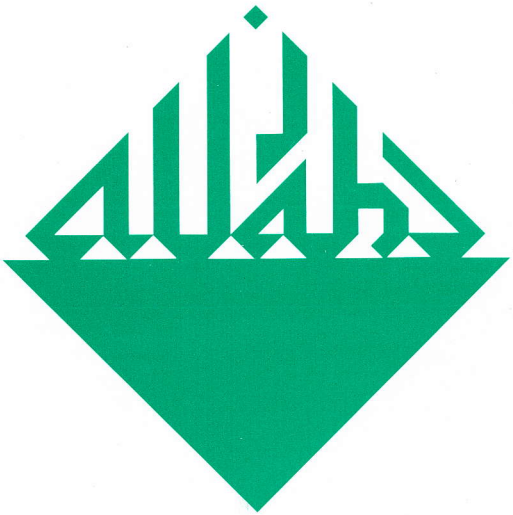

PARTAI KEADILAN SEJAHTERA:
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KOMITE PERSIAPAN PENEGAKAN SYARIAT ISLAM:
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CHANGE AND CONTINUITY:
THE KOMPILASI AND INDONESIAN ISLAMIC COURTS'

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Euis Nurlaelawati

Change and Continuity: The Kompilasi and Indonesian Islamic Courts'

Abstraksi: *Dalam seratus tahun terakhir dunia Islam menyaksikan perubahan mendasar dalam kodifikasi hukum keluarga Muslim. Fenomena ini berawal ketika Turki memberlakukan* Al-Majallat al-Ahkam al-Adliyah, *yang kemudian diikuti berbagai negara di belahan dunia Muslim lain. Indonesia bukanlah pengecualian. Pada 1991 negara berpenduduk Muslim terbesar di dunia ini mengesahkan Kompilasi Hukum Islam (KHI) melalui Instruksi Presiden (Inpres) No. 1/1991. Meskipun sebelumnya Indonesia telah menerapkan beberapa aturan dan bahkan undang-undang yang menyangkut hukum keluarga Islam, KHI tetap merupakan tonggak penting legislasi hukum Islam. Ia menghimpun atau mengkompilasi aturan-aturan yang tersebar dalam berbagai kitab fiqh, yang mencakup masalah perkawinan, kewarisan, dan perwakafan, secara komprehensif. Lebih dari itu, ia juga memasukkan aturan-aturan yang bernuansa pembaruan dalam rangka menjembatani ketegangan antara hukum Islam, kepentingan negara, dan adat, yang di beberapa daerah di Indonesia telah menjadi bagian inheren dari praktik hukum masyarakat sejak lama.*

KHI ditetapkan sebagai referensi yang harus dirujuk oleh seluruh hakim di Pengadilan Agama ketika menyidangkan perkara, mengganti berbagai aturan hukum Islam pada kitab-kitab fiqh. Dengan demikian, KHI hadir sebagai rujukan yang seragam bagi para hakim dalam memutus perkara. Karena itu, pemberlakuan KHI memiliki relevansi dengan konsep rasionalisasi hukum di Indonesia. Ia berusaha merasionalisasi aturan-aturan sakral hukum Islam ke dalam format hukum yang terstruktur, rasional dan modern.

Mengambil bentuk atau format teks hukum modern yang pembuatannya melibatkan tidak hanya ahli-ahli hukum Islam tetapi juga para 'ulama dan pemuka-pemuka organisasi-organisasi Islam di Indonesia, Kompilasi Hukum Islam *dibaptis sebagai produk ijma` (konsensus) 'ulama Indonesia. Meskipun demikian, keberadaannya ternyata masih diperdebatkan. Hal ini berpengaruh terhadap praktik beracara para hakim di Pengadilan Agama, yang dalam beberapa hal masih diliputi kegamangan dalam memilih rujukan hukum atas perkara yang mereka tangani.*

Aretikel ini mendiskusikan sikap dan perilaku hakim dalam mengambil pertimbangan hukum bagi perkara-perkara yang mereka selesaikan. Apakah para hakim sudah secara konsisten merujuk pada KHI dalam memutuskan berbagai perkara? Artikel ini mengungkapkan bahwa meskipun para hakim sudah merujuk kepada KHI, dalam beberapa kasus mereka masih mempergunakan kitab kuning dan mengabaikan KHI. Lalu, faktor-faktor dan alasan-alasan apa yang mendorong mereka mengabaikan KHI dan merujuk pada sumber hukum lain, seperti kitab kuning? Artikel ini menemukan bahwa, selain demi kemaslahatan publik dan kekhawatiran mereka menyimpang dari aturan fiqh yang sudah mapan, yang keduanya merupakan faktor yang bersifat kasuistik, keengganan ini berkait erat dengan beberapa alasan-alasan lain yang lebih fundamental, yakni; keinginan kuat para hakim untuk mempertahankan kekhasan (karakteristik) pengadilan agama dan kebutuhan untuk menjustifikasi putusan mereka dengan identitas keagamaan atau simbol-simbol keagamaan, serta konsep ijtihad yang mereka pegang kuat.

Untuk memperlihatkan fenomena tersebut dan adanya faktor-faktor tersebut di atas secara transparan dan jelas, paper ini akan mendiskusikannya disertai penyajian beberapa contoh putusan. Alasan-alasan dan contoh-contohnya yang bersifat kasuistik yang disajikan menjelaskan bahwa penyimpangan dari KHI dan secara bersamaan kecenderungan para hakim untuk merujuk kepada doktrin-doktrin fiqh mungkin hanya merupakan fenomena dari sikap sebagian hakim saja. Namun fakor-faktor lain yang disajikan dan bersifat universal dan fundamental memperlihatkan bahwa fenomena tersebut merepresentasikan sikap dan perilaku umum hakim di Pengadilan Agama.

Euis Nurlaelawati

Change and Continuity: The Kompilasi and Indonesian Islamic Courts'

الخلاصة: من خلال مائة سنة، قد حدثت فى العالم الإسلامي التطورات الملحوظة فى تقنين أحكام الأحوال الشخصية التى كانت بدايتها فى الأتراك عند ما طبقت "مجالات الأحكام العدلية"، ثم تبعتها الدول الإسلامية الأخرى بما فيها إندونيسيا التى عرفت بأغلبية المسلمين فيها. وفى عام ١٩٩١ أصدر القرار الجمهوري رقم ١ سنة ١٩٩١ بشأن مجموع الأحكام الإسلامية، رغم أنها طبقت قبل ذلك القوانين الأخرى التى تتعلق أيضا بقانون الأسرة الإسلامية، لكن هذا المجموع يعتبر أساسا مهما فى تقنين الأحكام الإسلامية. يتكون مجموع الأحكام الإسلامية من اللوائح المختلفة المنتشرة فى الكتب الفقهية التى تتعلق بمسائل الزواج والإرث، والأوقاف فى صورة متكاملة. بالإضافة إلى إدخال اللوائح التى تتسم بالتجديد لإيجاد الترابط بين الأحكام الإسلامية ومصالح الدولة وبين التقاليد والعرف فى بعض المناطق الإندونيسية التى كانت جزءا لا يتجزأ من وقائع الأحكام الموجودة فى المجتمع منذ الزمان.

وقرر مجموع الأحكام الإسلامية أن يكون مرجعا يعتمد عليه القضاة فى النظر إلى القضايا فى جميع المحاكم قبل إصدار الحكم عليها. قبل ذلك كانت الكتب الفقهية مرجعا أساسيا فيه. رغم وجود القانون رقم ١ سنة ١٩٧٤ بشأن أحوال شخصية (الزواج)، لكن الكتب الفقهية ما زالت مرجعا مفضلا وسائدا. هذا يرجع إلى أن القانون المذكور لم يتضمن أحكام الميراث فحسب، بل هناك بعض القضايا الزوجية لم يذكر حكمها فيه، مما يؤدي إلى وجود المراجع غير الموحدة عند القضاة فى إصدار الحكم وبالتالي تسفر عنه صعوبة الناس فى تحقيق العدالة فى المحاكم.

