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Nur Ahmad Fadhil Lubis

Institutionalization and the Unification of Islamic Courts under the New Order

Abstraksi: *Tulisan ini menganalisis bagaimana pengaruh ideologi Pancasila dan developmentalisme terhadap hukum Islam dan lembaga-lembaganya, terutama peradilan agama Islam, pada masa Orde Baru ini.*

Menghilangnya partai-partai politik Islam dalam perkembangan politik nasional dan menguatnya pengakuan terhadap ideologi Pancasila biasa dipandang sebagai penghambat bagi kemajuan hukum Islam dan lembaganya dalam rangka pembentukan sistem hukum nasional. Tapi tulisan ini melihat bahwa kebijakan-kebijakan politik pemerintah itu di samping tantangan bagi para pendukung hukum Islam tapi sekaligus telah menciptakan kesempatan dan iklim yang baik bagi hukum Islam dan pelembagaannya untuk berkembang, beradaptasi, dan terlibat dalam pembentukan sistem hukum dan peradilan nasional.

Orde Baru hendak menciptakan suatu sistem di mana kehidupan ekonomi, politik dan budaya didasarkan atas Pancasila. Tapi dalam masyarakat modern yang plural seperti Indonesia ini, keterlibatan semua kelompok dalam pembangunan merupakan suatu hal yang mutlak. Islam jelas terlalu kuat untuk diabaikan begitu saja. Suatu kebijakan pemerintah yang mengabaikan kepentingan umat Islam bisa menimbulkan reaksi yang keras dan konservatif dari umat Islam. Mereka bisa menjadi penentang upaya-upaya modernisasi yang dipelopori pemerintah. Karena itu pemerintah harus mengakomodasi umat Islam. Namun akomodasi ini juga dimungkinkan karena perkembangan baru di kalangan pemimpin Islam yang menunjukkan sikap mereka yang lebih rasional, moderat, dan akomodatif terhadap pemerintah. Sekarang para pemimpin Islam sudah menerima tidak relevannya kehendak mendirikan negara Islam di Indonesia. Mereka menerima Pancasila, dan berharap

dapat mewarnai Pancasila dengan ajaran-ajaran Islam. Ternyata "Islamisasi" atau "Santrinisasi" sedang berlangsung dalam masyarakat Indonesia dan juga dalam birokrasi.

Pemerintah jelas sangat berharap agar kalangan Islam dan lembaga-lembaga keagamaan mau melegitimasi dan mendukung program-program pembangunan. Namun demikian partisipasi umat Islam dalam politik harus diimbangi secara bijaksana hingga mereka tidak menentang penguasa, dan ketenteraman umat tetap dapat dijaga. Dalam hal ini pemerintah terus berusaha mengakomodasi umat dan menjadikan hukum Islam sebagai bagian dari agenda birokrasi. Ini merupakan cara untuk menciptakan suatu kelompok hakim dan pejabat peradilan baru yang sikapnya lebih modernis terhadap hukum Islam dan lembaga-lembaganya. Bersamaan dengan ini kontak dan kerjasama atara Mahkamah Agung dan Departemen Agama dalam mengembangkan hukum Islam semakin meningkat. Salah satu hasil penting dari kerjasama ini adalah Instruksi Presiden dan Keputusan Menteri Agama tentang perlunya dilakukan kompilasi hukum Islam.

Pada masa Orde Baru ini telah banyak ketentuan hukum yang mengadopsi hukum Islam sebagai hukum positip nasional. Ini tidak terbatas hanya pada bidang hukum yang secara tradisional telah menjadi bagian dari umat Islam, yakni yang berkaitan dengan keluarga, tapi juga bidang yang lebih luas: Undang-undang baru tentang Pendidikan Agama pada setiap tingkat pendidikan formal, dan Undang-undang no. 7/1992 tentang Perbankan. Yang disebut terakhir ini mengakui institusi mudârabah *("kesepakatan untuk menanggung bersama untung dan ruginya suatu usaha") sebagai salah satu dari fungsi bank-bank umum di Indonesia. Untuk mengatur kegiatan perbankan yang baru ini, telah dikeluarkan Peraturan Pemerintah no. 72/1992 di mana syarî`ah secara formal harus dijadikan acuan. Pasal 2 dari Peraturan ini menyatakan: "Prinsip* mudârabah *didasarkan atas* syarî'ah".

Undang-undang perbankan yang baru itu segera beroperasi ketika satu bank Islam, Bank Muamalat Indonesia, dibentuk. Bahkan ternyata keterlibatan syarî'ah *Islam dalam perbankan telah berlangsung sebelum berdirinya bank Muamalat ini dalam bentuk BPR (Badan Perkreditan Rakyat) di kota-kota kecil dan pedesaan.*

Gejala baru itu jelas merupakan tantangan. Kajian-kajian hukum Islam harus langsung diarahkan pada aktualitas dan persoalan-persoalan yang dihadapi umat Islam sekarang hingga mereka mendapat bimbingan bagi kesejahteraan hidup di dunia modern ini.

نور أحمد فاضل لوبيس

تأسيس وتوحيد المحاكم الإسلامية طبقا للنظام الجديد فى إندونيسيا

خلاصة

هذا المقال يقصد النظر إلى التغيرات الشرعية والقضائية التى حدثت من قِبَل النظام الحكومى لإندونيسيا، ويسعى إلى تحليل تأثير نظرية بانتشاسيلا وتطوير القانون والنظام الإسلامى، وخاصة المحاكم الدينية.

عندما ضعفت الأحزاب السياسية الإسلامية الرسمية، ثم اختفت من المنصة السياسية القومية، وتم تنفيذ الالتزام الفردى لبانتشاسيلا -كما هو معروف عامة- تم قمع وكبح تقدم القانون والنظام الإسلامى للبحث عن النظام الشرعى، فهذا المقال ينظر إلى أن يتناول تلك السياسات والبرامج، بالاضافة إلى التظاهر بتحدى صارخ لمؤيدى القانون والنظام الإسلامى، وذلك فى الوقت الذى توافرت فيه فرصة قيمة ومناخ ملائم للقانون والنظام الإسلامى لينمو ويزدهر ويتكيف ويساهم فى تشكيل النظام الشرعى والقضائى القومى.

إن الحكم الجديد يهدف إلى إيجاد نظام تنفخ فيه روح الحياة السياسية والاقتصادية والثقافية من بانتشاسيلا، مهما يكن الأمر فى مجتمع متجدد جماعيا (خاص بجنس أو عرق واحد) مثل إندونيسيا مساعى التنمية وسط جميع الفرق البارزة (فى الانطلاق نحو التقدم) ضرورية، رغم أن الإسلام ليست لديه قوة سياسية كافية ليمارسها من أجل بسط

وسيطرة نفوذه، حتى أن قوته فى وضع يمكن تجاهله، إلا أن تجاهل السياسة الحكومية المصالح الإسلامية يمكن أن ينتج رد فعل عنيف وصارم من قبل الجماعة الإسلامية التى ستبطل التكيف الإسلامى الحالى مع التجديد، فعلى الحكومة أن تقوم بالتوفيق بين أصوات الجماعة الإسلامية، وهذا التوفيق يمكن أيضا بما يوجد من تطور جديد عند زعماء المسلمين وهو يظهر أنهم أكثر اعتدالا ومنطقيا مع الحكومة، ويمكن توفير كل هذا داخل المبنى للمجتمع وبدون تحدى مباشر للوضع الشرعى المتميز. فالدعوة إلى الإسلام أو الدين تحتل مكانا بين الإندونيسيين والبيروقراطية (إدارة حكومية).

الرئيس سوهارتو بنفسه قد ظهر ليتحرك ويتقرب إلى الجماعة الإسلامية أكثر من أى وقت من فترة رئاسته، وإن تأييده لجمعية المثقفين (العقلانيين) ICMI -التى أسست لأول مرة فى ديسمبر ١٩٩٠ على مستوى واسع يمكن اعتباره أهم من كل شئ فى هذا الصدد. وتأكيدا على إخلاصه يبدو أن سوهارتو يرسم معالم جديدة للنظام الجديد الذى لا يتعامل مع الإسلام والمسلمين كأعداء، بل كشركاء كاملين فى بناء الدولة.

من يرسم السياسة لهذه الدولة يجب أن يدرك أن القانون ونظام القضاء الشرعى فى الدولة لديه إمكانيات: إمكانية المحافظة (على ما هو عليه من الأول)، وإمكانية تأييد التنمية، بأية حال وجود شئ واحد أمر حتمى، وهو أن حكومة الدولة تستطيع أن تبقى دون التعامل مع هاتين الإمكانيتين. الحكومة لديها أمل كبير فى أن كلا من الموظفين الدينيين والمؤسسات الدينية سيشترك فى التشريع ويؤيد برامج التنمية. على كل حال التأييد والاشتراك فى رسم سياسة الدولة من الجانب الإسلامى يجب أن يكون متزنا عقليا حيث ألا يتحدى نظام القضاء ولايؤذى المشاعر الدينية للمسلمين، وبدلا من تحدى المحافظة فى المحاكم الدينية مثلا نظام الحكم الجديد يبحث عمن يختارهم ليجعلهم أصحاب الإدارات الحكومية (موظفين) عن طريق رفع أوضاعهم، ودفع الأجور المغرية، ويؤفر لهم فى أعمالهم مناهج رفع المناصب عن طريق اتخاذ إجراءات جديدة، والاحتياجات والترقيات. وهذه البرامج ستساعد فى إعداد نوع جديد للقضاة وموظفى المحكمة الذين يستخذون موقفا عصريا (حضاريا) أكثر تجاه القانون الإسلامى ونظام القضاء الشرعى.

بعد سن القانون رقم ١٤/١٩٧٤ الذى ينص على أن سلطة المحكمة العليا ستغطى أيضا شئون المحاكم الإسلامية، حيث كانت هناك اتصالات متزايدة وتعاون جاد بين المحكمة العليا ووزارة الشئون الدينية فى إشراف وتطوير المحاكم الإسلامية. فقد أثمر التعاون بينهما فى شكل تأليف القوانين الإسلامية على أساس قرار جمهورى رقم ١ صادر فى ١٠ يونيو ١٩٩١، وعلى هذا الأساس أصدر وزير الشئون الدينية قرارا تحت رقم ١٥٤ فى شهر يوليو ١٩٩١، وذلك لإنجاز عمل التأليف باعتباره دليلا ومرجعا لجميع الوكالات والمؤسسات الحكومية، وخاصة للمحاكم الدينية، وكذلك فى جميع الأحوال لإنهاء الخلافات فى مجال النكاح والإرث والأوقاف، هذه أمثلة أساسية لأهمية الموظف التنفيذى فى تشكيل نظام قضائى قومى، ليس لتنفيذ القوانين الوضعية فحسب، بل أيضا للبحث الشرعى وصياغة القانون.

هناك بنود أوضاع شرعية كثيرة ذكرت فى نظام الحكم الجديد يمكن الاستشهاد بها باعتبارها قوانين إسلامية مطبقة كقوانين وضعية قومية: منها قانون رقم ١/١٩٧٤م، وقانون رقم ٧/١٩٨٩م للمحاكم الدينية. بجانب هذه القرارات المختلفة التى صدرت عن أعمال التحقيق فى مجال القانون الإسلامى فى البلاد -هناك قرارات أخرى مثل قرار حكومى رقم ٩/١٩٧٥ الخاص بأعمال التحقيق التى أجريت فى سنة ١٩٧٤م، والذى يتعلق بقانون الزواج، وقرار حكومى رقم ٢٨/١٩٧٧م الخاص بالمؤسسات الدينية الإسلامية، وقرار جمهورى رقم ١/١٩٩١م الخاص بتأليف القانون الإسلامى، وقرار الوزير الدينى رقم ٢/١٩٩٠ م الخاص بمن يشرف على الزواج الإسلامى.

إن تطبيق القانون الإسلامى لا يقتصر فقط على مجالات القانون تلك التى هى توجد فى قلب الدين تقليديا (عرفيا) يعنى قانون الأسرة والإرث، بل يشتمل أيضا على كثير من الأمور الدنيوية. نظام التعليم الجديد الذى يحتفظ بوظيفة التعليم الدينى ويمزيد من الثقة يشتمل على جميع المستويات وجميع أنواع التعليم الرسمى، والقانون الذى أعلن حديثا يتعلق بالمعاملات المصرفية (قانون ٧/١٩٩٢). هذا القانون يعترف بنظام تعاهد الاشتراك فى الأرباح والخسائر كواحد من وظائف البنوك عامة فى إندونيسيا. ومن أجل تنظيم هذا القانون الخاص بالنشاط المصرفى قد صدر قرار حكومى رقم ٧٢/١٩٩٢م،

ومرجعه الرسمى قائم على الشريعة. والبند الثانى لهذا القرار ينص على قاعدة الاشتراك فى الأرباح والخسائر التى تقوم على الشريعة، والبند الخامس يضع مزيدا من الشروط: (١) البنك الذى يقوم على قاعدة الاشتراك فى الأرباح والخسائر يجب أن يكون لديه مجلس رقابى شرعى يقوم بواجبه وهو أن يضمن أن جميع الأنشطة للتعامل المصرفى المتمثل فى جمع مبالغ (ودائع) مصرفية من الجمهور وتوزيعها على الجمهور مطابقة للشريعة.

