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*Mark Cammack*

## Islamic Inheritance Law in Indonesia: The Influence of Hazairin's Theory of Bilateral Inheritance

Inheritance law has long been a flashpoint for controversy in Indonesia. The issue has been especially incendiary for the country's majority Muslim population, for whom the question of what law shall govern the distribution of property on death has often assumed a symbolic significance out of proportion to its practical importance.

The principal focus of the inheritance controversy has centred on the question of which set of rules shall be used in the apportionment of estates. The issue has generally been framed in highly simplistic terms as involving a clear-cut choice between two supposedly distinct bodies of doctrine—the Islamic law of inheritance on the one hand and the customary law or *adat* of the country's many different ethnic communities on the other.

The reason the choice of inheritance rules has been loaded with such weighty symbolism—and the reason the alternatives have been defined in such stark contrast—is because inheritance law in Indonesia has become bound up with notions about Indonesian identity. In its most extreme form, the choice concerning the law that shall govern distribution of property on death is conceived as entailing a declaration of social identity and an avowal of a particular vision of Indonesian society. A determination that inheritance should be carried out according to the rules of Islamic law is understood as an affirmation of commitment to Islam, while the choice of *adat* is construed as an assertion of adherence to a supposed indigenous identity.

Inheritance serves as a proxy for larger questions about social identity and the nature of Indonesian society because the law of inheritance occupies an especially important place in constituting both Islam and ethnic identity. Law in general, and inheritance law in particular, are matters of great importance in Islam. As Joseph Schacht (1955: 28) has written, Islamic law is 'the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself (see also Hooker, 1984: v). Moreover, within the corpus of Islamic legal doctrine, inheritance rules occupy an especially important place. The rules governing the distribution of property on death are spelled out in more detail in the original sources than other areas of law, and are perceived as especially firmly rooted in divine revelation. According to an often-repeated Prophetic dictum, the rules of inheritance comprise folly one-half of all useful knowledge (Fyzee, 1974: 387).

*Adat* is similarly important to ethnic identity. Indeed, the very definition of ethnicity is grounded in the concept of *adat*, since the ethnic group is defined in terms of all those who recognise a common *adat*. And just as inheritance takes pride of place within Islamic doctrine, ideas about inheritance are especially important to *adat*. Inheritance rules are critical to the preservation of local communities that sustain the concept of *adat*. In its rules regarding the distribution of property on death, a society both reveals an ideal image of itself and seeks to ensure its continued existence. By assigning rights of inheritance to certain relationships but not others, a society expresses and at the same time reproduces the social ties by which it is, or wishes to be, constituted.

The inheritance issue in Indonesia has generally been framed, at least within the formal legal system, as involving a conflict between two incompatible alternatives: Islam or *adat*. But this construction of the situation is not inevitable or universal. Accommodation between Islam and *adat* has been most common in the realm of practice, where the understanding of the law has generally been more complex and nuanced and where distinctions between legal regimes have been less cleanly drawn. But there have also been occasional attempts to achieve reconciliation between *adat* and Islam on the level of theory. The most thoroughly developed and, I will argue, the most influential, of such attempts is Professor Hazairin's theory of an Indonesian school of Islamic inheritance law.<sup>1</sup>

Hazairin's views regarding Islamic inheritance are a very important contribution not only to Indonesian Islamic legal thought but to Islamic legal thought in general. Whether or not one accepts Hazairin's interpretation of the law, his ideas warrant serious consideration. Despite their importance, however, the details of Hazairin's theory of the content of Islamic inheritance have never been set forth in detail in English.'

This article presents a relatively detailed account of Hazairin's theory that the Qur'ân and the Traditions of the Prophet support what he refers to as a bilateral system of Islamic inheritance law. The second part of the article then examines recent developments in Islamic inheritance law in Indonesia, and argues that the law is moving, albeit slowly and tentatively, in the direction of an implementation of Hazairin's ideas.

### **The Received Islamic Inheritance Doctrine**

Islamic inheritance law, like Islamic law in general, was not revealed fully formed in the Qur'ân, but developed gradually over the course of nearly two centuries (see generally Coulson, 1964; Schacht, 1950). As it finally emerged at the turn of the 10<sup>th</sup> century, the law of inheritance is a composite structure that integrates elements from two basic sources: principles of interstate succession that had been practised in pre-Islamic Arabia; and explicit rules of entitlement to inherit revealed in the Qur'ân (see generally, Coulson, 1971; Fyze, 1974).

The law of inheritance in pre-Islamic Arabia reflected and reproduced the tribal structure of Arab society. According to Arab custom, inheritance was based exclusively on male blood lines and only males had rights of inheritance. The decedent's entire estate passed to his nearest male relative related to the decedent through male blood lines. The rules for determining priority among male agnates gave precedence to descendants over ascendants and to direct ascendants over collateral relations. Thus, first priority was given to male sons or male descendants related to the deceased through sons. In the absence of male agnatic descendants, the decedent was inherited by his father or agnatic grandfather. If the decedent had no qualifying descendants or direct ascendants, he was inherited by his uncle, in whose absence he was inherited by the descendants of the uncle, and so forth.

Islam modified the customary practice but did not completely displace it. The explicit inheritance legislation in the Qur'ân consists of a scattered collection of verses that specify fixed fractional shares of the estate as the inheritance entitlement of certain named relatives. The individuals who are granted inheritance rights in the Qur'ân are all persons who either had no rights of inheritance under pre-Islamic law or possessed inheritance rights that were inferior to other surviving heirs. Thus, the Qur'ân grants shares to the decedent's daughter, spouse and mother, none of whom qualified for inheritance under the prior law, and to the father and siblings,<sup>2</sup> whose inheritance rights would have been subordinate to those of a closer male agnate. The inheritance rights recognised in the Qur'ân are stated as a fixed fractional share of the estate: one-half for a single daughter, one-fourth for the widow, one-sixth for the mother, and so on.

