RELIGIOUS COURTS IN INDONESIA : JUDICIAL DEVELOPMENT AND ISLAMIC REVIVAL

Ratno Lukito

Abstrak

Salah satu fenomena yang paling menonjol pada pasca era kolonialisme di sebagian besar negara-negara Islam di dunia adalah semakin meningkatnya gerakan untuk kembali kepada kemurnian ajaran Islam, sebagaimana yang biasa didengungkan dengan slogan "Kembali kepada Qur'ān dan Sunnah." Pada dataran politis, hal ini tidak lain merupakan tindak lanjut dari kesadaran untuk kembali membangun identitas diri setelah dasar-dasar filsafah hidup mereka dirusak oleh nilai-nilai Barat. Muara aplikasi yang paling menonjol dari gerakan ini adalah usaha pembumian kembali prinsip-prinsip peradilan Islam dalam tatanan sistem peradilan suatu negara.

Fenomena tersebut tampaknya juga merembes ke Indonesia. Pengundanganbeberapa peraturan baru yang menguntungkan umat Islam akhir-akhir ini, seperti Undang-undang nomor 1/ 1989 tentang Pengadilan Agama dan Keputusan Presiden tahun 1991 tentang Kompilasi Hukum Islam, merupakan gambaran yang sangat jelas dari kebangkitan Islam di negeri ini. Sebagaimana yang terjadi pula di negara-negara Islam yang lain, pengundangan tersebut dapat dilihat sebagai respon terhadap kebutuhan kaum Muslimin untuk dapat merealisasikan ajaran Islam, khususnya dalam praktek sistem peradilannya. Perjalanan sejarah institusi Pengadilan Agama di Indonesia sejak masa penjajahan Belanda hingga tahun delapan puluhan menjadi gambaran yang jelas betapa ide untuk kembali kepada kemurnian Islam sesungguhnya pada prakteknya tidak dapat dipisahkan dari kebutuhan untuk juga mengadopsi nilai-nilai dari Barat. Hal ini dapat dilihat dari kenyataan yang terjadi di masing-masing negara Islam (seperti apa yang bisa kita lihat dari perkembangan eksistensi Peradilan Agama di Mesir dan Pakistan), dimana sejauh apapun semangat untuk kembali kepada kemurnian Islam itu ada, mereka tetap tidak dapat

membendung pengaruh sistem peradilan Barat dalam praktek peradilan Islamnya. Kenyataan ini tentu saja juga didorong oleh faktor intern masing-masing negara-negara Islam tersebut untuk beradaptasi dengan nilai-nilai lokal mereka.

Dalam kasus Pengadilan Agama di Indonesia, pengaruh nilai-nilai Barat justru tampak begitu menonjol. Dengan demikian dapatlah dipahami bahwa usaha peningkatan kualitas peradilan Islam sebagai langkah praktis dari ide kebangkitan Islam tersebut tidaklah berarti harus kembali kepada model klasik pengamalan peradilan Islam, tetapi pengadopsian sistem Barat justru dipandang sebagai langkah terbaik untuk memenuhi kebutuhan umat Islam.

ملخص

من أهم الظواهر الطالعة بعد عهد الاستعمار فى أكثر البلاد الاسلامية هى ارتقاء الحركة للرجوع إلى تعاليم الاسلام الخالصة نداؤها "العودة إلى القرآن والسنة" . من الجهة السياسية تكون هذه الحركة متابعة لوعى المسلمين فى إعادة شخصيتهم بعد ان كان الغربيون هدموا فلسفة حياتهم. ومن أظهر أعمال الحركة هى إعادة مبادئ الأحكام الإسلامية فى عملية أحكام الوطن.

هذه الظاهرة حدثت أيضا بإندونيسيا. خروج القوانين الجديدة/ أفادر المسلمين، مثل قانون نمرة ١٩٨٨/١ عن القضاء الاسلامى وقرار رئيس الجمهورية سنة ١٩٩١ عن جمع الأحكام الاسلامية، يعطى صورة بينة عن قيام الاسلام فى هذا الوطن. كما حدثت فى البلاد الاسلامية الأخرى "فإن تقرير هذه القوانين لإجابة حاجات المسلمين إلى عملية الأحكام الاسلامية وخاصة فى نسق القضاء. نظرا إلى تاريخ المحكمة الاسلامية بإندونيسيا منذ عهد الاستعمار الهولندى حتى سنوات ١٩٨٠، معروف بأن آراء تزكية تعاليم الاسلام فى الواقع متعلقة بالجهود فى أخذ تعاليم الغرب. هذه الحالة تعرف من

الأحوال الواقعة فى البلاد الاسلامية كما نرى نمو محكمة الدين بمصر وباكستان، فنرى أن الجهود فى تزكية تعاليم الاسلام لا تقدر على سدّ تأثير نظام المحكمة الغربية فى القضاء الاسلامى.

يكون تأثير الغرب فى القضاء الاسلامى بإندونيسيا، أظهر من البلاد الاسلامية الأخرى. فلذلك نفهم من هذه الواقعة بأن ترقية نوع القضاء الاسلامى كإحدى الخطوات الفعلية من آراء قيام الاسلام لا تعنى العودة إلى النظام القديم، با أخذ نظام الغرب لإملاء حاجات المسلمين.

Introduction

For many people, the image of the Islamic judicial process is symbolized by the picture of a *qāḍi* sitting barefoot and turbaned under a tree or in the corner of a mosque dispensing justice. Even Max Weber[1], who appreciated the actual Islamic adjudication as neither capricious nor unrestrained, developed the term *Kadijustiz* (*qāḍi* justice) to refer to "a type of legal system in which judges have recourse to a general set of ethical precepts unevenly employed on a case-by-case basis rather than to a series of rules abstractly formulated and uniformly applied."[2] Of course, this traditional legal system has been greatly altered as western codes and modern bureaucratic structures were introduced through a wave of colonialization in most Islamic countries.

