

The Religious Court in Indonesia: A Preliminary Overview of Mahkamah Syar'iyah Aceh

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Abstract. An Act to regulate the Religious Court (PA) as one of the judicial institutions in Indonesia experienced changes in its history. One of the factors that influenced these changes was political and social circumstances that occurred in both government and society. This paper discusses the social and political influences on the existence of religious courts in Indonesia.

Keywords: *Islamic Court, Mahkamah Syar'iyah*

Introduction

The religious court, as one of the legal institutions, cannot be understood independently of its political and social roots. Religious courts are symbols of authority, and Islamic courts are symbols of Islamic authority; the roots of this authority have genuinely influenced and shaped the existence of these institutions.

In Indonesia, the influences of both political interests of governments and social pressures from Indonesian Muslims on the Islamic Court have been recorded in its long history. The application of *adat* law both by the Dutch government and the changing of political atmosphere of Indonesian government to some extent, for instance, show an interference of the governments on the Islamic Court. Legal politics of authorities cannot seemingly be separated from the political consequences of this colonial law. In fact on the ground, for example, what was said by Daniel S. Lev¹ that "the existence of the Religious

¹Daniel S. Lev, *Courts in Indonesia; A Study in The Political Bases of Legal Institution*, (Berkeley: University of California Press. 1972).

quite dependent on the political will of the government in power" finds its justification. Nur Ahmad Fadhil Lubis,² also confirmed that analysis, though later denied by other Jaenal Aripin³, which argued that the theory of Cultural Existence theory asserts that the existence of the religious courts mainly due to social encouragement and culture.

The Islamic Court, however, has not become weak, but even has become stronger. Evidence of this can be seen in the promulgation of The Islamic Court Act 7/1989 under the New Order regime⁴ followed by Law No. 3 of 2006 which contains 42 amendments to the Law no. 7/1989 and then amended again by Law 50/2009 have given a strong foundation as well as competences to the religious court.

In the case of Aceh, religious courts are increasingly showing their existence especially when the judiciary was given additional competence in the field of Islamic criminal law although in some parts of the course. Presidential Decree 11/2003 concerning the Shariah Court (Mahkamah Syar'iyah) preceded by Qanun 10/2002 on the Shariah Courts, has been appointed Mahkamah Syar'iyah to replace the function and position of the Religious Court in the province of Aceh, along what has been mandated by Act 44/1999 concerning Special Province of Aceh regional and Law 18/2001 on Special Autonomy for the Province of Aceh. It is also expected that local government can implement a justice system that has long been coveted by the people of Aceh, ie. the Islamic courts. The Mahkamah Syar'iyah has strong position especially after The Indonesian Government issued Law 11/2006 on Aceh Government.

It is interesting to investigate the political and social bases of the Islamic Court in the pluralistic society of Indonesia, where, in an environment of varying beliefs, ethnicities, and political interests of authorities, the courts are

²Lubis, Nur Ahmad, "The state's legal policy and the development of Islamic law in Indonesia's new order" in in Arskal Salim and Azyumardi Azra (eds.), *Shari'ah and Politics in Modern Indonesia* (Singapore: ISEAS. 2003) p. 48-75.

³ Jaenal Aripin, *Peradilan Agama dalam Bingkai Reformasi Hukum di Indonesia*, (Jakarta: Kencana, 2008).

⁴It is well known as *Undang-Undang Peradilan Agama UUPA No. 7 Tahun 1989*.

able to exist. One objective of this study, therefore, is to examine the influences of political and social interests on the Islamic Courts in Indonesia particularly from the Old Order regime, the promulgation of Religious Court Act 7/1989 and The Law 11/2006 on Aceh Government. In approaching the subject matter, a historical approach will be employed. This method is expected to extract historical data on the subject and to discover the relationship between the findings.

For this purpose, this paper will be divided into some parts excluding introduction and conclusion. The first part will discuss historical overview of the existence of the Islamic Court during the early time of Islam in Indonesia and the Colonial Period under the influences of the political and social factors taken by both the Dutch government and Indonesian Muslims at the time. The second part will examine the legal and judicial changes of the Islamic Court during the Old Order period. It is then continued by discussion about the existence of Religious Court in Aceh. The last part will analyze the political and social developments brought about by the New Order regime, particularly through its policies toward the Islamic Court.

Historical Overview

During the early years of the spread of Islam in Indonesia, when Muslims lived in a society which was still unfamiliar with Islamic teachings, whenever there arose a dispute amongst Muslims the case would be entrusted to those who had a good knowledge of Islam.⁵ After the Muslim kingdoms established, kings and sultans appointed those who had special knowledge of to solve certain disputes. There were various forms of justice administration therefore and *adat* law was also used in some regions such as in South Sumatera and other places. In the Mataram kingdom there were officials of religious affairs referred to as *penghulu*. The *penghulu* also functioned as ordinary or Muslim judges whose task was to solve certain

⁵This was also the case of handling marriage contract for a woman who did not have a male relative to act on her behalf at her marriage or so-called *tahlkim*. See Abdurrahman Wahid, et.al., *Kontroversi Pemikiran Islam di Indonesia*, Bandung: Rosda Karya, 1991, p. 229.

disputes. As they conducted sessions in the veranda of the mosques, this court earned the name “veranda court”. The function of the *penghulu* remained unchanged until the coming of Dutch.