وهذه المسألة تذكرنا إلى ما قال "ويبير" عن تقاليد الأحكام الاجتماعية الموروثة التى تتسم بالغموض والتعسف فى الحكم. وحالة الأحكام التعسفية فى رأي "ويبير" ترتبط بإدارة الأحكام الغموضية حيث كانت سلطة القضاة تملك قوة مقدسة وتفسيرا شكليا. من هنا نجد أن

القاضي فى الغالب يميل إلى الذاتية والمحسوبية فى إصدار الحكم وإهمال القوانين المعمولة. إلا أن ""ويبير" يرى أن تغييرا جوهريا حدث فى عصر التنوير التى أدى به إلى تحول الأحكام الاجتماعية الموروثة إلى الأحكام أكثر ترتيبة ومعقولة التى تتسم بالعدالة الواضحة والثابتة فى حكمها. والعمل بمجموع الأحكام الإسلامية له علاقة بتعقل الأحكام الذى ذكره "ويبير"، والذى يحاول على تعقل الأحكام الإسلامية المقدسة لتصبح صيغة قانونية منظمة معقولة وعصرية. و جاء مجموع الأحكام الإسلامية بنظام التقنين الحديث والمنظم باللغة الإندونيسية للأحكام الإسلامية المختلفة التى كانت متناثرة فى الكتب التراثية (الصفراء) ومكتوبة باللغة العربية.

قد اشترك فى وضع مجموع الأحكام الإسلامية وصيغته الحديثة الفقهاء والعلماء ورؤساء التنظيمات الإسلامية المختلفة، بذلك يعتبر هذا المجموع نتيجة الإجماع للعلماء الإندونيسيين، ولكن وجوده ما يزال يثير الجدال التى يؤثر على القاضي فى اعماله القضائية فى المحاكم، لأنه فى بعض القضايا لا يملك ثقة كاملة فى جعل المجموع المذكور مرجعا فى إصدار الحكم .

ويناقش هذا البحث سلوك القاضي وموقفه من اتخاذ القرار فى بت القضايا المعروضة أمامه. هل القاضى يقف موقفا ثابتا فى الرجوع إلى مجموع الأحكام الإسلامية لبت القضايا المختلفة؟ وكشف البحث على أن القضاة قد رجعوا بالفعل إلى مجموع الأحكام الإسلامية فى إصدار الحكم، لكنهم فى بعض القضايا ما يزالون يطلعون على الكتب الفقهية التراثية ويهملون مجموع الأحكام الإسلامية. على ذلك ما هي المبررات التى جعلتهم إهمال مجموع الأحكام الإسلامية والرجوع إلى الكتب الفقهية القديمة؟. والاعتماد على نظرية الحكم الاجتماعي، هذا البحث يكشف لنا أنه بجانب المصلحة العامة وخوف القاضى على الانحراف من الأحكام الفقهية الثابتة وأن كليهما يعتبران من العوامل المؤقتة، هناك أيضا مبررات آخرى لخوفه هو حرصه على إبقاء خاصية المحاكم الشرعية وحاجته إلى تبرير أحكامه متفقة مع هواية دينية ومع نظرية الاجتهاد التى يتمسك بها.

والدليل على وجود تلك الظاهرة والعوامل المذكورة، يناقشه هذا البحث ويقدم عليه بعض الامثلة فى الأحكام الصادرة. والمبررات والامثلة التى أهملت مجموع الأحكام الإسلامية تتصف بصفة عارضة وتتعلق ببعض القضاة فقط. لكن العوامل الأخرى التى تتسم بالعالمية والأساسية أثبتت أن الظاهرة المذكورة تبين سلوك القاضى وموقفه فى المحاكم الدينية.

This paper takes a closer look at judicial practices and judgements in the Indonesian Islamic courts since the introduction of *Kompilasi* (full title: *Kompilasi Hukum Indonesia*, KHI). The *Kompilasi* covers Islamic legal rules, particularly family law, derived from various *fiqh* texts. The *Kompilasi* is divided into three books. Book One addresses marriage and divorce law. Book Two covers inheritance. Book Three is about endowment (*waqf*). The material is subdivided by topic into books, chapters, and articles, beginning with a chapter addressing general provisions, followed by chapters treating specific subject areas in each book.

This paper examines how judges in the Indonesian Islamic courts have referred to the *Kompilasi* in deciding legal cases put before them. Before the issuing of the *Kompilasi*, judges in the Indonesian Islamic courts decided legal cases brought before them largely on the basis of "classical *fiqh* texts". The Islamic legal thought reflected in such texts was usually identified as "jurist law" and was characterized by its focus on the casuistic method. On the one hand, as a jurist law, the *fiqh* texts were largely hypothetical rather than reality-oriented. On the other hand, the casuistry of *fiqh* texts is closely related to the structure of legal concepts, which was the outcome of an analogical way of thinking. As a consequence, there was no distinct structure of law which could guarantee certainty in legal transactions in society.[1]

The lack of "positive law" in the Islamic judicial system in Indonesia prior to the introduction of the *Kompilasi* had meant that the actual practices and judgements handed down by judges in the Indonesian Islamic courts were arbitrary in character. In making their decisions they were heavily influenced by *madhhab* affiliations, in which subjective preferences significantly determined what they considered the truth. This situation resulted in legal ambiguity. It was possible for disputants to ignore the authority of the decisions issued by the Islamic courts, by questioning their religious validity in the light of classical *fiqh* doctrines. It was in an effort to rid the Islamic legal system of this ambiguity that the *Kompilasi* was introduced

In looking more deeply at the impact of the *Kompilasi* I shall take account of not only the Islamic courts' use of the *fiqh* books but also ask: (1) whether or not the legal doctrines of the *fiqh* books have been maintained in dealing with the cases for which the *Kompilasi* sets different rules, in order to determine if the *Kompilasi* has been fully applied; (2) and to what extent the application of the *Kompilasi* has influenced the actual judicial process in the Islamic courts.

Considering the Public Interest

In what appears to be the majority of cases, judges in the Islamic courts have followed the provisions of the *Kompilasi* in deciding the legal cases brought before them. This is apparent in the judgements of the Islamic Court in South Jakarta (No. 19/pdt.p/1997/PAJS), which refused a request for confirmation of marriage (*ithbāt nikāḥ*) on the basis of the fact that it was requested by only one party, while the other party (the alleged husband) denied the marriage had ever taken place. The *Kompilasi* insists that the confirmation of marriage must be requested and agreed upon by a couple for their own welfare. Similarly, the judges of the Islamic court of Tasikmalaya (decision No. 11/pdt.p/ 2001/PA.Tsm), permitted a person to conclude a polygamous marriage only after the petitioner (the husband) could prove solid grounds for the need for a second wife. In this case, the wife had an incurable disease, and after he produced evidence of his capacity to finance the living expenses of his other wife/wives, as well as obtained the first wife's consent, he was given permission to marry again. In earlier cases, the judges of the Islamic court of Nganjuk refused to give a husband permission to take a second wife because it was known that the first wife, though yet to give birth, had no medical issues that would prevent her from conceiving in the future. The husband further argued that he had had sexual relations with the prospective second wife, which was then also put forward as a reason for the petition, but this line of argument was also rejected on the basis that the satisfying one's sexual appetite was not mentioned in the *Kompilasi* as sufficient reasoning for taking a second wife.[2]

Not all cases, however, demonstrate judges' concurrence with the *Kompilasi*, and some judgements have in fact demonstrated that in a number of cases they have deviated from the *Kompilasi* and referred to the *fiqh* books instead. They are apparently not worried that their decisions will be overturned by higher courts.[3] There are fundamental reasons behind their decisions to abandon the *Kompilasi*. Among these reasons is their intention to uphold the public interest. As a matter of fact, many judges argue that deviation from the rules prescribed in the *Kompilasi* is sometimes needed to create public will or to guarantee the satisfaction of justice for the parties or one of the parties engaged in a case. Therefore, in certain cases a number of rules in the *Kompilasi* are not to be obeyed absolutely.

Ḥaḍāna

The rule of the custody (*ḥaḍāna)* of a child aged below twelve years is the best example in this context. Article 105 of the *Kompilasi* lays down that *ḥaḍāna* of a child aged below twelve falls to his or her mother if his or her parents are divorced. Although they agree with this rule and mostly follow it, in practice, judges sometimes conclude that it is not always good to give all mothers this responsibility without due consideration; a small number of mothers of bad character, such as those addicted to drugs or those planning to marry another man, could be considered inappropriate parents. As the choice of giving the right of *ḥaḍāna* to one of the divorced parties aims to ensure the good welfare of the children, judges maintain that such a rule is not always to be followed and can be ignored where necessary to ensure the interests of the child's welfare is maintained.

