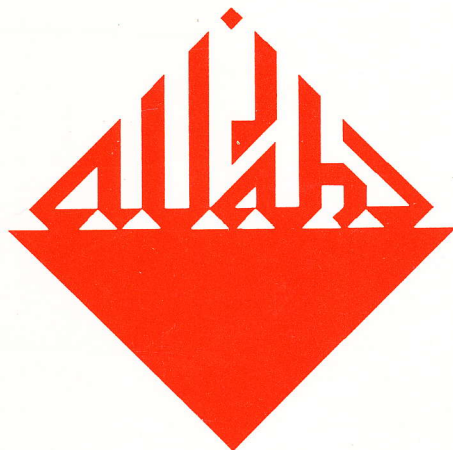


STUDIA ISLAMIKA

INDONESIAN JOURNAL FOR ISLAMIC STUDIES

Volume 10, Number 1, 2003
SPECIAL ISSUE



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Indonesian Journal for Islamic Studies

Vol. 10, No. 1, 2003

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STUDIA ISLAMIKA has been accredited by The Ministry of National Education, Republic of Indonesia as an academic journal (SK Dirjen Dikti No. 69/DIKTI/2000).

MB Hooker

Introduction: Islamic Law in South-East Asia

Introduction: Some General Comments

At this time, the beginning of the 15th/21st century, the distance between Islamic and secular traditions seems wider than at any time in living memory. This special edition is our attempt to open serious debate among legal scholars about the *sharī'ah*.

We have chosen a number of specialised topics each of which raises difficult issues (see below), and thus force us to enter into debate and provide possible answers. We are well aware that answers are conditioned by time and place and, in the case of *sharī'ah*, can never be final or binding for all time. But it is our time which is important; the truths of God's revealed message, through the Prophet Muhammad are, of course timeless; but each age must get from them practical answers and practical solutions to the issues of the day.

Islam is sometimes described as a theology in legal form. This means a number of things: *first*, that the individual's duty is to both God and man but primarily to God; *second*, that the revealed truths (in Qur'ān) are absolute and set the agenda for individual (legal) obligations; *third*, that ethics, morality and prescription are undifferentiated. There are wider implications: for example, that it is the duty of the ruler (government) to implement the *sharī'ah* (law) in the broadest sense; and that revelation is ultimately the superior form of authority and so takes precedence over whatever constitution is in force. These are the internal 'classical' positions developed over the past 1400 years by means of a complex and sophisticated jurisprudence.

That jurisprudence has not been developed by way of precedent, or by way of codification but by way of scholarship. The nearest parallel for the European traditions is the canon law at the time of Aquinas. Like the canon law, Islamic scholasticism began from the fixed principle of revelation contained in a text, originally received orally but later written down, the Qur'ân. It is a matter of debate whether the scholarly commentary developed a 'natural law' (as happened in Europe) or whether the primacy of revelation made the discussion turn in on itself, so resulting in a minutiae of glosses. There is evidence for both views.

Whatever might be the answer—and the debate continues—the whole *shari'ah* discussion assumes a static *ummat* (the totality of believers) in which social, linguistic and cultural differences could be subsumed in submission to God. Of course this is the ideal, and it was never, in fact, practical reality. However, each Muslim polity throughout history took this as a given and worked toward it (or breached it) while attempting to justify itself in the given terms. It was a self-contained universe in law. It depended on the revealed text, Qur'ân; the divinely inspired practice of the Prophet Muhammad, *Sunnah*; and the consensus of the recognised jurists, *ijmâ'*. It is through the latter, the classic text books, that we 'know' the former. However, there is another path to knowing. This is *ijtihâd*, an informed recourse to Qur'ân and *Sunnah*. *Ijtihâd* does not necessarily mean rejecting the text books but it certainly does not give them the traditional primacy. The limits of *ijtihâd* are, of course, always debated and, as with the other two monotheisms (Judaism and Christianity), there will never be a conclusion to that debate. This is an accepted position in contemporary Indonesian Islam.

South-east Asia: The Pre-Modern Law Texts

Islam in what is now Indonesia, Malaysia and the southern Philippines dates from the 15th century. It has left an extensive legacy in literature, philosophy and law. The key notion to keep in mind in assessing this legacy is the idea of 'selection'. As with other Muslim lands outside the Arab heartland, the recipient cultures selected from the classical heritage that which they found useful or appropriate. This does not mean that the provincial cultures were, or are, less 'Muslim'. On the contrary, belief and identity as 'Muslim' are as strong in South-east Asia as in Arabia. It does, however, mean

that the local cultural and language forms determined what Islam meant locally. In the broad sweep of Muslim history one can truly speak of 'Islams' just as one would speak of various forms of Christianity. The *ummat* is one but the expression of the faith is culturally defined. There is no dispute about this as a fact, but there have always been movements from within Islam to minimise or do away with the cultural variations which have existed for centuries.