During the period of the Dutch-East Indies Company (*Vereenigde Oost-Indische Compagnie*, or VOC) in Indonesia,⁶ the Islamic Court was still acknowledged as a judicial institution in the Dutch colonial legal system. One example is the colonial government’s issue of the regulation of 1819, stipulating that the native people remained subject to their own law and that a *penghulu* would still be appointed as advisor in cases of personal law. The practice continued until the Dutch formally established the institution of the Islamic Court in Java and Madura, or *Bepaling Betreffende de Priesterrades op Java en Madoera* in 1882.⁷ The historical picture of the Islamic legal institution in Indonesia at that time suggests that the Dutch colonial governments allowed Indonesian Muslims to apply Islamic law only because doing so served their political interests. Indeed, it served to prolong their hold on Indonesia.

In the late nineteenth century, however, many Dutch at home as well as in Indonesia hoped to eradicate the Islamic influence from the lives of the majority of Indonesians with

⁶During the early era of the Dutch government, Islamic law was still applied by Indonesian Muslims. This condition was illustrated by Carel Frederik Winter 1799 – 1859, an expert on Java, and Salomon Keyzer 1823 – 1868, an expert on Javanese language and culture and was supported by the existence of *Compendium Freijar*, containing Islamic marriage and inheritance laws. The condition was even supported by Dutch legal experts who believed that Islamic law was valid for Indonesia. Such an opinion was held by Willem Christian van den Berg 1845 – 1927, who stated that Indonesian Muslims had taken over Islamic law in its entirety *receptio in complexu*. This meant that Indonesian Muslims did not absorb only parts of Islamic law but absorbed it as a unity and way of life. For this reason, Van den Berg’s view is known as the *receptio in complexu* theory. See Sajuti Thalib, “Receptio in Complexu, Theorie Receptie dan Receptio A Contrario”, *Pembabaran Hukum Islam di Indonesia* Jakarta: Universitas Indonesia, 1981, p. 45. See also Mohammad Daud Ali, “The position of Islamic Law in the Indonesian Legal System”, *Islam and Society in Southeast Asia*, edited by Taufik Abdullah and Sharon Siddique, Singapore: t.p., 1986, p. 189.

⁷Daniel S. Lev, *Islamic Court in Indonesia* California: University of California Press, 1972, p. 17-19. See also Zaini Ahmad Noeh and Abdul Basit Adnan, *Sejarah Singkat Pengadilan Agama Islam di Indonesia*, Surabaya: PT. Bina Ilmu, 1983, p. 32.

various methods, including Christianization. This hope was based on belief in the superiority of Christianity over Islam, and partly on the belief that the syncretic nature of Islam in the Javanese villages would facilitate the Christianization of Indonesian Muslims.⁸ Regarding the Islamic Courts, the Dutch government then placed this court under the supervision of the colonial courts, that is, the *Landraad* (State Court). Decisions of the Islamic Court could not be enforced before the head of the *Landraad* had agreed to the decisions through *executoire verklaring* that is, an order of execution. This changing was also basically caused by advice of Snouck C. Hurgronje who proposed *Theorie Receptie*.⁹

The criticisms launched by Hurgronje concerning the Islamic Court influenced the Dutch administrators and marked the beginning of Dutch interference in the application of Islamic principles in legislation and judicial practice. The Dutch colonial government then changed the regulations of the Islamic Court, particularly those related to its jurisdiction. The *Compendium Freijar* was gradually nullified and finally replaced by *adat* law.¹⁰ Article 134 of Stbl. 1929 stipulates that personal disputes among Indonesian Muslims would be presided upon

⁸Harry J. Benda, *The Crescent and the Rising Sun, Indonesian Islam under the Japanese Occupation 1942-1945*, The Hague and Bandung: W. van Hoeve Ltd., 1958, p. 26.

⁹Snouck C. Hurgronje criticized the Islamic Court which existed alongside State Courts. According to him, the Dutch government's policy of recognizing and conducting courts of law alongside State Courts would make Islamic law stronger and finally could threaten the position of the Dutch in Indonesia. He would have liked Islamic law to be left alone, without any interference from the government. He thought that people would eventually neglect Islamic law. His theory was, in fact, politically motivated to weaken the Indonesian people's opposition to the authority of the colonial government. Hurgronje's opinion was factually affected by his antagonism toward Islam, which in his opinion, threatened the Dutch colonial position in Indonesia. This assumption was based on his view of Pan Islamism, which encouraged Indonesian Muslims to attain freedom from colonization.