Accordingly, in some cases judges have decided to grant the rights to the father.[4] The Islamic court of Bogor once ordered a mother to be deprived of the right of *ḥaḍāna* because it considered her incapable of taking care of her children for the reason that she planned to marry again soon after she divorced her first husband. The court based its decision on the *fiqh* doctrine stipulating that one of the qualifications for a mother to be given the right of *ḥaḍāna* is that she has no plans to marry again soon and that she has *iffah* (full of love and care). The *fiqh* books cited in this case are Dimasqī's *Kifāyat al-Akhyār*, Vol II, p.152, and Bājūrī's *Ḥāshiya Kifāyat al-Akhyār*, Vol. II, p. 198). The statement from the former reads as follows: "And to retain charge of a child the guardian must possess certain qualities such as reason, freedom, peity, love, trustworthiness, having achieved a settlement with the child, and have no plans for remarriage. If he or she fails in one of these capacities, he or she loses his or her right of custody." And the doctrine from the latter reads as follows: "[the guardian must be] caring and honest and someone failing to pray has no right of custody." In another case, the Islamic court of Rangkasbitung gave the right of *ḥaḍāna* of the children aged below twelve to their father on the basis of the consideration that the mother was not pious in her religion and that all the members of her family were non-Muslims. As a basis for its decision, it mentioned the legal doctrine from al-Bājūrī's *Hāshiya Kifāyat al-Akhyār*, Vol. 3, p. 203 stating that "...there is no right of *ḥaḍāna* for the mother who is religiously deviant."

In principle, the *Kompilasi* stipulates that *ḥaḍāna* of children should be first passed to women on the mother's side if the mother is considered to be incapable of assuming it.[5] But the fact that familial relationships are so close in Indonesia provides a foundation for some judges to give the right of *ḥaḍāna* directly to the father, as giving it to, for example, an aunt or grandparent on the mother's side can mean in effect still giving it to the mother.[6] In this respect, it should be mentioned that the *Kompilasi* indeed rules that to guarantee the safety of the children physically and spiritually, an Islamic court can transfer the right of *ḥaḍāna* from one nominee to others.

In the case of *mumayyiz* children (those who have reached maturity or those, according to the *Kompilasi*, aged above twelve years), the *Kompilasi* states that they are free to choose one of their parents to be their guardian.[7] In one such case (judgement No. 746/1991/PA.MDN), the Islamic court of Medan decided to give the *ḥaḍāna* of the disputants' two under-aged children to their mother and agreed with the decision of the other two children, aged twenty and seventeen years, to live with their father who happened to have reverted to his previous religion, Christianity. In this decision, they followed the *Kompilasi*.

This judgement attracted a great deal of criticism from some Islamic legal experts and judges. Satria Effendi, a professor at the Syarif Hidayatullah State Islamic University (UIN) in Jakarta, who regularly analyses decisions issued by the Islamic courts, criticized the judges who handed down the judgement for having not been circumspect enough in considering the possibility that the father may have harboured bad intentions to influence his two older children. He argued that under such conditions, the children should not to be given their right to choose freely with whom they will live and hence judges must choose for them who is the best guardian in terms of their religion. He went on to say that the majority of *'ulamā'* including the Shāfi'īte agreed that such a condition robs people of the right of *ḥaḍāna* of their children. Therefore, if in a Muslim family a spouse commits apostasy and this results in a divorce, the *ḥaḍāna* of their children must automatically be given to the party who is still Muslim.[8] As the basis for this he referred to the opinions of the majority of classical *'ulamā'*, including the Shāfi'ītes, who hold that being Muslim is one of the absolute conditions for a person to be a guardian; non-Muslims or apostates will automatically lose their rights of custody.[9]

Age of Marriage

Another example is the rule concerning the age of marriage for girls and boys. The *Kompilasi* (Art. 15) and the Marriage Law (Art. 7) both stipulate that girls and boys can enter into marital life if they have attained the age of sixteen years (girls) or nineteen years (boys). Broadly speaking, judges agree with the rule, but for a number of reasons they occasionally ignore it and give permission to those under the minimum statutory age to marry. It is true that the Law allows the dispensation for marriage to be given to those under the required ages.[10] The reasons for such a case are when the parents of a girl or a boy under the ages of sixteen and nineteen respectively consider that the couple have been intimate with each other to the point where it is feared that pre-marital intercourse has occurred between them. Alternatively, a parent may argue that the couple is already sufficiently mature and they wish to see their child married, and will not brook the refusal of the registry officials to marry their daughter or son. As a result, they bring the case to the court, requesting formal permission to marry their child. After hearing and considering the reasons and the situation of both the girl and the boy, which may be, for example, that the girl has reached maturity, and this is indicated by the fact that she is menstruating, a number of judges may find that they should approve the request and issue a decision stating that the girl or the boy can be officially married with her boyfriend or his girlfriend and therefore direct the official registrar of the place of origin of the girl or the boy to marry them.[11]

To support their decisions, judges pointed out the legal doctrine which states "...and the claim of a girl that she has reached her maturity may be accepted because she has experienced menstruation" presented in al-Dimyātī's *I'ānat al-£ālibīn*, vol. 11, p. 314, and/or the legal doctrine that states "...and the guardian of a boy may marry him if he sees in it something beneficial and good", presented in al-*Muhadhdhab*, vol. 11, p. 40. To strengthen their decisions, they refer to an Islamic legal maxim which states "...avoiding deficiency must be prioritized over the bringing of advantages". In doing so, they have tried to show that marriage at ages younger than those specified in the *Kompilasi* is more appropriate as it will prevent negative consequences.

From these examples, we can see how cultural assumptions, legal approaches, and substantive law are all deeply interlinked.

Therefore, it appears that judges often do not decide cases in accordance with the dictum of the law, but because the social utility demands this to be so. In Islamic law, judges frequently encounter the concepts of *istiḥsān* and *istiṣlaḥ*, forms of legal reasoning by means of analogy. These concepts incorporate the idea that analogies may be described with a clear eye to the social well-being at large rather than to a strict set of logically required results.[12] None the less, although we have already seen a number of cases in which legal presumptions are really little more than the judicial recognition of local assumptions, we observe that, through their judgements, judges always need to demonstrate that they have not deviated from the Qur'ān and other sources of Islamic law. They are convinced that the legal doctrines from the classical texts constitute the best sources for their judgements when they thought the strict application of the new code of law or the *Kompilasi* would cause harm and prevent serving the public utility. These two examples indicate that the deliberate ignoring of the *Kompilasi* by judges and their continuing reliance on the *fiqh* books is because the *Kompilasi* is casuistically perceived as an inappropriate text to be followed.

Against the Deviation of the *Kompilasi* from the *Fiqh* Texts

In other cases judges reject the rules in the *Kompilasi* because they claim that in some cases they have deviated too far from the classical *fiqh* doctrines. In cases of inheritance, for instance, they often abandon its provisions which happen to be being hotly debated by Muslim scholars and judges themselves. The reflections in this debate reveal that a number of judges are quite adamant in their repudiation of the *Kompilasi*.

Daughter versus Siblings

The first example is related to the inheritance rule as best illustrated by the two following cases (No.830/G/1991/PA.Pkl/No.69/G/1992/PTA.Smrg, and No.85/pdt.6/1992/V/PA.Mtr/No.19/Pdt.G/1993/PTA).[13] The first case involves a daughter and a number of sisters, all of whom were designated as co-heirs with the former by the first instance Islamic court of Pekalongan and the appellate court of Semarang. The second case, which attracted great attention from legal analysts and scholars, involves a brother of the deceased and a daughter.[14] It is not known whether or not the

litigants understood what the *Kompilasi* says about their case, but the heirs of the brother of the deceased in the second case came to the first-instance Islamic court claiming a share of the property on the basis that, as the brother of the deceased, their progenitor deserved to share with the deceased's daughter – while the daughter was still alive, the brother had died when the case was filed at the court, but was, of course, alive when his brother (*praepositus*) died. The court concluded that the case bristled with too many problems as the property disputed was not clear and, as the petition was considered not to have met the procedural requirements, therefore they rejected the case.[15] Being dissatisfied with the decision, both the plaintiffs and the defendant took the case to the appellate Islamic court and it agreed the brother be given a share.