The pre-modern texts date from these earlier centuries. They are valuable today because they show us how selections are made and for what purpose. It is purpose, or rather, the idea of purposeful selection, which characterises South-east Asian Islamic law. There is a vast complex of texts running into many hundreds of manuscripts. The 19th century European scholars, in the age of high imperialism (see below), read the material as corruption of the 'pure' Islamic law. The reason is obvious: while the texts do certainly contain elements of Islamic law, they also contain indigenous rules. This was thought to be a 'corruption' of the classical heritage. This idea of 'corruption' has persisted into the colonial and contemporary eras with sometimes unfortunate results.

A good example is the Malayan law text, *Undang-Undang Melaka* (Liaw, 1976), which dates from the 17th century and was the most influential text for the succeeding two centuries. The text is short and has three parts, which respectively deal with debt and debt bondage, marriage and divorce and property rights. The first and the last represent local custom (*adat*) whilst marriage and divorce are recognisably derived from Islamic law. Perhaps most interesting is an interpolated section, which classifies the sources of law as (a) reason, (b) Islam and (c) customs of the country. A diversity of sources is recognised and, where there is conflict or inconsistency, then the Islamic element is ranked lower than the other two. The evidence from this text and other, later Malay-Muslim texts is that Islam was not the only source for law in the Muslim sultanates. While the genealogies of these sultanates lay great stress on relationships with the West Asian (that is, Middle Eastern) countries of Arab/Islamic culture, this is not followed through in the law texts. Both, however, were produced at the same time and commissioned by the same ruler(s) and must, therefore, be read together.

The result of this reading is to show that source and selection of Islamic principle is not haphazard or incompetent. On the con-

trary it shows a degree of originality in using Islamic principle for a purpose, namely to legitimise the ruler 'by reference to' Islam. The religion here meant not just revelation but also attachment to the 'superior' West Asian civilisation. Some of the Malay-Muslim texts, in fact, include genealogies relating the texts' patrons to famous, ideal rulers of that area. While these might be fanciful in the historical sense, they were real for those who commissioned them. One might call these efforts 'myth' but, on another level, myths can also state truths. In our example, it is the illustration of the assimilation of foreign legal values. Of course the result is inconsistent but that is inevitable in any sort of cultural borrowing.

By the end of the 18th century there is a corpus of 'Muslim' texts, produced in and for the royal courts, which define sovereignty, rule and state. We would now call these 'public order' or 'public law' texts. In the earlier texts God's revealed message is subordinated to Islam used as a definition of sovereignty. The patrons of these earlier texts were theologically illiterate but there is nothing new in this, present day politicians are, after all, usually constitutionally illiterate. By the end of the 18th century, however, a much greater degree of theological understanding can be shown; but, at the same time, the tension between the absoluteness of revelation and local cultural realities remained unresolved.

These issues are discussed in Hooker (1986) which has extensive essays on the Burmese, Thai, Khmer, Muslim and Vietnamese pre-modern texts. The Malay-Muslim texts are at pp 347-435. Unfortunately, little work seems to have been published since then. Many Malay-Muslim and Javanese-Muslim texts remain to be investigated.

The Colonial Re-formulation of "Islamic Laws"

The success of European legal imperialism is nowhere more clearly demonstrated than in Dutch and British possessions in South-east Asia. Within two decades for the British, and slightly longer for the Dutch, Islam was reduced to a personal religion and confined to family law. How did this happen? The answer lies in the times (c 1800 to 1945) and in the legal policies adopted by the colonial rulers (see below). The consequence of these imperial policies remain alive and well into the 21st century. They still form foundations for Islamic law in contemporary Indonesia and Malaysia (see below).

British Colonial Law

From the late 18th century colonial legal policy rested on the following principle (Act of Settlement, 1781):

English law is the law of general application, subject to the religions, manners and customs of the natives, provided these exceptions are not repugnant to justice, equity and good conscience.

Even a cursory reading of this passage indicates its very restrictive nature and the judicial precedent developed throughout the 19th and 20th centuries confirms this. 'Religions, manners and customs' come to be defined as family law and charitable trusts and even within this narrow definition certain practices, valid in religion, were either restricted or forbidden under the 'justice, equity and good conscience' provision (for example, child marriage and aspects of charitable trusts).

But there was an even more fundamental change occurring. This was the re-formulation of *sharī'ah* into English law terms. Those principles of *sharī'ah* permitted to exist now became described in precedent and their validity and meaning was decided on English legal reasoning. A new hybrid law was developed, the 'Anglo-Muhammadian', or 'Anglo-Muslim' law. (The same happened with the 'Anglo-Hindu', 'Burmese-Buddhism', 'Anglo-Chinese', and 'Malay-Adat laws.) English judicial method absorbed the few principles of *sharī'ah* permitted to continue and, by the late 19th century, the new hybrid had taken on a life of its own. If one wished to know what 'Islamic' law was in British India or British Malaya, then one looked to the precedent. It was certainly not necessary to refer to the classical Arabic texts. One can even find cases from the highest level which actually reject classical Arabic texts if acceptance would have meant overturning existing local precedent. By 1900, a classically-trained Islamic jurist would be at complete loss with this Anglo-Muslim law. At the same time, however, a common lawyer with no knowledge of Islam would be perfectly comfortable.