The Qur'ânic legislation is obviously not intended as complete in itself. Because the persons granted inheritance rights in the Qur'ân are all either relatives who had no rights under the traditional law or relatives whose rights were subordinate to other traditional heirs, it is a reasonable inference that the Qur'ânic legislation was intended to supplement rather than supplant the traditional law. As the law eventually emerged, the specific grants of entitlement contained in the Qur'ân are interpreted as an overlay on the pre-Islamic law. The division of the estate is accomplished through a two-step process. The Qur'ânic heirs are granted their fixed fractional shares first and the residue of the estate goes to the decedent's nearest male agnatic relative, the so called *'aṣṣabah*, who had been the sole heir under the tribal law. In the rare situation in which there exist no representatives of either of these first two categories of heirs, a third category of takers, referred to as either 'distant relations' or 'uterine heirs', enters into inheritance. The group of relations that make up this third category of heirs is neither necessarily 'distant' - it includes grandchildren related to the decedent through a daughter - nor necessarily uterine - it includes a niece who is the daughter of the decedent's brother. It consists, rather, of every relation who is neither a Qur'ânic nor an agnatic heir (Fyze, 1974: 428).

## Hazairin's Theory of Bilateral Inheritance

Professor Hazairin is best remembered for his contributions to Indonesian Islamic law, but his training and research were in the field of *adat*. Hazairin studied under Professor B Ter Haar, an eminent Dutch scholar of Indonesian *adat* law and then researched and wrote about the customary law of an upland society in Sumatra (Feener, 2001: 106). Professor Hazairin's most enduring legacy is his theory of bilateral inheritance first published in 1958 in two volumes entitled *Bilateral Inheritance Law According to the Qur'ân* and *Bilateral Inheritance Law According to the Traditions of the Prophet*.

Hazairin's conclusions regarding the inheritance law of the Qur'ân stand in marked contrast to traditional Sunni doctrine. He rejected the standard Sunni categorisation of heirs into 'Qur'ânic sharers', male agnates (*'aṣābah*) and 'distant relations'. He argued instead that, correctly understood, the Qur'ân recognises three categories of heirs: heirs entitled to a fixed Qur'ânic share; heirs who share a 'relationship' with the deceased; and 'representatives' of pre-deceased heirs (Hazairin, 1982: 18). This categorisation of heirs follows directly from his more basic conclusion that the Qur'ân recognises both a principle of 'representation' of pre-deceased heirs and a principle of 'priority' among classes of relatives. Combining these two principles with the Qur'ânic rules granting fixed fractional shares to certain named relatives, Hazairin derived a complete body of 'bilateral' inheritance doctrine, which accords equal weight to both male and female blood lines.

### Representation

The concept of representation of pre-deceased heirs is widely recognised in the world's inheritance systems. It addresses the situation in which an heir, a child, for example, pre-deceased the person from whom he or she would otherwise be entitled to inherit. Under the principle of representation, the heirs of the pre-deceased heir (the grandchildren of the person whose estate is being inherited) succeed to the portion of the pre-deceased child.

Hazairin discerned a broader significance in the concept. For Hazairin, representation is a principle for determining which persons within a class of heirs, all of whom share the same degree of priority, are entitled to inherit. (Hazairin, 1982: 24-5). The princi-

ple of representation also determines the size of the share that the heir receives. (Hazairin, 1982: 39-40). Hazairin emphasised that representation is not a principle of *replacement* or *substitution*. Rather, it is a principle of inheritance. A relative who inherits as a representative inherits in his own right, and not on the basis of a derivative right from the pre-deceased heir. The 'representative' does not 'replace' another heir because the dead link to the deceased no longer exists (Hazairin, 1982:25). Because the pre-deceased link does not exist at the time the estate opens to inheritance, the link is not himself an heir and so there can be no question of replacement or substitution.

Hazairin based his argument that the Qur'ân recognises the principle of representation on his interpretation of Qur'ân IV: 33 (Hazairin, 1982:27-31). That verse states that 'Unto each We have appointed heirs of that which parents and near kindred leave'.<sup>3</sup> Hazairin construed the word translated here as 'heirs' (*mawâli*) to mean representatives of heirs. He arrived at this interpretation by focusing on the fact that the verse contemplates that the share of the inheritance from either the parents or the near kindred be given to the *mawâli*, and not to the person/s implied by the term 'each' at the beginning of the verse (Hazairin, 1982: 27-8). That is, the verse states that We have appointed *mawâli* unto each', and not 'We have appointed *mawâli* of parents and near kindred'. This becomes clear, Hazairin writes, if the word 'each' is replaced with a proper name, Fulan, for example. The verse then reads 'Unto [Fulan] We have appointed [representative] heirs (*mawâli*) of that which parents and near kindred leave'.

In order to ascertain the meaning of *mawâli* Hazairin asks what relationship is suggested in the verse between (1) the decedent, (2) the *mawâli*, and (3) the party referred to as 'each' in the introductory phrase 'unto each' (that is, Fulan). The verse deals with inheritance from parents and near kindred. Taking first the case of parents as decedents, Hazairin argues that when the deceased whose property is to be divided is designated as a 'parent' the word 'each' must refer to children, since it is only children who have parents (Hazairin, 1982: 27). If the deceased's children are still alive, then they inherit from their parents pursuant to Qur'ân IV: 11 (Hazairin, 1982: 28). But the verse also grants an inheritance to the *mawâli* whom God has appointed for those children ('unto

each we have appointed *mawâli*'). In other words, replacing 'each' with 'Fulan', the verse grants a share of the inheritance to the *mawâli* of Fulan, which makes the *mawâli* heirs (along with Fulan) of the deceased parents. Thus, the verse recognises heirs of the parents other than Fulan.