Handing down the decision that the brother, in the second case, as the sisters in the first case, should share with the daughter, it is clear that the appellate court of Mataram and the lower courts of Semarang adopted a juristic interpretation of a relevant Qur'ānic verse, which states that the siblings, sisters and brothers, are granted rights in inheritance if the deceased leaves no child or *walad* (IV: 176). It is common knowledge that the majority of Sunni scholars have understood from this verse that, when the deceased leaves a child or *walad* the siblings are excluded from the share and that, so as to reconcile the practice of the Prophet who once gave sisters shares with daughters, they have interpreted the word *walad* in this verse to refer to male children only.[16] This means that in the existence of a daughter the siblings can be granted a share. It is on the grounds of this traditional Sunnite interpretation that the word *walad* refers to males only, that these Islamic courts granted the brother a share.

In both cases the daughters appealed to the Supreme Court, and the judges in the Supreme Court reversed the decision of both appellate courts. They agreed that the daughters excluded the brother (in the second case) and sisters (in the first case) from a share, stating that as long as the deceased left children, either male or female, the rights of inheritance of the deceased's blood relations, with the exception of parents and spouse (not a blood relation), are blocked. Interestingly, in this respect they referred to the view of Ibn 'Abbās, one of the companions of the Prophet, who interpreted the word *walad* in the verse mentioned above as both male and female children, - a position which unleashed criticism from a number of scholars and judges as they considered

these Supreme Court judges, as will be discussed below, had misunderstood Ibn 'Abbās - and did not, as of course the two appellate courts had, mention the *Kompilasi* as their basis at all.

What does the *Kompilasi* say in this regards? Why did they not refer to it? The *Kompilasi*, Articles 181 and 182, states that the rights of inheritance of siblings can only be granted in the absence of *anak*. *Anak* is the exact translation of *walad*.[17] So, the *Kompilasi* rules as the Qur'ān says. In principle, the word *anak* refers to both a male and female child. However, it seems that the use of the word is still confusing to some judges who question whether it, as the word *walad* in the Qur'ān, refers only to males as the Sunnite interpretation or to both males and females as in Ibn 'Abbās interpretation.

This issue has provoked a heated debate among both judges and specialists in Islamic law. This debate can be followed in the monthly publication of the Directorate of Islamic Justice of the Department of Religious Affairs, *Mimbar Hukum*, from which it can be discovered that the position of the classical Sunnite doctrine among Indonesian Muslims, particularly specialists in Islamic law and judges, remains so strongly entrenched to the extent that many of them have dared to take a position against the *Kompilasi* and even against the decision of the Supreme Court. Even though the Supreme Court's decision had gained support from a number of judges,[18] the opposition to it is too significant to ignore.

In one of its issues, the journal published articles by Baidlawi and Rahmat Syafe'I, who presented the interpretations of the word *walad* given by earlier jurists, including that of Ibn 'Abbās, and connected these to the debate aroused by judicial practices, particularly in relation to the second case. Intending to counter the view of the Supreme Court, in their articles both Baidlawi and Syafe'i wrote that it is true that Ibn 'Abbās interpreted the word *walad* as referring to both a male and a female child, but it is a mistake to understand that his inclusion of female child under the word *walad* as his intention to exclude a brother. Therefore the Supreme Court would be in error if it took his (i.e. Ibn 'Abbās) view as its legal basis for its decision. Ibn 'Abbās, they continued, meant that it is only sister(s) and not brother(s) over whom a daughter(s) takes precedence. In other words, they wanted to emphasize unambiguously that Ibn 'Abbās thought that when the deceased left behind male and female children, or only a male child, the right of siblings, both brother(s) and sister(s) are super-

seded. But if the deceased left behind only a daughter, it is only the right of sister(s) and not of the brothers which is superseded, therefore it is only when she is contested with sister(s) that the daughter is considered *walad*. Explaining this, the writers wanted to say that should the deceased have left only a daughter - as in the second case discussed - the claim(s) of the brother(s) to the share has clear bases in the views of both the Sunnite jurists and Ibn ʿAbbās. Therefore, they argue, the Supreme Court was mistaken when it cited and referred to Ibn ʿAbbās' view to support its decision of granting a full share to the daughter and at the same time of excluding the brother from a share, as Ibn ʿAbbās himself did not intend it to be so.[19] By understanding the opinion of Ibn ʿAbbās in this way, they also seemed to convey that the decision of the Supreme Court that a daughter can take precedence over sibling(s) was correct and had legal basis.[20]

Several remarks can be made on the basis of these two cases. *First*, it may be true, as Cammack has stated, that the Supreme Court probably wanted to give direction to the future development of Islamic inheritance doctrine and tried to be consistent with the premise developed that male and female relatives enjoy an equal position under the law.[21] But the fact that the Supreme Court judges did not refer to the *Kompilasi* or to theories proposed by a number of Indonesian legal experts, for instance Hazairin's bilateral theory, but to Ibn 'Abbās's view, demonstrated its lack of confidence in the *Kompilasi* and its inclination towards the legal doctrines from the *fiqh* books such as those used in the first instance and appellate Islamic courts. *Second*, although the Department of Religious Affairs has no authority to evaluate the legal rulings of the Islamic courts, it feels a need to analyse and study the judgements issued at all levels of the Islamic courts including the Supreme Court. It must be, however, noted that if what the Supreme Court practises implies the development of judicial model when appeals are made, what the Department of Religious Affairs does, as reflected in *Mimbar Hukum*, constitute a kind of a legal reflection confirming that there are other opinions on one case which might also be proper or indeed even more proper to apply.[22] Moreover, Indonesian Muslim scholars also still argue that, as they often invariably find that no two cases are precisely the same since the people are not exactly the same, therefore the judges could justifiably reach different judgements as long as the reasoning process remains the same.

Apostasy within Marriage

Another example which demonstrates judges' preference for the legal doctrine from the *fiqh* books and decision to ignore the provisions in the *Kompilasi* concerns the rule of apostasy in its relation to the marital relationship.

The *Kompilasi* mentions that apostasy can be taken as grounds for divorce and the consequences of this divorce actually can be solved by a number of articles in the *Kompilasi* regulating the period of *iddah* and the *nafkah* for the divorced wives. Article 153 (2b) states that if the marriage is dissolved by divorce, - without outlining how or for what reason the divorce occurs - the period of the *iddah* starts after the pronouncement of the divorce in the court, that is, for those who are menstruating it lasts for three times of being clean or is at least ninety days and for those who are not menstruating it lasts ninety days, and for those who are pregnant it is until the birth of the child. Many judges are confused about this issue. The source of their confusion is their understanding that the marriage is automatically dissolved as soon as the apostasy is committed, whereas they are required to treat this case just as other divorce cases arising for other reasons. Were they consider it to be only one of the reasons for dissolving a marriage, they would not be confused. Furthermore, a great deal of doubt still exists regarding whether or not wife who has become an apostate still has the right of *nafkah* as well as *mut'a* from her husband, as they tended to consider her as *nāshij* (disobedient). In this respect the judge I interviewed argued that "...because the *Kompilasi* is silent on this, we need to resort to *ijtihād* by referring to the *fiqh* books".

While the *Kompilasi* seeks not to dissolve a marriage at a precise moment one of the parties commits apostasy, for those who tend to refer to the *fiqh* books, one of the consequences of the apostasy is the dissolution of the marriage and that it must be acted upon as soon as the apostasy is committed.[23]

Parallel with this is the matter that while the *Kompilasi* tends to stress the element of disharmony resulting from the act of apostasy, the majority of judges are inclined to stress the act of apostasy itself.[24] One of the former chief judges of the Islamic courts, said that a petition of divorce on the grounds of apostasy does not acquire any attempts at reconciliation.[25] Another judge strongly suggested that the clause 'resulting in disharmony in the marital life' attached to the word '*murtad* (apostate)' found in Article 116 (h) be eliminated, as it makes the rule itself vague. He asserts that

the essence of the clause has been covered in the same Article (116: f), which mentions continuous quarrelling as one of the grounds for divorce. If the clause is maintained, the aim of Point (h) is obscured, that is it is apostasy or disharmony to be considered. Apostasy can stand by itself as adequate grounds for the judges to end the marital relationship of a couple. They are not burdened by the necessity of proving the existence of disharmony resulting from the act of apostasy.[26]

As a matter of fact, judges in the Islamic courts are inclined to decide a case of apostasy on the basis of the apostasy itself. The decision of the judges of the Islamic court of Tasikmalaya illustrates the case. They decided to grant the petition for a divorce for a woman who claimed that her husband had reverted to his previous religion, shown by the fact that he attended a church congregation every Sunday. In their legal summing-up, they mentioned that there was no need to summon the husband to appear before the court because the court is not competent to try a non-Muslim, they thereby added that the act of apostasy will unquestionably produce disharmony in future should the marriage be permitted to continue.[27] This case clearly reveals that it is the act of apostasy itself which leads the court to end the marriage. Reconciliation and even hearing from the party who is an apostate is therefore unnecessary.