¹⁰Arso Sosroatmodjo, and A. Wait Aulawi, *Hukum Perkawinan di Indonesia*, Jakarta: Bulan Bintang, 1981, 12. See also Daud Ali, *op. cit.*, p. 12.

by Islamic judges, provided this was acceptable according to *adat* law and there existed no rule relating to the case.¹¹

Through the government's regulating the decree, *adat* law automatically replaced the position of Islamic law in the Dutch legal system. Hurgronje's theory had succeeded in replacing Islamic law. By limiting the power of Islamic law in Indonesia, the Dutch colonial government served to separate Indonesian Muslims from their religion, and strengthen its hold on the colony.

In 1937, through *Stbl.* 1937 no.116, the authority to deal with inheritance cases was officially transferred from the Islamic Courts to the civil courts (*Landraad*). Article 3 of the regulation, as quoted by Hooker, stipulates:

In affairs concerning a Muslim husband and wife relating to marriage, revocation, reconciliation, and divorce 'where the intervention of a religious judges in necessary'. In addition the Court might 'declare divorce, (*uitspreken van echtscheiding*) and it had to validate or establish the conditions upon which divorce by the breaking of a condition (*ta'lik*) was claimed. Payments of money or the transfer of goods in suits including dowry (*mahr*, *huwelijks-gift*) and maintenance (*nafaka*, *levensonderhoud*) were also within the sole competence of the Court. All other claims for money or goods, however, fell under the authority of the civil judge (*gewonen rechter*). Neither the *Penghulu* Court nor the original Priest Court ever had competence over matters dealt with under the civil laws of marriage.¹²

The regulation of the decree clearly indicates that the jurisdictions of the Islamic Court of *hadlanah* and *waqf* became the competence of the civil court (*Landraad*). The division of jurisdictions in marital cases between the Islamic Court and the civil court indicated that *adat* law had been successfully applied

¹¹Ismail Sunny, "Kedudukan Hukum Islam dalam Sistem Hukum Indonesia", *Dimensi Hukum Islam dalam Hukum Nasional*, Jakarta: Gema Insani Press, 1996, p. 132.

¹²M. B. Hooker, *Islamic law in South East Asia*, Singapore: Oxford University Press, 1984, p. 250.

in Indonesia. The jurisdictions of the civil courts were based on *adat* law and were applied wherever these courts were established.

Social disfavor toward this decree continued. Kyai R.M. Adnan, in a meeting with Dr G. F. Pijper, the Dutch advisor for indigenous affairs, argued that application of *adat* law in inheritance cases involving Muslims would damage relationships in Muslim family life. Inheritance is a part of Islamic law, and Muslims could therefore not follow or implement inheritance laws which were based on *adat* law. This argument helped prevent wider implementation of Stbl. No. 116/1937; the decree was, nevertheless, put into effect.¹³

Religious Courts under the Old Order Regime

Focusing on the political aspect of the Islamic Courts, it is evident that the Old Order neglected regulation of the Islamic Court. The founding fathers who drafted the 1945 Constitution (Undang-Undang Dasar 1945) did not entertain the idea of a religious court. Article 24 of the Constitution simply says that judicial powers shall be exercised by a Supreme Court and other courts in accordance with the promulgated statute. Meanwhile, article 25 prescribes that the structure and jurisdiction of these courts, as well as the conditions for appointment and dismissal of judges be regulated by statute.

Social factors also influenced the process of creating the Constitution. This could be seen in certain Indonesian leading figures' desire to reformulate the Constitution, initially based on *Piagam Jakarta* (the Jakarta Charter). Mohammad Hatta and Sartono's idea of "religious neutrality" successfully mediated a controversy between Islamic figures and Nationalists. The controversy stemmed from a clause stated in the Jakarta Charter. The clause declared that the state was "based on Belief in the All-mighty God, with the obligation to carry out the Syari'ah Islam for the adherents of Islam."¹⁴

¹³Lev, *op. cit.*, p. 23-4.

¹⁴"... berdasar kepada: Ketuhanan Yang Maha Esa, dengan kewajiban menjalankan Syariat Islam bagi pemeluk-pemeluknya." Daniel, S. Lev, *The Transition to Guided Democracy: Indonesian politics 1957 – 1959*, Ithaca: Cornell Modern Indonesia Project Monograph Series, 1966, p. 128-9.

These political and social factors had indeed affected the application of Islamic law by the State. But, by the late 1945, when Indonesia's new political parties had already begun to emerge, further compromises had to be worked out between nationalist groups on the one hand and Islamic nationalist groups on the other; the latter now carried enough weight in the republican deliberative council. Consequently, a new Ministry of Religion (Kementrian Agama) was established on January 3, 1946.