This paper will discuss the development of religious courts in Indonesia from their earliest formulation during the Dutch colonial era until current conditions in the modern history of Indonesia. Using this discussion as a basis, this study will go on to probe the phenomena which has emerged in many Muslim countries, often called the "Islamic revival", advocating a return to the application of classical Islamic law in legislation and judicial practice. I shall argue that although the idea of "a return to Qur`ān and Sunna" has been embraced by many Muslim countries, the creation of nation states on a Western model has led each Muslim country to present a different picture of the realization of this ideal. The judicial

system has also suffered from reformulation and European influences; Islamic revivalists have called for a purification of Islamic law and a revival of the traditional Islamic judicial system. Their desire for a return to a pristine Islam has thus far failed; although a number of countries have attempted to implement some form of Islamic law, they have all failed to resist some form of western influence. In addition, the principle which promotes the adaptation of classical Islamic precepts to local need, has permitted the application of judicial system to vary according to country and region.

This study will be divided into three major discussions. The first will deal with the development of religious courts in Indonesia during the occupation of the Dutch and Japanese regimes while the second will discuss the religious court since Indonesian independence. The third section will then analyze the phenomena of Islamic revivalism in the application of the judicial system which has emerged in the Islamic world. This line of analysis provides an understanding of the practice of revivalism with reference to the development of the religious courts in Egypt and Pakistan as a comparison to their development in Indonesia.

I. Islamic Courts in the Colonial Era of Indonesia

As early as the beginning of seventeenth century, the Dutch-East Indies Company (*Vereenigde Oost-Indische Compagnie* or VOC) had already occupied the archipelago. As their main concern was to extract agricultural commodities as expeditiously as possible, the VOC resolved to respect the practice of Islamic law of the indigenous people "except where commercial interests were at stake."[3] The shift from VOC rule to Dutch administration at the beginning of nineteenth century, however, can be seen as the beginning of Dutch interference in the application of Islamic principles in legislation and judicial practice. The formal institution of the religious court in the East Indies dates from 1882, although it has existed as a means of promoting justice for all Muslims since the coming of Islam to the archipelago.[4] The Dutch intention in 1882 was to administer Islamic law through a collegiate tribunal. Prior to that time, the Dutch made no attempt to interfere with the organization of the religious courts.[5]

As Islamic law (most notably Islamic family law) was practiced in local Muslim communities, Governor-General Daendels (1808-1811) tried to legalize the function of the chief of the mosque (*penghulu*) as an

advisory role in the regular court (*Landraad*). After his tour of inspection in the residency of Semarang, he issued an Ordinance for the north coast of Java, stating that the *penghulu* was to act as an adviser in every native court when a Muslim was a litigant.[6] Article 73 of which provided that, "... the right of their high priest to decide certain differences regarding marriage and succession shall be left entirely unaltered."[7] This was in fact the first Ordinance concerning the practice of Islamic law by the native people since the Dutch administration had assumed power. Later, when Java came under British control in 1811 as a consequence of the Napoleonic war, Raffles, the founder of Singapore, was appointed Lieutenant-Governor; he extended Daendels' system throughout Java. In his "Regulation for the more effectual administration of justice in the provincial courts of Java", passed in 1814, he mentions that the *penghulu* constitutes a part of the tribunal in his capacity as adviser, although he did not mention the religious administration of justice.[8]

After the Dutch reassumed control of the archipelago from the British, the Commissioners-General who succeeded Raffles maintained the legal conditions already in existence. Through the regulation of 1819, the native people remained subject to their own laws and a *penghulu* was required to attend the meetings of their Courts as an adviser. This advisory role of the *penghulu* in cases of Muslim personal law remained unchanged until 1820.

1820 marks the beginning of the Dutch recognition of a distinctly religious administration of justice, although at this time the duties of the penghulu were not clearly defined. The Dutch issued an Instruction for the Regents (*Regenten Instructie*)[9] stating that disputes among Muslim in regard to inheritance should be settled by the *penghulu*. The regents were required to "leave the priest free to exercise their calling in accordance with the habits and customs of the Javanese in regard to marriage questions, inheritance and the like."[10]

A difference of opinion arose between the Court of Justice at Semarang and the Supreme Court of the Netherlands Indies in 1834 when the lower Court decision to recognize the *penghulu*'s judicial rights based on the provisions contained in the instruction for regents was overturned by the Supreme Court. The Government then tried to revise this regulation. The Governor-General's Order in Council of 1835 noted that the Instruction means that "whenever differences arose between Javanese about marriage questions, inheritance and the like, *which have to be de-*

cided by Muslim law (italics mine), it shall be the duty of the priests to attend to these."[11] Later, still in the same year, the Government issued *Staatsblad* 1835 No. 56 requiring that disputes in marriage, inheritance, and other cases of Islamic family law among Muslim people in Java and Madura should be settled by the *penghulu* while any cases directly concerned with payment should be brought to the regular court.

Furthermore, the jurisdiction of the Muslim judges was recognized by a vague formula issued in an 1848 decree on judicial organization that "civil differences between natives, which are to be decided by their priests and chiefs according to the religious laws or customs and ancient traditions, shall remain under their jurisdiction";[12] six years later, this provision was incorporated into the Royal Decree regarding the government of the Netherlands East Indies. In short, during this period the policy of the Dutch did not affect the institution of the religious court itself directly but only the process of justice.