Another judgement issued by the Islamic court in Rangkasbitung demonstrates more concretely that reconciliation is not to be striven for in a divorce sought when one of a couple has become an apostate and that the difference of religious faith was the strongest motivation which led the judges to comply with the petition for divorce. It is recorded in the judgement that a man petitioned for divorce because he claimed that he had frequent disagreements with his wife, and they had been apart since April 2003. It is also recorded that the husband admitted since January 2004 to have reverted to his former religion, Christianity, which he had embraced before marrying his wife. The wife, who contested the husband's petition, stated that not everything husband had stated was true and that she still wanted to save her marriage although the husband had reverted to his former religion. In dealing with this case the judges decided to terminate the marriage. What is of interest is that in their legal considerations they clearly stressed the apostasy of the husband, attested to by the fact that since January 2004 the husband has been active in one of the churches in Rangkasbitung. They then referred to Article 116 (h) of the

Kompilasi which mentions that apostasy constitutes one of the grounds for divorce. It also cited the legal text from *al-muhadhdhab*, Vol. 2, p. 54, which states '...if a couple or one of each becomes an apostate, the marriage is to be annulled....if the apostasy occurs after a sexual relationship has been commenced the divorce occurs after the expiry of the *iddah* period'.[28] In giving such a judgement, the judges ignored the objection of the wife contesting the husband's petition and had adduced the act of apostasy as the main grounds for divorce, whereas it was clear that the apostasy had basically been committed after the couple had been involved in arguments for a long time and had separated. They did not even seem to consider the possibility that, by stating that he had reconverted to Christianity, the husband had merely intended to back up his petition and ensure that it was granted.

From the discussion above, it can be clearly inferred that judges in the Islamic courts only accept the reform aspects introduced by the *Kompilasi* which do not deviate greatly from the *fiqh* books. It seems that the *Kompilasi* has not had the force to shift the central position of the established *fiqh* doctrine among Indonesian Muslims. Even though it seeks to impose the registration of marriage and limit the age of marriage for couples and insists that divorce should follow due legal process, it still does not have the power to interfere in the religious validity of a marriage for which religious conditions and qualifications have been fulfilled. Similarly, the *Kompilasi* has failed to eliminate the cases of injustice arising from the application of the Islamic law of inheritance by promoting the bilateral system of inheritance which places the male and female links in the same position. It has no power to force judges in the Islamic courts to abandon the *fiqh* doctrines in dealing with the cases of inheritance. Paradoxically, they have continued to demand the institutionalization of Islamic law by the State, an insistence which is not complemented by their readiness to depart from the legal doctrines prescribed in the *fiqh* books.

Maintenance of Tradition and Religious Identity: Other factors

All of the factors discussed above become much more influential in the attitude of judges when they are coupled with the other reasons which constitute more universal and fundamental reasons of why judges in general hold on to *fiqh* doctrines in their judgements. Besides the fact that the *Kompilasi* was put in effect only in

the form of a Presidential Instruction, which has less legal force than a Statute, and therefore is considered to be loosely binding, the maintenance of tradition and the question of religious tradition constitute reasons for this trend. Recalling the replies given by almost all the judges I interviewed when asked whether or not their citation of and their preference for legal doctrines from the *fiqh* books would be minimized or even pushed to one side when the *Kompilasi* has become a Statute, the answer was 'No'. In other words, concealed behind the façade of their doubts about the legal status of the *Kompilasi* there are apparently more intrinsic reasons or other more profound explanations for their attitude.

The Maintenance of Tradition

The reluctance of the judges to abandon the use of the *fiqh* books in their judicial practice after the upgrading of the legal status of the *Kompilasi* to that of a statute indicates that they want to use the *fiqh* books not only in a cases for which the *Kompilasi* (and subsequently the statute) does not provide or takes different position from the *fiqh* texts. This reluctance apparently has to do with the distinguished position enjoyed by the Islamic tradition among Indonesian Muslims. Although ideas of reform are very much part of their religious discourse, the position of tradition remains strong among them. In fact, the majority of them are traditionalists attached to the largest Muslim organization in the country, the Nahdlatul Ulama. Among them the position of the *kitab kuning* to which the Islamic courts were historically and culturally oriented is quite central. [29]

Comprehension of the influence exerted by traditional and cultural elements on judges is strengthened by an examination of their educational background and the system of their recruitment, in both of which until now the *fiqh* book remains one of the topics tested. Most of them graduated from *pesantrens* before continuing their studies at a State Institute for Islamic studies (*Institute Agama Islam Negeri*, or IAIN). In the *pesantren* the tradition of studying and analysing *fiqh* books has always enjoyed a considerable position.[30] Although they have adopted a modern curriculum, the *pesantren* still also includes *fiqh* texts as an area of study. This familiarity of the *pesantren* graduates with the *fiqh* books is formally revived and refreshed as soon as they apply for a position as a judge in the Islamic courts. In fact, in order to aspire to this position, applicants should first pass an examination in, besides other subjects, the reading of certain *fiqh* books.[31] A failure to read the

fiqh books may disqualify an applicant from being appointed a judge. Zuffran Sabrie, a senior staff member at the Directorate of Islamic Justice in the Department of Religious Affairs, said that being able to read *fiqh* books is an absolutely unconditional qualification for being a judge in the Islamic court up to the present day. Sabrie expressed his opinion in these words:

> We have to maintain the central position of the *fiqh* books in our environment, that is the Islamic court, and this is why we should employ judges capable of reading Arabic. I realized that the reading test for Arabic could not be regarded as the optimal way to do this as we still found judges employed in Islamic courts with no ability to read Arabic, even though they had passed the test. But what is a better way than this? I am sure that the quality of judges of the Islamic court in terms of Arabic will be worse if the test is not utilized.[32]

As the educational background of the majority of the applicants is a *pesantren* education where the *fiqh* books were accorded a central position in the study curriculum, not to mention the fact that from the very start of their career Islamic court judges are required to demonstrate a solid understanding of *fiqh* books - even after the issuing of the *Kompilasi* – then it is not surprising that the tradition of referring to *fiqh* books is so institutionalized, it might even be said internalized.

Here, it is feasible to argue that while such an intensity of feeling for preserving an established tradition in a society, particularly among judges in the Islamic courts in this case, persists, any formalization of law (even at the higher levels of the legal system) will not have a great effect on law enforcement. Therefore, the thesis which states that the rule of law, which had been judicially established, will be loyally obeyed, as it has fulfilled the formal element of its legality, will not always be valid. It is an incontrovertible fact that the formal juridical dimension embraced by the *Kompilasi* is not as effective in motivating the judges to apply it to its fullest possible extent. They still prefer the *fiqh* books should the *Kompilasi* adopt a different stance. Even should they agree with the *Kompilasi*, they still exclusively explore the legal doctrines in the *fiqh* books. To understand this attitude, we may turn to Hart's statement that the enactment of a law by Parliament or through other instruments of legislation is not enough to effectuate the validity of a law. The law must be internalized by such insiders in the legal system as judges and lawyers, and in a wider sense by all citizens.[33] In the case of the Islamic law, merely enacting a law and claiming it is Islamic will not be sufficient to ensure its validity if it

is not linked to its real sources, namely, the Qur'ān, the *ḥadīth*, and the *fiqh* texts, as it is only through such linkages that the process of the internalization of the law claimed to be Islamic can be accomplished. And the way to ensure that the insiders believe that the law is Islamic law and is based on the sources mentioned is to link each provision of the law to a specific rule or general principles contained in those sources.[34]