The historical development of Anglo-Muslim law is described in Hooker (1975: 94-115) and the references there cited. The claim that *sharī'ah* was, and is, now knowable in English law form has been demonstrated through data (1988-1990s) from Malaysia and Singapore only (Hooker, 1999a: 57-75). This essay shows that, even

where classical texts are cited in the religious courts of these jurisdictions, that material is still subject to English-law analysis.

It is not fanciful to suggest that the classical *sharī'ah* is not the operative law and has not been since the colonial period. 'Islamic law' is really Anglo-Muslim law; that is, the law that the state makes applicable to Muslims.

Dutch Colonial Law

The Dutch also marginalised the classical *sharī'ah* although by a different method. From the 1850s it became a settled principle of Dutch colonial legal policy that each racial group should have its own law, applied only to members of that group. There were separate legal universes. For Europeans, or persons assimilated to that status, Dutch law applied. For natives it was *adat* (custom). The *sharī'ah* as such had no formal status, except to the degree or extent permitted by any of the *adat*/laws. Its status was dependent on recognition by *adat*, that is, its 'reception' into *adat* law. This so-called 'reception theory' has since dominated the administration of Islamic law in Indonesia.

Within a few years, the Dutch colonial system of separate laws based on race began to break down and even the invention of special conflict of laws rules (*hukum antargolongan*) to resolve differences proved a failure. To propose strict divisions based on race is not, in fact, a practical proposition. People from different law groups marry and contract across racial lines. An additional complicating factor was the success of the Christian missionary efforts by the end of the 19th century, creating a new class, the 'Christian Native'.

For the Muslims in the Netherlands East Indies (NEI), however, the 19th century Islamic reform movements, derived initially from the Middle East, exacerbated the legal uncertainties of religion vis-à-vis *adat* laws. To this chaotic pluralism we must also add the effect of Dutch legal scholarship (say 1870s-1930s), which was concerned to re-state the indigenous laws of the NEI in a form suitable for colonial administration. This involved selection and re-drafting of rules to make them consonant with legal pluralism and suitable for the newly emerging colonial economy. These are the contexts for the *sharī'ah* to which we now turn.

From the point of view of the colonial administration, the effective day-to-day law for the Muslim population was *adat*, which

might or might not include a reference to Islam. In fact the Islamic reference was much wider than was first thought, particularly in the area of family law. The response therefore was to establish a 'Priest-Court' (Priesteraad) in 1882 for Java and Madura with jurisdiction in marriage, divorce, inheritance and trusts (*waqf*). The judges were Muslims with some recognisable expertise, but the courts had only limited powers to enforce their own judgments. It appears not to have worked satisfactorily and in 1937 a new Regulation on Religious Justice was enacted. This dealt largely with procedure, then as now a real difficulty; however, it also reduced jurisdiction, confining it to marriage and divorce. Most importantly, enforcement of decisions (except in dowry, maintenance and expenses) was a matter left to the secular (Landraad) courts. These courts might, and apparently often did, refuse enforcement, especially where immovable property was in issue.

Looking back, from the perspective of a century, we can see that the response to the legal implications of Islam was to control and limit the *shari'ah*, whilst at the same time allowing it a minimal presence, but in a bureaucratic form. The religious courts were in fact executive institutions: the classical *shari'ah* was little, if at all, evident as a working system of religious jurisprudence.

The most complete account of colonial legal policy in the NEI is in Burns (1988: 148-298). This long paper covers all aspects of policy and has extensive descriptions of substantive law, the courts and the individual statutes. It has full references to the Dutch scholarship from the later 19th century through to the 1950s. The only full account of the Islam-*adat* tension is Prins (1954). There is a brief survey in Hooker (1984: 249-55). The subject has not been properly researched so far as I know since the Prins book, now half a century old.

Islamic Law in the Republic of Indonesia, 1945-1990s

The Republic of Indonesia (RI) had a bitter and bloody struggle for independence and one of its first acts was to establish a Ministry of Religion in 1946. For the first time Islam had a formal presence in the modern state. Islamic political parties were also founded but the RI was not an Islamic state; it was a secular state—as it remains today—with a European-derived Constitution. The promulgation of that Constitution in 1945 was not, however,

uncontested. An intense debate was carried on between secular nationalists and those who advocated that Islam, in some way, be the foundation of the independent republic for which all were struggling. In the event the Islamic case was lost, although this has not prevented the argument from resurfacing at intervals over the past half century of independence (see Hooker and Lindsey, this issue). The argument is quite simple; that ultimate sovereignty is in God, and thus a man-made Constitution must express God's will or at least not be contrary to it. The issue is one of authority: who has the right to say whether a Constitution does or does not accord with the will of God? The Islamic answer is that only those properly qualified, the *'ulamâ'* (religious scholars), may do this. The 'Council of Guardians' in Iran is a contemporary answer. Indonesia has never adopted this position but instead has the Pancasila ('Five Principles'), the first element of which is 'Belief in One God'. Islam has, or can be, subsumed in some way under this rubric so that it has become part of a national state ideology of formal religious tolerance (except towards Judaism and some 'cults'). This reduces revelation to an ideology, the basis for which is not God-given, but instead derives from secular political thought. How has this secularised recognition of Islam and *shari'ah* translated into effective law?