(٢) تشكيل المجلس الرقابى الشرعى يجب أن يتم عن طريق بنك معترف به يقوم على الاستشارة مع الأنظمة التى تكون مكونة من علماء إندونيسيا أنفسهم. وبيان هذا البند يشرح أيضا أن وظيفة هذا المجلس الرقابى الشرعى تكون تحديد شرعية ونشاط وانتاج وخدمة لأى بنك من وجهة نظر الشريعة الإسلامية، وبالتالى يجب أن يشمل هذا المجلس هؤلاء الأعضاء الذين لهم معرفة واسعة وعميقة فى الشريعة. لم يبق هذا القانون على صفحات الكتب طريلا، لأن بعد فترة قليلة من الزمن تم تأسيس بنك إسلامى جديد، وهو بنك المعاملات إندونيسيا. فى الحقيقة باشتراك المنظمات الإسلامية فى التعامل المصرفى والأنظمة المالية تم تأسيس بنك مبكرا باسم BPR يعنى مؤسسة مصرفية تتمتع بثقة الشعب، وذلك فى جميع المناطق المدنية والقروية.

ومن أجل مواصلة هذه الظاهرة العظيمة ورفع شأنها يجب أن يقوم مؤيدو القانون الإسلامى بجهاد جديد يعنى القيام بالجهود المنتظمة والمتواصلة لاستنتاج مبادئ وقوانين شرعية من مصادرها عن طريق البحث العلمى عن التراث الغنى بالتقاليد والآداب الشرعية الإسلامية، تلك الدراسات هى الجهة المسئولة عن شرح الحقائق وقضايا الساعة لعدد السكان الإندونيسى فيه الأغلبية العظمى للمسلمين، وتوجيههم إلى التقدم نحو القيام بالخدمات الاجتماعية وتحسين الكفاءات فى العالم المعاصر.

ترجمة من الانجليزية:
صلاح الدين الندوى

The growing discontent under guided democracy and the pressure of deteriorating economic conditions under Sukarno brought about political violence and social conflict on an unparalleled scale in Indonesia's history. This was the opposite of Sukarno's ideal of uniting different ideological streams —nationalism, communism and Islam— under his guided democracy. The abortive coup of September 1965 which was followed by the destruction of the communist party and its anti-religious ideas marked a turning point in the history of the Indonesian nation. While the full story behind the September 30th movement, as it was named thereafter, remains subject to conflicting interpretations, there can be no doubt about the result of the coup.[1] The most important result was the end of the Sukarno era and the emergence of the New Order government.[2]

This article will look at the legal and judicial changes brought about by the New Order government and will seek to analyze the impact of "Pancasila" ideology and "developmentalism" (*pembangunan*)— the two key words of the New Order regime's basic policy— on Islamic law and institutions, especially the *Agama* (religious) courts. The weakening, and later disappearance, of formal Islamic political parties from the national political stage and the enforcement of singular adherence to "Pancasila" have usually understood as having suppressed and curbed the progress of Islamic law and institution in the search for national legal system. However, this article will seek to show that those policies and programs, in addition to posing a tremendous challenge to the proponents of Islamic law and institution, at the same time created a valuable opportunity and a favorable climate for Islamic law and its institutions to develop, adapt and participate in the formation of the national legal and judicial system.

Legal Order and Legal Development

The political power of Sukarno, who had been nominated as president for life and had dominated the Indonesian political scene since before independence waned considerably soon after the abortive coup. His remaining influence was effectively broken when he kept trying to play down the demands of fast growing counter-movements led by the anti-Communist army generals, Muslim organization and student leaders. The decisive transfer of political power occurred on March 11, 1966, when President Sukarno reluctantly signed an order em-

powering General Suharto, "to take all steps deemed necessary to guarantee the security, tranquility and stability of the government machinery and the process of the Revolution ... [and] the personal safety and authority of the President ... "[3] It was later obvious that the steps "deemed necessary" by Suharto included the abolition of the Indonesian Communist Party and its affiliates and the arrest of many of Sukarno's ministers, something that Sukarno refused to do.

The New Order came into existence as a reactive response to the deteriorating conditions under the pretext of the "guided democracy" of President Sukarno, who sought to integrate existing conflicting political ideologies. The divide and rule policy of Sukarno enhanced tension in particular between the communist and left wing parties, and the Islamic and other anti-Communist exponents. The army's rank and file, which had bitter experience of communist rebellions and uprisings, generally disapproved of the favorable position given to the Communist Party and its leaders by Sukarno. The army's suspicion grew stronger when the PKI wanted to arm its members as a voluntary militia. All these developments culminated with the abortive coup of September 1965. The counter movements temporarily united all fronts against the establishment.

However, when everything cooled down, the prime beneficiary of this crisis was the Indonesian army, whose surviving leaders moved to establish a "quasi-military" regime under Suharto.[4] During the period of violent transition (1966-1968) the radical parties were destroyed and other parties were weakened. The military assumed control of government. Instead of cooperating with the available politicians, the regime sought the assistance of academicians, especially economic professors most of whom had graduated from Western universities and who had no political followers, and also those who came from minority groups, especially Christians. The coalition of these two groups formed a new cabinet with two urgent programs: political stability and economic development.

Recovery was greatly assisted by a considerable expansion of crude oil production and the development of natural gas resources which were encouraged by two unanticipated increases in the price of oil and gas in 1973 and 1979. The favorable treatment by industrialized donor countries to help the country also played a remarkable role in helping the government to realize its prime objectives.

Learning from the failures of Sukarno government, the New Or-

der regime, as opposed to the "Old Order" of Sukarno, insisted on its legality by claiming to uphold the constitution integrally and by maintaining that its basic objective was a constitutional mission to create stability and prosperity for the whole nation. The new provisional People's Consultative Assembly, now cleansed of all communist influence and Sukarno's backers, acknowledged the validity of the presidential command letter (MPRS Decree no. IX/1966), discharged Sukarno of his executive power in the following year (MPRS Decree no. XXXIII/1967), and in 1968 appointed Suharto outright as the second President of the Republic (MPRS Decree XLIV/1968).[5]

After being established through the formal procedures of existing constitutional stipulations, the New Order government took challenging initiatives to solve the chronic problems of the nation. The economic situation had been devastated by the prolonged costly war against the colonial powers, regional and fractional rebellions, the neglect of economic development, and the rampant practice of corruption during the first phase of independence. The present government consolidated its bureaucracies and stripped them of any political power. The military moved in and installed its personnel at every key position of power in politically and economically strategic ministers, central and regional bureaucracies and state-owned firms, especially in trade and the oil industries.

The New Order aims to create a system in which political, economic and cultural life is inspired by Pancasila, and by means of which a stable and institutionalized structure, and prosperous and just nation are to be built.[6] This idea was encouraged by a conviction that much of the national interest and development had previously been neglected due to the struggle over ideological differences. Stability and economic progress were two principal goals which the Old Order was accused of failing to achieve and these two became the prime goals and the channel of legitimacy of the New Order government. These goals were embodied in Pancasila which became the ideological foundation of the state and nation. The present government claimed that the true principles of Pancasila had been pushed aside by Sukarno and the PKI (Indonesian Communist Party) under the pretext of Guided Democracy. Therefore, the New Order wanted to put an end to the ideological debates that had dominated the early years of independence and so emphasized the compromising ideas of Pancasila. The new political systems based on Pancasila values are being built

specifically to fulfill the basic need of the whole Indonesian population.

Many studies dismiss the New Order regime's determination to adopt and apply the Pancasila ideology as an essentially self-serving strategy promoted by the existing regime to preserve the status quo and to continue its ravaging of state resources. Most of the student overlook the significance of promoting an indigenous compromising ideology in this critical new nation. It was also obvious that the prevailing mood among national leaders was to stop the disintegrating factors that had ravaged the nation since its independence. A few writers seek to go beyond this and try to understand how the actors perceived their actions. In other words, this latter type of study sees how the New Order regime is determined to design its own polity and tries to conceptualize this polity, in terms that are consistent with the ideological concepts that they use in their self-understanding and analysis.[7]

The New Order government, however, does not merely retain Pancasila, but has also campaigned to elucidate and disseminate its existence. A short course was designed to educate the Indonesian people, starting with civil servants and then community leaders and students, about the directives for the realization and implementation of Pancasila and some other civic subjects. The manifest intention has been to establish a strong national solidarity and to prevent conflict arising from ideological differences, and this objective, being compounded by other conditions, seems to have reduced political tension and ideological debates. However, this nation-wide compulsory systematic dissemination of a strictly formulated "philosophy" may have a negative impact and destructive effect upon social integration and political dynamism.[8]

The rejection of the "Islamic" state and the failure of the liberal system and guided democracy during the Sukarno era, had forced the New Order regime to find a common ideology which would prevent the disintegration of Indonesia's plural and heterogeneous societies. Besides, they also have to prove that the claim exponents of an "Islamic" state, that never had a chance for this to be tried in a national Indonesian context, is beyond any probable option. The existing political parties were affected and weakened by the suffering of the whole country. This trauma and a distrust of the political leaders made the policy of the New Order, to exclude them from the cabinet and any

important key positions, look normal and acceptable. The only existing alternative, which may challenge the ruling government, comes from the Islamic circle. Too much pressure on Islam or too drastic a distance from it may backfire by facilitating the Islamic groups' claim that the existing government is detrimental to Muslim interest and rights.

The goals of stability, national integration and development filled the regime's political discourse during the first decades of the New Order. Because of the continuing silence of concepts like consensus (*mufakat*), deliberation (*musyawarah*) and mutual cooperation (*gotong-royong*) among the general population, the policy makers of the New Regime sought to inscribe Pancasila, which contains those values, into the national consciousness, in spite of the fact that the same terms had been used (or absurd) by Sukarno. Thus, the very first act of the People's Assembly (MPR) was to reaffirm its commitment to and the centrality of the reinstated 1945 Constitution, and to declare that Pancasila "cannot be changed by anybody, including the elected MPR, because changing the content of the preamble means the dissolution of the state", thus signaling its ideological significance in shaping the government's policies. In order to prevent the possibility of any deviant interpretation of Pancasila, the People's Assembly promulgated a decree elaborating basic interpretation of it. The government established a nation-wide institution to devise, supervise and organize "upgrading courses" on Pancasila for government officials and society leaders.

In this respect, the New Order was more consistent and fortunate than its predecessor. With the disappearance of the communist party and the weakening of most of the politicians, the newly established government was not plagued by conflicts over ideological issues and the priority of national interests. There was a general tendency then to eschew ideological slogans and to play down political niceties in favor of pragmatic economic action.[9]

Another basic claim of New Order government is its insistence on upholding the 1945 Constitution. This constitution was designed by a Javanese-sponsored preparatory committee under the pressure of an on-going struggle. Consequently, it was intended more as a provisional constitution and gave great power to its executive leader to lead and guide the nation in a time of struggle and revolution. Sukarno himself on many occasions in the early days of independence stressed

that the Constitution was only a "temporary", "lighting" and "revolutionary" constitution, which in due time could and must be perfected by the elected representatives of people.[10] However, it was Sukarno who decreed the return to this temporary constitution and used it to support his guided democracy.

No wonder some observers call this document an "authoritarian constitution"[11] which justifies the authoritarian action of any ruling regime as "constitutional". This may partly be the reason why Sukarno, as well as Suharto, took every step necessary to prevent this constitution from being repealed or amended.

In line with this, the provisional People's Assembly was reshuffled by, among others, discharging members of the communist party and affiliated organizations. The transformed Assembly which was now presided over by General Nasution, an anti-Communist army general who survived the assassination attempt of the September 30 movement, convened in 1966 and formally decreed that, until national elections, it would function as the People's Consultative Assembly intended by the Constitution. The provisional Assembly also decided to revoke many previous Sukarno-designed MPRS decrees such as those that adopted guided democracy and the nomination of Sukarno as president for life.

The break-up of guided democracy revived a strong hope among many people for the rule of law and the authority of the judicial system. Constitutionally, the conduct of the government is to be based on the rule of law, since Indonesia is a *rechtstaat* (a state based on law), not a *machtstaat* (a state based on power). The constitution also states that Indonesia is a democracy in which sovereignty resides with the people and is vested in the People's Consultative Assembly as the institutional embodiment of the entire Indonesian people. However, the drafters of the constitution did not endorse the *Trias Politica* theory of Montesquieu which advocates a separation of powers among executive, legislative and judicial branches of government. Instead, it adopted a distribution of powers among different but cooperative organs of government which individually or collectively serve the national interest. The formulation and decision concerning national interests at the practical level are more often than not in the hands of the president, who acts beyond his capacity as the head of the executive branch of the government.

Soon after the "Old Order" was toppled, in response to the many

forms of influential executive law-making introduced by Sukarno, and in an effort to clarify the types and order of law permitted and regulated by the 1945 Constitution, the reshuffled People's Assembly stipulated that *Pancasila* must be source of all laws, and on this basis, it adopted the following order of laws proposed by the House of Representatives:

a. at the top is the Constitution (*Undang-undang Dasar*) which can be implemented in three ways: by a decree of the People's Assembly, by statute and by Presidential Decision;
b. Decrees of the People's Assembly (*Ketetapan MPR*). These fix the broad outlines of national policy for legislative and executive spheres of government. Those directed at the legislature must be implemented by statute, those at the executive by Presidential Decision;
c. Statutes (*Undang-undang*). These are enacted by the House of Representatives and ratified by the President. They are passed for the purpose of implementing either the Constitution or a Decree of the People's Assembly. The President also has emergency power to promulgate a "regulation in lieu of statute" (*Peraturan Pengganti Undang-undang*), which is of the same rank as statutes but must be withdrawn unless approved by the House of Representatives at its next session;
d. Government Regulations (*Peraturan Pemerintah*). These are promulgated by the President for the purpose of implementing a statute;
e. Presidential Decisions (*Keputusan Presiden*). These are also promulgated by the President, for one of three purposes: to implement the Constitution, to implement a Decision of the People's Assembly in the executive sphere, or to implement a Government Regulation;
f. Other implementing regulations. For the purpose of applying a higher order of regulation, other regulations of a lower priority are authorized. Normally, these are promulgated by a Minister.[12]

Beside the 1945 Constitution the re-application of which was decided by Presidential Decree in 1949, there were two other constitutions that had been introduced to the country. All three constitutions

shared a common characteristic of affirming the continuing applicability of Dutch colonial law and other existing laws, so long as new ones have not been established in conformity with the Constitution. The promulgation of new laws had been very slow which led to greater reliance on executive regulations. The few laws that have been promulgated so far have mostly been initiated, designed and heavily influenced by the executive branch of the government. This situation has been more obvious under the New Order government. The complex plural colonial legacy, complicated by "revolutionary" policies and neglect of the legal progress and facilities of the Sukarno and early Suharto regimes, has contributed to the existence and persistence of the "vast and extensive jungle of law". Another effect of this situation has been to give extraordinary discretion to government authorities. The very complexity and vagueness of the Indonesian legal system in itself constitutes an obstacle to achieving a high degree of justice and legal certainty besides leaving wide latitude for discretion to government authorities.