What Lawrence M. Friedmann has proposed also seems to be relevant to this case. According to Friedmann, the application of law is to be communicated in three dimensions, namely: the structural; the substantial; and the cultural. He suggests that application will only be effective if all three dimensions have been considered. Therefore, although the law has been substantially and structurally systematized, it will not have been applied well if, for example, a society has failed to alter its cultural attitude and traditional practices.[35] Even though the three dimensions share an equal position in this issue, it is not impossible that one of them may play a more significant role than the others in a certain society. The cultural factor can be, for example, considered more dominant than the other two factors in the case of those groups in the community which have strongly maintained their traditional model in solving cases.[36]

In this regard one particular phenomenon is worth mentioning here. It is that the greatest attempt to maintain and express the preservation of the use of the *fiqh* texts is among the senior judges. The judges in the first instance Islamic courts reported that the senior judges in the Islamic appellate courts often strongly recommend they preserve the use of the *fiqh* books and even vehemently claimed judgements in which no Arabic texts or the legal doctrines from the *fiqh* books have been cited are judgements issued outside the Islamic courts.[37] Indeed, as has been mentioned above, research into the comparison between judgements issued by judges in the first instance Islamic courts and by those in the appellate Islamic courts found that the judgements issued by the latter are more frequently grounded on *fiqh* books and many of their judgements were overturned by the Supreme Court judges.

It seems that the psychological and sociological aspects invariably contribute to the practice of the judges in the appellate Islamic courts in giving judgements on the cases brought before them. They have been working as judges for a very long time, beginning in Islamic courts in rural areas, and their rank is usually lower

than their counterparts in the urban Islamic courts. Then they are appointed judges or even directors of Islamic courts in both rural and urban areas and later again judges in the appellate Islamic courts and the Supreme Court. This wide experience and seniority have played a large part in their legal maturation process and have often led them to an overstated attitude in deciding the relevant legal considerations. Such a position is easily understandable when we consider the psychological and sociological aspects which have led to their independent decision to rely on the *fiqh* books, coupled with the fact that they have become very accustomed to using the *fiqh* books.

The Question of Religious Identity

The tendency of the judges in the Indonesian Islamic courts to continue quoting the *fiqh* books becomes more readily explicable when we observe the debates among Indonesian Muslims concerning the issue of defining what is "Islamic" and what is not. By debating such an issue they are actually trying to inscribe a religious identity. In this context the Arabic language plays a crucial role, especially in giving people their religious identity. It simultaneously also emerges as a source of authority. A person's authority in Islamic knowledge is often determined by their mastery of Arabic, or more precisely the *fiqh* books. For judges in the Islamic courts there is always a need to demonstrate this mastery by preserving the use of the *fiqh* books in their judicial practices so that their authority as the guardians of Islamic law can be acknowledged and accepted by society.

A number of judges were adamant that they feel more certain and on firmer ground with citations in Arabic in their judgements. The judgements are considered to be more accurate and binding (*afḍal*) on account of the insertion of the Arabic texts. The transfer of the Islamic legal doctrines expressed in Arabic as covered in the *fiqh* books to a more understandable and articulate language presented in the *Kompilasi* is considered to be useful only in a few cases, as a tool to help to understand the rules required to be applied. In fact, although the judges refer to the *Kompilasi* and in doing so follow its provisions in deciding some cases, they often mention only the codes of its articles and rarely or indeed never display its full texts or provisions. Instead, they afterwards cite the opinions of the earlier *'ulamā'* in a full statement in Arabic. "We simply have to be different from the other courts", said al-

most all directors and judges of the Islamic courts in which I conducted my research. "We are 'Islamic courts (judges)', and need to show our identity", they argued. A few judges who do not read the *fiqh* books fluently are accordingly also persuaded to cite the Arabic legal statements from the *fiqh* books. In this regard, it is interesting to mention here that since 2004 judges of the Islamic court in Cianjur have written the *basmallah* (*Bismillah ar-rahmân ar-rahîm*, or 'In the name of Allah the most merciful the most most kind') at the top of the judgement in Arabic script, whereas before this was always written in Latin script.[38] One of its judges mentioned that this is to demonstrate their religious identity, that is, that they are judges of the Islamic court. In fact, another judge confirmed that to read and write even a letter in Arabic script has religious merit and is considered *'ibādah*.[39]

The Arabic language and script do indeed enjoy a privileged position among the Indonesian Muslims, particularly traditionalist *'ulamā'*. They think both represent noble values in themselves; hence they not only adhere to the Arabic language but also to Arabic script and therefore when they write in and translate the *fiqh* works into vernacular languages, they have done this almost without exception in Arabic script.[40] Aware of this, judges feel that they need to comply with this orientation. The judges assume that if they do not follow or respond to the legal awareness of the community, the community will abandon the Islamic court. In fact, they have sometimes heard that a certain community often claims that the Islamic courts are no longer Islamic when it finds no Arabic texts cited in its decisions. The community is more convinced of the validity of a judgement that is supported by Arabic statements. Therefore, to quote the *Kompilasi* is not enough to demonstrate that they really know and comprehend the *fiqh* books or master the classical sources of the rules of the *Kompilasi*.[41]

This is palpable in the attitude displayed by judges when making judgements on cases in which they agree with the provisions of the *Kompilasi*. In these cases, judges usually mention the article of the *Kompilasi* and then proceed to quote one or more opinions of the *'ulamā'* drawn from certain *fiqh* books. The case of a divorce related to the utterance of *ta'līq ðalāq* is probably the best example. The *Kompilasi*, Article 116, rules that a divorce can be concluded on the basis of the existence of various reasons, one of which is a husband's violation of one or more points falling under *ta'līq ðalāq*. This reason is listed as Point (g) of Article 116. In deciding such a

case, the judges usually mention Article 116 Point (g) of the *Kompilasi* as one of the legal bases for their judgements, but then also quote the *fiqh* doctrine from Sharqāwī's *Ḥāshiya 'alā al-Taḥrīr* which reads "Whoever makes his *talak* dependent upon an action, the *talak* is co-terminus with the performance of that action according to the original pronouncement." This is the case in almost all the judgements in divorce cases in my collection.

For the judges demonstrating their mastery of the *fiqh* books is also of special importance in reinforcing their position as religious authorities outside the circle of the traditional authority, the *'ulamā'*. Broadly speaking, the litigants rarely bother about the legal basis taken by the judges in deciding disputes or cases brought before them. Most of the litigants who come to the Islamic courts are not overly concerned about the legal reference for the judgements handed down to them. They focus on the core of the judgements themselves.

While a majority of litigants are ignorant of religious references, a number of judges admitted that in a few cases references to the *fiqh* books are necessary in order to convince the litigants, particularly a defendant. In the case of divorce petitioned by a wife but strongly opposed by her husband, for example, a judge feels a need to put forward opinions of earlier *'ulamā'* which explain the rules pertaining to the case specifically and clearly. A number of judges said that in such a case, the husband often argued that he still loved his wife and they had never quarrelled. Meanwhile the wife, while also admitting that they had never had a serious clash, felt that she could no longer live together with her husband. Hearing the case and not being able to persuade the wife to retract her petition, the judges grant the petition. In doing so, the judges usually mention Article 116 of the *Kompilasi*, but go on to give a more relevant legal basis for the case. For this purpose, they quote the legal doctrine which reads "...if the hatred of a wife towards her husband has grown more aggravated, her petition for divorce can ultimately be approved in the court" (al-Anīārī's *Minhāj al-Ł ullāb*, vol. IV, p. 346).[42] They believe that referring to the opinions of earlier *'ulamā'* in the *fiqh* books can convince the defendant that their approval of the petition is based on a sound Islamic legal basis.

It can be inferred from this fact that the judges, while citing the *fiqh* books, have not deviated fundamentally from the provisions of the *Kompilasi*. In the first case of *ta'līq ðalaq*, it is very clear that the judges adopted the provisions of the *Kompilasi* but also needed a

justification or seal of legitimacy from the *fiqh* books. The second example indicates that the judges needed to reveal the Islamic legal basis more explicitly, by so doing they believed that the litigants, particularly the one found against, would be satisfied and accept the judgement. All of the examples indicate that judges often felt the need for more legitimacy and justification to endorse their judgements, and are convinced that the *fiqh* texts can fulfil this need.