The answer is ambiguous. On the one hand, a Ministry of Religion was established in 1946, thus giving Islam a formal bureaucratic presence for the first time. In addition, overtly Muslim political parties were permitted (political activity in religious terms was, of course, proscribed in the colonial period). These were considerable gains for Islam, but, on the other hand, the colonial regime of religious courts, with a severely restricted jurisdiction, continued and was extended in 1957 to all parts of the newly independent republic. These courts, the *Pengadilan Agama*, were under the jurisdiction of the Ministry of Religion, which was in dispute with the Indonesian Supreme Court (*Mahkamah Agung*) (and thus the Ministry of Justice) on this matter, a tension which is still not resolved (see Hooker and Lindsey, this issue). The important point is that the colonial separation of jurisdiction between the secular and the religious courts, especially in respect of marital property, was carried over into the post-independence judicial structure. A further point is that the religious courts were under-

funded and under-staffed. There is a very fine and detailed account of the courts in Lev (1972). This is still the classic study. Although the data do not go past the late 1960s, there is no reason to doubt the accuracy of the analysis through into the 1980s.

The Religious Court system described above did, however, undergo significant change in 1989 with the promulgation of a new Law on Religious Justice (No 7/1989). The larger part of this statute is concerned with establishing procedural matters; these include staffing, forms for administration, costs and so on. For the rest, jurisdiction is the main subject and this, in many ways, repeats the Dutch and later post-independence laws. Essentially, the Religious Courts are family law courts and the main subject is divorce and property settlement arising out of divorce. There is a useful survey up to the mid-1980s of Islamic law administration in the New Order government by Cammack (1989). This has material on courts and judges and also deals with family law.

The second significant change occurred in 1991 with the publication of the Compilation of Islamic Law (*Kompilasi*) by Presidential Instruction (see Hooker and Lindsey, this issue). It is a code of law for the Religious Courts, although it describes itself as a 'guide'. It sets out the basic sources of law and then follows these with a summary version of the classical law on marriage, inheritance and trusts. A fuller discussion can be found in Hooker (1999b). This is merely an outline of the colonial structure and its revival after independence. There are as yet little data on how the reformed Religious Courts and the *Kompilasi* actually work. On the Indonesian *shari'ah* system generally, see Hooker and Lindsey (this issue).

Useful sources on contemporary *shari'ah* jurisprudence include the legal journal *Mimbar Hukum* and the more general *Studia Islamika*.

Islamic Law in Malaysia, 1950s-2001

The colonial legacy in Malaysia was the Anglo-Muslim precedent and, from the 1950s, legislation (Administration of Islamic (sometimes 'Muslim') Law) in each of the States of the Federation. The Federal Constitution of 1957 declares Islam to be the 'Religion of the Federation'. The Ninth schedule, List I, gives power to the States to legislate for religion. The story of the past half centu-

ry is thus an account of the complex and unresolved interplay between the Constitution of Malaysia (1963), the secular, invented Anglo-Muslim precedent and post-independence legislation.

The obvious place to begin is the legislation in the States of the Federation, including the Federal Territory. While there are differences in the detailed rules amongst the States, all the legislation deals with three areas of law.

The first is what one might describe as the 'official determination' of principle. Here the legislation establishes a Majelis (Council), which oversees finances, courts and, most importantly, establishes Fatwâ Committees. These committees issue opinions on points of principle relating to law and dogma. The opinion is binding in the State for which it is issued. The status of *fatâwâ* has always been contentious in the Anglo-Muslim precedent. While the terms on which *fatâwâ* may be issued are set down in the State Enactments, that is, the sources for them are in the classical jurisprudence of the four Sunni schools, these are not 'known' in the English law sense (that is, in the rules of evidence). Admissibility, therefore, depends on the existing rules of evidence, precedent on which it had already decided that 'Muslim' law was a local law' that could not simply be found' but had to be proved. In addition, the Constitutions of 1957 (Federation of Malaya) and 1963 (Malaysia) distinguished between the secular and religious courts and it was the former that had ultimate authority. We return to this point below but it should be kept in mind that this aspect of the standard State legislation has serious difficulties.

The second part of the States' enactments establishes the Religious Courts and sets out jurisdiction, which is essentially in family law and trusts. Again, this raised difficulties with the secular courts which, in a series of decisions from the 1960s to the 1980s, reiterated their overriding jurisdiction relying on federal statutes made under federal constitutional authority. To be sure, very few cases came up to the High Courts or the Federal Court in Muslim family law matters. The vast majority of applicants to the Religious Courts were poor and mostly women. But there were enough appeals at the higher level to demonstrate the inequality of the two respective jurisdictions.

The final part of the State enactments sets out the substantive principles of *sharî'ah*. These are family law, parts of the law of

property and offenses against religion. The actual rules are accurate short summaries from *fiqh* textbooks. The notable feature is that while the rules certainly state principles, they are drafted in a form that recognises bureaucratic administration. In this they are like any other statute. The result is that the success or otherwise of any action depends as much on forms and formality as it does on its correctness in *fiqh* principle.

