HASBI'S THEORY OF *IJTIHĀD* IN THE CONTEXT OF INDONESIAN *FIQH*

Yudian Wahyudi

A Thesis Submitted to
the Faculty of Graduate Studies and Research
in Partial Fulfillment of Requirements for
the Degree of Master of Arts

Institute of Islamic Studies
McGill University, Montreal

The shortened title of thesis:

HASBI'S THEORY OF IJTIHĀD

ABSTRACT

Author	: Yudian Wahyudi
Title	: Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*
Department	: Institute of Islamic Studies, McGill University
Degree	: Master of Arts

This thesis studies the proposal for an Indonesian *fiqh*, articulated by Muhammad Hasbi Ash Shiddieqy (1904-1975) as an effort to bridge the tension in Islamic law between revelation and reality *(ᶜāda)* in Indonesian society. While such an indigenous *fiqh* can only be created through *ijtihād*, most Indonesian Muslims believed the gate of *ijtihād* to have been irrevocably closed and thus they vehemently opposed any suggestion toward creating an Indonesian *fiqh*. To make *itjihād* possible once again, Hasbi worked hand in hand with the reformists with the call of "Back to the Qurᵓān and the Sunna." The reformists' program consisted of attempts to eliminate "non-Islamic" elements from Muslim life, to open the gate of *ijtihād*, to bring an end to blind imitation (*taqlīd*) and to allow for *talfīq*, a comparative study of *fiqh*. In order to preserve the reformed law, Hasbi supported his idea of an Indonesian *fiqh* with a double principle, proposing the Indonesian *fiqh*'s focus on human relations (*muᶜāmala*) only with exclusion of the fundamental beliefs and rituals. He made consensus *(ijmāᶜ)*, analogy *(qiyās)*, juristic preference *(istiḥsān)*, and custom *(ᶜurf)*, together with the Qurᵓān and the Sunna, the proofs *(adilla)* of *ijtihād*, and hence, the sources of law (*maṣādir al-*

aḥkām). On the other hand, he made them the methodologies of *ijtihād (ṭuruq al-ithbāt)*, by emphasizing the collective *ijtihād (al-ijtihād al-jamāᶜī)* or consensus as the only procedure that Indonesian Muslims should adopt. Hasbi also believed that a school of law (*madhhab*) would develop faster when adhered to by a government. An effort has been made in this thesis, therefore, to relate Hasbi's otherwise abstract ideas of collective *ijtihād* to the political structures of the Indonesian Republic. This rather liberal interpretation is offered to help Indonesian Muslims hasten their attempts at creating an Indonesian *fiqh*, and at casting aside the "reception theory," an expression of the Dutch legal politics of *divide et empera* which has no place in independent Indonesia.

Résumé

Auteur	: Yudian Wahyudi
Titre	: Théorie de l'*ijtihād* de Hasbi dans le contexte du *Fiqh* indonésien
Faculté	: Université McGill, Institut des études islamiques
Diplôme	: Maîtrise és Arts

Cette thèse étudie le project d'un *fiqh* indonésien tel qu'articulé par Muhammad Hasbi Ash Shiddieqy (1904-1975) pour combler l'écart qu'il percevait dans le droit islamique entre la révélation et la réalité *(ᶜāda)* de la société indonésienne. Alors qu'un *fiqh* indigène ne peut être conçu que par l'*ijtihād* la majorité des musulmans indonésiens croient que les portes de l'*iijtihād* sont irrévocablement fermées et s'opposent donc avec véhémence à toute suggestion visant à créer un *fiqh* indonésien. Pour rendre l'*ijtihād* à nouveau possible, Hasbi collabora avec les réformistes à un appel pour le "retour au Coran et à la Sunna." Le programme des réformistes consistait à éradiquer tous les éléments "non-islamiques" de la vie musulmane, à ouvrir les portes de l'*ijtihād* à mettre fin à l'imitation aveugle *(taqlīd)*, et à permettre l'étude comparée du *fiqh* *(talfīq)*. Pour préserver cette loi réformée et pour consolider son idée d'un *fiqh* indonésien, Hasbi fit appel à un double principe, proposant que le *fiqh* indonésien se concentre sur les relations humaines *(mu'āmala)* à l'exeption des croyances et des rituels fondamentaux. D'une part il fit du consensus *(Ijmāᶜ)*, de l'analogie *(qiyās)*, de la préférence juridique *(istiḥsān)*, et de la coutume *('urf)*, ainsi que du Coran et de la Sunna, les preuves *(adilla)* de l'*iijtihād* et donc les sources de la loi *(maṣādir al-aḥkām)*. D'autre part, il en fit les méthodologies de l'*ijtihad (ṭuruq al-ithbāt)*, en mettant l'emphase sur l'*ijtihad* collectif *(al-ijtihād al-jamāᶜi)* ou

consensus, comme l'unique procédure que les indonésiens devraient adopter. Hasbi croyait également qu'une école juridique *(madhhab)* se développerait plus vite si le gouvernement y adhérait. Cette thèse tentera donc de relier le concept d'*ijtihād* collectif de Hasbi, qui serait autrement abstrait, aux structures politiques de la République indonésienne. Cette interprétation plutôt libérale est offerte pour aider les musulmans indonésiens dans leurs efforts pour créer un *fiqh* indonésien et pour se défaire de lathéorie de la réception," une expression que la politique légale hollandaise de *divide et empera* qui n'a pas sa place dans une Indonésie indépendante.