But why are Indonesian Muslims, the *'ulamā'* and therefore also the judges, so very concerned about revealing their religious identities and consider the Arabic language to be one of the signifiers of their religious identity? The answer seems to be partly related to their rigid adherence to the Shāfi'īte school. Indeed, in contrast to the other Sunnite schools, particularly the Ḥanafītes, Shāfi'ītes believe that learning Arabic is obligatory upon every believer in order that he or she is able to perform his or her religious obligations properly. Al-Shāfi'ī (d.829/204), in his *Risāla*, stated:

> It is obligatory upon every Muslim to learn the Arab tongue to the utmost of his power in order (to be able) to profess through it that there is no God at all but God and Muhammad is His servant and Apostle', and to recite in it (i.e., the Arabic tongue) the Book of God, and to utter in mentioning what is incumbent upon him, the *takbīr*, the *tasbīḥ* and the *tashahhud* and others. Whatever learning he gains of the language which God made to be the language of him (Muhammad), by whom He sealed His prophethood and by whom He revealed the last of His Books, is for his (man's) welfare, just as it is his (duty) to learn (how) to pray and recite the *dhikr* in it.... Calling the attention of the public to the fact that the Qur'ān was revealed in the Arab tongue in particular is (a sincere piece) of advice to (all) Muslims.[43]

The unique position of the Arabic language in the Islamic courts may not seem so very surprising and can be logically understood when we recall the religious doctrine which emphasizes that judges in the Islamic court have a religious responsibility, namely: they are not only responsible for the present life (*dunya*), but also responsible for the Hereafter (*al-akhīra*). They are very much tied by the religious doctrine which states that in deciding legal cases, the judge is standing with one of his legs in the area of enjoyment (paradise) and the other in the area of frustration and irritation (hell). Saddled with such a burden, it is understandable that they need to say a special prayer or even meditate and reflect (*bertafakkur*) before they decide the cases passed on to them. Consequently it seems that they feel that to articulate religious nuances and fulfil their heavy religious responsibility they still need to quote Arabic texts from *fiqh* books.[44]

Conclusion

It is quite apparent that judges in the Indonesian Islamic courts have demonstrated their concern about the *Kompilasi* since its introduction in 1991. They have quoted its articles as the foundation for their judgements. But the acceptance of the *Kompilasi* had not led them to abandon their preference to quote the legal doctrines from the *fiqh* books. The discussion above has demonstrated that the tendency to continue quoting the *fiqh* books among the judges is based on a number of reasons. In terms of their preference for their legal doctrines to the provisions in the *Kompilasi*, cultural assumptions in which the public interest takes priority do seem indeed to have been confined. We have already seen a number of examples in which their decisions were determined by their understanding of local concepts and customs and for which an attempt has been made to find legal support in the *fiqh* books. Faced with cases of petitions such as *ḥadana* and in giving permission for under-aged couples to get married, which if acceded to by the judges could have a positive effect according to local assumptions but is not allowed according to the *Kompilasi*, judges have often looked to the *fiqh* books and followed a distinctive approach, daring to oppose the *Kompilasi*. They have considered that it is better for the common good that the rules of the *Kompilasi* be set aside in favour of a judgement which is more suitable to achieving a socially beneficial goal. Prioritizing a local assumption above that which is set in the *Kompilasi* when solving such cases however does not seem to have given the judges satisfaction in terms of their legal reasoning. To support their application of such a distinctive approach, besides weighing up whether it will be beneficial, they need to present it in such a way which demonstrates conformity with the sources of the Islamic law.

In other cases judges have been inclined to quote legal doctrines from the *fiqh* books to such an extent that they abandon the provisions in the *Kompilasi* entirely. Many judges feel that the *Kompilasi* has exceeded its brief in adopting such local practices as the representation of heirs and adoption or in heeding the growing demands among feminists for putting male and female in the same position. They have sought to demonstrate their repudiation by enthusiastically returning to the dominant opinion of *'ulamā'* covered in the *fiqh* books.

Moreover, other more fundamental and universal factors strengthened the attitude of judges toward the *Kompilasi*. In fact,

as judges of the Islamic courts which are religious in character, they feel a need to justify their judgements on the basis of religious texts. By doing so, they associate themselves with a religious corpus which belongs exclusively to *'ulamā'*. Most certainly, they are required to demonstrate their understanding of religious texts so that society is convinced of the validity of their judgements. However, they have shown a tendency to exaggerate and have displayed inappropriate attitudes in quoting these religious texts, indicating that the quotation itself is treated more as a decoration at the expense of its content.

Endnotes

1. Brinkley Messick, *The Calligraphic State: Textual Domination and History in a Muslim World* (California: University of California Press, 1993) 63.
2. See judgement No. 341/1976.
3. See S. Pompe and J.M. Otto, "Some Comments on Recent Developments in the Indonesian Marriage Law with Particular Respect to the Rights of Women", *Verfassung und Rech Ubersee*, 4, 1990: 415; cf. Cammack who reported that since the application of the Law of Marriage some judges appear to be wary of their judgements being overturned by the Supreme Court on cassation and that is why they are inclined towards the Marriage Law. Mark Cammack, "Islamic Law in Indonesia's New Order", *International and Comparative Law Quarterly*, 38, 1989: 53.
4. It should be noted that while the Hanāfite, Hanbalite, and Mālikite schools put the mother of the father in the third rank after the mother of the mother, the Shāfi'îte school specifies the father as the appropriate person to have custody after the mother of the mother. And the *Kompilasi* follows the Shāfi'îte opinion and therefore places the father in the third rank, the first being the mother, the second the mother of the mother.
5. See Art. 156 of the *Kompilasi*.
6. In 1977 the court of Medan also deviated from the Law of Marriage and decided to give the right of *ḥaḍāna* of the children to their father because the mother was considered to have re-converted to Christianity after three years as a Muslim. As the legal considerations for its decision, the court mentioned the legal doctrine which states '...there is no right of *ḥaḍāna* for the mother who is religiously deviant'. The court emphasized the fact that the parents of the father and all the rest of his family were Muslims, while the family of the mother were non-Muslims. A similar case was heard again in Medan in 1986 and the court gave the same judgement. See judgement No. PA. b/8/PTS/144/1986.
7. Art. 156 (b) of the *Kompilasi*.
8. Satria Effendi, "Analisis Fiqh Terhadap Yurisprudensi Tentang Perceraian: Hak Hadhanah Akibat Perceraian Sebagai Fokus", *Mimbar Hukum*, 21: 6, 1995.
9. There is basically another opinion embraced by Ibn Qāsim, some Hanāfite and Hanbalite adherents, and Muhammad Abū Zahroh, which holds that a guardian does not always have to be a Muslim, particularly when the children are still under age. See Muhammad Abū Zahrah, *Al-Aḥwāl al-Shahîiyya*. In terms of the under-age period, the majority of earlier *'ulamā'* mention that it starts from the delivery of the baby until he or she attains the age of seven years.
10. Art. 7 (2) of the Marriage Law.
11. Deviation from this rule was often also made by officials of the Offices of Religious Affairs (*Kantor Urusan Agama*, or KUA). Interestingly, this was done by manipulating the correct age of the would-be groom or bride. In order that they could enter marital life despite being under the formal ages required in the *Kompilasi*, the officials often ignore the known fact that the age of the bride or the groom written in the identity card was not the correct one.
12. Rosen Lawrence, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989) 46.
13. The text of the case and its decisions can be also seen in *Mimbar Hukum*, 30:7, 1997: 122-151.
14. See Cammack, "Inching towards Equality", 14-15, and Bowen, *Islam, Law and Equality in Indonesia*, 197-198.
15. So, the lower court had not decided the case following the traditional doctrine and had not granted the brother the share with the daughter of the deceased as understood by Cammack. See Cammack, "Inching toward Equality", 15
16. Noel J. Coulson, *History of Islamic Law* (Edinburgh: Edinburgh University Press, 1971) 66. It should be noted here that the interpretation by the Sunnites of the word *walad* as referring to only male only happens in this verse, as they interpret the word *walad* appearing in other verses as including both male and female.
17. I mean the word *walad* as generally interpreted in the Qur'ān as male and female and not as translated in the Arabic dictionary which refers to only a male child.