What could be the relationship between Fulan and the deceased parent such that the *mawâli* of Fulan become heirs and Fulan himself does not? Based on the principle that the Qur'ân grounds inheritance on the existence of a blood relationship between the deceased and the deceased's living relatives, Fulan can only be a relative of the deceased who has died before the deceased. The *mawâli* of Fulan, therefore, must be the heirs of the 'parent' who are descendants but not children of the parent. This can be explained by construing Fulan to be a child who died before his parent. The *mawâli*, then, are heirs of the parents linked to the parent through the pre-deceased child. In other words, the *mawâli* are the representatives of a pre-deceased child (Hazairin, 1982: 28-30).

Verse 33 states that 'We have appointed *mawâli* of that which parents and near kindred leave' (emphasis added). Interpreting the reference to 'near kindred' in a parallel fashion to the interpretation of the reference to 'parents', Hazairin concludes that the verse grants inheritance rights to the *mawâli* or representatives of pre-deceased near kindred as well (Hazairin, 1982: 30-1). As to which heirs among the near kindred the rule of representation applies, Hazairin rejects the possibility that the representatives of the deceased's parents inherit under the principle of representation. His reason for not applying the rule of representation to parents is that to do so would disrupt the system of priority among classes of heirs, since children of a pre-deceased mother would then inherit concurrently with the deceased's father. Hazairin also concludes that the right of representation does not apply to the widow or widower of the deceased. This conclusion is based on the fact that the concept of a 'pre-deceased widow' is illogical, since a widow or widower is by definition someone who has survived his or her spouse (Hazairin, 1982: 38-9).

Thus, Hazairin concludes that the Qur'ân endorses the principle of representation of pre-deceased heirs as a basic mechanism for determining inheritance rights. A relative qualifies as a repre-

sentative if (1) she is related to the deceased by blood; and (2) between the representative and the deceased there are no living links. For example, an orphaned grandchild of the deceased qualifies as a *mawâlî*, regardless of the sex of the grandchild or the sex of the pre-deceased parent, but a grandchild whose linking parent is still alive does not. Likewise, a cousin of the deceased qualifies as a representative if the connecting aunt or uncle is dead, but a cousin will not qualify if the linking aunt or uncle is still alive.

### Hazairin's System of Priority among Classes of Heirs

Hazairin's second major principle — priority — is a mechanism for determining who among the decedent's potential heirs shall be entitled to inherit in a particular case. As Hazairin observed, some principle for establishing priorities among potential heirs (or some other mechanism for limiting the number of takers) is implicit in the principle of representation (Hazairin, 1982: 34—5). This is because granting inheritance rights to representatives of pre-deceased heirs results in a potentially significant expansion of the group that shares in the inheritance. In the absence of rules that define which among the potential heirs shall be entitled to inherit in a particular case, the number of heirs would become very large and their identification a practical impossibility.

Traditional Islamic inheritance law as practiced by all of the major schools includes rules that have the effect of establishing priorities among potential heirs. First, the Qur'ân nominates certain relatives as heirs, but also makes clear that not all those so named are entitled to inherit in all cases (Coulson, 1971: 36). The inheritance rights of some Qur'ânic heirs are made expressly dependent on the absence of other relatives. In most cases it is the size of the share, rather than the entitlement to inherit, that varies depending on presence or absence of other surviving relatives. The share of a surviving spouse is reduced by half if the deceased had children; the share of the deceased's mother is stated to be one-sixth of the estate if the deceased had children, one-third if the deceased was childless. In other cases, the right to inherit is entirely foreclosed by the presence of other relatives.

While the Qur'ân itself provides some guidance on the question of priority among potential heirs, the explicit Qur'ânic doctrines on the subject clearly do not establish a comprehensive or

even adequate system of priorities. Issues regarding priorities not addressed in the Qur'ân are answered based on authoritative pronouncements of the Prophet and/or juristic interpretation. The most basic rule regarding priorities among heirs, described by Noel Coulson as the golden rule of Qur'ânic inheritance (Coulson, 1971: 31), specifies the relative positions of the two primary categories of heirs —the so-called Qur'ânic heirs and the male agnates or residuary heirs. The fundamental principle of priority is that the Qur'ânic sharers receive their portion first, and the residue is then given to the nearest male agnate, the sole heir under pre-Islamic Arab custom.

Although the Qur'ânic heirs have the first claim on the estate, the residuary heirs are by no means secondary or unprotected. The position of the residuary or agnatic heirs is guaranteed by the second important principle of priority, the institution of 'preclusion' (*hijâb*) which holds that the nearest such agnatic relation forecloses other more 'distant' relations from inheritance (Coulson, 1971: 33; see also Thalib, 1981: 89-91 discussing origins of the institution of preclusion). The institution of preclusion operates to limit the number of agnatic takers<sup>4</sup> and also operates to foreclose certain Qur'ânic heirs from inheriting in a particular case. For example, the siblings of the deceased, who are granted a Qur'ânic portion, are precluded from inheriting in the presence of a son or other agnatic descendant.

Some mechanism for determining priority among potential heirs is necessitated by Hazairin's principle of representation, but the determination of who shall be entitled to inherit clearly cannot be made according to the priority rules of traditional Sunni doctrine. This is because to apply the rule from Islamic law that the nearest male agnate totally excludes more remote relatives would in many cases have the effect of defeating the rule of representation. Under the traditional doctrine, an orphaned grandchild is completely foreclosed from inheriting if the deceased is also survived by any son (Coulson, 1971: 33-4).<sup>5</sup> The principle of representation demands both that there be some rules for determining priority and also that those priority principles not be the rules of classical Islamic inheritance.