The term *rechtstaat* is mentioned in the Elucidation of the 1945 Constitution. It is interesting to see that foreign word is cited directly without further explanation which means that either the term is well-known and understood by everybody or that this foreign concept did not have any acceptable equivalent among the drafters. The latter seems to be case. The Indonesian phrase *Negara Hukum*, (state based on law, state based on the Rule of law, state law) became popular in later discussion. The New Order has formally proclaimed itself committed to the idea of *Negara Hukum* as stipulated by the Constitution and under the guiding principles of Pancasila. Discussions on the implementation of this grand policy have been more political than legal. The prevailing modes of governance which inclined more towards the *beamtenstaat* (bureaucratic state), patrimonialism and the so-called *integralistisch staatsidee* (ideal integralistic state), let alone military guided democracy, have colored the discussion and formulation of legal development during the New Order government.

The idea of a state based on law within the framework of integralistic state seemed to be the guiding principle of the government in the second decade of its establishment.[13] During the first decade despite some formal statements in favor of legal reform, this was superseded by the urgency of economic development. The concept of an integralistic state was proposed by Supomo, a legal scholar with spe-

cialization in Indonesian customary (*adat*) law who held an important post at the Ministry of Justice under the Japanese occupation government. He was later Minister of Justice in early independent Indonesia while holding a professorship at a leading law school in Jakarta. His ideas seemed to represent an embodiment of the whole nation, in which the leader acted as the benevolent father of the people. It also represented a strong state with an emphasis on unity, with no dualism between state and individuals since all individuals are an organic part of the state. It has been claimed to represent the character of communal and family life in Indonesian society. In Supomo's perception, a new state must emerge at a strong state because only a strong state with a strong leader can bring unity and prosperity to the people. The new state must be based on a totalitarian ideology which integrates the whole nation. Consequently, the whole nation rejects the idea of separating, let alone dichotomizing, different powers of the state. Many scholars hold the opinion that constitutionally, the *integralistich staatsidee* had been defeated when the 1945 Constitution subscribed to the *rechstaat* principle, to the norm of a *republic*, and to limited human rights guarantees.[14] But others, specially those who hold power and influence in the government, maintained the basic ideas that had never been rejected and they have been immersed in the stipulation of Pancasila and *kekeluargaan* basis in the Constitution.[15]

The elements of these two different, often conflicting, concept of *rechtstaat* and *integralistisch staatsidee* may be traced to the statutes promulgated by the New Order government which seek to integrate them into the Indonesian legal system. A new law on the Judiciary (Law no. 14/1970) restored some principles of judicial authority by revoking the presidential right to interfere in judicial matters, but at the same time, it opened the way to executive interference through the control of appointment, promotion, transfer, dismissal and salary of the judges. The government keeps on emphasizing that there should be harmony between the branches of power. The opening of this possible interference strengthened an argument that the judiciary has become an extension of the larger bureaucracy. As such, the notion of the bureaucratic state or *beamtenstaat* practiced during the colonial times remains. In this respect, Lev's observation may have continued up to present:

> ... with political parties steadily weakening and the *pamongpradja* (bureaucrats) securely in place, both *Guided Democracy* and the New Order were genetically linked to the structure of the colonial state. In this respect, at least, the independent state was not merely similar to the colonial state. It was the same state.[16]

Another important principle which seems to have guided the legal policy of the New Order government is the notion of law as a "tool of social engineering", which practically means that the laws are directed to facilitate and regulate the developmental programs of the movement. Suharto, in 1974, implicitly emphasized this principle in his formal speech:

> Even though development definitively brings about a chain of substantive and urgent changes, it is absolutely necessary to maintain stability and order. This must not be understood to mean statistic that is just maintaining a status quo. Law, as an important means to keep order, must be developed and nurtured in such a way as to give an appropriate moving space for those changes. Absolutely not the other way around, this hampers developmental efforts just for the sake of the desire to conserve old values . Indeed, law must come forward, leading the way and smoothing the road for progress.[17]

At the formal constitutional level, the guidelines of State Policy which have been decreed by the People's Consultative Assembly promulgates that all the planning, implementation, supervision and improvement of developmental efforts and state policy must be guided by nine basic principles as follows: (1) belief and piety towards the One Almighty God which is the spiritual, moral and ethical foundation of national development, (2) utility, (3) democracy, (4) justice and equality, (5) balance, harmonious and appropriate, (6) rule of law, the essence of which is justice and truth, (7) self-confidence and reliance, (8) heroism, and (9) belief in science and technology.[18]

In connection with the nation's legal condition and its development, the Guidelines state the following:

> Development in the field of law and legal statutes have created a legal system and legal product which gives legal protection and a legal foundation for society and developmental activities. Gradually improved legal conscience and more rapid development demand the formation of a national legal system and legal products which support and come from Pancasila and the 1945 Constitution. Legal development, furthermore, still needs to pay attention to the improvement of the socialization of law, the improvement of consistent and consequent law enforcement, the improvement of qualified and respon-

sible law enforcing officials, and the creation of their adequate supporting means and facilities.[19]

Based on the perceived actual legal conditions of the country, and guided by the general basic principles of national development, the legal development for the next twenty-five years of the New Order government are directed towards "the formation and function of a strong national legal system, based on Pancasila and the 1945 Constitution, by paying attention to the plurality of the existing legal order, which is able to guarantee legal certainty, stability, enforcement and protection; the essence of which is justice and truth, besides being able to safeguard and support national development which is backed up by law enforcement agencies, adequate legal services and facilities as well as by a law-aware and abiding society."[20]

These ideas have been formulated further in the Guidelines of State Policy which reiterate that legal development is directed to create a united national legal system by gradually developing three important fields of legal systems: (1) Substantive Material Laws (*Perangkat Hukum*), (2) Systematic Legal Order and Structure (*Tatanan Hukum Nasional*), and (3) Legal Culture (*Budaya Hukum Nasional*).[21]

The legal development in the field of substantive material laws consist of the following: (a) Extension of the Principles of National Law, (b) Development of Legal Statutes in accordance with the aspirations and needs of modernizing and improving the Indonesian population, (c) Development of jurisprudence as a real legal source of national law, and (d) Establishment of customary law (*hukum kebiasaan*) which is based on Pancasila philosophy and the 1945 Constitution.

The order and structure of the national legal system are directed to solidly build the following aspects: (a) establishment of national laws as a compact system, which comprises the organization, institutions, structure and legal mechanisms, (b) improvement of qualified and respected law enforcing officials and institutions, (c) improvement of legal service professionals, (d) improvement of expertise, skills of law professionals, as well as the clear division of rights and responsibilities among various law professions, (e) ordering and intensification of the existing legal institutions, (f) creation of necessary new legal institutions, (g) improvement of legal information, e.g., the establishment of law libraries and a Law Documentation and Information Network System, (h) improvement of legal planning, research and development

facilities, (i) improvement and modernization of physical facilities and supporting materials for legal development.

The new guidelines of State Policy also emphasized the development of the abstract ideas upon which a national legal system is to be built. This is called the development of national legal culture (*pembangunan budaya hukum nasional*). To achieve this, the Guidelines reiterate the following programs: (a) to establish and to socialize the national legal philosophy and national legal theory, (b) to maintain and intensify legal conscience and law abiding behavior, (c) to improve legal education and professional ethics.

The development of national legal system under the New Order government, at least as formally expressed by the Ministry of Justice and other high-ranking officers, has been based on three fundamental perspectives.[22] First is nationalism in the sense of emphasizing the idea that the Republic of Indonesia is a nation-state, not a state founded upon a racial, cultural or religious basis. Therefore, under the national legal system, as far as possible, there must not be any regulation, written or otherwise, that discriminates between people based on ethnic group, class, race, religion or the like. Second is the *nusantara* perspective which is the view of the Indonesian nation upholding the idea that the whole *nusantara* Indonesian archipelago is an integrated, compact unity of *tanah air* (land and water mother-country). The Indonesian language may be unique in including *air* (water) in referring to their motherland. This perspective requires that the same laws be valid for the whole country, all the regions have the same rights and responsibilities, and no region will be discriminated against or privileged over another, under the unitary state of the republic. Last but not least is the theme of *Bhinneka Tunggal Ika* (Unity in diversity). This phrase is also on the coat of arms of the nation. Even though the prime principle and objective of the development of a national legal system is to create a single united legal system which is directed to realize national interests (*kepentingan nasional*), the law must not overlook the reality that the population of the country consists of those who have different religions, race, ethnicity, culture and interests. Enforcing the same rigid law for this plural society may inflict injustice and incite resentment which are against the objectives of maintaining and improving a just and harmonious society of the whole population. Thus, a certain extent of variety is permitted as long as it does not endanger the integrity and unity of the nation are weaken

the national resilience. The existence of this variety is viewed as a subsystem which integrates itself harmoniously in the national legal system and serves the national interest.

These principles and points of view have been expressed time and again not only by the bureaucracy but also by the legal community at large. It may be safe to suggest that the legal debates and discussions on legal reform during the New Order government use, or possibly abuse, these principles.

There are three general dimensions in applying all the above ideals and objectives. The first dimension is that of safeguarding against the appearance of a legal vacuum in which a legal uncertainty, or even a chaotic situation, may erupt. The second is a dimension of improvement in the sense of modifying the inherited colonial legacy to be more in line with the spirit of independence and national aspirations. Only in the third dimension is an outright enactment of new laws in order. As suggested above, one of the main priorities of the New Order government is to replace those colonial laws and regulations that continued to function as transitory regulations until the new ones promulgated in accordance with the Constitutional principles that exist. It has been estimated that three are at least 400 colonial laws and regulations waiting to be reformed.[23] The first two dimensions mentioned above contributed to a persistence of colonial legacy, and eventually may have contributed to the existence of the bureaucratic state as suggested before by some scholars. Likewise, the reluctance of some bureaucrats to reform those outdated regulations may have been encouraged by the fear of losing their privileges. Legal reforms through executive regulations may have been more profound and easier to implement because, among other factors, they do not have to go through complicated and time-consuming parliamentary debates and public opinion. However, further studies need to be undertaken to substantiate this contention.

This condition may be explained by the historical legacy of the Indonesia legal system as well as its legal bureaucrats and professionals who have been heavily influenced by the Dutch legal system which can be traced back to the Roman-Germanic civil law traditions. One of the characteristics of the civil law system has been an emphasis on the development of law in a codified manner, rather than in the resolution of individual disputes. Max Weber characterizes civil law as having a logically formal rationality. It is logical, as explained by

Trubek, [24] to the extent that decision in specific cases are reached by the process of specialized deductive logic proceeding from previously established rules or principles. It is formal to the extent that the criteria of decisions are intrinsic to the legal system. It is rational in the sense that it relies on some justifications that transcend a particular case and is based on existing, unambiguous rules. So, compared to common law system, a civil law system is particularly more open to philosophical and doctrinal influence. In this system, these influences come largely from academics and rulers, whereas in a common law system they lie mostly in the hands of judges.[25]

Even though executive influence has been very strong in shaping the country's legal process and products, be it formal or informal, written or otherwise, it does not mitigate the contribution of judge-made laws and judicial jurisprudence, especially that of the Supreme Court.

Judicial Authority and Independence

Having said all this, no one can deny that the New Order government has been successfully producing new kinds of legal statutes (*Undang-undang*), and more executive regulations. The most important legal statutes are those that regulate the judicial institutions and their procedural regulations. Some substantive laws have also been enacted in the fields of criminal law and some commercial and financial laws. This latter category of laws has been urgently needed due to rapidly growing economic activities during the last two decades in this country. In the following section, some of these laws pertaining to the judiciary will be discussed.

The relatively separated and independent judicature stipulated by the Constitution, which was neglected by the Sukarno regime, was supposed to be restored by the New Order government. However, the founding fathers of the nation who drafted the 1945 Constitution did not entertain the idea of a separate independent judicial branch of the government. An independent judiciary is not explicitly stated in the 1945 Constitution. Article 24 simply says that judicial powers shall be exercise by a Supreme Court and other courts in accordance with the promulgated statute. Meanwhile article 25 of the Constitution prescribes that the structure and jurisdiction of these courts, and the conditions for appointment and dismissal of judges be regulated by statute.