Surprisingly, the colonial regime formally established the "official" institution of the religious court. On January 19, 1882, the Dutch issued *Staatsblad* 1882 No. 152, establishing religious courts in Java and Madura or *Bepaling Betreffende de Priesterraden op Java en Madoera*; strangely enough no mention was made of the competence of the courts. The fundamental matter of the role of the Islamic official was never defined *vis a vis* the other indigenous law court. The Dutch intended to administer Islamic law through this regulation but the court continued to reflect misunderstandings of Islam and Islamic law as indicated in Dutch name *Priesterraaden*. The comparison of the function of the chief of the mosque and the Muslim judge (*penghulu* in Java and *kadi* in other areas) with that of the Christian priest was a fundamental error; there are no priests in Islam. The error led to the unavoidable result that attributing a priestly functions were attributed either to the *penghulu* or other mosque officials, who were combined into the official *priesterraaden*. This body, which was supposed to be "a formalization of an existing Islamic institution, ran directly counter to Islamic practice which gave to the *penghulu* a sole jurisdiction in such a matters as marriage, divorce and inheritance."[13]

Another problem was the lack of definition of the competence of the court. Although it had distinct jurisdiction in matters of family law and inheritance, every verdict of the *priestarraaden* needed to be ratified by the regular court before it was implemented. The formalization of Is-

lamic law through the official court, therefore, had a negative impact on the existence of Islamic law as the advice of the *penghulu* was often ignored by the native courts in actual cases. To make matters worse, legislation with a similar restrictive aspect was also common; *Staatsblad* No. 482 of 1932, article 4, paragraph 2B, for example, forbade the Mus-lim marriage official to assist in a marriage which violates the *adat* of Minangkabau and Batak.[14] As Hooker explains, this condition invited the resentment of Muslim leaders resulting in a constant agitation against Dutch policies on the religious court, ranging from requests for more control to threats of a boycott against the *priesterraaden*.[15]

It was against this background that a step toward a better understanding between the colonial regime and their subject was taken with the formulation of an Islamic policy followed by the creation of the office of Adviser on Arabian and Native Affairs in 1889, to whom Dr. Christian Snouck Hurgronje (1867-1936) became its pioneer. Hurgronje's arrival in Batavia in 1889 marked the beginning of the scientific study of Islam in the Indies. Many books and articles on the subject had appeared prior to that year, but the authors of such works had failed to grasp the oriental conception of Islam.[16] Hurgronje's suggestions to the authorities on Islamic policy were implemented, resulting in an initial accommodation between the Muslims and the colonial authorities.[17] In Hurgronje's view, the only key to the modernization of the East Indies was accommodation with the new age; neither custom nor Islam could provide the answer for the kind of operation that would be necessary. Hurgronje's policy, based on tolerance in religious matters together with a vigilance and firmness in countering attempts to extend Islamic political control,[18] worked well at a grass-roots level, at the higher level judiciary, however, there was a lack of legislative initiative.[19]

Following this idea, a series of enactments on Islamic judicial administration successfully became law during the period between the years 1929-1938. However this legislation, in spite of its success in defining Islamic legal competence, still confined to the field of jurisdiction regardless of the demands initiated by a variety of Islamic parties.[20] The opinion of Muslims in general was thus marginalized as the Dutch attempted to strengthened the authority of custom.

The first piece of legislation after the Hurgronje era was the Marriage Enactment of 1929[21] which declared that the *penghulu* was a government official subject to the Regent's control. This regulation also

fixed the procedure for the registration of marriages and divorces and set the fees to be paid for these services.[22] Later, a second bill, *Staatsblad* No. 53 of 1931, was introduced. This had more serious effects on the institution of the religious courts. Three new provisions were proposed in this enactment: (1) *priesterraaden* were to be abolished and superseded by *penghulu* courts, allowing a single judge to practice in the courts of the religious official, (2) the *penghulu* would have the status of a government servant and would receive payment for his services, (3) a court of appeal would be established to review the decisions of the *penghulu* court.[23] Unfortunately, the government claimed that financial hardship prevented them from enacting the final regulation.[24] To balance out this unsatisfactory state of affairs, the *Hof voor Islamietische Zaken* or *Mahkamah Islam Tinggi* for appeal of the *penghulu* court came into existence in 1937 and was supplemented by a rule regarding competence taken from the decree of 1931. However, this was too late to influence the develop-ment of Islamic law.

The third piece of legislation was the *Staatsblad* No. 116 of 1937, bitterly attacking the needs of Muslims. Through this regulation the jurisdiction of inheritance was transferred from the religious courts to the native courts "where claims were to be adjudicated not according to Islamic law but to *adat* (customary law)."[25] The *priesterraaden* were to be limited in jurisdiction to matters of marriage and divorce only.

The final legislation concerning religious courts was issued by the Dutch in 1937. *Staatsblad* No. 638 promulgated the stipulation of the establishment of the "Kadi" courts in the first instance and in appeal to Southern and Eastern divisions of the island of Borneo (Kalimantan). Although the jurisdiction of these courts was similar to the powers assigned to the religious courts in Java, their creation was regarded as a great advance over the system currently prevailing in Java.[26] With regard to the remaining part of the archipelago no regulation had yet been made. There were, however, religious judges in Palembang and Jambi of Sumatra, and in coastal towns on the islands of Borneo and Ternate who settled legal suits between Muslims. Their judicial powers were determined more by customary law than by Islamic law including jurisdiction over marriage, inheritance and matters concerning endowment (*waqf*).[27] This condition was unchanged when Japan wrested control of the archipelago from the Dutch.

The Japanese instituted few changes in religious courts other than trying to replace the Dutch names for these courts with Japanese names. Especially at the centers of colonialization, Java and Madura, Japan changed the name for the religious courts from *Priesterraaden* to *Sooryoo Hooin* and that of appeal from *Hof voor Islamietische Zaken* to *Kaikyoo Kootoo Hooin*.[28] The religious courts held the same position under the Japanese occupation that they had held under the Dutch. As noted by Noer, "[t]he situation during the Japanese period was thus one of preserving the status quo."[29] The courts in Java and Madura continued their usual activities, handling cases of marriage and sometimes advising on matters of inheritance, while the sultanate courts outside Java and Madura had still broader jurisdiction including the settlement of inheritance disputes.