18. See, for an example, Alizar Jas, "Pengertian Kata Walad dalam Surah al-Nisa Ayat 176", *Mimbar Hukum*, 40 (1998).
19. See Baidlawi, "Ketentuan Hak Waris Saudara dalam Konteks Hukum Islam", and Rahmat Syafe'i, "Kajian Terhadap Putusan Mahkamah Agung tentang Kewarisan Saudara dengan Anak Perempuan", *Mimbar Hukum*, 44 (1999). Their understanding is concluded on the fact that on this issue Ibn 'Abbās dealt only with the case in which a sister (aunt) and a daughter were involved and did not discuss a case in which a daughter is left behind with a brother (her uncle). In the Tafsīr of Ibn Kathīr, the view of Ibn 'Abbās on the issue is described as follows: Ibn Jarīr and his colleagues reported that Ibn 'Abbās and Ibn Zubayr said that if a deceased left behind him a daughter and a sister, the sister receives no share (for its Arabic quotation, see Appendix no. 18). See Ibn Kathīr, *Tafsīr Ibn Kathīr* (Beirut: Dār al-Fikr, 1986). The writers also added that none should interpret the word *walad* in Verse 176 as embracing males only. They argue that the word *walad* in verse 176 refers absolutely to both male and female, but the verse is not to be interpreted in a deviant (*mukhālafa*) way that is, the verse is not to be interpreted as to rule that in the existence of children, siblings are totally excluded. In other words, this verse only describes the right of inheritance of siblings when the deceased leaves no children (*kalāla*). Should the deceased leave children, the right of inheritance of siblings is to be ruled in the Prophetic sayings which state "...give certain shares to the defined heirs and the remaining is the right of the male groups" (transmitted from Ibn 'Abbās) (for its Arabic quotation see Appendix no. 19), and which states "...for the daughters is a half and for a daughter of a son is the portion that makes two-thirds of the shares and the residue is for the sister" (transmitted from Ibn Mas'ūd). For the discussion on this, cf. Bowen, *Islam, Law and Equality in Indonesia*, 197.
20. Even though, the writers also claimed that granting the daughter a full share was also a deviation, as no text said so. They claim that should a sister exist but be excluded, the daughter is not to be granted a full share but only half. *Ibid.*
21. See Cammack, "Inching toward Equality", 15.
22. Interview with Wahyu Widiana, March, 2005, Jakarta, and Bustanul Arifin, 2003, Jakarta.
23. See, for example, Nawāwī's *Minhāj al-Ṭālibīn*, vol. III, 205-210, Ibn Ḥajar's *Tuḥfah al-Muḥtāj*, vol. IV, 117-130, Al-Bājūrī's *Ḥāshiya Kifāyat al-Akhyār*, vol. II, 263-266, and Dimyāṭī's *I'ānat al-Ṭālibīn*, col. IV, 132-142.
24. Art. 116 (h) of the *Kompilasi*.
25. H.A. Mukti Arto, SH, *Praktek Perkara Perdata pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 1996).
26. See Fachruddin, "Murtad Sebagai Alasan Perceraian dan Impelementasinya di Pengadilan Agama", *Mimbar Hukum*, 39: 9 (1998), pp 12-18. Fachruddin also commented that if the stress is placed on the clause of 'resulting in disharmony', the couple should request the divorce on the basis for the reasons for divorce enumerated in point (f) and then the judges should base their judgements on the existence of disputes and arguments between the couple. Should this be done, the apostasy itself is not considered to be affecting marital relationship at all.
27. The refusal of the judges to hear and try the renunciation of Islam case had produced quite a dramatic and unusual decision even earlier. Pijper recorded that once the court of Demak refused to hear the case of divorce initiated by an apostate woman, arguing that the court was not competent to solve the case brought by a non-Muslim person(s), see Pijper, *Fragmenta Islamica*, 92.
28. See Judgement No. 34/pdt.G/2004/PA.Rks. For more or less the same cases, see Judgement of Rangkasbitung No. 135/Pdt.G/2004/PA.Rks, and Cianjur Judgement No. 326/Pdt.G/2004/PA.Cjr. The Cianjur judgement even cited the Qur'ānic verse of al-Baqara, 221, as its source.
29. See Nurchozin, "Kitab Kuning: Peranan dan Masalahnya di Peradilan Agama", *Mimbar Hukum*, 3:2 (1991).
30. For the discussion on this subject, see Zamakhsyari Dhofier, *The Pesantren Tradition: The Role of the Kyai in the Maintenance of Traditional Islam in Java* (Arizona:

Arizona State University, 1999); also his *Tradition and Change in Indonesian Islamic Education* (Jakarta: Office of Religious Research and Development of the Ministry of Religious Affairs, 1995) 126-127.

31. For further discussion of the subjects of the test, see Lubis, "Islamic Justice in Transition", 280.
32. Interview with Zuffran Sabrie, Jakarta, 3 May 2003.
33. See H.L.A. Hart, *The Concept of Law* (Oxford, 1961), 101, and his "Positivism and the Separation of Law and Morals", *Legal Review*, (1958), 71. See also Thomas Morawetz, *The Philosophy of Law: An Introduction* (New York: MacMillan Publishing Co. Inc., 1980).
34. See Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihād* (Kuala Lumpur: The Other Press, 2002), 298.
35. Lawrence M. Friedmann, "Legal Culture and Social Development", *Law and Society Review*, 4 (1969).
36. See Prof. Dr Bagir Manan, "Pengembangan Sistem Hukum Nasional Dalam Rangka Memantapkan Negara Kesatuan RI Sebagai Negara Hukum", *Mimbar Hukum* 56 (2002): 8.
37. As told by a number of judges of the Islamic courts of Bogor, Rangkasbitung and Tasikmalaya.
38. See, for examples, judgement No. 326/Pdt.G/2004/PA.Cjr, judgement No. 397/Pdt.G/2004/PA.Cjr, and judgement No. 416/Pdt.G/2004/PA.Cjr.
39. Interview with judges of the court of Cianjur, February 2005. Concerning the significance of the Arabic language and its supreme importance as the religious language of Muslims, see Anwar G. Chenje, *The Arabic Language: Its Role in History* (Minneapolis: University of Minnesota Press, 1969), 3-25.
40. Martin van Bruinessen, "Pesantren and Kitab Kuning: Change and Continuity in a Tradition of Religious Learning", *Texts from the Islands: Oral and Written Traditions of Indonesia and the Malay World*, ed. Wolfgang Marschall (Berne: The University of Berne, 1994) 124-125.
41. Interview with Wahyu Widiana, Jakarta, 4 March 2005.
42. For its Arabic quotation, see Appendix no. 5. Arabic statements other than the one cited above are also often referred to by the judges. They read as follows '...if the love of the wife for her husband has certainly disappeared, her petition for divorce can ultimately be approved in the court' (*Ghāyat al-Murām* by Shaykh al-Majdī) (see Appendix no. 6), and ' ...if the love of the wife for her husband has certainly vanished, their mediators can make a decision on divorce without the approval of either wife or husband' (*Risālat al-Shiqāq*, 22) (see appendix no. 23). See the judgement of the Islamic court of Rangksbitung No. 144/Pdt. G/ 2002/ PA Rks, and of Cianjur No. 364/Pdt.G/2004/PA.Cjr.
43. See Gerard Wiegers, "Language and Identity: Pluralism and the Use of non-Arabic Language in the Muslim West", in Jan Platvoet and Karel van Der Toorn (eds.), *Pluralism and Identity: Studies in Ritual Behavior* (Leiden: E.J. Brill, 1995), 304.
44. The importance attached to religious symbols in the thinking of Indonesian Muslims may be also illustrated by the earlier court letters of the Islamic Sultanates of Melaka and Aceh in which the writers, be they judges or the clerks, always inserted Qur'ānic verses and Sufi terminology, especially in the Preamble and the section of compliments, even though they were writing to a foreign non-Muslim leader. See Ahmat Adam, "Islamic Elements in the Art of Malay Traditional Court Letter Writing", an unpublished paper presented at the 35th *International Congress of Asian and North African Studies*, Budapest, Hungary, 7-12 July, 1997.

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