These two short articles mentioned above have become the prime reference and basis for enacting "fundamental rules" (*ketentuan-ketentuan pokok*) statutes. As observed by some scholars, it is customary for the so- called "fundamental rules" law of Indonesia to function more as policy declarations than as statutory schemes. Implementation usually depends on the enactment of subsequent legislation and the promulgation of special implementing regulation usually in form of government regulations or ministerial decisions. On a practical level, these lower implementing regulations also function as authoritative interpretations of the basic laws. Until such organic laws and implementing rules are established, the "basic" laws operate more as a statement of national intent. Many court decisions denied a defense's argument based on an enacted statute because it had not had any implementation guidance yet.[26]

The principle of a limited "independent judiciary" is contained in the Elucidation to the judicial articles of the 1945 Constitution, which states that the judiciary should be free from government/executive influence and that the position of judges should be protected from such influences by statute. The elucidation does not spell out what is meant by "independent judiciary". It is left to be elaborated and promulgated in subsequent laws aimed at implementing the Constitution. By reading the laws promulgated after independence, this principle has been understood and applied differently depending on the political whims of those who are in power. As a result, during the guided democracy period of Sukarno, the President was authorized to interfere at any time when revolution or the national interest was at stake.[27] The judiciary was subordinate to the executive, personified by the President, who was perceived as a benign father of the nation and the leader of the revolution. Historically speaking, this was a continuation of what a king was supposed to be in pre-colonial times. Furthermore, centuries of colonization by the Dutch who ran the country more as a bureaucratic state gave strong influence to the country's elites. This influence dies hard even after independence and the proponents of the rule of law and an independent judiciary must encounter it.

The idea of the rule of law and independent judiciary have fluctuated in Indonesian legal discussions. During the parliamentary years (1950-1957) it served as the legitimating ideology of the constitutional republic, but many of its symbols were attached conservatively to

Dutch colonial institutions, procedures and codes that were carried over into independence. This conservative stance and colonial legacy were repugnant to many revolutionary fighters and nationalist leaders. These smoothed the way for Sukarno to introduce his integralistic patrimonial guided democracy (1958-1965) which submerged the principle of the rule of the law and an independent judiciary and emphasized substantive, rather than procedural, justice. When the Old Order was toppled, those dormant ideas were rapidly revived. During the early days of the New Order period, many of its leaders blamed the previous regime for trampling the principle of the rule of law and supported the ideas of *negara hukum* (legal state/state based on law).

The discussion and debates later came to a climax with the promulgation of Law No. 14/1970 which was more of a compromise and middle-way between the ideas of the rule of law and an independent judiciary and that of an integralistic state.[28] The New Order government took the initiative to introduce a law which could bring about substantial changes in Indonesia's judicial system, in particular in emphasizing the independence of the judicial bodies from executive interference. Thus Law No. 19 of 1964, notably article 19, which allowed the president to intervene in judicial matters was revoked and replaced by Law No. 14 of 1970, the Basic Law of the Judiciary. Article 4, paragraph 3 of the new Law eliminated article 19 of Law 19/1964 and stipulated against any intervention in judicial matters by non-judicial forces, thereby reconfirming formal judicial independence.

In addition to confirming the principle of judicial independence the new law also authorizes increased authority for the judiciary and several new provisions. These include the presumption of innocence until proven guilty (article 8), the right to legal aid (article 36), the right to be tried in an open court (article 16), and the right to compensation for illegal detention (article 9); all speak to the recognition of some basic human rights. The renewed interest in rights of the individual in law enforcement, made possible by the mental climate and political environment of this period, had its manifestation in the field of criminal law in the creation of a completely new code of criminal procedures (*KUHAP – Kitab Undang-undang Hukum Acara Pidana*) in 1981. The KUHAP can be viewed as the logical continuation of the recognition of the citizen's basic rights in the 1970 Basic Law on Judiciary Power. However, in the field of substantive criminal law, the old colonial code of criminal law (*Wetboek van Strafrecht*)

promulgated in 1918 is still in force. At the time of this writing a bill on national criminal law has been introduced and discussed in parliament, and the upsurge of public comments and debates on the bill show the enthusiasm for and importance of this law for the people at large.

Returning to the provisions of the law no. 14/1970, perhaps the most interesting move in strengthening judicial power is the application of the judicial review of the Supreme Court. According to article 26, the Supreme Court (*Mahkamah Agung*) has the authority to declare invalid all regulations below the level of statute (*Undang-undang*) on the grounds that they are contrary to higher-level regulation statutes. Thus for the first time a judicial remedy is authorized for eliminating, inter alia, various executive decrees which contradict the legislation they are supposed to implement. However, this formal stipulation still needs to be tested in actual cases, especially because the Supreme Court can use this power only in an appeal is raised to it.

However, the same law contains a stipulation that might not always be in line with the ideal of judicial independence. Article 31 of Law 14/1970 stipulates that judges are appointed and dismissed by the President. Furthermore, in day-to-day practice, all the judges are government officers under the supervision of the ministry of justice whose minister is an assistant of and is responsible to the President. Besides, the judges are also members of official KORPRI (Korps Pegawai Republik Indonesia/Corps of Government Officers of the Republic of Indonesia) which is part of the ruling party, Golkar.

The Law retains the existing structure of four court system with a Supreme Court at the apex. Those court are *Peradilan Umum* (General Court), *Peradilan Agama* (Religious Court), *Peradilan Militer* (Military Court) and *Peradilan Tata Usaha Negara* (State Administrative Court). The General Courts are courts of general jurisdiction in both civil and criminal matters. They have 3 levels: District Courts (*Pengadilan Negeri*), provincial High Courts (*Pengadilan Tinggi*) and national Supreme Court. These levels, with slight variations, also exist in the other courts with the Supreme Court as the highest judicial body of the nation.

The other three court sub-system are considered special courts of justice. *Agama* Courts have special jurisdiction over disputes between husbands and wives of Islamic faith, and over disputes involving Islamic law in enumerated areas to the extent that such areas have not

been superseded by statutory law applicable to the Muslim population. Military courts try and determine cases involving armed forces personnel in accordance with the military codes. The State Administrative Courts, which were the last to be established in the country, hear and decide upon complaints and disputes concerning the policy and decision of government offices and officials.

At this point, it is appropriate to say more about the Supreme Court, because this court supervises all the existing courts, including the religious courts. As the highest judicial body in the country, as recently regulated by Law no. 14/1985, the Supreme Court is authorized to hear cases from all types of courts that are brought before it. Unlike the High Court at the provincial level, the Supreme Court does not concern itself with either the facts nor the evidence of the case, but limits its examination to the legal aspects or points of law of the case. What this means is that the Court investigates whether the lower courts (i) have infringed the law, or (ii) have applied the law erroneously. Thus, the Supreme Court's principal role is to ensure the uniformity of the law, or whether the lower court interprets and applies law correctly. Appeals to the Supreme Court in Indonesia are known as *kasasi*. This term is derived from French "cassation", indicating that this system originated in France and was brought to Indonesian by the Dutch.[29]

In addition to the above judicial duty, the Supreme Court has some other important functions: (i) to supervise legal processes across the country, (ii) to exert control over judges' activities, (iii) to give legal opinions and advise to high state institutions, including the President, for example in granting/refusing presidential legal clemency. The Supreme Courts is headed by a chairperson (*ketua*), assisted by one Vice Chair (*wakil ketua*) and six Junior Chairpersons (*ketua muda*). The Chair and Vice Chair are nominated by the House of Representatives and appointed by the President. The President also appoints the Junior Chairpersons from those supreme justices proposed by the Chair. The current law limits the appointment of supreme justices only from those who have adequate and satisfactory judicial positions or other legal professions. Currently, this highest court has 55 justices. Ordinarily, there are a panel of three justices to hear each case. However, the Chair and Vice Chair are not limited to the judicial and legal professions only. Articles 11 to 13 of the Law no. 14/1985 regulates that the retirement and dismissal of the Chair, Vice

Chair and Justices of the Supreme Courts are in the hands of the President in accordance with statute without any obligation to seek approval from the House of Representatives.

As mentioned above, the 1970 Basic Law of the Judiciary maintains and strengthens the position of the *Agama* Courts in Indonesia's New Order. Article 10 states that judicial power is exercised by courts of justice in the spheres of general religious (*agama*) courts, military and state administrative courts. It further stipulates that the Supreme Court is the highest court in the nation having responsibility for, among others, the supervision and hearing of final appeal (cassation) cases from *Agama* Courts. Traditionally, it was assumed that a case was finalized after being heard and decided by the High *Agama* Court. There have been cases that have still been appealed even after it, for which a Director of Islamic Judicature in the Ministry of Religion would issue a resolution. These appeal cases, which were not many, functioned to symbolize the authority of the Ministry. This is way there was some resentment against the submission of the religious court's decisions to the scrutiny of the "secular nationalist" Supreme Court. This transfer seems to ensure that the *Agama* Courts operated within the judicial system and, indirectly, to indicate that the status of the *Agama* Courts is equal to that of the other three courts operating in the country.

At the theoretical level this was indeed encouraging to the proponents of Islamic courts. At the practical level, the principle of equality among the four judicial bodies remained a subject of debate. For one thing, the surviving colonial rule determined that all decisions of the *Agama* Court were to be sanctioned by the local civil court in order to be officially enforceable, even if they had been decided by the High Court of Appeal. The fiat of execution (*executior verklaring*) was needed only if the disputants did not carry out the decision voluntarily. But, a new marriage law (Law no. 1/1974) which was mainly viewed as a concession to Islamic law, stipulated that all religious court decision must mandatorily be approved (*pengukuhan*) by its counterpart general civil court. This change from specific approval to a general imperative obviously indicates that the Islamic courts were subordinated under the civil courts.[30] The main reason cited is the lack of an executing agent (*juru-sita*), someone like court bailiff in the US., in the *Agama* Courts.

However, it was through the enactment of the new Marriage Act

in 1974 as Law no. 1 of 1974, that the existence of *Agama* Courts was more solidified and their functions were extended. Article 63 of this Law stipulates that for Muslim Indonesians their marital and divorce disputes will be tried and decided by the *Agama* Court in accordance with their religious norms. The extension and re-affirmation of *Agama* Court jurisdiction as stipulated in the Marriage Law of 1974 includes the following:

What are intended as the matters of marriage which are regulated in the Act No. 1 Year 1974 concerning Marriage are among others:

1. permission to have more than one wife;
2. permission to conclude a marriage for those who are not yet 21 (twenty one) years age, when the parents or guardian or relatives of the straight lineage have different opinions;
3. marriage dispensation;
4. marriage prevention;
5. refusal of Marriage Registrar to register a marriage;
6. marriage cancellation;
7. negligence suit of the spouse's responsibility;
8. repudiation divorce;
9. divorce suit;
10. settlement of common property;
11. child custody and alimony;
12. child custody and alimony whose father fails to perform his responsibility;
13. maintenance support of the ex-wife and determination of the responsibility of the ex-wife;
14. child's legal status;
15. termination of parental custody;
16. termination of guardianship;
17. appointment of non-relatives as legal guardians in cases in which relative guardians fail to fulfill the responsibility;
18. appointment of a guardian in cases of child of minor age who is abandoned by parents;
19. financial compensation punishment of guardian who has caused a loss to the property of the child under guardianship;
20. determination of the origin of a child;
21. determination of the refusal to conclude mixed marriages;
22. determination on the validity of marriages concluded before

the promulgation of Act No. 1 Year 1974 concerning Marriage and which were concluded in accordance with other regulations.[31]

Before concluding the discussion of judicial development during the New Order government, there is one remaining issue. Although customary courts, which were abolished and then reinstated under Dutch colonial rule, were later formally abolished in 1951 by the government, peaceful settlement and village justice is still practiced in many rural areas. My observation in seven provinces, some of them in the hinterland, although preliminary, indicates that this grass-roots method of setting disputes still survives. Even though more and more village authorities that are asked to mediate, look to the state legal system for guidance, they still adapt their producers and formulations to local conditions. The influence of the local *'ulamâ'* and *kiyai* have been great not only in setting disputes but also in socializing the religiously-valued legal rules. This type of settlement is recognized and recommended by formal courts of justice. The importance of grass-roots informal leadership of the Islamic *'ulamâ'* has come to the attention of the government which seek to co-opt them into disseminating its programs.

In this instance, it is worthwhile noting that some village chiefs who are nominated from above, rather than being elected by the local population, as well as religious preachers who advocated the formal national way of doing things, have been alienating themselves from their own populations. In 1988, a well-known Indonesian scholar was commissioned by the interior ministry to study the impact of law no. 5/1979, which tried to model village administration throughout the archipelago on the Javanese *desa* (village), in ten provinces. Interestingly he found that, after almost a decade, the traditional non-Javanese patterns of village organization persisted. In Aceh, for instance, villages are subject to a supra-authority that groups several settlements under one local leader. In North Sumatra, clans are more influential than village ties. He also notes that in many cases the Javanese-style village chiefs had lost their respect of villagers; they and the system imposed on the villages were regarded as alien. He concluded that the law had ignored the organic communities on which it was imposed, and in practice it was operating below par.[32]

Islam and the New Order

The policy of guided democracy under Sukarno who sought to integrate, but also to play off against each other, the three main ideologies in the society, i.e. NASAKOM (*Nasionalisme, Agama dan Komunisme* – Nationalism, [Islamic] Religion and Communism), created explosive internal tension. This tension came to a head in particular between Islam and Communism. The army was cited as the most important third power. The extermination of the "Gestapu/PKI" after the abortive coup of September 1965 was a turning point in Indonesia history. Islamic leaders claim that it was the great victory of Islam in Indonesia, while the proponents of "Pancasila" maintain and promote it as the "miracle" of Pancasila, on which basis the New Order government commemorates this day as "Hari Kesaktian Pancasila" (*Pancasila Miracle Day*).