There was in fact an effort to abolish the institution of the religious courts in the Japanese period when Soepomo submitted a report to the government on religious courts in June 1944 which recommended abolishing them.[30] Parallel with Soepomo's recommendation, in April 14, 1945 Japan had suggested the separation of state and religion, so that all matters related to Muslim belief, including religious courts, would be handed over to Muslim society and would be operated privately without state involvement.[31] These efforts, however, were never implemented, probably due to the fear of the colonial regime that it might result in Muslim protest, as well as the fact that Japan only occupied the archipelago for a short time. Therefore, the judicial system for Muslims remained the same as that inherited from the Dutch.

II. Islamic Courts in the National Era

In the early era of independence, although the functions and jurisdiction of the religious courts continued to follow the model inherited from the colonial era, the organization of the courts was changed. The courts which had been administered by the Ministry of Justice during the time of the Japanese occupation, came under the jurisdiction of the Ministry of Religion in 1946.[32]

Two years later, the government, through the Law no. 19 of 1948, decreed that religious courts would be united in the regular court. Cases involving Muslim litigants which should be resolved under Islamic law, would be handled by a Muslim judge. However, this law was never put into effect by the Indonesian government. Based on the constitution of

1945, the existence of religious courts was still based on *Staatsblad* 1882 no. 152, especially for Java and Madura.[33] In 1951, the Sultanate Courts outside Java and Madura were abolished, resulting in confusion over the settlement of religious disputes. Six years later, through a government regulation (*Peraturan Pemerintah*) No. 45/1957, the confusion was resolved; the establishment of religious courts was stipulated in areas outside Java, Madura and South Kalimantan with more extensive jurisdiction than the courts on those islands. The religious courts outside Java and Madura, for example, have jurisdiction over matters of inheritance.

Until this time, therefore, the structure, procedure and names of the religious courts varied slightly in the three regions where they were located: (1) in Java and Madura, the courts were named *Pengadilan Agama* and *Mahkamah Islam Tinggi* for appeal; (2) in Banjarmasin (South Kalimantan), the *Kerapatan Qadi* or *Pengadilan Qadi* had *Kerapatan Qadi Besar* or *Pengadilan Qadi Tinggi* for its appellate; (3) and for the rest of Indonesia, the courts were called *Mahkamah Syar'iyah* and the appeals courts were called *Mahkamah Syar'iyah Propinsi*. The courts in the first two regions continued to use the regulations inherited from the Dutch period, while government regulation No. 45 of 1957 had jurisdiction over the courts in the rest of Indonesia.[34]

Later developments of the religious court system in independent Indonesia were not without difficulties. The idea of a "reception theory",[35] inherited from the Dutch, influenced many Indonesian law experts and led to the understanding of the existence of the religious courts. The most prominent of them was Dr. Raden Soepomo, adviser to the Justice Department, who seemed very antagonistic to Islam and who exercised great influence in the preparations for the introduction of the constitution.[36] The difficulties faced by the religious courts was also caused by officials in the Department of Justice and the civil courts in general who were graduates of Dutch law schools in which Islamic law constituted only a small fraction of the curriculum.[37] Most of them understood Islamic law only from their studying of *Shafi'ite* school of law as applied by Indonesian Muslim traditionalists and neglected the basic teachings of Islam. Therefore, they felt estranged from both Islam itself and the desire of some Muslims to practice Islamic law.

The problem was increased by the fact that the Muslim judges who ran the religious courts were traditionalists whose knowledge of Islamic law was confined to the classical Shafi'i school, and officers whose

judicial knowledge was very limited. This created a huge gap between judges and law experts educated under the Dutch who possessed a very westernized understanding of law and Muslim judges trained along traditional lines in Islamic educational institutions as well as the major adherents of classical Islamic law.[38]

This condition later came to a climax with the promulgation of Law No. 14 of 1970. This Basic Law of the Judiciary which replaced Law No. 19 of 1964 maintains and strengthens the position of the religious courts in Indonesia's new Order. Article 10 states that judicial power is exercised by courts of justice in the spheres of general religious courts, military and state administrative courts. Hence, this Law seems to ensure that the religious courts operated within the judicial system and, indirectly, indicates that the status of the religious courts is equal to that of the other two courts operating in the country.

However, at the practical level, the principle of equality among the three judicial bodies remained uncertain.[39] The colonial rule, requiring all decisions of the religious courts to be ratified by the regular courts before being officially implemented, even if decided by the High Court of Appeal, still survived. The fiat of execution (*executoire verklaring*) was needed only if the disputants did not carry out the decision voluntarily. This was strengthened by the Marriage Law (Law no. 1 of 1974), viewed mainly as a concession to Islamic law, stipulating that all religious court decisions should be approved by its counterpart regular court. This change from specific approval to a general imperative obviously indicates that the religious courts were subordinated under the regular courts.[40] This "execution permit" was criticized by many Muslim writers who argued that it was contradictory to the general norms of the Basic Judiciary Law.[41]

The conflicting attitudes among Indonesian politicians and law experts toward the existence of the religious courts continued through the 1980s. Such an attitude was basically an indication of bias against the position of Islam in the state. This condition was worsened by the poor administration and work procedure of the religious courts. Even Hazairin himself, recognized as the most prominent challenger to the reception theory,[42] had at one time expressed his disagreement with the courts.[43]

Hazairin's attitude toward the religious courts was typical of some Muslims who, although considering Islamic law an important ingredient in the Indonesian law-making process, were of the opinion that

the practice of Islamic law did not depend on the existence of the courts. They believed that Islamic law could be applied through the regular courts. Other Muslim, however, argued that the religious courts were indispensable for the application of Islamic law, and the decision of the regular courts on the basis of Islamic laws means the interference of secular-trained lawyers in sacred law,[44] an action which could lead to an abuse of Islamic law.