The legislation has been much elaborated from the 1980s in all the States. There are now several enactments in each State, which go into each of these three aspects of *sharī'ah* administration in increasing detail. In particular, the subject of offenses has been widened to include such areas as apostasy. In fact, in the past 20 years *sharī'ah* has become increasingly defined in criminal law terms. In 1993, the State of Kelantan even proposed the introduction of the seventh century Arab penalties of mutilation and amputation for a variety of offenses. Unhappily, this is largely politically driven. Nothing has come of it in practice, however, due to the Federal Constitution and separation of jurisdiction which have rendered such initiatives unenforceable.

The Federal Constitution is central and nowhere more so than in the vexed issue of secular court-Religious Court jurisdiction. As we saw above, the latter is dependent and derivative, with the possibility always that an appeal could overturn a Religious Court judgment on grounds that had nothing to do with *sharī'ah*. There was enormous resentment about this and the Federal Government attempted to deal with it in 1988 by way of constitutional amendment. There was a new art 121(IA) which provides:

[The secular courts] shall have no jurisdiction in respect of any matter within the jurisdiction of the *Sharī'ah* Courts.

There is precedent on what this article means from both the High Courts and the Federal Courts. The conclusion is that the Religious Courts have exclusive jurisdiction in respect of the matters specified in the Ninth Schedule to the Constitution. While this solves the jurisdiction issue, and could dispose of the Anglo-Muslim precedent, the fact remains that the definition of what is 'religious'/'religion' is still a matter for the secular courts.

But what actually is the *sharī'ah* in the Religious Courts: is it *fiqh* or something else, or both? Recent data show that while the courts

certainly rely on the classic texts of *fiqh*, the way in which they deal with them, especially at Appeal Board level, is through English-derived methods of legal analysis. Thus, we have 'precedent', 'persuasive', the practice of 'distinguishing' and so on. The earlier Anglo-Muslim precedent is not cited. Instead we now have a new, indigenous form being created. It even has its own law reports of record, the *Jurnal Hukum*.

These are the contexts for *sharī'ah* in modern Malaysia. The most comprehensive description is by Horowitz (1994). This is an especially interesting paper because Horowitz examines the legislation in terms such as 'evolution', 'utilitarian' and 'social change'. These are not classes in classical *sharī'ah* or in the Anglo-Muslim common law. On the other hand, he also uses 'dualism' and 'syncretism' which are concepts of law (and history) well understood in South-east Asia and it is to these that we now turn.

The Originality of *Sharī'ah* in South-east Asia

It may appear strange to scholars of classical Islam to conflate 'originality' and *sharī'ah* in one place. But this conflation does not deny the universality of Islam nor does it question revelation. All it says is that in Indonesia and Malaysia the *sharī'ah* is now expressed in forms which are particular to these places for the Muslims of these two States. These forms of expression originated in South-east Asia. When one asks —'what is Islamic law in Indonesia and Malaysia?'— the answers are the originalities described above. We have the pre-modern texts where Islam is a point of reference for definitions of sovereignty. This is followed by colonial reformulations and, now, the contemporary versions of these in the 21st century.

Where, then, is the 'pure' *sharī'ah*? Has it disappeared? The answer is 'yes', as a working system, that actually determines individual obligation. On the other hand, it exists in the texts which remain, in some ways, its only 'true' expression. The essence of the modern revival movements is to regain a primacy for the texts, to inject their contents and reasoning into the working legal system. After 30 years or so there has been only moderate success, some would say minimal and it would be a rash person who would predict the future. All we can do is take the historical and contemporary data 'from the place' as the primary reference and this means

understanding the localised expressions of *shari'ah* in their own terms.

This is not a new argument; the centrality of the local data has been a feature of historical studies for the past 40 years. The argument says, in the case of Islam, that the local version is historically, sociologically and legally true' and is not a corruption or denial of the 'pure' (that is, Arabic) Islam. The argument is put in detail in the collection edited by Hooker (1983). There are also valuable essays on history, philosophy, literature, sociology, law and politics. More recent scholarship over the past 20 years has confirmed the earlier arguments, although some of the data in the earlier essays are now out of date.

The validity of the argument in the various disciplines has not, however, prevented claims from within South-east Asian Islam to the contrary. These seek to show a 'corruption' of revelation and the necessity for a return to an Arab(ic) purity. This is the so-called 'fundamentalist' position. It requires a denial of one's own history, and the validity of one's culture and language. It is a-historical in that it ignores variation within and between communities throughout Muslim history. It is also wholly impractical except under severe repression (as the example of the late unlamented Taliban movement has shown). Most often the argument is political. There is little in the way of showing that the *fiqh* can 'in practice' be an appropriate law for a modern nation state. Even more important, none of the examples I have seen shows how a transition from the contemporary accommodation to something more 'pure' can be managed. Transitions are always problematic, particularly when the reform of law is involved. They are even more so when the 'reform' becomes 'replacement', in this case with a jurisprudence founded in revelation, the main principles of which were established 1300 years ago.

Much of the discussion in Indonesia and Malaysia is carried on in journals and magazines. In Malaysia the journal *Harakah* is informative and in Indonesia the *Media Dakwah* publications are a primary source.