Devout Muslims and their organizations were the most prominent force in the anti-Communist and anti-Sukarno actions of the mid-1960's. The association of Islamic Student (*HMI, Himpunan Mahasiswa Islam*) provided most of the manpower for the demonstrations against the ruling regime in Jakarta in 1966. The Nahdlatul Ulama (NU), particularly its youth wing – *Pemuda Ansor*, played a major role in crushing the communist exponents throughout the country. It is undeniable that the support lent considerable legitimacy to the transfer of power to Suharto, at that time an unknown army general. It is also natural that the expectations among the Muslim leaders of taking a leading role in the New Order government were very high. However, this did not occur, and many Muslim leaders felt betrayed and were disillusioned with the growing strength and steadfastness of the army to block the progress of the Islamic political movement. At the same time, there have been efforts to encourage the growth of mainstream, non-political, purely religious Islam.

While all exponents of the New Order essentially agreed that "pembangunan" (development) was necessary and a must as a panacea to Indonesia's immense problems, conceptions differed regarding the meaning and implications of this process. Sharp conceptual differences arose, in particular, between the Muslim intelligentsia and their secular counterparts. The secularist nationalist elites (military, socialist and Christians) generally felt that a politically powerful Islam would be an obstacle to modernization. Many were disdainful of the quality and capabilities of traditional [Muslim] leaders.[33]

Before going further, it is important to point out that in talking about Islam and Muslims in Indonesia, it is easily misleading to conclude that Islam in the country was only represented by the Islamic political parties and formal Islamic organizations. Many army generals and officers as well as leaders of the nationalist "secular" parties are not only nominally Muslims but also practice Islam. They may have different opinions about the position of Islam in state affairs. General Nasution and General Alamsjah Ratuprawiranagara are two good examples of this type of Indonesian Muslim. Their positions are even more significant because in the early days of the New Order they were "insiders" and close associates of Suharto. Nasution, for example, strongly opposed the idea of an Islamic state as advocated by the Islamic political parties in the early days of the Republic, but so far as the value of religious life in the nation-state is concerned, he was consistently supported it. To him, and many others like him, Muslim's demand that the state allow them to practice an Islamic way of life, including Islamic law, is justifiable and constitutional in terms of Islamic religion and is in accordance with Indonesia's national interests. He further says, that in national construction and development, the establishment of and improvement in the practice of the Islamic code of life by its community will have very important results in the following aspects: spiritual-psychological, socio-political harmony, and efforts and investments toward social well-being and education through the community's initiative.[34]

Another important figure is Alamsjah Ratuprawiranegara, an army general who had various important position in the cabinet including Minister of Religion. In one of his books, he strongly argues that there is a complete harmony between Pancasila and Islam. He pleads for national integration and emphasizes the need to correct the popular image of Muslims in the eyes of their political opponents. He later also pointed out that "Pancasila is the greatest gift and sacrifice of the humble Indonesian Muslims as a majority population for the sake of Indonesian national unity and integrity."[35]

On the other hand, inside the Islamic political parties themselves, there have been many who do not personally adhere to Islamic religious teaching. Some kind of mistrust exists among the Muslim population towards their political leaders and it has sometimes been exaggerated by others for certain vested interests. This phenomenon is not constant, because there has been a growing interest in Islam, which

some writers call "santrinization", especially among the upwardly mobile segments of the population.

The variety of ideas among Muslims in Indonesia has been observed by many scholars and it is constantly changing. The label "reformist" and "conservative" which used to be used to refer respectively to the Muhammadiyah and Nahdlatul Ulama, are not always valid especially in the latter part of the New Order period. This means that many NU leaders have come up with reformist ideas while conservatism has gradually overcome some of the Muhammadiyah rank and file. However, the characteristic of the reformist vis-a-vis the conservatives as expounded by Lapidus, without strictly attaching them to specific organizations are still valid. As such his summary is quoted at length:

> The difference between the old and new forms of Islam were manifold. The traditionalists viewed the world as unchanging; the reformers saw it as ever changing in history. The traditionalists viewed religion as mystical and magical disposition of mind. Prayer, fasting and recitation were intended to create inner peace and bring about harmony between the believer and the truth. Traditional religion was oriented to ritual, to states of feeling and to passive acceptance of reality. By contrast, the reformist position stressed active mastery of the self. The reformers defined religion in terms of individual responsibility for moral reform and for bringing into being a Muslim community adapted to contemporary conditions. Their religion was inner-directed, ethical and intellectual. Whereas traditional religion maintained its commitment to a concept of the harmony of the individual with his community, the community with the state, and the state with the universe, reformist religion sought actively to transform the individual in society to bring about a Muslim utopia. To achieve these goals, the reformers adopted Western organizational and educational methods, accepted scientific ideas and the use of vernacular languages, and waged a vigorous campaign in the press to insinuate Islam into the social fabric. Scout movements, schools, orphanages and hospitals were essential to making Islam an active force in society.[36]

There has been cautious consideration among military and secular leaders to curb the political and economic growth and independence of the devout Muslim segment of the population, which contains the only visible element of challenge to the legitimacy of the ruling government. This prevailing condition has not only not given favorable positions to the mostly low-based and highly expecting Muslim leaders but also even weakened their economic opportunities and political basis.

The dissatisfaction of some Muslim leaders regarding the New Order

was visible when Suharto refused to rehabilitate the Masjumi party that dissolved itself under the pressure of Sukarno, but instead a new Muslim party (*Partai Muslimin Indonesia/Parmusi*) was allowed to appear with strict condition that it may no appoint any of the former Masjumi leaders. Even with this constrained new party the government sought to influence its policy and progress. Later legislation in 1973 stipulated even further that all the four existing Muslim parties had to merge into a single party (*Partai Persatuan pembangunan/PPP*) and the other parties were merged to form *Partai Demokrasi Indonesia (PDI).*

By the mid-1980s, under the Law of Mass Organizations, all political parties and social organizations were legally required to adopt Pancasila as their sole principle (*asas tunggal*). This meant that PPP and all Muslim organizations including Muhammadiyah and NU, had to discharge their Islamic basis and symbols. The initial hope that had been hampered by the unsymphatetic measure of the New Order government towards political Islam was revived in some circle by the expectation of winning it over in the upcoming general election. Not only was the promised election postponed but the statute enacted later to regulate the election and the outcome of the general election disappointed Islamic political leaders. The overall development of the New Order's policy towards Islam and its traditional political leaders who had helped in crushing the old order caused, according to one keen observer on Islam in Indonesia "a growing frustration in the Islamic community."[37]

This policy was another deliberate effort of the government to reform political activities and to prevent the use and abuse of Islam and its religious symbols for political purposes. Initially, the government had focused on fashioning a pragmatic organization out of a collection of groups set up by the military at the end of Sukarno's rule to combat the growing influence of the Communist Party. This was done later by promoting a previously obscure and loosely integrated combination of functional groups, *Golongan Karya (Golkar)* which was first set up in 1964 as an umbrella organization for anti-communist exponents, and it has never formally been intended as a political party. This group, with strong support and affluent facilities, emerged to be the ruling party during the New Order government with sweeping victories in all the general elections held in the country.

Another important policy of the New Order government in its

early days in power was the imposition of a "floating mass" program. This program was intended to create the stability which was greatly needed for development. This concept rested on the assumption that the vast majority of the Indonesian population was prone to the ill-effects of politicking at the village level. As it turned out, this program was remarkably successful in the "de-politization of [the] Indonesian population".[38] This decision was inspired by the success of PKI in gaining mass support under Sukarno and the success of Islamic leaders in inciting masses to eliminate communist party members after the failed coup. The events left a latent fear and deep trauma among the army generals and small but influential minorities, especially Christian and Chinese groups. These groups managed to establish a close relationship with some of the New Order leaders and came to influence early New Order policy-making. Several important ministries and key posts in the cabinets have been disproportionately held by members of these minorities.

Successive Suharto cabinets consistently failed to include any prominent member of existing Muslim political parties. The Ministry of Religion which used to be fortress and channel of Islamic political interests, especially those of the NU, was reformed by the appointment of Mukti Ali, an accommodationist reformist-oriented scholar and an advocate of pragmatism with close ties to the Muhammadiyah movement, and followed by Alamsjah Ratuprawiranegara, an army general and close associate of Suharto and later by Munawir Sjadzali, a career diplomat with a traditional Islamic educational background. The present minister, Tarmizi Taher, is a medical doctor who used to work in the Indonesian Navy and was the Ministry's general secretary under Minister Sjadzali. This strategic position of general secretary of the Ministry has always been held by an army general, either active or retired. Consequently, this shows the government's policy of bringing this Ministry closer to the fold of the New Order's perspectives.

A series of policy initiatives by the government culminating in a policy that all political parties and mass organizations must be based only on Pancasila, eliminating Islam as a formal basis for Muslim organizations, created tension and protest from major Islamic organizations and leaders. In coping with this difficult requirement, the Muslim population reacted in various ways. Even though some radical fringes were able to incite several violent and bloody incidents,

the majority of population were gradually more receptive and sought to adapt and modify the new demands to their benefit.

Furthermore, not all Indonesian Muslims saw Islam and the New Order as unalterably opposed or were satisfied with the existing "Islamic" political parties. Mintaredja, who was the government's nominee to chair the Parmusi in 1970, represented a new breed of Islamic leadership, that was prepared to work more cooperatively with the New Order. He wrote several booklets elaborating his rationale. However, this type of approach was a minority in the first decade of the New Order. The idea of abandoning the futile strategy of putting all the eggs only in the political basket was also championed by Nurcholish Madjid, the general chairman of HMI (*Himpunan Mahasiswa Islam*) in the first decade of New Order period. This latter exponent of a neo-modernist Islamic movement in Indonesia expounded his ideas more elaborately and touched on the wider problems of Islam and the Muslim population in general.[39]

In a plural modernizing society like Indonesia, development efforts among all existing groups are essential. Although Islam has not been a powerful enough political force to exercise predominant influence, it is too powerful to be disregarded. Given the Muslim population's overwhelming majority in the country, no sustained developmental effort can succeed without its support. A governmental policy that neglect Islamic interests may result in a conservative and rigid reaction from the Islamic community which will nullify the present Islamic adaption to modernization. The Islamic community possesses genuine interest which must be given fair consideration. Anything less may incite social disintegration and political stagnation.[40] However, after the New Order regime was strongly established there were some accusations against the Islamic political parties and the Muslim community of being "anti Pancasila". These accusations harked back to the constitutional debates of the early 1950's.

Responding to all these unfavorable conditions, the Muslim leaders and intelligentsia reacted in various ways. Muhammad Kamal Hassan divides them into three groups: the idealists, reformist and accommodationists. My own observation, at least for the last decade, is that the third group has become more prominent and, under pressure, many of them have been co-opted into the establishment. For them, the issue of an Islamic state, whatever it may mean, has been discarded. In the intervening days of the New Order, there was an

effort to revive discussion of the Jakarta Charter in the June-July 1966 sessions of the People's Assembly but this was prevented by the army and some Muslim leaders. Since then it has not had a place in political discourse, and is only brought up by non-Muslim factions whenever there is a discussion on national policy to adopt anything considered beneficial to the Muslim population, such as the debates on the Marriage Act of 1974 and the *Agama* Courts Act of 1989.

All political parties and mass organizations have taken Pancasila as their sole basis. It has been more common among Muslim leaders to emphasize the irrelevance of the issue of an Islamic state. More and more discussions are directed towards inculcating Islamic values among the people at large, contributing to national development and directing its future course. While adhering to Pancasila, the Muslim leaders strive to imbue Pancasila with the teachings of Islam. All this may be carried out within the existing structure and without directly challenging the status quo. As one Islamic leader said after 1965 "actually we do not talk any more about an Islamic state but at best about an Islamic society."[41]

The awareness of the accelerated progress occurring in society at large and the realization of Islam's and Muslims' role, contribution and share in this, have become recurrent themes among Muslim leaders in the country. No one denies that Islam has declined as a formal political force, but its potent influence has been emerging as a cultural identity. Indeed, there are some writers who argue that Indonesia has become more Islamic under Suharto's rule, despite the regime's neutral, if not secular, learning.[42] Many phenomena and events have been cited by the proponents of this view to substantiate their conclusion: the increase in the "Islamization" of the society, including the ruling elites and the middle class, the spread of Islamic consciousness on the campuses, and the growing Islamic intellectual influence on attitudes towards national, social and economic development. Newly enacted legal statutes, such as the Basic Law on Education and Law no. 7/1989 on *Agama* court, the composition of the New Cabinet, and presidential decisions, for instance, Presidential Instruction no. 1/1991 on Islamic Law Compilation, and many others have also been mentioned to support this view.

President Suharto himself has appeared to move closer to the Muslim community than at many other time during his presidency. His actions and off-stage maneuvers in the last few years have indicated a

distinct softening of the regime's attitude towards Islam. The most important of all may have been his support for first broadly based organization of Muslim intellectuals (*ICMI/Ikatan Cendekiawan Muslim Indonesia*) in December 1990 headed by his trustee and protege, B.J. Habibie, Minister of Research and Technology and a number of other important persons. Capping this, Suharto took his family and a group of important figures on the pilgrimage to Mecca in June 1991. By reasserting his faith, Suharto seemed to be marking a new phase of New Order, which treats Islam and Muslims not as enemies, but as full partners in building the country. Needless to say, this new development surprised many people, including his former associates, and outraged some who were deprived of their privileges and distanced from their opportunities.[43]

It is too early to forecast the outcome of these latest developments and of course it demands closer examination from a wider perspective. Tentatively speaking, it is obvious that Suharto and the New Order's latest policy are all within the heterogeneous framework of Pancasila and the 1945 Constitution, and politically the new learning seems to have anticipated a new trend towards Islam and acknowledges the real conditions of the country. There have not been any concrete moves to establish expressly Islamic institutions close to the heart of the government, the furthest that this new movement may go is to transform "Indonesianized" Islam into a kind of civil religion. However, in this climate, Islam, including Islamic law, in an actualized modernized form, may have a greater chance of influencing the formation of the country's spiritual views as well as everyday life.