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ACKNOWLEDGMENTS

This thesis owes much to the help and contribution of many people. Dr. Wael B. Hallaq, my thesis adviser, made me realize that any attempt at Islamic legal reform which does not derive its theoretical framework from *uṣūl al-fiqh* is a brittle reform. I also benefited from Dr. Karel A. Steenbrink, visiting Professor at the Institute of Islamic Studies during 1992-1993, for suggestions regarding Chapter I of my thesis. I have benefited from several discussions on Islamic legal reasoning of the subject of Chapter II with Ms. Siti Qomariyah, and occasionally with Mr. H. Affandi Mochtar and Mr. Hasan Asari; I am grateful to all of them. I would always remember the assistance of my friends, Mr. Thomas J. Singleton, Ms. Karen Dougearty, Mr. Safique Virani, Mr. Bruce Fudge, and Mr. Muhammad Qasim Zaman for suggesting improvements in the style and presentation of this thesis. I alone am responsible for any shortcoming in my thesis, however.

Many others have also helped make this thesis possible. The McGill Indonesia IAIN Development Project provided me with a scholarship to study at the Institute of Islamic Studies, McGill University. Both the Rector of the Sunan Kalijaga IAIN and the Dean of its Faculty of Islamic Law accelerated my nomination by giving me all necessary assistance. Dr. Nourouzzaman Shiddiqi, the son of Dr. Hasbi Ash Shiddieqy, who is now the Dean of the Graduate Faculty of the Sunan Kalijaga IAIN, not only encouraged me to study at McGill University, but also made available to me a number of Hasbi's works. These works would, of course, have taken longer to reach Montreal had it not been for the help of Ms. Cêline Beaudoin and Ms. Ratna Dewi, of the Jakarta Mc-Gill-IAIN office. I wish to express my gratitude to all these individuals and institutions.

Montreal, July , 1993

Y.W.

SYSTEM OF TRANSLITERATION

Here I follow the transliteration system of the Institute of Islamic Studies, McGill University. However, the Indonesian words or names derived from Arabic are written in the form cited in the sources. For example: "Nourouzzaman" rather than "Nūr al-Zamān," and "Nahdlatul Ulama" rather than "Nahḍat al-ᶜUlamāᵓ." The same also applies to non-Arabic derived Indonesian words or names, regardless of their old or new spelling. For instance: "pokok2" not "pokok-pokok" (plural). Some differences between the old spelling and the new one (1971 onward) are as follows: (1) *dj* becomes *j*, such as *Djakarta* becomes *Jakarta*; (2) *j* becomes *y*, such as *jang* becomes *yang*; (3) *nj* becomes *ny*, for example *njanji* become *nyanyi*; (4) *sj* becomes *sy*, for instance *sjari`ah* becomes *syari`ah*; (5) *tj* becomes c, e.g. *Atjeh* becomes *Aceh*; (6) *ch* becomes *kh*, like *Chalil* becomes *Khalil*; and *oe* becomes *u*, such as *oelama* becomes *ulama*.

INTRODUCTION

The Indonesian *fiqh* in 1940[1] was the product of a vigorous interaction between the ideals of Islamic jurisprudence (*fiqh*) and the social realities of Indonesian Muslims. There were two main factors that encouraged Hasbi to initiate his Islamic reform aiming at Indonesianizing Islamic law. Politically, as a colony of the Netherland East Indies, Indonesia was controlled by the colonial government. Culturally, the understanding of *fiqh* on the part of Indonesian Muslims was weak. Using various relevant approaches, it is my intent in this thesis to explore this dualism, by emphasizing the significance of Indonesian *fiqh.*

To toughen their political supremacy, the Dutch tried to weaken the official position of Islamic law, by giving currency to the "reception theory." According to this theory, *adat* (customary) law was the law that historically applied to Indonesia.[2] Consequently, Islamic law, considered foreign, could be applied only where it was recognized by the *adat* law.[3] This theory, supported by such Dutch scholars as

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[1]Teungkoe Mohd. Hasbi (Ash Shiddieqy), "Me'moedah'kan Pengertian Islam I," Pandji Islam, Boendelan Tahoen Ketoedjoeh (1940), 8412. See also, Nourouzzaman Shiddiqi, "Pemikiran Muhammad Hasbi Ash Shiddieqy tentang Pembinaan Hukum Islam di Indonesia," National Paper Seminar, Sunan Kalijaga, 1986, 1; and idem, "Muhammad Hasbi Ash Shiddieqy dalam Perspektif Sejarah Pemikiran Islam di Indonesia," Ph. D. diss., IAIN Sunan Kalijaga, 1987, 1.