In English, the most up-to-date source is Hefner (2000) which deals with Indonesia. Unfortunately, there is no equivalent for Malaysia in exactly the same sort of way but there are two collections of essays from within Islam, which take on purity of revela-

tion, law and the modern state: Othman (1994) and Ismail (1995). These two collections are another form of originality, as they are edited and largely written by Muslim women.

The Wider Context: Western Perceptions of Islam

For all of the 19th and 20th centuries the originalities of South-east Asian Islam have been ignored, underplayed or dismissed by Europeans. The reason is obvious. The British and the Dutch were in charge, not just politically, economically and military, but intellectually as well. They set the agenda as to what Islam was and how it was to be formulated. It was thus possible to claim in early 20th century British Malaya that 'Islam has destroyed classical Malay culture'; and, in the NEI, that Indonesians are only 'nominal Muslims'. It was perceptions such as these that allowed, even made necessary, the reformulations of *sharī'ah*. The result for contemporary *sharī'ah* is its compression into the European-derived forms of code, statute and precedent.

But there is a wider context. The West does generally view Islam through law in the biased and intemperate reporting of *jihād* (in this genre, the word is equated with terrorism'); the subjugation of women (the reality is more complex); 'Islamic penalties' (simplistically seen as physical mutilation); and *fatâwâ* (equated, with gross inaccuracy, with the death sentence). These are crude and obvious examples. They are primitive constructions of the 'other', the East, of the kind against which many writers have vigorously protested (Said, 1978). At the same time, however, the temptation to construct remains and there are quite sophisticated forms in circulation today.

The best example comes from the eminent novelist, VS Naipaul (2000: I):

Islam is not simply a matter of conscience or private belief. It makes imperial demands. [A Muslim's] world view alters. His holy places are in Arab lands; his sacred language is Arabic. His idea of history alters. He rejects his own; he becomes, whether he likes it or not, a part of the Arab story. [He] has to turn away from everything that is his. The disturbance for societies is immense, and even after a thousand years can remain unresolved; the turning away has to be done again and again. People develop fantasies about who and what they are; and in the Islam of [non-Arab] countries there is an element of neurosis and nihilism.

Naipaul's stories make the individual characters come alive with all their frailties, inconsistencies and uncertainties; a long way from the certainties of Arabic imperialism and the imperatives of revelation. But it is not so far from such personal inconsistencies to the legal originalities described above. These are also uncertain and are outside or, better, do not acknowledge, Arab imperialism but they exist and they work. Western lawyers place great value on certainty and perhaps underestimate the fact that inconsistency is also a fact of common or civil law legal life. The originalities, as I have described them, may be inconsistent in how they express the immutable truths of revelation but that does not necessarily mean they are incompetent or not viable systems of belief.

The Essays in this Issue

(The first three papers in this issue originally appeared in the *Australian Journal of Asian Law* (vol 4 (3), 2002) and are reproduced here with the permission of Mr Chris Holt, managing director of Federation Press. We acknowledge, with thanks, his generosity).

The choice of essays for this special issue must be justified. To make sense they need to have a commonality or, at least, address a common issue. 'Islamic law' on its own is not sufficient. We find this common issue when we take the question, fundamental to Islam in the 21st century, of whether the classical jurisprudence of Islam is still a working system of law in the contemporary nation state. 'Working system' means (a) principles determining obligation, which (b) are actually implemented. It is suggested that this is, at best, debatable. Indeed, as mentioned, there is a strong argument that the classical jurisprudence is dead as a working system. Under the twin impulses of colonialism and, later, globalisation, it has been replaced by secular definitions which allow or incorporate parts of *shari'ah* but do not allow classical legal thinking. The methods of reasoning now are not those in the *fiqh* texts; instead, the intellectual agenda is set by the civil or common law. Is this true? This seems to us to be the fundamental question facing governments of Muslim populations.

We have chosen four essays, which, between them, show just how complex the answer can be. More importantly, the answers are not separate from each other but related in various ways. We tend to forget these relations. As history has shown many times,

sharī'ah is a whole and, while one may separate out elements according to one's interest or intentions, these parts can never truly be isolated from each other. So it is with the essays in this issue. They may appear to be on separate topics but essentially they come back to the main question: the status of classical reasoning in the 21st century nation state. They show us alternatives: that the classical legal reasoning is decisive; secondly, that it is for the most part merely referential in modern South-east Asia; thirdly, that it can be radically rethought and finally, that it can be manipulated. These are now considered in turn.

Sharī'ah *Decisive*

This is the subject of the first article in this issue by Nadirsyah Hosen. For Islam to be decisive is unusual in Indonesia but it does occur in a very significant field, the giving of *fatwâ* (rulings/opinions on a point of a law). With one exception, the bodies which issue *fatâwâ* (singular: *fatwâ*) are outside state-controlled Islam but they are all the more important for this reason. They have an independence, untrammelled by legislation or judicial formality. The result is published opinion on a wide variety of subjects, often contradicting official state policy.