Hazairin discerns rules establishing priority among classes of heirs implicit in Qur'ân IV: 11, 12, and 176, the basic verses on in-

heritance (Hazairin, 1982: 34-9). In order to ascertain the priority among classes of eligible relatives implied by these verses, Hazairin first sets aside the relatives who receive a fixed Qur'anic share on the basis that their entitlement is specified in the Qur'ân, and they therefore stand outside the system of determining priority among heirs that receive an indeterminate share (Hazairin, 1982: 35). The remaining relatives designated in these verses as heirs are sons, along with daughters when accompanied by sons (verse 11); the father, if the deceased had no descendants (verses 11,12); and brothers, together with sisters when accompanied by brother/s (verse 176). The problem, then, is to decide how the priority among these heirs is to be determined. Hazairin observes that the Qur'ân provides that the father and children inherit from each other, and siblings inherit from each other (Hazairin, 1982: 36). Furthermore, the father inherits from his children only if the children have no descendants.<sup>6</sup> Implicit in this rule is the principle that descendants have a higher priority than the father. Likewise, based on the fact that siblings inherit only in the absence of the father (v. 176), Hazairin concludes that siblings have a lower priority than parents (Hazairin, 1982: 36). Thus, the order of priority is, first, children, second, the father and, third, siblings (Hazairin, 1982:36). Because children includes both males and females, because the father' also includes the 'mother', and because the deceased's siblings include both brothers and sisters and encompass all three types of sibling —germane, consanguine and uterine<sup>7</sup>— the order of priority established by the Qur'ân treats male and female blood lines equally (Hazairin, 1982: 36). When the hierarchy of priority is supplemented with the principle of representation of pre-deceased heirs, a complete system of priority according to class emerges. The first class of heirs consists of children and their descendants; the second class consists of parents; and the third class consists of siblings and their descendants. In the event the deceased left no descendants, parents or siblings, then the deceased's grandparents are next in order of priority, followed by the descendants of the grandparents, the great-grandparents and their descendants, etc. A class having lower priority does not enter into inheritance unless there are no surviving members of any class having higher priority.

Hazairin's system of determining eligibility to inherit based on a hierarchy of classes of heirs differs in several important ways

from the method for determining entitlement relied on by traditional Sunni doctrine. First, under Hazairin's system of classes of heirs, persons within the same class are all entitled to inherit regardless of proximity to the deceased, provided only that between the heir and the decedent there is no surviving link to the decedent. Thus, a grandchild of the decedent will be entitled to share the inheritance with the decedent's son, provided only that the linking parent of the grandchild died before the decedent. While the degree of proximity to the decedent may affect the size of the resulting share, Hazairin's system of priorities is based entirely on class, and does not condition entitlement on comparison of nearness of degree within a single class. Under Sunni law, by contrast, a relative who is nearer in degree to the decedent totally excludes more remote relatives within the same class. This means that a grandchild of the decedent will be totally excluded from inheritance by any surviving son, even if the surviving son is not the father of the grandchild (Coulson, 1971: 33-4).

The second important difference between Hazairin's system of priority and the priority rules of the Sunni schools has to do with the effect of an heir's gender in determining the entitlement of other relatives. As noted, for Hazairin the class of descendants for purposes of determining priority includes both sons and daughters as well as more remote descendants related through either male or female blood lines. The effect of including female and female-related relatives as class members, and of giving preclusive effect to the presence of any class member, means that classes having a lower priority are entirely excluded from inheritance by the presence of a daughter, a daughter's daughter, or any other direct descendant, regardless of the gender of the heir or the blood line. Under Sunni law, the presence of a daughter or non-agnatic descendant frequently affects the share of other heirs. The size of the Qur'anic shares of the spouse and the mother are reduced by the presence of any child, including a daughter, and the presence of daughters may affect the size of the residual share of the *'aṣābah*. But under Sunni law the daughter or non-agnatic descendant does not *de jure* foreclose a non-Qur'anic heir from inheriting.

This second difference between the Sunni priority rules and Hazairin's theory - the effect of the presence of a daughter - assumes importance in two situations. First, the difference between

the two systems of priority affects the inheritance rights of the father when the deceased is survived by a daughter or daughters but left no sons or agnatic descendants. Under Sunni law the daughter does not foreclose the father, who retains his position as the nearest male agnate, and is therefore entitled to the residual share. Because the father is also entitled to a Qur'anic share of one-sixth when the deceased is survived by a child, in this circumstance the father takes two shares: one share as a Qur'anic heir and a second share as the *'aṣṣābah*. Under Hazairin's theory, by contrast, the father is limited to his Qur'anic share of one-sixth when the deceased leaves any descendants, regardless of the gender of the heir or the nature of the heir's relationship to the decedent. The second more significant difference arises when the deceased is survived by a daughter or non-agnatic descendant and siblings, but not by agnatic descendants or the father. Sunni law here grants the daughter her Qur'anic share, but the daughter does not disqualify the siblings from their rights as *'aṣṣābah*. Thus, the daughter or daughters take the share prescribed in the Qur'ān, and the siblings inherit the residue. Under Hazairin's theory, the existence of daughters as representatives of the class of descendants completely forecloses inheritance by siblings.<sup>8</sup>

To create a complete system of heirs and order of priorities Hazairin integrates his scheme of priorities among heirs entitled to an open share—the group he calls 'blood relations' (*dhû al-qarābah*)—with the group of Qur'anic heirs, who stand outside the system of priorities among classes of heirs. The entitlement of these heirs is specified in the Qur'ān, and is not dependent on the absence of heirs having higher priority. Thus, the surviving spouse inherits regardless of the presence of other heirs, and the mother and father inherit concurrently with either descendants of the deceased or the deceased's siblings.