This ministry played an important role in dealing with the need for Islamic law; the key to understanding its administrative existence lies both in political policy and in the impact that the ministry, as a power that could enforce a set of established rules, had on Islamic reality in Indonesia. Islam thereby truly possessed a legal system in Indonesia, for there now existed the bureaucracy to make it effective. The initiating mechanism of this new reality for Islam was Law no. 22 of 1946, which repealed the colonial Marriage Ordinance of 1929 and replaced it with a new system of organization.

Despite the Indonesian government's promulgation of Law no. 22/1946, the drive to codify Islamic law still represented a long process. Law no. 22 did not affect the substantive law of marriage; the Muslim marriage rules are not even mentioned in the text. It was purely formal and procedural. It attempted to impose Indonesia-wide, uniform administration for Muslim marriage. The Law was initially applied in Java and Madura; it was not until 1954 that it was extended to the other territories of Indonesia. The innovative element in the Law lies in its administration. The Ministry of Religious Affairs established the local Office of Religious Affairs, or *Kantor Urusan Agama* (KUA), whose sole function was to register marriages, divorces, and reconciliations.¹⁵

¹⁵The relationship between KUA and the religious courts was very significant, particularly in the outer islands, for KUA was an essential instrument for achieving uniformity in Islamic legal affairs. For instance, the officials of KUA sometimes tried to settle marital disputes before they went to court. This condition, however, led to disputes between KUA and the religious courts. Apart from this problem, KUA also offered policy guidance and helped in problems of legal interpretation. Lev, *Islamic Court, op.cit.*, p. 75-6.

Nevertheless, social pressure from both nationalists and Muslims toward the nature of the Islamic Court continued. The nationalists, mainly graduates of Dutch law schools, continuously insisted on the elimination of the Islamic Court. The first attempt to do so was reflected in Law 19/1948, which was never implemented because of events during the revolution; the Dutch capture of Jogjakarta, which clearly expressed the ideals of nationalist lawyers and political leaders, provided for the complete integration of the judicial system and the weakening and eventual elimination of *adat* courts. Statute 19/1948 made no mention at all of a distinct sphere of Islamic justice, thereby spelling its demise. Fortunately, the statute turned out to be meaningless.¹⁶

A second legislative effort to eliminate Islamic courts was more circumspect and less ambitious. Law no. 1/1951, on the organization and procedure of civil courts, again provided for a unified civil judiciary and the gradual abolition of *adat* courts. However, while it called attention to the limitations of religious courts, this statute recognized their separate existence. Its drafters (in the Ministry of Justice), however, suggested that the government would consult Parliament about transferring jurisdiction over issues of Islamic law to first instance civil courts.¹⁷ Islamic parties, however, paid a great deal of attention to such institutional issues in Cabinet and Parliament. Moreover, Islamic mobilization was now less confined by a dwindling revolutionary momentum.

The nationalist pressures in fact prodded the Ministry of Religion to pay more attention to the Islamic Courts. This factually resulted in an improvement. In 1957, the Indonesian government issued government regulation (*Peraturan Pemerintah*) No. 45, which established religious courts outside Java, in *Madura* and *Kalimantan*.¹⁸ The structure, procedure and names of religious courts in the three regions varied: (1) in *Java* and *Madura*, the courts were named *Pengadilan Agama* and *Mahkamah*

¹⁶*Ibid.*, 65.

¹⁷*Ibid.*

¹⁸In 1951, the government had abolished the courts outside Java and Madura.

Islam Tinggi for appeal; (2) in *Banjarmasin (South Kalimantan)*, the *Kerapatan Qadi* or *Pengadilan Qadi* had *Kerapatan Qadi Besar* or *Pengadilan Tinggi* for its appellate; and (3) for the rest of Indonesia, the courts were called *Mahkamah Syar'iyah Propinsi*.¹⁹

On the one hand, regulation No. 45 could solve problems faced by Indonesian Muslims, particularly in Islamic matters. On the other hand, the jurisdictions of all Islamic courts still referred to Law no. 22/1946, which related only to marriages, divorces, reconciliation and some additional matters, including inheritance, *waqf*, hibah (gift), shadaqah and baitul mal for the Islamic Courts in the outer islands.²⁰ Hence, it seems that regulation No. 45 is merely a continuation of Law no. 22/1946 without any modification; in fact, *adat* law was still put into effect. Article 4 of this regulation provides for religious judges in marriages, divorces, reconciliations and matters of inheritance, to the extent that, 'according to the living law', they are resolved according to the law of Islam. Regulation No. 45 did not help much in mediating the tension between Muslim nationalists and nationalist seculars supported by civil judges.