There are four main *fatâwâ*-issuing bodies, distinguished from each other by stated difference in their methods of reasoning. A *fatwâ* begins with a question to a recognised scholar, or group/ 'collective' of scholars who give an answer. The answer is not binding in the same way that a judicial decision is binding. If one is not satisfied one can go elsewhere. That, at least, is the classical theory of *fatwâ*. In addition, those who give *fatâwâ* must be recognised authorities. Those so recognised in Indonesia, at least by their followers are Nahdlatul 'Ulama (NU) (Renewal of the Scholar); Muhammadiyah; Persatuan Islam (Persis) (Union of Islam); and Majelis 'Ulama Indonesia (MUI) (the Indonesian 'Ulama Council).

These are the four main *fatâwâ*-issuing bodies; there are other, minor, sources. Is there actually an Arabic intellectual imperialism? The answer is 'yes, up to a point', in the method as set in the disciplines taught in Mecca, Medina and Al-Azhar in Cairo. These were, and are, known in Indonesian institutions teaching Islam. The *pesantren* (private Islamic boarding schools) — also *pondok*— still provide an Arabic-focused education. The modern equivalent

are the IAIN (Institut Agama Islam Negeri, State Islamic Institutes), funded by the Ministry of Religion but now with a much wider curriculum (see Hooker and Lindsey, this issue).

On the other hand, the *fatâwâ* in these sources are firmly grounded in the facts of Indonesian Muslim life. Strict 'Arabic' applications of prescription are just not possible or practical and the *fatâwâ*, from each source, do recognise this. The degree of recognition varies. In fact, it is impossible to ask for perfect consistency over time (the past 100 years). As I have said earlier, we may place too much emphasis on certainty especially where a practical interpretation of a revealed religion is the issue.

These questions are fully discussed in Hooker (2003). This book has chapters on method, ritual, the status of women, Islam and modern science, and Islam and the state. The basic material is the collection of *fatâwâ* from the four sources described above.

The Sharî'ah is Referential

By this I mean the laws which apply to 'Muslims', as opposed to 'Islamic law'. The former appears in codes, statutes, precedents and administrative regulations, all of which are European-derived. It is characteristic of the colonial and post-colonial state in which the intention was, and still is, to control Islam. This is achieved by reference to selected parts of *sharî'ah* incorporated into the European form and defined and implemented through the techniques of that form. The *sharî'ah* thus becomes bureaucratised and, of course, diminished. The most significant legacy of 1400 years of scholarship is largely ignored. There is no longer an 'Islamic law' although it is called by that term.

This is the subject of the article in this issue by Hooker and Lindsey: just what is the reference in Indonesia? They argue that it is the modern forms as, for example, in the revised Religious Courts Law and in the *Kompilasi*. It is time now to examine these modern forms and a striking example is the text on the Religious Courts produced by the Department of Religion.

The text, *Sketsa Peradilan Agama* ('Sketch of Religious Justice'), was produced in 1998 by the Department of Religion and, in the foreword, sets out its aims: (a) to provide information on the religious justice system, so as to (b) avoid 'common misunderstandings and false criticisms'. This theme is continued in the Introduc-

tion, 'providing services to the community', to 'realise Indonesia's religious aspirations' and to 'complement other government institutions'. The text then gives a short history of religious courts in Indonesia starting in the 16th century and praising the ideals of Islam. There is no mention of the colonial Dutch Religious Courts. The section on the status and functions of the court is simply a summary of the 1991 Law on Religious Justice.

More striking from the referential point of view is a quite elaborate section on "vision' and 'mission' which asserts the distance of the courts from the classical *shari'ah*. The following quotation speaks for itself:

The Vision of the Religious Courts

The function of the Religious Courts in the future will derive from the vision that the Religious Court will always be an institution for the upholding of truth and justice in a professional, effective, efficient and modern manner in accordance with its authority and will always serve the nation and religion by providing top quality legal service to the seekers of justice, within the national legal system and based on Pancasila and the 1945 Constitution. The institution of Religious Courts is convinced that justice, truth, order and legal certainty in the law and legal practice is essential in creating a safe, secure and orderly environment blessed by God. In view of the dignity and nobleness of the key duty of the Religious Courts, namely the implementation of positive Islamic law in settling family disputes between Indonesians of Muslim faith, and considering that the family has a strategic role as the smallest unit of society and the development of the community and the nation, therefore the Religious Courts will continue to demonstrate concern for the principles of justice, truth, order and legal certainty, paying particular attention to social changes and the development of values as a result of progress in science and technology, and will optimally achieve speedy, simple and economic justice. The criteria for success of the Religious Courts in future will be:

First: Succeed in implementing the basic duties of the Religious Courts in fostering the creation of a safe, secure and orderly community as an integral component of civil society.

Second: Succeed in putting intrinsic and extrinsic values into practice. The values of Islamic justice based on the universal val-

ues of Islam will be the foundation for the work ethic of judges and other staff of the Religious Courts.

Third: Succeed in implementing their function in a constructive and optimistic manner for the development of the nation, in particular for the development of the national law. The existence, progress and performance of the Religious Courts will always be honored and will obtain legitimacy from the community, both formal and cultural.