In spite of these weaknesses, however, the religious courts succeeded in partially fulfilling their function as problem-solver in marriage disputes. Especially for many of the villagers, this was a worthwhile function provided by the religious courts as well as local religious offices through consultations. Considering the rule of judges in judicial decision making, people would certainly not find consultation services in an ordinary civil court. Therefore, some Islamic judges played an advisory role in the problem of marriages and divorces in areas where there was no advisory committee on marriages and settlement of divorces (*Badan Penasehat Perkawinan dan Penyelesaian Perceraian=BP4*).[45]

Against this background the Indonesian government, to the surprise of many observers, issued Law no. 7 of 1989 on religious courts on December 29, 1989, creating the most recent changes in the institution of the religious courts. The modernist Muslim ideal of promoting the institution of the religious courts in conjunction with the modern form of the judicial system was fulfilled by this law. In contrast to the court system defined by the Dutch inheritance, this new law gives a uniform name to the courts throughout Indonesia, i.e., *Pengadilan Agama* (Religious Court) and *Pengadilan Tinggi Agama* (Higher Religious Court) for the courts of appeal. More importantly, the jurisdiction of the courts has been expanded to include all cases of Muslim family law, namely marriage, divorce, repudiation, inheritance, bequest, gift (*hibah*) and endowment; in addition, the religious courts share an equal status with the regular courts, so that the *executoire verklaring* is no longer needed.

Much has been written concerning the latest development of Islam in Indonesia. Most of them seems to agree that there is a growing understanding between the state and Muslims since the second half of the 1980s. Newly enacted legal statutes, such as the Basic Law on Education, and the Presidential Instruction no. 1 of 1991 on Islamic Law Compilation, as well as the vast support of the government for broadly based organizations of Muslim intellectuals (*Ikatan Cendekiawan Muslim Indo-*

nesia=ICMI) and many others indicate the distinct and clear intention of the New Order regime under Suharto to fulfill the needs of Muslim society. This new development seems to be marking a new phase of the New Order which treats Islam and Muslims not as enemies, but as full partners in building the country.[46]

The phenomena of the regime's softening attitude towards Islam surprised many people considering that the voice of non-Muslim factions in Indonesian political discourse remained prominent until the end of 1980s; this prominence was clearly illustrated during the process of enacting the law on religious courts in the House of Representatives (*Dewan Perwakilan Rakyat*). Non-Muslim and nationalist groups displayed a great deal of resentment concerning the draft of Religious Courts Act of 1989.[47] Interestingly, they connected this to a suspicion of Muslim efforts to revive the Jakarta Charter. In their view, the enactment of Law no. 1 of 1989 was an indication of the awakening intention of Indonesian Muslims to build an Islamic state.

Such suspicion seems baseless in light of the fact that the idealist Muslim group which promotes a state based totally on Islamic ideology has been consistently defeated by another group of accomodationists during the last decade. For other Muslims the issue of an Islamic state, whatever that may mean, has been discarded. In conjunction with the fact that all political parties and mass organizations have taken Pancasila as their sole ideological basis, more and more Muslim leaders see the irrelevance of the issue of an Islamic state in the republic of Indonesia. Their discussions are no longer directed toward the building of an Islamic state but rather toward inculcating Islamic values in the on-going development of Indonesia. 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."[48] In other words, although Islam has declined as a political force, its cultural identity has had an undeniably potent influence in recent Indonesian politics. This condition seems to have encouraged the enactment of the latest Law on religious courts.

Through this law, the religious courts now have an independent status in the Indonesian judicial system. No one can undermine the courts as they have fulfilled the requirements of the modern courts and have equal status with other judicial bodies in Indonesia.

III. The Religious Court and Islamic Revivalism

Since the process of decolonization in the Islamic world political pressure for a return to an application of Islamic principles in legislation and judicial practice has arisen. This appears to be a continuation of Muslim consciousness of the need to reform their own identity since its destruction by Western culture. In Pakistan, for example, the dominant political leadership, whether military or clerical, has espoused this trend and given it a constitutional foundation. In other countries such as Egypt, especially after the promulgation of the personal status law of 1979, needs for changes in areas governed by Islamic law have been met through legislation.[49] On a practical level, however, this movement cannot give the Islamic judicial system in Muslim countries freedom from Western influences. This phenomena can best be seen through comparisons with the experience of other Muslim societies which experienced colonialization like that of Indonesia.

In Egypt, religious courts continued to exist side by side with secular courts, but their jurisdiction was restricted to matters of personal status and they were governed by a decree-law of 1931 replacing an earlier enactment of 1897. From the classical concept of the *qaḍi's* position, this regulation shows the influence of modern ideas. The classical Islamic judicial system maintained the principle of a single judge; the bench of several judges as practiced in the Egyptian religious courts was unknown. The regulation of 1931 also established a formal appeal procedure, an entirely Western concept. This system was altered however when the legal system was finally unified with the abolition of the Mixed Courts in 1949 and the religious courts in 1955. The new civil code enacted in 1949 is, however, an eclectic synthesis of Islamic and Western ideas. An eclectic approach was also used in the drafting of personal status legislation; provisions of these laws were not based on one Sunni school, but adopted the classical Islamic teaching on any particular issue from any of the four *madhhabs* (schools of law) that they considered best meets modern needs. Since the abolition of the religious courts, jurisconsults (*muftis*) no longer play an important role in the courts, but the fatwas of the Fatwa Committee of al-Azhar and of the Grand Mufti are now influential where religious and social issues are concerned.[50]