The government regulation was still influenced by the *receptie theorie* proposed by the Dutch colonial government; this is evident in article 4 of the regulation, which subordinates the application of Islamic principles to the legal practice of local *adat* laws. Later developments in the Islamic Court system in independent Indonesia were not without difficulties. The idea of *theorie receptie* inherited from the Dutch, influenced many Indonesian law experts and led to the understanding of the nature of the Islamic Courts. The difficulties faced by the Islamic Courts were caused by officials in the Department of Justice and the civil courts themselves: graduates of Dutch law schools in which Islamic law constituted only a small fraction of the curriculum.²¹ Most of them neglected the basic teachings of Islam, understanding Islamic law only from what they studied

¹⁹Roihan A. Rasyid, *Hukum Acara Peradilan Agama*, Jakarta: Rajawali, 1991, p. 17.

²⁰See Lembaran Negara 1957 No. 99 as quoted by Noto Susanto, *Organisasi dan Jurisprudensi Peradilan Agama di Indonesia*, Yogyakarta: N.P. Gadjah Mada, 1963, p. 8.

²¹Deliar Noer, *The Administration of Islam in Indonesia*, Ithaca, N.Y.: Cornell Modern Indonesia Project, Southeast Asia Program, Cornell University, 1978, p. 45.

of the Shafi'ite school of law as applied by Indonesian Muslims in general. They therefore felt estranged from both Islam itself and from the desire by some Muslims to practice Islamic law.

During the years of Guided Democracy, when the integrative and aggrandizing drives of all national institutions, including the secular judiciary, were strong, the Islamic Court faced a difficult phase. During this period, which began in 1957, Sukarno developed enormous personal power; the political system expanded rapidly and became somewhat involute. One example was the abolishment of Masjumi, an Islamic organization, in 1960. Organized Islam all but gave up the ideological banner of a state based on Islam, and was, for the time being, only one part of the Nationalism-Religion-Communism (NASAKOM) triumvirate. This period was indeed critical for Islam.

The Islamic Court under the New Order

The policy of guided democracy under Sukarno, who sought to integrate the three main ideologies in the society (i.e. NASAKOM), created explosive internal tension. The tension was greatest between Islam and Communism. Devout Muslims and their organizations were the most prominent force in the anti-Communist and anti-Sukarno actions of the mid-1960's, finally succeeding in eradicating their communist exponents throughout the country. It is undeniable that this support lent considerable legitimacy to the transfer of power to Suharto and the New Order regime.

Political conditions during the early phase of this regime influenced the nature of Islam in Indonesia, particularly Islamic judicial and legal institutions in the State. The judicial and legal changes cannot be separated from the impact of "Pancasila" ideology – a key phrase in the New Order regime's basic policy – on Islamic law and institutions, particularly the Islamic Courts. The weakening and later disappearance of formal Islamic political parties from the national political stage and the enforcement of singular adherence to "Panca Sila", on the one hand, suppressed and curbed the progress of Islamic law and Islamic institutions in their search for a national legal system. On the other hand, the policies and programs, in addition to

posing a tremendous challenge to the proponents of Islamic law and institution, 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.

No one can deny that the New Order government has successfully produced new legal statutes (*Undang-Undang*) and more executive regulations. One of the efforts made by the New Order regime was to restore the separate and independent judicature neglected by Sukarno's regime. It was Law no. 14/1970, the so-called Basic Law of the Judiciary, which maintained and strengthened the position of the Islamic Courts in Indonesia's New Order. Article 10 of the Law retains the existing structure of the four-court system with a Supreme Court at the apex. Those courts are *Peradilan Umum* (Civil Court), *Peradilan Agama* (Religious Court), *Peradilan Militer* (Military Court) and *Peradilan Tata Usaha Negara* (State Administrative Court).²² Hence, this law seems to ensure that the Islamic Courts operate within the judicial system and, indirectly, indicates that the status of the Islamic Courts is equal to that of the other two courts operating in the country. On a practical level, however, the Islamic Court was subordinate to the civil court. The colonial practice of requiring all decisions of the Islamic Courts to be ratified by the civil court before being implemented - even if decided by the High Court of Appeal - still survived. The fiat execution (*executoire verklaring*) was needed only if the disputants did not carry out the decision voluntarily.

Because most Indonesians are Muslim and because *adat* and Islamic leadership groups subscribe to different principles of legitimacy, the mixture of *adat* and Islamic law has been accompanied by a certain amount of tension. Pressure to enforce Islamic marriage law, for instance, continued to exist, particularly from women. In fact, pressure from the ranks of women had originated in the early 1900's; it was not the Dutch or Christian marriage law they challenged, but the Islamic

²²See The Basic Law of Judiciary no. 14/1970 as quoted by Sostroatmodjo and Aulawi, *op. cit.*, p. 158-184.