Indonesian society is caught somewhere between tradition and renewal, between conservatism and modernism. The developmental programs initiated by the New Order government gave mixed, sometimes conflicting, signals to the people. The regime has drawn on tradition to maintain control, but at the same time encouraged changes to implement progress. The overall ideal seems to advocate a "guided progress" and a "modernized tradition". They all look contradictory but, as aptly observed by Vatikiotis, Indonesians are "masters at managing the contradictions in their society."[44]

This seemingly contradictory approach has been a feature of the policies of the new order government. The policy makers of the regime must have been aware that Islamic law and Islamic legal institutions in the country possess both the potentials of being bulwark of

conservatism and of being the proponents of progress. However, one thing is certain, no government in the country can survive without attending to them. The government had great hopes that religious functionaries and religious institutions would legitimize and support the development programs. However, Muslim support and participation in state politics had to be balanced wisely so as not to challenge the ruling regime and not to openly offend the religious consciences of Muslim. Instead of challenging the exponents of legal conservatism in the religious courts, for example, the New Order government, sought to co-opt them into becoming state bureaucrats by elevating their positions, giving them better salaries, providing them on-the-job upgrading courses, and by setting new procedures and requirements for recruitment and promotion. These programs have been instrumental in creating a new breed of judges and court officials who have a more modernist attitude towards Islamic law and legal institutions.

To sum up, three aspects stand out about modern Indonesia as it has developed under the New Order. Modern Indonesia, first of all, is the most populous Muslim country in the world and lately has shown signs of becoming more Islamic. Another is rapid growth of its economy which is creating a more consumer-oriented, modern-educated, politically-aware society which may eventually be prone to certain liberal ideas. At the same time, there appears to be no hint of overall reform or change of attitude in the way the society is regulated by the state. The government seems to uphold the principle of "slow but sure" (in Javanese, it is said "*alon-alon asal kelakon*"). But the segments of society which see this as too slow, or not sure enough, are increasing. These ways of seeing Islam and Muslim in this modernizing society, is like looking at a glass "half full, or half empty". Whichever way one looks at it, the Muslims in this country have much at stake without participating in its development. In this context, a discussion of the role and contribution of Islamic law in the formation of national legal system is presented below.

Islamic Law in a National Context

In discussing Islamic law (both in the sense of *shari'ah* and *fiqh*) in Indonesia, the focus here is on the position and contribution of Islamic law in the national legal system. The Indonesian legal system characterizes a pluralism in many senses of the term, even though

various laws that comprise its sub-systems are coming closer to forming a united national legal system. This pluralism is not only in the field of substantive law, but also in procedural law and the judicial institutions that enforce it. The best way to describe the legal condition of the country is its national motto: *Bhinneka Tunggal Ika* (Unity in Diversity). The diverse laws that have been applied in Indonesia are Indigenous Customary Law (*Adat*), Islamic Law and Western Law, or more specifically Dutch, and to a lesser extent also British law. The oldest among these three is the Indigenous Customary law, and then the Islamic law, which came together with the spread of the Islamic religion in the region, and lastly Dutch law, which was enforced by the colonial government starting from the sixteenth century.

In the light of this background, we will start by looking at the relationship between Islamic and *Adat* law. When Islam entered into the archipelago, the populations of this vast area were subject to their respective customary rules which were different from one tribe to another, and from one region to the next. Islamic legal theory (*Usûl al-Fiqh*) recognizes the significance of *'âdah* (customs) and *'urf* (usage's) as supplementary sources of Islamic law. This means that the population who convert to the Islamic religion may continue to practice their customs and usage's, as long as they do not contradict the injunctions of the primary sources, i.e. al-Qur'ân and al-Sunnah. Considering the broad legal injunctions of the Qur'ân, plus the tolerant attitudes of the Sufi and mercantile Muslims who introduced the religion to this region, it may be assumed that most existing customs and usage's were revived after the conversion. The Islamization of local customs must have been a long and peaceful process, a process which some writers observe is still continuing to date.[45] In some areas, such as Aceh and later also in Minangkabau, adat has been integrally immersed into Islamic law.[46]

The Islamic legal theory of *adat* and the on-going process of interaction between *shari'ah* and *adat* took a different turn and a dichotomous dimension when the Dutch colonial government interfered. Initially the Dutch adopted a non-interference policy but later, when colonial interests lay more in the preservation of locally oriented and conservative *adat* than universal and egalitarian Islamic law, the Dutch took the side of local *adat* leaders in their struggle against Islamic proponents. The best case in point was the "paderi war" in Central

Sumatra in the early twentieth century. Islam, as a universal and egalitarian religion, was conceived as a threat to Dutch colonial domination. This was obvious when van Vollenhoven defended *Adat* law because, among others, if *adat* was not revived and defended, surely Islamic law would become prevalent.[47] More and more legal scholars and Muslim leaders in Indonesia over the last few decades have maintained that the conflict between Islamic law and *adat* was created, or at least exaggerated, by the colonial officers.

The interest in *adat* law became stronger when a debate flared up over which law was best for the Indonesian population. Many colonial officers favored the imposition of modern Western laws after being adapted to Indonesian conditions. However, the idea that Adat law, into which some Islamic legal elements had been integrated, was the actual positive law of the people, as put forward by Snouck Hurgronje and van Vallenhoven, gained momentum and supporters during the last phase of the Dutch colonial government. The prominence of *adat* over Islamic law was adopted as a formal legal policy as it was promulgated in Basic Law of the colony in 1927.

Basically, *adat* law is unwritten rules which grow, develop and disappear along with the growth and development of the concerned community. One occasion, there have been efforts to collate the existing community conventions into written forms. Many ethnographic monographs have been produced to record these *adat* laws. One good example of the integration of some principal elements of *adat* law into legal statute is the Basic Agrarian Law of 1960. Many scholars argue that after being transformed into statute, the characteristics of *adat* law are lost.

This latter characteristic is also shared by Islamic law. The source of Islamic law are in written forms, as are the formulations by legal scholars in *fiqh* texts, but they are not codified. These materials must go through "*taqnîn*" (enactment) by the caliphs or Muslim rulers, or by "*qadâ*" (adjudication) of a *qâdî*, or by "*fatwâ*" (legal opinion) of a "*mufti*" (jurist consult) to transform them into "positive law". Most Islamic law has never been enacted as positive law by the ruler; it is followed and respected as a part of religious conviction and due to moral consciousness and social sanctions.

After the enactment of Law no. 14/1970 in which the authority of the Supreme Court also covers the Islamic courts, there were increasing contacts and cooperation between the Supreme Court and the

Ministry of Religion in supervising and developing Islamic courts in the country. Even though the Act implicitly stipulates that the cases of the *Agama* Courts may be appealed to the Supreme Court, its application was hampered by the absence of appropriate procedural laws. In the meantime, the policy in the Islamic courts and the Ministry of Religion, considering that no new law was enacted to regulate it, continued to follow the colonial regulation which stated that the decisions of appeal from the High Religious Court were final.[48]

The enactment of the Marriage Law in 1974 extended the jurisdiction of the Religious Courts, and case dockets increased considerably. At the same time, more and more disputants wanted to present their cases at the level of the Supreme Court. In light of this situation, the Supreme Courts issued its own regulation in 1977 to regulate procedures in the examination and decision of appeal cases originating from religious courts. However, the Ministry of Religion maintained the existing law and tradition. This dualism created a debate among legal scholars and bureaucrats and only ended when the Chairman of the Supreme Court and the Minister of religion met and issued a common statement in 1979. This agreement has been followed by mutual cooperation between the two institutions. This cooperation was also enhanced by the establishment of a special chamber dealing with cases from religious courts, and six Supreme Court justices were appointed to it with a chair appointed among them.[49]

In the early eighties, the Supreme Court presented its opinion that one of the basic reasons for judicial uncertainty and legal confusion in the Islamic courts was the absence of judicial procedures and codified Islamic laws. Moreover, the selection, promotion and supervision of the judges was also cited as needing urgent improvement to elevate and integrate Islamic courts into a national judicial system. In March 1985 a joint program was launched by the Supreme Court and the Ministry of Religion with a specific objective to gradually overcome these problems.[50]

This cooperation was borne fruit in the form of the compilation of Islamic law. One of them is the use of Presidential Instruction (*Inpres*), instead of statute (*Undang-undang*), Government Regulation (*Peraturan Pemerintah*) or even Presidential Decision (*Keputusan Presiden*) which have a higher level in the national legal order. Even those who approved the formulization of this compilation through a Presidential Instruction, acknowledged that ideally it should be en-

acted as a legal statute through Parliament and President as regulated by articles 5 and 20 of the Constitution. However, they realized that this ideal is not realistic considering the sensitivity of the issue among some nationalist and non-Muslim leaders. Furthermore, in a country with a strong executive system and a patrimonial political culture, an executive order may be practically as effective as a formally enacted statute. In some cases, it has been more effective because there have been several *undang-undang* enacted by the parliament, such as the Law on the Environment, which remained idle for quite some time because its implementing regulations had not been issued by the executive branch of government. In the light of these conditions, it might have been a wise and effective choice, and a "by-pass road",[51] to apply the compilation with Presidential Instruction no. 1 on June 10, 1991, and based on it, the Minister of Religion issued Decision no. 154 in July, 1991 to formally implement the compilation as a guidance and reference for all government agencies, especially the *Agama* Courts, as well as society at large, in setting disputes in the fields of marriage, inheritance and *waqf*.[52]

This is a prime example of the significance of the executive function in the formation of a national legal system, not only in enforcing the promulgated laws but also more so in legal-finding and law-making. The national legal system is an open system in the sense of considering any existing laws in the world as its raw materials as long as they are not contradictory to Pancasila values, 1945 Constitution norms and national interests as well being in line with the legal needs of the Indonesian state and nation.[53]

Given all these requirements, one may ask: what is the position of Islamic law in the national law? Does the Muslim community which comprises the great majority of the country's population adhere to Islamic law regardless of whether it has been transformed into national law or not? Has the requirement of testing the elements of Islamic law through Pancasila values, the 1945 Constitution norms and official law-making procedures created another kind of *reception theorie* in the sense that Islamic law is not valid by itself but it becomes positive law that people follow only if it has been received as "national" law, and as such it is followed not as Islamic law but more as national law?

To answer these challenging questions, government officials maintain that since there has been a national consensus in the form of

Pancasila and the 1945 Constitution, national development should be built in accordance with the agreed consensus. However, as the first principle of Pancasila is Belief in God and given the demographic factor that the majority of the population are Muslim, Islamic law has a special position and function in the formation of a "unified modern national legal system".[54]

Given all these fact, the possibility of Islamic legal values influencing national law or the elements of Islamic law, so that it is received as positive law, is extensive if not imperative. Alternatively, the existence of legal products which are contradictory to basic Islamic values is unlikely, and if enacted, they are likely to be ineffective, or even counter-productive. However, the positive contribution of Islamic law to national law will be hampered if Islamic law does not reform and actualize itself in responding to the pressing demands of modern life. Therefore, Minister Saleh insists on an open attitude on both fronts: the Islamic law proponents and the national law policy makers. For the last decade, this openness seems to have been easier on both sides party due to the lessening of political interests, the growing process of "Islamization", or as some writers call it "santrinization", among government bureaucrats, and the gradual acceptance of "*pembaruan*" (renewal) among Muslim leaders.

There have been many legal statutes enacted during the New Order government that may be cited as having adopted Islamic law as national positive law. Some of these have been repeatedly mentioned in the previous discussion: Law no. 1/1974 on Marriage an Law no. 7/1989 on the *Agama* Court. Besides these, various regulations have been issued to implement Islamic law in the country, for example, Government Regulation no. 9/1975 on the Implementation of the 1974 Marriage Law, Government Regulation no. 28/1977 on Islamic religious foundations (*Perwakafan Tanah Milik*), Presidential Instruction no. 1/1991 on the Compilation of Islamic Law, and Minister of Religion Regulation no. 2/1990 on the guardian of Islamic marriages.[55]

The application of Islamic law is not only confined to those fields of law that are traditionally at the heart of the religion, i.e. family and inheritance law, but also occur in more mundane fields. In these sense, one may cite the new Education Law, tabled after exhaustive drafting in early 1989 and after heated debates, which enshrined with more certainty the role of religious instruction at every level and in every kind of formal education, and appeared to grant more security to

private religious schools. Let us conclude the examples of transformation of the elements of Islamic law into national law by looking at the newly promulgated Law on Banking (Law no. 7/1992). It is interesting to note that this Law recognizes the institution of *mudârabah* (profit-loss sharing agreements) as one of the functions of general banks in Indonesia. In order to regulate this new banking activity, a government Regulation no. 72/1992 was issued, in which reference is formally made to Islamic *sharî'ah*. Article 2 of this Regulation states: "The profit-loss sharing principle as intended by the above-mentioned article 1 is a profit loss-sharing principle based on *sharî'ah*". Article 5 further stipulates:

1. A bank based on the principle of profit-loss sharing must possess a *Sharî'ah* Supervisory Council (*Dewan Pengawas Syari'at*) which has a duty to ensure that all banking activities in collecting funds from the community and in distributing them to the community are in accordance with *sharî'ah* principle;
2. The formation, of this *Sharî'ah* Supervisory Council is to be carried out by the concerned bank based on consultations with the institutions in which the Indonesian *'ulamâ'* associate themselves.