During the reign of Zia ul-Haqq, the legal and judicial system in Pakistan underwent important changes. In conjunction with the need to return to strict Islamic injunctions, the government issued the Constitu-

tion Order of 1979 stipulating the establishment of the Shari'a Benches at the High Courts of each province.[51] In 1980, the Federal Shari'a Court was created to replace the Shari'a Benches due to the duties overloaded on the High Courts. As an organ which watches over the compatibility of laws with Islamic requirements, the Court has consisted since 1981 of a Chief Justice and seven judges, three of whom are *ulama*. This court may now rule on the question whether a law is repugnant to the "Injunctions of Islam" not only upon petition, but also on its own motion.[52] For the first time since the Mogul period Islamic religious scholars play a role in the court system.[53] The judiciary, as Liebesny points it out, "is faced with the task not only of adjusting to the new rules of positive law, but also of familiarizing itself,...with the general character of Islamic law of which these rules are an important part."[54]

In Indonesia, the Islamic revival seems to have resonance. Not long after the decolonization movement succeeded in overthrowing the colonial state, movements toward forming laws which would meet the needs of Muslims in Indonesia resulted in the passing of some codes derived from the principle of Islamic law. The passing of the Marriage Law in 1974, the Religious Court Law in 1989 and the Compilation of Islamic Law in 1991 are clear examples of this.

A historical analysis of the development of the Islamic judicial process in Indonesia shows that the influences of Dutch law and legal codes have proven detrimental to the practice of law in Indonesia. In this country, the resulting neglect of Islamic law has left gaps in the legal system that the government's recent promulgations seek to fill. Islamic revivalist movements have arisen throughout the Muslim world, at least in part, as a response to a feeling among Muslims that they have lost their Islamic identity. The recent Indonesian legal decrees are also a response to this feeling and to a need in Indonesian society for a legal structure which permits Islamic law to meet the needs of Indonesian Muslims in a way that Dutch derived law is incapable of doing. As explained above, the close relationship between the *'ulamā'* and *'umarā'* or Islam and state since the 1980's has led to the improvement of the condition of Islamic judicial system in the country. The position of the religious courts is undoubtedly strengthened by the promulgation of Law no. 1 of 1989 as the structure and jurisdiction of the courts are improved based on the modern judicial form.

Conclusion

In the structure of relationships between politics and religion in Islam, Allan Christelow states that the point of maximum stress is located in the office of *qādi*, "a state-appointed religious judge."[55] This remains true in the relationship between state and Islam since the emergence of the nation state in Islamic countries as a result of their encounter with western values. In the judicial practice, although the traditional role of the *qāḍi* has been altered by the introduction of western codes and the development of bureaucratic structures, the quest in many Muslim countries for an authentically Islamic way of life has given renewed emphasis to the classical precepts of Islamic law.

However, legal developments in Islamic countries do not present a unified picture. As shown in Indonesia, Pakistan and Egypt, the creation of nation states based on the western model has led each country to use different methods in solving the problem of adaptation. Egypt abolished the system of the religious court and promoted the role of the *fatwa* of the Grand Mufti and the Fatwa Committee as the way to revive pristine Islam, while Pakistan, in conjunction with the need to re-establish Islamic legal principles in its economic life and its penal system, has established the Shari'a Court as a tool for deciding whether a law is repugnant to the injunctions of Islam, that is the Qur'ān and Sunna of the Prophet. In Indonesia, on the other hand, the need to return to Qur'ān and Sunna has been realized by the improvement of the Islamic judicial system to conform to the modern style of the collegiate tribunal, as well as the legislation of some enactments which promote the practice of Islam.

Thus, the idea of returning to an Islamic way of life cannot be separated from the need to adopt some aspects of modern life. Here, the colonial experience of Islamic countries cannot be neglected for its role in awakening the need to return to a pure Islam. In other words, although rejection of the West inspires Muslims all over the world to return to the basic teaching of Islam, the practice of pure Islam itself cannot be freed from western values.

In the case of the religious courts in Indonesia, the western style, rooted in the colonial experience, takes part in the realization of a more Islamic judicial system. The improvement of the religious courts is not a means of returning to the classic system of *kadijustiz* (to use the concept developed by Max Weber); rather, by adopting the structure and organization of the western judicial system, Indonesian Muslims can meet the

need of their society for the practice of Islamic law. The degree of adoption is indeed different in each Islamic country, as can be seen from the picture depicted in Pakistan and Egypt, and this is under-standable due to the variations of Muslim society in each country.

End Notes

[1] Max Weber, *Max Weber on Law in Economy and Society*, Tr. by Edward Shils and Max Rheinstein (Cambridge: Harvard University Press, 1954), p. 351-2.

[2] Lawrence Rosen, "Equity and Discretion in A Modern Islamic Legal System," *Law and Society Review* 15/2 (1980-81): 217; See also the general account of the subject in Bryan Turner, *Weber and Islam: A Critical Study* (London: Routledge and Kegan Paul, 1974), pp. 107-21.

[3] Daniel S. Lev. "Colonial Law and the Genesis of the Indonesian State," *Indonesia* 40 (October 1985): 58.

[4] Zain Ahmad Noeh and Abdul Basit Adnan, *Sejarah Singkat Peradilan Agama Islam di Indonesia* (Surabaya: PT. Bina Ilmu, 1983), pp. 29-49; For an English work on this topic, see Daniel S. Lev, *Islamic Courts in Indonesia* (Berkeley: University of California Press, 1972). The tradition of *taḥkīm* (the appointment of an Islamic expert as an arbitrator) in Muslim societies can be seen as a form of the religious court in its early stages. This was especially true in the time prior to the establishment of the monarchies. Once the power of the state had arisen --mainly in the form of Islamic kingdom-- Muslim judges were appointed by a king or a ruler as the system of the religious courts became more organized. The condition of the religious courts was varied throughout the archipelago. In some places like Aceh, Jambi in Sumatra, South and East Kalimantan, South Sulawesi religious judges were appointed by local rulers. In other areas, including parts of North Sulawesi, the North Sumatran territories of Gayo, Alas and Tapanuli, and also South Sumatra, there were no distinct religious courts, though at those places local religious leaders performed judicial services. In Java, however, religious courts existed in all regency from about the sixteenth century. See also Martin van Bruinissen, "Shari'a Court, Tarekat and Pesantren: Religious Institution in the Banten Sulatanate," *Archipel* 50 (1995): 165-199.