marriage law, which by not being codified, left Muslim women without the means to protect their rights. Under orthodox interpretation of Islamic law, women could be married, divorced, or made to share a husband with other wives. Articulation of these issues began with Kartini and continued with women's organizations such as KOWANI, PERWARI, Wanita Islam, and KNKWI. They held congresses in 1928, 1935, 1938, and 1941 to challenge the Indonesian government to issue a codification of marriage law.²³ Although these pressures did not succeed in bringing about the codification of marriage law, they did create some patchwork reforms which strengthened women's position in marriage. Such statutory reforms changed the procedural system in Indonesian marriage law. Registration was no longer necessary for the validity of marriages; Muslims who did register could do so at the Local Office of Religious Affairs (KUA) rather than at the Civil Registry. The reforms also had some small effects in the direction of equalizing the rights of spouses, in the form of *ta'lik talak*, a marriage agreement in which the husband consents to grant his wife the right to seek a divorce for certain stated reasons. Another reform which resulted in equal rights between wife and husband was the Circular Letter of the Supreme Court no. 3/1963 which gave all Indonesian women the same right to make contracts and appear in court.²⁴

Such problems could be definitively solved through legal innovation. In 1974, the government promulgated Act 1/1974, better known as *Undang-Undang Perkawinan*, or Marriage Act. The legislative process of this Act was colored by controversies in the House of Representatives (*Dewan Perwakilan Rakyat*) and demonstrations by Indonesian Muslims in Jakarta. As controversies and demonstrations continued to

²³J. Katz and R. Katz, "The New Indonesian marriage Law: A Mirror of Indonesia's Political, Culture, and Legal System," in *The American Journal of Comparative Law*, 23:4 Fall 1975, p. 656-657, and see also Sastroatmodjo and Aulawi, *op. cit.*, p. 52.

²⁴J. Katz and R. Katz, 656-7. See also Muhammad Kamal Hasan, *Muslim Intellectual Responses to "New Order" Modernization in Indonesia*, Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992, p. 145 – 154.

flare, it became clear to the government that compromises were necessary.²⁵

To some extent, the Act fulfilled the need to have a codification of marriage law. On the one hand, the Act dealt with marital problems and even gave equal rights to husband and wife. On the other hand, it still did not create an independent religious court. This new marriage law stated that all religious court decisions must mandatorily be approved (*pengukuhan*) by its corresponding general civil court. Article 63 of this Act stipulates that marital and divorce disputes among Muslims will be tried and decided by the Islamic Court in accordance with the religious norm.²⁶ It was through the enactment of the new Marriage Act, however, that the existence of the Islamic Court was solidified and its functions were extended. This Act has been successfully applied in Indonesia because it has received strong support on the local level from officials, women's groups and others.²⁷

The political climate toward Islam, however, has changed since the mid 1980's. President Suharto appeared to move closer to the Muslim community than at any other time during his presidency. His actions over the years have indicated a distinct softening of his regime's attitude toward Islam. One of the important actions may have been his support for the first broadly based organization of Muslim intellectuals (*Ikatan Cendekiawan Muslim Indonesia (ICMI)*).

Most important of all was the promulgation of Act no. 7/1989, known as the Islamic Court Act (*Undang-Undang Peradilan Agama or RUUPA*), which on December 29, 1989, effected the most recent changes in the institution of the Islamic Courts. In contrast to the court system defined by the Dutch, this new law gave a uniform name to the courts throughout Indonesia: *Pengadilan Agama* (Religious Court) and *Pengadilan Tinggi Agama* (Higher Religious Court) for the courts

²⁵*Ibid.*, p. 670-6.

²⁶Marriage Counseling Bureau, *The Indonesian Marriage Law* Jakarta: Department of Religious Affairs, 1998, p. 29.

²⁷J. Katz and R. Katz, "Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited," *The American Journal of Comparative Law*, 23:4 Fall 1975, p. 307-681.

of appeal. More importantly, the jurisdictions of the courts were expanded to include all cases of Muslim family law, namely marriage, divorce, repudiation, inheritance, bequest, gift (*hibah*) and endowment. Furthermore, the Islamic Courts now shared equal status with the regular courts.

Significant developments occurred after the enactment of Law 7/1989 on Religious Court. Followed 10 years later with the legislation of Law. 35/1999 that regulates the system of the roof (one-roof system) which was reaffirmed by Law 4/2004 on Judicial Power. But Law 3/2006 on amendment of Law 7/1989 on Religious Courts is then considered by many as the most historic moment for the development of the Islamic Court with the expansion of Shariah authority in economic matters.

At first, as stipulated in Law 7/1989, the Religious Court only authorized to handle matters of marriage, inheritance, wills, grants, endowments and Sadaqah. Law no. 3/2006 which amend Law no. 7/1989 then expand the competence of the religious courts. In section 49 the competences have been added to matters of zakat (alms), and Islamic charity. Explanation of article 49 of Law 3/2006 detailing the case what is meant by "marriage", one of which also mentions the adoption in Islamic law.

In the same chapter, described 11 activities included in the economic Islamic bank, Islamic microfinance institutions, Islamic insurance, Islamic reinsurance, Islamic funds, bonds and letters of shariah medium-term securities sharia, Islamic security, Islamic finance, Islamic mortgages, Islamic financial institutions for Pension fund, and Islamic business.