The Mission of the Religious Courts

To settle family disputes among Muslims as precisely and fairly as possible to achieve public welfare by upholding the principles, determinations and legal objectives of Islam as well as continuously paying attention to changes in the community in the frame work of the national legal system."

It is this passage which is to the point here (the rest of the text describes bureaucratic procedures and gives elaborate statistics). 'Vision' uses terms such as 'truth', 'justice', 'professional', 'efficient', 'modern', the 'nation' and, most important, 'based on Pancasila and the 1945 Constitution'. God only blesses an environment created on these bases; He is not, in this version at least, the creator of the environment. Later in the 'Vision Statement' we have a reference to 'social change' and technology'. It is only at the end of the Statement that we have a passing reference to the 'universal values of Islam'. These are not specified.

When this passage is read with the actual structure of the court(s) and with the *Kompilasi*, it is difficult to avoid the argument that this is an essentially referential system.

From the internal point of view of classical scholarship —the purist view— these comments make dismal reading. Is there no *fiqh* response to the challenge of modernity? This is the subject of Mark Cammack's article, as well as a more general article by Ajmand Ahmad.

Re-thinking Sharī'ah?

Cammack approaches this issue by way of analysing the work of the Indonesian scholar Hazairin, whose theory of bilateral inheritance attempted a reformulation of the *farâ'id* (inheritance)

rules. *Farâ'id* is a highly complicated technical subject and the main thrust of Hazairin's argument is an attempt to re-interpret the rules so as to make possible an advance in the rights of qualified females; in other words, to bring them nearer to equality with the qualified male inheritors. This is very hard to do because the *farâ'id* rules are in Qur'ân and are thus set forever as revealed.

Hazairin discusses the issue by way of analytical classes; the issues of representation and priority among classes. The discussion here is on interpretation of Qur'ân and is not wholly convincing. In fact, his interpretations are strained and inconsistent. They are not acceptable amongst the totality of Indonesian 'ulamâ'.

However, the 1950s are half a century away and we now read Hazairin in the new millennium and in the current circumstances of Indonesian Islam. The latter include the new Law on Religious Justice (1991) and the *Kompilasi* (1989) (see Hooker and Lindsey, this issue). In these new contexts it is possible that Hazairin's proposals may yet come to fruition despite their radical nature and Cammack's essay suggests how this might occur. Of course, time will tell. It is worth noting in passing that there is no Malaysian equivalent for Hazairin.

Another approach to the re-thinking of *sharî'ah* is illustrated in Ahmad's essay where the focus is on competing methodologies with reference to women, human rights and contemporary Islam. This is a huge subject but in this paper the author confines herself to a specific set of material so as to narrow the issue. All too often this is not done and, as a consequence, argument very quickly degenerates into generalities, mostly driven by personal and/or political bias. Such is illustrated in Ahmad's discussion of Western feminist comment on Islam, Muslim women and human rights where, in quite influential books, we find a combination of inappropriate theory with no understanding of *fiqh*. The theory looks convincing to a Western reader because it is Western. The insidious nature of the assumptions involved is demonstrated in Ahmad's discussion of Iranian and Malaysian Muslim feminist writings in which we can find an "internalised orientalism". All that this means is that Western feminist theory has set the agenda and determines the method of argument, a position which is not acceptable.

The better approach may be found in Fazlur Rahman and Muhammad Shahrur. Both authors take us into a rational hermeneutic

(see Ḥallâq in the references in this paper) which also has its variations in Indonesia (see Hooker, *Indonesian Islam* (2003)). The point is that one must establish a *method - ijtihâd* - which does not do violence to *fiqh* but at the same time is practical in the modern nation state. All that we can say at the moment is that dissonance is the norm.

Sharî'ah as Manipulated

This means exactly what it says. There are circumstances, and quite important ones, in which the classifications and forms of *sharî'ah* are used, *manipulated*, on purpose, so as to justify legal transactions. The *sharî'ah* in fact is used to give a colour of legitimacy to transactions which are essentially foreign to its nature. The paper by Richards in this issue on "Islamic" contracts in Malaysia illustrates how this happens. He deals with Islamic banking/economics contracts of sale, hire, loan and purchase on credit. While much of the "Islamic economics" is theoretical and rather wishful in its approach (actually true of this "dismal science" generally). Richards concentrates on the actual contracts themselves. He finds that although topped and tailed with terms drawn from medieval Muslim commercial practice the terms and conditions of the contracts are purely English/Malaysian commercial Law. A *qâḍī* could not understand them and certainly not adjudicate on them. The Malaysian religious courts in fact have no jurisdiction and disputes go to the secular courts where the discussion is wholly in English/Malaysian commercial precedent and statutes. This is a true instance of manipulation.

Conclusion

It is clear from these five essays and from the bibliographical material that the *sharî'ah* in Indonesia and Malaysia is in a state of rapid change. While its forms are derived from the respective colonial histories, the past 50 years have seen developments which are original to the area. The variety of answers which one must now give to the question —'what is *sharî'ah*?— are evidence of this. Whether one wishes to describe the material as a new regional *madhhab* (jurisprudential school of thought) has now become a pertinent issue and this is considered in more detail by Hooker and Lindsey (this issue).

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