[5] Lev, *Islamic Courts*, pp. 11-7.

[6] This Ordinance was also known as a Regulation on Court Organization and the Administration of Justice applied to both civil and criminal cases. Article 7 stated that "In every native Court of the various regencies the penghulu or high priest shall have a seat, though he shall only act in an advisory capacity and have no casting vote." *Nederlandsch-Indisch Plakaatboek*, Uitgave Mr. J. A. van der Chijs, Vol. XV, p. 178, Article 58, as quoted in H. Westra, "Custom and Muslim Law in the Netherlands East Indies," *Transactions of the Grotius Society* 25 (1939): 153.

[7] *Plakaatboek*, XV, p. 175. This also appears in the Instruction to Regents in the same volume, pp. 294-5, Article 12, and in the decree regarding the administration of the Chirebon lands. Section V, Article 24, *Plakaatboek*, XV, pp. 177-8.

[8] Raffles, Thomas Stamford, Sir, *History of Java*, 2nd ed. (London: Murray, 1830), p. 309.

[9] Article 13 of the Act.

[10] As quoted in *Ibid.*

[11] *Ibid.*, p. 157.

[12] *Ibid.*

[13] Hooker, *Adat Law*, p. 94; Also Lev, *Islamic Courts*, pp. 18-9.

[14] Hooker, *Adat* Law, p. 109.

[15] *Ibid.*, p. 95.

[16] R. A. Widjojoatmodjo, "Islam in the Netherlands," *Far Eastern Quarterly* 2 (1942-43): 56.

[17] Hooker, *Adat Law*, p. 95.

[18] Harry J. Benda, *The Crescent and the Rising Sun* (The Hague and Bandung: W. Van Hoeve Ltd., 1958), p. 20-6; Alfian, "Islamic Modernism in Indonesian Politics: The Muhammadijah Movement During the Dutch Colonial Period," Unpublished Ph. D. Dissertation, January 1969. Hurgronje's Islamic policy was founded on three basic principles: (1) giving unlimited and sincere freedom to Indonesian Muslims in the practice of strictly religious matters (*'ubudiyah*) like prayer, fasting, pilgrimage, (2) respective to the social institutions existing in Muslim community (*mu'āmalah*), while making attempts at the same time to displace them gradually with Western institutions, (3) on matters of politics, notably that of the influence of Pan-Islamism upon Indonesian Muslims, the government should resist and eliminate any political ambitions of the Muslims.

[19] Hooker, *Adat Law*, p. 95.

[20] For an outline of political and legal development see B. J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1982), pp. 50 onward.

[21] Issued in *Staatsblad* No. 348 of 1929.

[22] Hooker, *Adat Law*, p. 96.

[23] *ibid.*; See also Westra, "Custom and Muslim Law," p. 157.

[24] Westra said: "The Government informed the *Volksraad* (People's Council) on several occasions that the reason for not introducing this proposal was the financial burden involved, or to be exact, the salaries of the penghulus. That this particular difficulty should stand in the way is doubly unfortunate, as one of the arguments against the Courts of priests was that their members were not to be paid, and that it could hardly be expected that in that case competent persons would be found willing to be appointed as members thereof." See his "Custom and Muslim Law," p. 157.

[25] Hooker, *Adat Law*, p. 96.

[26] Westra, "Custom and Muslim Law," p. 159.

[27] *Ibid.*

[28]Zaini Ahmad Noeh and Abdul Basit Adnan, *Sejarah Singkat Pengadilan*, pp. 44-6.

[29]Deliar Noer, *The Administration of Islam in Indonesia* (Ithaca, N. Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978), p. 46.

[30]On deeply accounts of Soepomo's paper see Daniel S. Lev, *Islamic Courts*, pp. 35-6.

[31]Noeh and Adnan, *Sejarah Singkat Pengadilan*, pp. 45-6.

[32]Second announcement of Ministry of Religious Affairs (*Maklumat Menteri Agama II*) stated that all religious courts were under the organization of department of religious affairs.

[33]H. Zaini Ahmad Noeh and H. Abdul Basit Adnan, *Sejarah Singkat Pengadilan Agama Islam di Indonesia* (Surabaya: PT. Bina Ilmu, 1980), p. 54.

[34]Eddy Damian and Robert N. Hornick, "Indonesia's Formal Legal System: An Introduction," *The American Journal of Comparative Law* 20 (1972): 517-8.

[35]This theory was basically formulated by the Dutch scholars, prominently C. van Vollenhoven, to undermine the practice of Islamic law in the archipelago, claiming that living law of the indigenous Indonesian society was not Islamic law at all, but rather local customary law and Islamic law would be practiced when customary law allowed it.

[36]Deliar Noer, *The Administration of Islam in Indonesia*, p. 45.

[37]*Ibid.*

[38]*Ibid.*, pp. 46-7.

[39]Nur Ahmad Fadhil Lubis, "Institutionalization and the Unification of Islamic Courts under the New Order," *Studia Islamika* 2/1 (1995):22-6.

[40]*Ibid.*, p. 25.