Other new Authority of Law. 3/2006 is in terms of property rights disputes among Muslims and giving testimony of determining the beginning of new moon (*rukayah hilal*) in the early months of the Islamic calendar, as well as the provision of information or advice on the differences of determining the Qibla direction and prayer time.

The Islamic Court in Aceh

The people of Aceh has been recognized as a religious community since the colonial era. They put on a respectable

scholars (ulama) in the life of the nation. After going through a long process in 1999 Indonesia has ratified Law. 14/1999 on Implementation Privileges In Special Province of Aceh. Essentially, the enactment of Law No. 44 of 1999 has brought new developments in the Province of Aceh in particular relating to the judiciary. This province was given authority to develop and manage privilege (article 2, paragraph 1). It also was confirmed in TAP MPR Decree IV 1999 on the Outlines of State Policy (Garis- Garis Besar Haluan Negara) on the construction of regional autonomy within the Republic of Indonesia. It is to resolve issues in a fair and comprehensive ways in area that requires immediate and serious policies. Especially for Aceh it is mentioned:

- a. Maintaining national integration within the Republic of Indonesia to respect equality and diversity of social and cultural life of the people of Aceh, through the establishment of the Special Region of Aceh special autonomy governed by laws
- b. Resolve the Aceh case in a fair and dignified ways by conducting an investigation and a fair trial for human rights violations, both during the implementation of Military Operations and post-Military Operations.

MPR mandate is implemented by the presence of Law 18/2001 on Special Autonomy for Aceh Province in which one of the its substances is the establishment of the Mahkamah Syar'iyah as a special courts applicable in Aceh. Mahkamah Syar'iyah is not entirely new institution but it is more than a development of the existing religious court. It can be said that it is the Syari'ah Courts, so called Mahkamah Syar'iyah, which have such extended competences as Islamic Economy and Islamic criminal law, besides Islamic family law which is previously under the competence of religious courts. The existence the Syari'ah Courts affirmed through Presidential Decree 11/2003 on Mahkamah Syar'iyah and Provincial Mahkamah Syar'iyah in Aceh were determined and declared effectively on March 4, 2003.²⁸

²⁸On the same date the Minister of Religious Affairs inaugurated the Mahkamah Syar'iyah and also conducted the inauguration of the Chairman of

Special autonomy to Aceh community can be understood as government appreciation of the Acehnese long history. This is seen that the implementation of the special autonomy is a recognition of the state given to this region because of the struggle and the fundamental values of society that be maintained from generation to generation as foundation of spiritual, moral and humanitarian.²⁹ Implementation of privileges includes four things:³⁰

1. Implementing of religious life
2. Implementing of adat life
3. Implementing education
4. The role of the ulama in the legislation process of provincial policy

Implementation of Islamic law is intended as a basis for all Acehnese Muslims, not for other religions. Law 18/2001 also authorized to establish Mahkamah Syar'iyah as the judicial authority that will implement Islamic law (Article 25).

In the implementation of special autonomy and privileges in applying Islamic Law Aceh Provincial Government has established several supporting institutions³¹ and stipulated several Provincial Regulation, so called Qanun, one of them is the Qanun 10/2002 on Sharia Courts (Mahkamah Syar'iyah).

Meanwhile, in the implementation of adat life, Aceh Provincial Government has also legislated several Qanuns. One of those includes reaffirming role of Keuchik (village head) and Imuem Mukim as members of the Adat court with competences to resolve any disputes occurred in the community.

As an judicial institution that implementing Islamic court, the authority of Mahkamah Syar'iyah is based on the Islamic law in national legal system. The authority is governed by Qanun and applied to Muslims. In addition, Islamic law in

Mahkamah Syar'iyah District/Provincial Mahkamah Syar'iyah by the Indonesian Supreme Court.

²⁹Indonesia, Law 44/1999 Article 3 .

³⁰*Ibid* pasal 4 .

³¹Several new institutions established are Department of Islamic Shari'ah, Advisory Council of Ulama and Council of Adat Aceh.

Aceh has still covered some aspects of both public law and private law, the competences set forth in the Qanun 10/2002 on Shariah Court also cover those aspects of law.

The Presidential Decree 11/2003 concerning the Provincial Mahkamah Syar'iyah in Aceh that limits its competence according to the Religious and the Provincial Religious Court competences added to other competence relating to the such aspects of people life as faith, worship and religious ceremony, however, has not aligned with the provisions and spirit embodied in Article 25 paragraph (2) of Law 18/2001 which is the spirit of the implementation of Islam law in Aceh. Article 3, paragraph 1 states:

Kekuasaan dan kewenangan Mahkamah Syar'iyah dan Mahkamah Syar'iyah Provinsi adalah kekuasaan dan kewenangan Pengadilan Agama dan Pengadilan Tinggi Agama, ditambah dengan kekuasaan dan kewenangan lain yang berkaitan dengan kehidupan masyarakat dalam ibadah dan syiar Islam yang ditetapkan dalam Qanun. (The authority and competence of Mahkamah Syar'iyah and the Provincial Mahkamah Syar'iyah are The authority and competence of the Religious and the Provincial Religious Court, added to the The authority and competence of other people's lives in worship and Islamic syi'ar specified in the Qanun).