The elucidation of this article further explains that the function of this *Sharî'ah* Council is to determine the legality of any banking activity/product/service from the point of view of Islamic *sharî'ah*; consequently, the members of this council must consist of those who have wide and deep knowledge of *sharî'ah*.[56] This law did not remain on the books very long, because soon afterwards a new Islamic Bank, *Bank Muamalat Indonesia*, was established in which Suharto, his family and several Muslim ministers and high ranking officers own portions of the shares. In fact, the involvement of Islamic organizations in the banking and financial institutions had been initiated mush earlier in the form of BPR (*Badan Perkreditan Rakyat*/People's Credit Institute) in sub-urban and rural areas. At this point, it is worthwhile mentioning that during my observation visit, a short course on Islamic Banking was given by IAIN (State Institute for Islamic Studies) in Medan, North Sumatra and the participants were not only IAIN students but also students from other general universities. A semi-official research and study center for Islamic Economics and Banking

has also been established in Medan, the largest city and the center of commercial activities on the island of Sumatra.

These are good examples of how Islamic law is transformed into national law. Even though no one denies the emergence of a favorable social climate and a better political environment during this most recent phase of the New Order government in terms of the transformation of Islamic law into positive national law, accepting the conclusion that Islamic law has enjoyed an upper hand the formation of a national legal system is fraught with risk and exaggeration. Those legal products and developments mentioned above seems to be ad hoc and unsystematic. However, it gives a beneficial precedent and a clearer picture for Islamic law proponents on the condition and possibilities of defining and applying Islamic law elements into national positive law. The strict and complete imposition of Islamic law in the nation-state of Indonesia, even if only for the adherents of Islam, may not only be impossible, but also detrimental to Muslim interests at large.

Islamic law as expounded in *fiqh* literature and practices by the Muslim community has been accepted and succeeded as raw material for the formation of national law through a legal channel of national law-making. Ismail Suny, a famous scholar of constitutional law and Muslim leaders, is of the opinion that the position of Islamic law in the Indonesian legal structure is stronger than just "raw material". Borrowing a theory in constitutional law, he put forward the terms "persuasive source" and "authoritative source". Persuasive source is that people have to be convinced to accept and implement it, while as an authoritative source it is valid by itself. He maintained that article 29 of the 1945 Constitution which states that: "The State guarantees the freedom of each and every citizen to profess a religion and to worship in accordance with one's religion and belief", has established Islamic law as an authoritative source at least for those Islamic adherents and canceled completely the *receptie* theory which denied the validity of Islamic law until it was received by a community as part of its "adat" law. The Presidential decree of Juli 5, 1959 to return to the 1945 Constitution mentioned in its consideration the factor that the Jakarta Charter[57] was an inherent part of the Constitution, which strengthened the authoritativeness of Islamic law as a source of the national legal system.[58]

Suny also argued that the validity of Islamic law only for Muslim does not contradict the principles of equality before law which is

stipulated in article 27 of the Constitution. Systematic interpretation of articles 27 and 29, he argues, is a relationship between general rule (*lex generalis*) and specific rule (*lex specialis*). Equality before law in which each and every citizen is treated equally without any discrimination based on race, color, class, religion, ect. applies as a general principle. Meanwhile the right to profess a religion and to worship accordingly is also guaranteed by the Constitution and is applied as a specific rule which excepts it from a general rule. This argument has also been cited by Munawir Sjadzali in defending the constitutionality of the Law on *Agama* Courts.[59] In his writing, he quoted a former Minister Of Justice, Omar Senoadji, who maintained that not all legal distinctions are to be seen as a breach of the principle of equality before law, even treating unequal people equally may not be in the line with justice and the constitution.

To pursue and up-grade this phenomenon, the Islamic law proponents must exercise a new *ijtihâd* in the sense of carrying out systematic and endless effort to derive legal principles and rules from its sources by considering wisely the rich legacy of Islamic legal traditions and literature. Those studies are directed to answer the actualities and problems of the present-day Indonesian population, the great majority of which are Muslims, and to guide them in advancing their welfare and capabilities in the modern world.

On this point, Ismail Saleh, a previous Minister of Justice, forwarded an interesting and viable theory. When the bill of *Agama* Courts was heatedly debated in parliament and public, an article by him appeared in one of the Catholic-owned leading newspapers in Jakarta with a nation-wide circulation, which maintained that a national legal system is to be a more unified system of law. However, it is an open system in the sense that any system or doctrine that is in line with Pancasila and the 1945 Constitution may become a source in its formation. In this context, Islamic law is in a better position. But, Islamic law has also to go through the mechanism of national law-making. What is important is to find out the universal norms of Islamic law so that they be accepted by every segment of the population and as such they will be accepted more easily and transformed into a national legal order. If there is a difference between Islamic law and other sources, efforts should be directed to find a common core (*inti*) and common denominators among these different sources, so that the gap can be filled or at least minimized. Only if all this proves

ineffective, it may be wise and just to adopt the concept of *Bhinneka Tunggal Ika* (Unity in Diversity) in the sense that each distinct group is subject to its distinctive law without making the others subject to it.[62]

As reiterated above, the success of implementing some sections of Islamic law and the adoption of certain elements of Islamic values into national positive law are made possible by a favorable political situation and by cooperation with other segments of the population. This conditioning may be imperative if this trend is to continue. The contribution of those Muslim legal bureaucrats and professionals who are generally not conversant, or even some that are unsatisfied with traditionally formulated Islamic law, has been critical in this process. Mutual cooperation and constructive dialogue between these two proponents of Islamic law, irrespective of their differences in what constitutes this, are required to make Islamic law not only enforceable as a national law but also in reinvigorating it as an actual legal system that fits the demand of a modern society.

Footnotes

1. The literature on the Indonesian coup d'etat is extensive. Some of the representative material with conflicting opinion include the following Arthur J. Dommen, "The Attempted Coup in Indonesia", *The China Quarterly* 25 (January-March 1966); John Hughes, *Indonesian Upheaval* (New York: McKay, 1967); Donald Mindley, "Political Power and the October 1965 Coup in Indonesia" *Journal of Asian Studies*, XXVI/2 (February 1965), pp. 103-110; John O. Sutter, "Interpretations of Gestapu, the 1965 Indonesian Coup", *World Affairs*, CXXXII/4 (March 1970), pp. 305-317, and W.F. Wertheim, "Indonesia before and after the Untung Coup", *Pacific Affairs*, 39 (Spring-Summer 1966). These interpretations and many others are summarized in Arnold C. Backman's book, *The Communist Collapse in Indonesia* (New York: W. W. Norton and Co., 1969). Some scholars at Cornell University also conducted research and put forward their interpretation see Benedict R. Anderson and Ruth T. McVey, *A Preliminary Analysis of the October 1, 1965 Coup in Indonesia* (Ithaca, NY: Cornell Modern Indonesia Project, Intern Report Series, Cornell University Press, 1971). For an official explanation of the coup, see Nugroho Notosusanto and Ismail Saleh, *The Coup Attempt of the September 30th Movement* (Djakarta, 1968).
2. For a good introduction to the emergence of the New Order, see J. M. van den Kroef, *Indonesia since Sukarno* (Singapore: Asia Pacific Press, 1971), and another book with the same title by Peter Polomka (Melbourne, Penguin Books, 1971).
3. Donald Hindley, "The September 30 Movement and the Fall of Sukarno", *The World Today*, XXIV (August 1968), pp. 345-6. For an interesting discussion of the backgrounds of the March 11th Order, see Peter Polomka, *Indonesia since Sukarno* (Ringwood, Victoria, Australia: Penguin, 1971), p. 89. The text of this order itself is reprinted in *Far Eastern Economic Review*, (March 24, 1966), p. 550.

4. There has been an endless debate over which category of state the Indonesian policy belongs to. Most Western analysis continue to purvey New Order Indonesia as an authoritarian military state, some prefer to call it a quasi-military state, and others a bureaucratic state. However, the New Order exponents calls it a "Pancasila Democratic state". See Chua Beng Huat, "Looking for Democratization in Post-Suharto Indonesia", *Contemporary Southeast Asia*, 15/2 (September 1993); and Richard Langil, *Military Rule and Development Policy in Indonesia under the New Order*, 1966-1974 (Ph. D. dissertation, American University, Washington, DC), p. 61.
5. All the decrees and decisions of the Provisional People's Consultative Assembly are complied by Kansil and Erwin, *Kitab Himpunan Karya MPRS* (Djakarta 1970). See also Eddy Daiman and Robert N. Homick, "Indonesia's Formal Legal System; An Introduction", *American Journal of Comparative Law*, 20/3 (Summer 1972).
6. On the development of Pancasila democracy in the New Order, see, among others, Abdul Haris Nasution, *Pancasila Democracy Today and Tomorrow* (Djakarta, nd) and *Orba: A Guide to the New Order Government Policy* (Djakarta: Department of Information, Republic of Indonesia, November 1967). Also useful is Donald , "Indonesia 1970; The Workings of Pancasila Democracy", *Asian Survey* XI (February 1971), and "Indonesia, 1971: Pancasila Democracy and the Second Parliamentary Election", *Asian Survey*, XII (January 1972).
7. One example of study using the liberal democratic category is Andrew MacIntyre, *Business and Politics in Indonesia* (Sydney: Allen and Unwin, 1990), while a cultural essentialist tendency is represented by Richard Robison, *Power and Economy in Suharto's Indonesia* (Manila: Contemporary Asia Publishers, 1990). This cleavage of approach and debates was visible on topic of democratization and the role of the middle class in it. See Richard Tanter and Kenneth Young, *The Politics of Middle Class in Indonesia* (Clayton: Center for Southeast Asian Studies, Monash University, 1990). For a good example of a new approach, see Chua Beng Huat, "Looking for Democratization in Post-Soeharto Indonesia", *Contemporary Southeast Asia*, 15/2 (September 1993), pp. 131-160.
8. For extensive study on this subject, see Christine Drake, *National Integration in Indonesia: Pattern and Policies* (Honolulu: University of Hawaii Press, 1989).
9. The pragmatic and realistic, if not simplistic, approach of the early New Order government is noted by many observers of Indonesia. See, among others, Guy Pauker, "Indonesia: The Year of Transition", *Asian Survey*, VII (February 1967); Guy Pauker, "Indonesia Age of Reason?", *Asian Survey*, VIII (February 1968); John Allison, "Indonesia: Year of the Pragmatists", *Asian Survey*, IX (February 1969); and Mochtar Lubis, "Indonesia's Goals and New Realities", *Pacific Community*, II (April 1971).
10. As quoted by B.J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1982), p.37.
11. See for example, Guy J. Pauker, "Policy Implication of Political Institutionalization and Leadership Change in Southeast Asia", *Asian Affairs An American Review*, 13/3 (Fall 1986).
12. MPRS Decree no. XX/MPRS/1966 of Juli 5, 1966 concerning the DPR-GR (House of Representatives) memorandum about sources of the legal order and forms of regulation. See Kansil and Erwin, *op. cit.*, p. 150. See also Eddy Damain

and Robert N. Hornick. "Indonesia's Legal System an Introduction, "*American Journal of Comparative Law*, 20/3 (Summer 1972), pp. 524-526.

13. See, for instance, the remark made by the ruling party *Golkar* on the draft bill of the Supreme Court and the General Court respectively, September 17, 1985. See also the reply of Minister of Justice to remarks made by members of the House of Representative on the draft bill, October 4, 1985. The Minister, among others, said "The government actually is applying *integralistic* principles in accordance with the spirit of Pancasila and the 1945 Constitution in supervising the judges by emphasizing a priority on togetherness and consultation between the government and the judiciary". For further discussion see Todung Mulya Lubis, *In Search of Human Right: Legal Political dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: Gramedia, 1993), pp. 86-96.
14. See Ismail Suny, a professor of constitutional law in the University of Indonesia and one of the leaders of the Muhammadiyah organization, *Mekanisme Demokrasi Pancasila* (Jakarta: Aksara Bari, 1978); Marsilam Simanjuntak, *Unsur Hegelian dalam Pandangan Negara Integralistik* (a thesis submitted to the Law School, University of Indonesia, 1992) and Lubis, *op. cit.*, p. 87.
15. Among those who subscribe to the integralistic state are Padmo Wahyono and Oemar Senoadji, both of whom have had influential positions either in the Supreme Court or the Ministry of Justice. See Wahyono, "Hak dan Kewajiban Asasi Berdasarkan Cara Pandang Integralistik Indonesia", *Forum Keadilan*, 9 (1989), Senoaji, "Kekuasaan Kehakiman di Indonesia sejak Kembali ke Undang-undang Dasar 1945", a paper presented at the Seminar on "Thirty Years of the Return to the 1945 Constitution" held in Law School, Pajajaran University, Bandung, Juli 5-6, 1989, as quoted by Lubis, *op. cit.*, p. 87.
16. See Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State", *Indonesia*, 40 (1985), p. 72.
17. As quoted by Sunaryati Hartono, a current directories of the Nation Law Departement Center, in his article, "Pembinaan Hukum Nasional Pada Pembangunan Jangka Panjang Tahap II Dalam Konteks Hukum Islam", *Mimbar Hukum*, IV/8 (1993), p. 1.
18. The decree No. II year 1993 of the People's Consultative Assembly on Guidelines of State Policy (*Garis-garis Besar Haluan Negara*) in which a master plan for the second twenty-five year national development plan is formulated. See *Ketetapan-Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Tahun 1993* (Jakarta: BP7 Pusat, 1993), pp. 19-20. This publication is in Bahasa Indonesia and the translation here is mine.
19. *Ibid.*, p. 30.
20. *Ibid.*, p. 33.
21. Information and quotations on the Guidelines of State Policy in the sphere of legal development, besides being taken from the official publication cited in footnote 17, are also taken from Sunaryati Hartono, *ibid.*, pp. 1-18.
22. See Ismail Saleh, Minister of Justice, "Wawasan Pembangunan Hukum Nasional", *Kompas* (June 1 and 2, 1989). This article appeared in one of the largest daily newspapers in Indonesia during the heated debate in the Parliament and public on the bill of Religious Court. This article is later also included in Zuffran Sabrie (ed.), *Peradilan Agama dalam Wadah Negara Pancasila: Dialog tentang RUUPA* (Jakarta: Pustaka Antara, 1990), pp. 124-131. See also Sunaryati Hartono, *op. cit.*,

pp. 3-4.