Finally, Hazairin derived the rules for determining the size of an heir's share from the express Qur'anic directives on the subject and the rule of representation. Qur'anic sharers receive the fixed fractional shares specified in the Qur'ān. In determining the size of open shares inherited by heirs who possess a relationship with the deceased, males receive twice the share of females having the same relationship to the deceased. The share of representatives is calculated per stripes; that is, the representatives inherit a share

equal to the share that would have passed to the pre-deceased heir—the party represented— had he or she survived.

### Recent Developments in Indonesian Islamic Inheritance

Hazairin's system of bilateral inheritance represents an extreme departure from Sunni inheritance law and has never achieved wide acceptance. But while Hazairin's ideas were far too radical to win broad approval, they were not ignored or forgotten. Although Hazairin's vision of a national inheritance law based on his theory of bilateral inheritance was not realised during his lifetime, his theory of bilateral Qur'anic inheritance was embraced by a small but influential group of academics and helped shape the policy debate over the direction of future development of Indonesian inheritance law.<sup>9</sup>

### The Compilation of Islamic Law

The question of inheritance law reform was discussed more or less continuously from the time of independence, but the sensitivity of the issue and the press of more important issues prevented any action on the matter for nearly 40 years. By the mid-1980s, however, the Soeharto government had developed sufficient confidence in its control over Islamic politics and its ability to manage the direction of legal development that the potential benefits of raising the inheritance issue outweighed the risks. The vehicle that was chosen to address the content of Islamic inheritance law was denominated a Compilation (*Kompilasi*) of Islamic Law. This form was adopted to avoid any suggestion that the authors of the document were presuming to change the law. The work was to consist of three books covering three subject areas: marriage and divorce in Book I; inheritance in Book II; and charitable foundations in Book III.

The preparation of the Compilation was carried out jointly by the Department of Religion, which has administrative responsibility for the Islamic judiciary, and the Supreme Court, which exercises ultimate authority over the interpretation of Indonesian Islamic law through its power to review decisions from Islamic courts (see Abdurrahman, 1992). The research, drafting and approval of the Compilation was structured so as to ensure broad participation of the Islamic establishment and to lend credibility

to the claim that the final product would do no more than collect and restate existing Islamic doctrines. As a part of the process of researching the work, the drafting committee surveyed Islamic leaders from around the country on the subjects to be included in the law. The final draft of the Compilation was not submitted to the legislature for enactment, but was ratified by a convocation of the country's leading Islamic figures, a process clearly designed to invoke the important Islamic jurisprudential principle of *ijmâ'* or consensus (see Bisri, 2000: 42 and Matardi, 1996: 34, both describing the Compilation as an *ijmâ' 'ulamâ'* or clerical consensus). In 1991 the Compilation of Islamic law was formally promulgated by means of a Presidential instruction directing the Minister of Religion to implement the law in the Islamic courts (Presidential Instruction No 1/1991).

The sponsors of the Compilation initially intended to use the project as a means for effecting far-reaching changes in the law of inheritance. In speeches delivered during the early stages of preparation of the Compilation, Minister of Religion Munawir Sjadzali, the most prominent government official associated with the project, advocated the total equalisation of the inheritance rights of male and female children (Sjadzali, 1988). This proposal went beyond Hazairin's proposed bilateral Islamic inheritance, since Munawir's scheme would have granted both an equal entitlement to sons and daughters and also equal shares, whereas Hazairin recognised an equal entitlement for males and females, but retained the unequal ratio of two shares to the son to one for the daughter.

The most ambitious reform objectives for the Compilation were not realised in the final result. Munawir Sjadzali's proposal for a gender-neutral inheritance scheme provoked strong opposition from the Muslim community and was abandoned by the prepares before the Compilation was presented for approval. The inheritance provisions included in the final version of the Compilation that was eventually approved consist principally of Indonesian language translations of the major Qur'ânic texts on the subject. With respect to children of the decedent, for example, Compilation art 176 provides:

If there is a daughter she receives one-third, if two or more they share two-thirds, and if there are daughters and sons, the sons share with the daughters in the ratio of two-to-one.

The inclusion of these Qur'anic texts has led most observers to conclude that the Compilation codifies basic Sunni doctrine. That impression is strengthened by the fact that the Compilation also includes some of the most important Sunni interpretations of the Qur'anic texts. For example, another article (181) provides: If a person dies without leaving child or father, a uterine brother or sister receives one-sixth. If they are two or more, they share two-thirds.

This language, together with another article addressing the rights of germane and consanguine siblings (Compilation art 182), codifies the standard Sunni resolution of an apparent conflict between two Qur'anic verses addressing the rights of siblings, and would seem to signify an unequivocal rejection of Hazairin's theory of bilateral Qur'anic inheritance.

#### *Representation of Pre-Deceased Heirs*

However, while most of the inheritance provisions of the Compilation suggest a continued adherence to accepted Sunni doctrines, the Compilation also includes a small number of innovations. The meaning and significance of these innovations, moreover, is a matter of considerable disagreement. The most important and controversial innovation is art 185, which provides for representation of pre-deceased heirs. That article states:

1. Heirs who die before the decedent can be replaced by their children ...
2. The share received by the replacement heir may not exceed the share of an heir of the same degree as the person who is replaced.