[41]See for example T. Jafizham, "Peranan Pengadilan Agama dalam Pelaksanaan Undang-undang Perkawinan," in *Kenang-Kenangan Seabad Peradilan Agama* (Jakarta: Departemen Agama, 1985), pp. 170-72; and also H. Dahlan Ranuwihardjo, "Peranan Badan Peradilan Agama dalam Mewujudkan Cita-Cita Negara Hukum," *ibid.*, pp. 201-12.

[42]See Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas Indonesia, 1982), pp. 7-10, wherein he called the reception theory a "teori iblis" ("theory of the devil").

[43]See on this account in Lev, *Islamic Courts*, p. 88.

[44]Noer, *Administration*, pp. 48-9.

[45]*Ibid.*, p. 50.

[46]Lubis, "Institutionalization," p. 34-5.

[47]See on this account Ismail Saleh, "Wawasan Pembangunan Hukum Nasional," *Kompas* (June 1 and 2, 1989). As quoted in Lubis, "Institutionalization," p. 47. This article appeared in *Kompas*, one of the largest daily newspapers in Indonesia, during the heated debate in the Parliament as well as public on the bill of Religious Court. See also Zuffran Sabrie (ed.), *Peradilan Agama dalam Wadah Negara Pancasila: Dialog tentang RUUPA* (Jakarta: Pustaka Antara, 1990), pp. 124-31.

[48]See B. J. Boland, *The Struggle of Islam in Modern Indonesia*, p. 159.

[49]See on this analysis for example Herbert J. Liebesny, "Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival," *The Middle East Journal* 37/2 (1983): 202-17.

[50]*Ibid.*, pp. 203-4, 215.

[51]Lucy Caroll, "Nizam-I-Islam: Processes and Conflicts in Pakistan's Programme of Islamisation, with Special Reference to the Position of Women," *Journal of Commonwealth and Comparative Politics* 20 (1982): 57-95

[52]*Ibid.*, p. 70.

[53]Liebesny, "Judicial Systems," p. 214.

[54]*Ibid.*, p. 215

[55]Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (New Jersey: Princeton University Press, 1985), p. 262.

BIBLIOGRAPHY

Alfian, "Islamic Modernism in Indonesian Politics: The Muhammadijah Movement During the Dutch Colonial Period," Unpublished Ph. D. Dissertation, January 1969.

Benda, Harry J. *The Crescent and the Rising Sun.* The Hague and Bandung: W. Van Hoeve Ltd., 1958.

Boland, B. J. *The Struggle of Islam in Modern Indonesia.* The Hague: Martinus Nijhoff, 1982.

Bruinissen, Martin van. "Shari'a Court, Tarekat and Pesantren: Religious Institution in the Banten Sulatanate," *Archipel* 50 (1995): 165-199.

Caroll, Lucy. "Nizam-I-Islam: Processes and Conflicts in Pakistan's Programme of Islamisation, with Special Reference to the Position of Women," *Journal of Commonwealth and Com-parative Politics* 20 (1982): 57-95.

Christelow, Allan. *Muslim Law Courts and the French Colonial State in Algeria.* New Jersey: Princeton University Press, 1985.

Damian, Eddy and Robert N. Hornick, "Indonesia's Formal Legal System: An Introduction," *The American Journal of Com-parative Law* 20 (1972): 492-530.

Hazairin. *Hukum Kekeluargaan Nasional.* Jakarta: Tintamas Indonesia, 1982.

Jafizham, T. "Peranan Pengadilan Agama dalam Pelaksanaan Undang-undang Perkawinan," in *Kenang-Kenangan Seabad Peradilan Agama.* Jakarta: Departemen Agama, 1985. 170-82.

Lev, Daniel S. *Islamic Courts in Indonesia.* Berkeley: University of California Press, 1972.

--------. "Colonial Law and the Genesis of the Indonesian State," *Indonesia* 40 (October 1985): 57-74.

Liebesny, Herbert J. "Judicial Systems in the Near and Middle East: Evolutionary Development and Islamic Revival," *The Middle East Journal* 37/2 (1983): 202-17.

Lubis, Nur Ahmad Fadhil. "Institutionalization and the Unification of Islamic Courts under the New Order," *Studia Islamika* 2/1 (1995):22-6.

Noeh, Zain Ahmad and Abdul Basit Adnan, *Sejarah Singkat Peradilan Agama Islam di Indonesia.* Surabaya: PT. Bina Ilmu, 1983.

Noer, Deliar. *The Administration of Islam in Indonesia.* Ithaca, N.Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978.

Raffles, Thomas Stamford, Sir, *History of Java*, 2nd ed. London: Murray, 1830.

Ranuwihardjo, H. Dahlan. "Peranan Badan Peradilan Agama dalam Mewujudkan Cita-Cita Negara Hukum," in *Kenang-Kenangan Seabad Peradilan Agama,* pp. 201-12.

Rosen, Lawrence. "Equity and Discretion in A Modern Islamic Legal System," *Law and Society Review* 15/2 (1980-81): 217-45.

Saleh, Ismail. "Wawasan Pembangunan Hukum Nasional," *Kompas.* June 1 and 2, 1989.

Turner, Bryan. *Weber and Islam: A Critical Study.* London: Routledge and Kegan Paul, 1974.

Weber, Max. *Max Weber on Law in Economy and Society*, Tr. by Edward Shils and Max Rheinstein. Cambridge: Harvard University Press, 1954.

Westra, H. "Custom and Muslim Law in the Netherlands East Indies." *Transactions of the Grotius Society* 25 (1939): 151-67.

Widjojoatmodjo Raden Abdulkadir. "Islam in the Netherlands East Indies." *Far Eastern Quarterly* 2 (1942-43): 48-57.

Zuffran Sabrie (ed.), *Peradilan Agama dalam Wadah Negara Pancasila: Dialog tentang RUUPA.* Jakarta: Pustaka Antara, 1990.