The Decree 11/2003 does not provide competence to Mahkamah Syar'iyah to settle lawsuit in criminal cases as defined in the Qanun No. 10/2002. There may be possible interpretation involves all aspects of life including Islamic economy as well criminal law, not only limited to prayer, fasting and pilgrimage.

Interpretation of the Decree as such is more in line with the awareness and understanding of society, otherwise changes to the Religious Courts to Mahkamah Syar'iyah has no meaning, if such competence is still same as the Religious Court competences without any significant changes as an important aspect for the implementation of special autonomy for Aceh province.

With the enactment of Law 4/2004 on Judicial Power which recognizes the existence of special tribunal, but still

remains in one of the existing courts. Mahkamah Syar'iyah is a special court within the religious court. It has been stated in Qanun 1/2002 on the Islamic Court governing competence of Mahkamah Syar'iyah as stipulated in Article 49 of the Qanun 10/2002.

Qanun function as provincial regulation but practically it must be understood differently and higher than the Provincial Regulation, so called Perda. When Qanun is still seen as ordinary legislation, the special autonomy has no meaning at all, because it will be the same as the ordinary regional autonomy.³²

Sharia Courts and the Special Autonomy under Law 11/2006 on Aceh Government

The earthquake and tsunami in Aceh on December 26, 2004 has killed approximately 300,000 and heavily devastated many buildings. This tragedy is the starting point for the emergence of awareness of all parties to resolve conflict in a peaceful and dignified way as well as the call for solidarity rebuild Aceh in the frame of the Republic of Indonesia. This awareness has manifested in the legislation of Law 11/2006 on Aceh Government.

It is much more completed when the Law has also legislate several articles concerning the implementation of Islamic law specifically in Chapter XVII of Article 125 to Article 137. The core of these Articles is contained as follows:

- a. Islamic law implemented in Aceh includes Islamic faith, law and morals. Islamic law in this part includes Islamic worship, ahwal ash-syakhshiyah (family law), muamalah (civil law), jinayah (criminal law), court, tarbiyah (education), propagation and defense of Islam. (Article 125)
- b. Every Moslem is to implement Islamic law and for people who live or stay in Aceh are obliged to respect Aceh's implementation of Islamic law. (Article 126)
- c. Aceh Government is responsible for the implementation of Islamic law and ensure freedom of harmony and respect for the values espoused by the

³²Rifyal Ka'bah, *Penegakan Syari'at Islam di Indonesia*, Khairul Bayan, Sumber Pemikiran Islam, Surabaya, 2004, p. 30

religious community. And the government allocates funds and resources for the implementation of Islamic law. (Article 127)

- d. Shari'ah Courts are part of the national judicial system conducted by the Mahkamah Syar'iyah. And it is the court for every Muslims who lived in Aceh whose competence cover Islamic criminal law (jinayah) besides civil and family law, which shall be further legislated by Qanun. (Article 128)

The legislation of Law 11/2006 has theoretically provided a strong foundation for Mahkamah Syar'iyah to settle lawsuit in criminal law (jinayah). To implement The Law 11/2006 Aceh Government proposed legal draft of Qanun Jinayah (Qanun of Islamic Criminal Law) and Hukum Acara Jinayah (Qanun of Procedure Law for Islamic Criminal Law) in 2009. Nevertheless, the two Qanuns were rejected by Aceh Governor. One of the main reasons of this rejection is about sentence of rajam (stoning) which is still debatable.

Conclusion

In case of Indonesia, political and social factors have in fact influenced the establishment of the Islamic Court in Indonesia. During the Dutch colonial period the court was a main target of Dutch legal politics which served to weaken the position of Islam among its adherents while strengthening the colonial government's hold on Indonesia. The *receptie theorie* adopted by the Dutch government was one of the tools for suppressing the establishment of Islam at that time. The theory has been adopted by many Indonesians since independence, however, particularly when faced with problems related to the Islamic Court. The political climate during the Sukarno regime, akin to socialism and communism, was not conducive to the Islamic Courts. Under the New Order regime, however, Islamic legal and judicial changes were made. Social demands played an important role in those changes. The establishment of the Islamic Courts in Indonesia was a necessity in a legal system which must serve various groups in Indonesia.

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. These conditions may be imperative if this trend is to continue. The contribution of Muslim legal experts, bureaucrats, and professionals is badly needed in order to make Islamic law enforceable as national law, and reinvigorate it as a legal system befitting the demands of modern society.

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