23. This estimate was given by Mrs. Hartono, the current Directrice of the National Law Development Center. See Hartono, *ibid.*, p. 12.
24. See David M. Trubek, "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review*, 3 (1972), pp. 720-753.
25. For further discussion on the civil law system, see J.T. Merryemen, *The Civil Law Tradition* (Stanford: Stansford University Press, 1969), and Alan Watson, *The Making of Civil Laws* (Cambridge: Harvard University Press, 1981).
26. This condition had been observed by Eddy Damain and Robert N. Hornick in the early seventies. In general this condition, to a lesser extent, is still true. See their article "Indonesia's Formal Legal System: An Introduction", *American Journal of Comparative Law*, 20/3 (Summer 1972),p. 510.
27. Article 19 of Law No. 19/1964 says: "In the interests of revolution, the honor of the state and nation, or the urgent interest of society at large, the President can engage or interfere in court proceedings". While article 23 of Law No. 13/1965 states "In cases where the President interferes the court proceedings have to be stopped and the decision of the President should be announced". For further discussion on the perspective of human right debates in Indonesia, see Lubis, *op. cit.*, pp. 96-102.
28. For a detailed discussion of the background and debates about this law, see Daniel S. Lev, "Judicial Authority and the Struggle of an Indonesian Rechtstaat". *Law & Society Review*, 13/1 (Fall 1978). pp. 37-71.
29. See R. Subekti, *Law in Indonesian* (Bandung: Karya Nusantara, 1976), and Bambang Waluyo, *Implementasi Kekuasaan Kehakiman Republik Indonesia* (Jakarta: Sinar Grafika, 1992), especially chapter 6 on the Supreme Court, pp. 95-116.
30. Many Muslim writers criticize this institution of "execution permit" and argue that is contradictory to the general norms of the Basic Law of Judiciary. See, among others, T. Jafizham, "Peranan Pengadilan Agama dalam Pelaksanaan Undang-undang Perkawinan", in *Kenang-Kenangan Seabad Peradilan Agama* (Jakarta: Depertemen Agama, 1985), pp. 170-172; and H. Dahlan Ranuwihardjo, "Peranan Badan Peradilan Agama dalam Mewujudkan Cita-Cita Negara Hukum," *ibid.*, 201-112.
31. The jurisdictions which are established by the 1974 Act of Marriage are enumerated in the Elucidation of article 49 paragraph (2) of the Act no. 7 Year 1989 concerning the Religious Court, State Gazette No. 49 Year 1989. See Abdul Gani Abdullah (ed.), *Himpunan Perundang-undangan dan Peraturan Peradilan Agama* (Jakarta: Intermasa, 1991), pp. 302-303.
32. As cited by Michael R.J. Vatikiotis, *Indonesian Politics under Suharto: Order, Development and Pressure for Change* (London: Routledge, 1993), p. 110.
33. See Allan A. Samson, *Islam and Politics in Indonesia*, (Ph. D. dissertation, University of California Berkeley, 1972), pp. 279-9.
34. For full quotations and discussion see Muhammad Kamal Hassan, *Muslim Intellectual Responses to the "New Order" Modernization in Indonesia* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1980), p. 47-51.
35. See book, *Islam and Pembangunan* (Jakarta: Kiblat, 1970). See also Hassan's analysis of it, *op. cit.*, p. 47.
36. Ira M. Lapidus, *A History of Islamic Societies* (New York: Cambridge University

Press, 1988), pp. 765-766.

37. Allan Samson, "Islam in Indonesian Politics", *Asian Survey*, (December 1968), p. 1014. This is an important article on this subject, from which a number of the following facts and data are taken.
38. See Leo Suryadinata, *Military Ascendancy and Political Culture: A Study of Indonesia's Golkar* (Athens: Ohio University Press, 1989), p. 70.
39. For extensive studies on Nurcholish Madjid's ideas, see Muhammad Kamal Hassan, *op. cit.*, pp. 78-116.
40. See Allan A. Samson, *op. cit.*, p. 1017.
41. See B. J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1982), p. 159.
42. See for example Natsir Tamara, "Indonesia in the wake of Islam", *ISIS* (1986); S. Awanohara, "The New Call to Prayer", *Far Eastern Economics Review* (Januari 24, 1985), pp. 26-31; and Michael R. J. Vatikiotis, *Indonesian Politics under Suharto: Order, Development and Pressure for Change* (London: Routledge, 1993), pp. 120-138.
43. Vatikiotis who had been a reporter for *Far eastern Economics Review* in the country for several years recorded some interesting reactions on this new development. One Christian senior army general quoted as saying that Suharto's move was "the biggest disaster to hit the New Order". See his recent memoir, Michael R. J. Vatikiotis, *ibid*, p. 113.
44. *Ibid.*
45. See Mitsou Nakamura, *The Crescent Arises over the Banyan Tree* (Yogyakarta: Gadjah Mada University Press, 1983).
46. The integration of adat into Islamic law may be discerned from the proverbs of each community. In Aceh, for example, there is a famous saying: *Hukum ngon adat hantom cre, ladee zat ngon sipeut* ([Islamic] law and *adat* cannot be separated; as between a thing with its attribute). The proverb from Minangkabau reveals the connection between Islamic law and adat in a clearer position: *Syara' mengato, adat memakai* (Shari`ah decides, adat applies). For further discussion see Mohammad Daud Ali, *Asas-asas Hukum Islam* (Jakarta: Rajawali Press, 1990), p. 201. In the case of Minagkabau, see Hamka, "Hubungan Timbal Balik antara Adat dan Syara' di dalam Kebudayaan Minangkabau", *Panji Masyarakat* 61/IV (1970), and Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984).
47. This remark has been used time and again by the proponents of Islamic law to point out the implicit colonial background that backs up "adat" law. Even Bustamul Arifin, a Supreme Court Judge, and later the Junior Chair for *Agama* Courts appeals in the Supreme Court, quoted it. See his article in Muchtar Na'im, *Menggali Hukum Tanah dan Hukum Waris Minangkabau* (Padang: Center for Minangkabau Studies, 1986).
48. This was regulated in article 7 State Gazette no. 601 of 1937 in conjunction with article 15 State Gazette no 638 of 1937 and continued to be valid based on the stipulation of chapter article 11, Government Regulation no 45 of 1957. See *Kenang-Kenangan Seabad Peradilan Agama di Indonesia* (Indonesia: Depertemen Agama, 1985), p. 46.
49. These supreme court justices who were appointed to the chamber by the chief of the Supreme Court in 1979 were (late) Sri Widoyati Wiratmo Soekito, Z. Asikin

Kusumah Atmadja, B.R.M. Hanindyo Poetro Sosropranoto, Poerwata S. Gandasubrata, Kaboel Arifin and Bustanul Arifin. The last mentioned justice was later in 1982 officially appointed to be the chief of the chamber with the title Junior Chief (Ketua Muda) of the Supreme Court by the President of the Republic. All six justices were Muslims and had formal education in "secular" national law schools and none, excepting the chief, can be considered 'ulama in the traditional background in Islamic religion. This was a matter of contention among *Agama* court judges, Ministry of Religion officials and Muslim leaders at large. Therefore, many had good reason to feel relieved when in late 1982, there more Supreme Court Justices with some religious education but not at level of *'ulama* were appointed. See H. A. Muhaimin Nur, et al. (eds.), *Kenang-Kenangan Seabad Peradilan Agama di Indonesia* (Jakarta: Departemen Agama, 1985), pp. 52-53. Special research on the sociological background and judicial behavior of these judges, or in the matter of all the supreme courts justice, is need and essential in order to comprehend the judicial system.

50. See Arifin, "Kompilasi", *op. cit.*, pp.26-27. For extensive discussion of the Islamic Law Compilation, see H. Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992).
51. The term "by-pass road" (*jalan pintas*) was used by Supreme Justice Harahap to refer to the Compilation of Islamic law and the way it is enacted and implemented.
52. For further discussion on the background and efforts to implement the compilation, see Abdul Gani Abdullah, "Pemasyarakatan Inpres No. 1/1991 tentang Kompilasi Hukum Islam", *Mimbar Hukum: Aktualisasi Hukum Islam*, III/5 (1992), pp. 1-6, K.H. Sjechul Hadi Permono, "Sosialisasi Inpres No. 1/1991 tentang Kompilasi Hukum Islam, *ibid.*, pp. 7-16, and Ahmad Azhar Basyir, "Pemasyarakatan Kompilasi Hukum Islam melalui Jalur Pendidikan Non Formal", *ibid*, pp. 17-20.
53. See Ismail Saleh (Minister of Justice), "Eksistensi Hukum Islam dan Sumbangannya terhadap Hukum Nasional", *Kompas* (June 3, 1989).
54. The attributes of a "modern unified national legal system" have been expressed by the Minister of Justice and high ranking officers. See, for example, Ismail Saleh, *ibid.* This article was later complied by Zuffran Sabrie (ed.) *op. cit.*, pp. 132-136.
55. All laws, government regulations and legal documents pertaining to the jurisdictions of *Agama* Courts have been complied by Abdul Gani Abdullah, *Himpunan Perundang-undangan dan Peraturan Peradilan Agama* (Jakarta: Intermasa, 1991).
56. For further discussion of the new Law on Banking in Indonesia, see Widjanarto, *Hukum & Ketentuan Perbankan di Indonesia* (Jakarta: Grafiti, 1993).
57. Those who argued against the validity of Islamic law and the existence of separate courts for Muslim citizens in a national legal judicial system have criticized some Muslim leaders for wanting to establish an Islamic state and to reassert the Jakarta Charter which had been defeated and refused once and for all. Based on this, they opined that the existence of separate Islamic court which enforces Islamic law is unconstitutional, against the national consensus and detrimental to national integration, and most of all, contradictory to Pancasila. See, for example, Franz Magnis-Suseno, "Seputar Rencana UU Peradilan Agama", *Kompas* (June 16, 1989); S. Widjojo, "Antara Negara Agama dan Negara Pancasila", *Majalah*

Hidup, 7 (February 12, 1989); S. Widjojo, "Kesaktian Pancasila dan Tantangan", *Majalah Hidup*, 10 (March 1989); P.J. Suwarno, "Peradilan Agama di Negara Pancasila", *Suara Pembaruan* (April 6, 1989); T.B. Simatupang, "Menyempurnakan RUUPA demi Makin Mantapnya Persatuan & Kesatuan Bangsa", *Suara Pembaharuan* (June 29, 1989).

58. Ismail Suny is a professor of constitutional law and legal theory at the school of Law, Universitas Indonesia, Jakarta, from which he graduated in 1957. He also obtained his Masters in Civil Law at McGill University, Montreal, Canada (1960) and a jurist Doctorate from Universitas Indonesia (1963). He comes from Aceh, a predominantly Islamic strongly area in the northern tip of Sumatra and has been active in the Muhammadiyah organization as one of the chairman of its national board and Rector of Muhammadiyah University in Jakarta (1973-1980). He was also the Vice Director of the National Law Development Center, Ministry of Justice (1964-1874), for a short period a member of the House of Representatives (1973-1980), and a consultant to the prestigious National Defense and Security Board (1980-1987). Despite all these positions in official institutions, he was a consistent scholar whose writings sometimes criticizes unconstitutional practices of the New Order government. Because of this, he had been detained by the security officers. When Suharto's policy leaned to cooperate more with Muslims, he joined the ICMI (*Ikatan Cendikiawan Muslim se-Indonesia*) and was appointed as one of its national chairmen. He was later appointed as Ambassador to Saudi Arabia. Some of his writings which are relevant to the topic of this study are: "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia", in Juhaya S. Praja (ed.), *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: Remaja Rosdakarya, 1991), pp. 73-81, "Hukum Islam dalam Hukum Nasional", *Hukum dan Pembangunan*, XVII/4 (August 1987), pp. 351-357, "Tradisi dan Inovasi Keislaman di Indonesia dalam Bidang Hukum", *Mimbar Hukum*, IV/8 (1993), pp. 19-28.
59. See Munawir Sjadzali, "Landasan Pemikiran Politik Hukum Islam dalam Rangka Menentukan Paradilan Agama di Indonesia", in Juhaya s. Praja (ed.), *Hukum Islam di Indonesia*, pp. 41-67.
60. See Ismail Saleh, "Eksistensi Hukum Islam dan Sumbangannya terhadap Hukum Nasional", *Kompas* (June 3, 1989). This article was later included in Zuffran Sabric (ed.), *Peradilan Agama dalam Wadah Negara Pancasila: Dialog Tentang RUUPA* (Jakarta: Pustaka Antara, 1990) pp. 132-136

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