The drafters of the Compilation offered no explanation of the jurisprudential warrant for permitting representation of pre-deceased heirs, and provided no guidance on the rule's meaning or application. This silence regarding the legal basis and intended purpose of the rule was probably not the result of oversight. It seems likely, rather, that the source and scope of the rule were deliberately obscured as the only means of both obtaining approval of the rule and also leaving open the possibility of future development of the law in line with the drafters' broad objectives.

In the absence of any explanation, the language of the article is sufficiently ambiguous to support dramatically different interpre-

tations of its scope. Opponents of the rule argue that it does no more than grant to judges the authority in an appropriate case to provide for orphaned grandchildren out of the decedent's estate (Rasyid, 1995). On this view the orphaned grandchild is not him or herself an heir, and does not strictly speaking 'inherit'. The orphaned grandchild is not a 'replacement heir', but one who 'replaces an heir'.<sup>10</sup> On this narrow view of the rule, the only effect of the Compilation provision regarding representation of pre-deceased heirs is to authorise judges on an ad hoc basis to grant a part of the estate to orphaned grandchildren who have not otherwise been provided for. It is further argued that the heirs of the deceased other than children must agree to any grant to a 'replacement for an heir' if that grant would have the effect of reducing the share to which those heirs would otherwise be entitled (Rasyid, 1995).

The narrow interpretation of the provision on representation of pre-deceased heirs regards the rule as essentially a procedural device addressed to the powers of the court. The Islamic law of inheritance, on this view, remains fundamentally unchanged. Another view regards the Compilation in general and the rule regarding representation in particular as having fundamentally transformed the substance of Islamic inheritance law.<sup>11</sup> Anshori (1995: 39), for example, argues that the inclusion of the provision regarding representation of pre-deceased heirs in the Compilation demonstrates an effort to accommodate Indonesian developments regarding the law of inheritance, including Hazairin's theory of bilateralism. This interpretation is premised on the view that the rule regarding representation of pre-deceased heirs in the Compilation implements Hazairin's theory that the Qur'ân guarantees the right of descendants of pre-deceased heirs to the share of the inheritance that would have gone to the dead ancestor had he or she survived. More generally, the incorporation of the rule regarding representation in the Compilation gives effect to Hazairin's larger theory of bilateral inheritance.

A number of prominent academics have expressed the view that the Compilation implements Hazairin's theory of representation of pre-deceased heirs." The Supreme Court, which has ultimate authority to interpret the rule, has not definitively addressed the question and will not be inclined to do so in the near future. However, the Court's decisions applying the rule granting inher-

itance to representatives of pre-deceased heirs are consistent with the view that it is based on Hazairin's theory. The Court's application of the rule is consistent with the view that the representative of the pre-deceased heir inherits in his or her own right, and there is no indication that the Court regards the rule as simply a grant of authority to make provision for needy orphans on a case-by-case basis. First, the Court has granted persons who inherit as representatives a share equal to that which the pre-deceased heir would have received had he or she survived. This is consistent with Hazairin's theory, and would not necessarily occur if the rule simply granted judges the power to provide for orphaned grandchildren as circumstances require. Further, what few indications exist suggest that the scope of the representation rule is being applied consistently with Hazairin's theory that the Qur'an grants rights to descendants of pre-deceased heirs. As noted, Hazairin's theory does not recognise rights of representation for all deceased heirs, but only for descendants and collaterals. While the Compilation provision does not specify any limitations on who among the decedent's deceased heirs can be represented—an omission that has led critics to suggest that it could be applicable to deceased spouses and parents—the Court has so far not extended the rule beyond pre-deceased children and siblings.<sup>12</sup>

### **Priority among Potential Heirs**

One indication that the law of inheritance is moving in the direction of effectuation of Hazairin's theory of bilateral inheritance is the inclusion in the Compilation of a rule of representation of pre-deceased heirs, one of the cornerstones of Hazairin's theory. There is also evidence, albeit tentative and equivocal, of movement in the direction of recognising the second basic principle of Hazairin's theory—the doctrine of priority based on classes of heirs. One indication that Hazairin's theory of priority according to class has replaced the Sunni doctrine that determines priority according to rules of exclusion is based on the implications of the adoption of a rule of representation of pre-deceased heirs. The adoption of a rule of representation arguably implies broader changes in the law of inheritance. This is because the principle of representation conflicts with fundamental features of Sunni inheritance law, and its inclusion in the Compilation can therefore be con-

strued as an implicit rejection of those incompatible elements. The feature of the received doctrine that is most directly in conflict with representation of pre-deceased heirs is the doctrine of preclusion.

The denial of inheritance rights to children of pre-deceased heirs under the received doctrine is not a consequence of a specific rule treating the subject of representation, but follows from the application of the general principles governing the determination of priority among potential heirs. As discussed above, the Sunni doctrines specifying which among the decedent's agnatic kin shall be eligible to inherit include a rule of degree, according to which more remote relations are foreclosed from inheriting by the presence of a relative of the same class who has a closer connection to the deceased. A surviving son, therefore, forecloses grandchildren whose linking parent pre-deceased the decedent, since the son is closer in degree to the decedent than the grandchildren. The operation of the rule of degree precludes any broad principle of representation, since the survival of a relative nearer in degree of relationship forecloses inheritance by more remote relations. The Compilation does not expressly overrule the Sunni priority rules, or even address them; it simply declares a result that is contrary to their long-standing and obvious application. It is a reasonable inference, however, that the rule regarding representation of pre-deceased heirs emerges in the Compilation because the principles that had previously prevented representation were abandoned or modified.

A second development that has occurred independently of the adoption of the rule of representation provides more direct support for an interpretation of the law as endorsing Hazairin's theory of priority according to class. The Supreme Court has signalled an inclination to depart from the received doctrines regulating priority among potential heirs in favour of a system consistent with Hazairin's inheritance scheme.<sup>13</sup> Like the implementation of the rule of representation, the apparent shift toward a determination of entitlement to inherit according to a system of priorities among classes of heirs, rather than based on the traditional Islamic institution of preclusion, has been highly tentative and equivocal. In at least two cases, however, the Court has issued decisions squarely at odds with received doctrines regarding the determi-

nation of entitlement to inherit and consistent with Hazairin's theory of priority according to class.

The first of the two cases arose in the Islamic court for Mataram on the island of Lombok, West Nusa Tenggara, and involved a dispute between the descendants of two brothers, Amaq Itrawan and Amaq Nawiyah." Amaq Nawiyah died first, some time before 1930, survived by a daughter and his brother. In 1992 the heirs of Amaq Itrawan filed suit, claiming title to property that had belonged to Amaq Nawiyah when he died. The defendants in the case were descendants of Amaq Nawiyah. The plaintiffs claimed title to the property on the basis that Amaq Itrawan inherited a share of Amaq Nawiyah's estate as his brother. Applying well-settled Islamic inheritance doctrine, the first instance court ruled in favour of the plaintiffs granting them a share of the estate of their ancestor's brother.

The second case involved the estate of a man named Haji Asrori who died in East Java in 1989."<sup>14</sup> Two months after Asrori's death, the deceased's widow and his only child, a daughter by another marriage, met with village and religious leaders for the purpose of dividing the deceased's estate. The meeting produced a signed and witnessed agreement whereby the bulk of the deceased's property passed into the control of the daughter and her adult children. Two years later the deceased's widow joined with the deceased's brother to file suit in the Islamic court for Pekalongan, East Java, seeking to invalidate the agreement on the grounds that it was a result of duress by the deceased's daughter, and requesting a division of the estate by the court according to the rules of Islamic law. The defendants named in the suit were the daughter, her three children, and four of the deceased's siblings.

The first instance Islamic court granted the petitioners' request and invalidated the agreement, but not on the grounds of duress. Rather, the court relied on a provision of the Compilation which authorises the parties to agree to a division of the estate that deviates from that prescribed by law, but only if all of the heirs agree to the distribution and provided that the heirs are aware of their entitlement under the law. Based on the fact that several of the heirs—the deceased's siblings—were not party to the agreement, the court found the agreement invalid for failure to conform to required procedures. The court then proceeded to determine the deceased's heirs and their respective shares.

Although the claimants in the two cases differed, the resolution of both cases came down to the same issue —what are the rights of the decedent's siblings when the decedent is also survived by a daughter or daughters? In both cases, moreover, the outcome under the received doctrine is clear: while the deceased's siblings are totally excluded from inheritance by a son or other agnatic descendant, siblings are not disqualified by the presence of a daughter.

The decisions in the first instance courts and on appeal to the high courts conformed to the received doctrine in both cases. In both cases the Supreme Court reversed the decisions of the lower courts. In neither case did the Court explain its reasoning in any depth. Indeed, the Court did little more than declare the result. In one of the cases the Court cited as authority the views of one of the companions of the prophet, Ibnu Abbas. In the other case the Court cited no authority whatsoever. But while the Court offered scant insight into its reasons, it left little doubt regarding its view of the state of the law. As the Court stated in the first of the two cases, 'so long as the deceased is survived by children, either male or female, the rights of inheritance of the deceased's blood relations, except for parents and spouse, are foreclosed'.<sup>15</sup> And while the Court gave no overt indication that it was guided in its decision by Hazairin's theory of bilateral Islamic inheritance, the result that the Court announced conforms precisely with Hazairin's doctrine of priority according to class.

## **Conclusion**

Indonesian inheritance law is the product of an extremely complex combination of forces, both social and ideological. Any effort to identify trends in the law or project the direction of future development will inevitably be incomplete and selective. The account presented here has made no attempt to comprehend the range of influences bearing on the law. Indeed, Indonesian observers would probably regard the notion that the law is moving in the direction of implementation of Hazairin's theory of bilateral inheritance as strained if not wholly unintelligible.

Law everywhere must continually negotiate two conflicting demands. On the one hand, it must demonstrate the objectivity and constancy without which it would no longer be law; on the

other, it must demonstrate the adaptability without which it would no longer be socially salient. The tentative and covert progress of change to Islamic inheritance law in Indonesia is testament to the extreme sensitivity of the issue. There is little likelihood that the Supreme Court will declare a gender-neutral law of Islamic inheritance any time soon, since the Court is well aware that neither the Islamic judiciary nor the broader culture is prepared to accept such a bold innovation. Moreover, if the Supreme Court did come out in favour of Hazairin's theory, it would face an extraordinarily difficult challenge in persuading the Muslim establishment to follow.

That said, history is probably on the side of reformers. The forces of nationalism, globalisation and rapid social change present serious challenges to the premises of Islamic law. The Islamic legal tradition may well survive and prosper, but it may find it necessary to reinvent itself to do so. And while the idea of *adat* continues to be invoked, it could be argued that the only world in which the concept is intelligible no longer exists. More important than either of these changes, however, are the changes that have occurred in Indonesian society. Over the past half century the Indonesian family has experienced a dramatic transformation. Beginning at about the time of the nationalist revolution, patterns of mate selection, marriage age, divorce rates, and family size have all changed dramatically (see Jones, 1994; Heaton et al, 2001). While the impact of these social transformations cannot be predicted with precision, the changing patterns of family life in Indonesia are certain to have a powerful influence on Indonesian law.

## Endnotes

1. Michael Feener 2001 and John Bowen 1998 have recently emphasised the importance of Hazairin's contribution to Indonesian Islamic legal thought. Their work, however, has focused on the jurisprudential basis of Hazairin's thinking, rather than on his ideas about the positive content of Islamic law. For biographical information on Hazairin, see *Ensiklopedi*, 1996: 537-40.
2. The category of siblings who receive a Qur'anic share is broader than the category of siblings entitled to inherit under pre-Islamic law, since the group of siblings entitled to receive a Qur'anic share has been interpreted to include uterine siblings, who had no rights under the prior law.
3. Based on Mohammed Marmaduke Pickthall's 1979 English translation.
4. This limitation is based on what is known as al Jabari's rule, which establishes priorities among agnatic heirs according to three criteria: order or class, degree of relationship, and strength of the blood tie: Coulson, 1971: 33-5; Fyzee, 1974: 424-8.
5. This results from the application of the rule of degree, the second of the three criteria for determining priority among agnatic relatives.
6. The father inherits as a Qur'anic sharer even when children are present, but we are here concerned with the father's right to an 'open' share in the absence of children.
7. The Qur'an treats the inheritance rights of siblings in two separate verses which, on their face, are inconsistent if not entirely contradictory. The traditional doctrine reconciled the conflict between the two verses by interpreting one as referring exclusively to uterine siblings and the other as referring to germane and consanguine siblings. Applying his assumption that male and female blood lines have equal weight, Hazairin rejected any distinction between the two verses based on the character of the relationship between the deceased and the siblings. That is, he denied that a uterine sister is any less a sister than a full or consanguine sister. Instead, he distinguished the two verses based on whether or not the deceased was also survived by the deceased's father. The provision granting siblings the larger share, according to Hazairin, applies only when the deceased was not survived by the father. When the father is an heir with the deceased's siblings, the siblings take the smaller portion: Hazairin, 1982: 54—5.
8. Although the rights of siblings to inherit a residual share in competition with a daughter or daughters is clearly recognised in Sunni law, Hazairin's alternative view is not without substantial support in the original sources. Hazairin grounded his view that siblings inherit only in the absence of any direct descendant on Qur'an 4: 176. That verse states that:
 

.. if a man dies without a child and leaves a sister, she takes half of the inheritance.... If there are two sisters, they take two thirds of the inheritance. If the collaterals include both males and females, then the male takes a share equivalent to that of two females.

 Hazairin interpreted the word here translated as 'child' to mean either male or female children. This indeed is the common and accepted meaning of the Arabic word *walad*, and the term is interpreted to encompass both sons and daughters when used in other Qur'anic texts dealing with inheritance. Qur'an 4: 11, for example, conditions the size of the

- mother's share on whether the deceased was also survived by a 'child' (*walad*), which Sunni law interprets to mean either sons or daughters. Since, according to Hazairin, a child includes either sons or daughters and, because the principle of representation allows the children or other descendants of a pre-deceased son or daughter to assume the position of the pre-deceased parent, siblings inherit only in the complete absence of any descendants.
9. The most influential exponent of Hazairin's ideas both within the academy and among policy makers was Sayuti Thalib, who held a professorship in Islamic law at the University of Indonesia for many years. In a book entitled simply *Islamic Inheritance Law in Indonesia* (1981) and used as a text in University of Indonesia law courses, Sayuti presented a detailed statement of Hazairin's theory of bilateral inheritance that he then contrasted with the Shafi'ite school of Sunni law, which he describes as patrilineal inheritance.
  10. The narrow interpretation of the rule is based on the fact that the rule is permissive rather than mandatory; it states that a pre-deceased heir can be replaced by a child, not that the pre-deceased heir *shall* be replaced. Further support for the restrictive interpretation is drawn from paragraph (2) of the article, which states that the share of the replacement may not exceed the share of an heir having the same degree [of relationship to the deceased] as the pre-deceased heir. It is argued that this restriction on the size of the share would not be necessary if the replacement were an heir in his or her own right, since the size of the replacement's share would then be identical to the entitlement of the party represented.
  11. This view was expressed by, among others, Tahir Azhary, a senior lecturer in Islamic law at the University of Indonesia who was later appointed Professor of Islamic law. In an article addressing the Islamic sources for the Compilation published shortly after it was approved, Tahir maintained that the Compilation adopts Hazairin's theory of representation of pre-deceased heirs. The article on representation, Tahir wrote, 'can be seen as a new legal norm within Islamic law. In other words, the rule qualifies as an *ijtihad*. As far as the writer is aware, the first person to introduce a theory of representation was the late Professor Hazairin, ... who put forward a theory of representation based on Qur'ân, Surah 4: 33. It appears', Tahir wrote, that the Compilation has incorporated Hazairin's theory': Azhary, 1991:17.
  12. See A Bakar bin H Puteh et al v Muhammad bin Alt & Aisa binti Ali, MA Reg No 70 K/AG/1997 applying the rule of representation to the children of the deceased's pre-deceased sister.
  13. The decision by the Supreme Court is designated as H Hikmah alia Imaq Putrahimah binti Amaq Nawiyah et al v H Nur Said bin Amaq Mu'minah, MA No 86 K/AG/1994.
  14. Waryem binti H Asrori v H Mundiayah binti H Abbas et al, MA No 184K/AG/1995.
  15. Acceptance of this rule is by no means assured. In an unsigned analysis of one of the cases by an official of the Department of Religion included in the volume in which the decision was published, the author writes that, notwithstanding the Court's decision, It remains possible for judges at the first instance and appeals courts to hold a different opinion, for exam-

ple that only sons foreclose other heirs from inheriting, provided that the judges can offer arguments in opposition to the interpretation given by the Supreme Court, and that interpretation is accepted by the Supreme Court': Department of Religion, 1999: 8.

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