[2]It was based on article 134: 2 of the *Indische Staatregering.* See for example, Supomo, Sistem Hukum di Indonesia (Jakarta: Pradnya Paramita, 1965), 67; M. Rusaini Rusin, "Prospek Hukum Islam dalam Negara Republik Indonesia yang Berdasarkan Pancasila," Studia Islamika, 14/6 (Januari-Juni 1981), 22; and Yahya Harahap, "Praktek Waris Tidak Pantas Membuat Generalisasi," in Polemik Reaktualisasi Ajaran Islam, ed. Iqbal Abdurrauf Sainima (Jakarta: Pustaka Panjimas, 1988), 127.

[3]Suyuti Thalib, "Reception in Complexu, Theory Receptie dan Receptie A Contrario," in Pembaharuan Hukum Islam di Indonesia in Memoriam Prof. Mr. Dr. Hazairin, ed. Panitia Penerbitan Buku untuk Memperingati Prof. Mr. Dr. Hazairin (Jakarta: UI-Press, 1981), 44-45. See also, Iman Sudiyat, Asas-Asas Hukum Adat Bekal Pengantar (Yogyakarta: Liberti, 1985), 3; and Soerojo Wignjodipoero, Pengantar dan Asas-Asas Hukum Adat, 19th edition (Jakarta: Haji Masagung, 1990), 29.

Christian Snouck Hurgronje, reversed Solomon Keyzer's (1823-1868) *reception in complexu* theory. With the *reception in complex* theory, Keyzer, then supported by Lodewijk Willem Christiaan van den Berg, had maintained that Islamic law was in fact applied to Indonesia from 1600 to 1800; consequently it had been given legal recognition through articles 75, 78, and 109 of *Regering Reglement* Year of 1854 (*Staatblad* 1854 Number 2).[4]

The Dutch, then, gradually and subtly changed the matters of *Reglement op het belied der regeering van Nederlandsch Indie* so as to reduce any benefit to Indonesian Muslims, by enacting the Netherland *Staatblad* of 1906: 364 (December 31, 1906) and the Netherland Indie's *Staatblad* of 1907 Number 204. On June 6, 1919 the *Regeling Regelement* was changed again so that it now required "giving attention" to Islamic law rather than "applying" it.[5] Further, the Dutch enacted the *Indische Staatregeling (Staatblad* 1925: 415),[6] article 163 of which divided the Indonesian citizens into those of European ancestry, those of Foreign East ancestry, and those who were indigenous. Inspired by the article, Cornelis van Vollenhoven put forward the idea that Indonesia had 19 regions of *adat* law.[7] The political intent of *divide et empera* inherent in the reception theory was now strengthened.

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[4]Munawir Sjadzali, "Landasan Pemikiran Politik Hukum Islam dalam Rangka Menentukan Peradilan Agama di Indonesia," in Hukum Islam di Indonesia: Pemikiran dan Praktek, ed. Tjun Surjaman (Bandung: Remaja Rosdakarya, 1991), 41.

[5]Thalib, "Reception in Complexu," 44-45.

[6]It began applying on January 1, 1926. Soediman Kartodiprojo, Pengantar Tata Hukum di Indonesia, 11th edition (Jakarta: Ghalia Indonesia, 1987), I: 54; and Rien. G. Kartasapoetra, Pengantar Ilmu Hukum Lengkap (Jakarta: Bina Aksara, 1988), 36.

[7]They are as follows: "1. Aceh (excluding the Gayo- and Alaslands); 2. The Gayo-, Alas-, and Bataklands; 3. The Minangkabau territory; 4. South Sumatra; 5. The Malay territory, that is, the east coast of Sumatra (excluding the Batak area) together with the Riau-Lingga archipelago, of which the Malayan peninsula could be regarded as the British moiety); 6. Bangka and Bitung; 7. Borneo excluding Serawak, North Borneo; 8. The Minahasa; 9. The territory of Gorontalo; 10. South Celebes, together with the Buginese coast of the island; 11.

The Religious Courts, to which the Indonesian Muslims could have recourse, were also the target of the Dutch. In 1820, the Dutch had started to limit their functions, as attested in the *Regenten Instructie.* Although acknowledging their existence through the *Staatblad* of 1882, the Dutch neither provided allowances for the employees of these courts nor gave them the same status as other courts. Finally, the Dutch limited their jurisdiction only to marriage, divorce, and reconciliation (*rujūᶜ)* cases by enacting the *Staatblad* 1931 Number 53, which continued in effect up to 1988.[8] As a consequence of the firm hold of the reception theory, the decisions of Religious Courts, which "functioned no more than as an institution bestowing legal opinions (*fatāwā*),"[9] could be binding on unsatisfied litigants only after the National Courts (*Pengadilan-Pengadilan Negeri)* had reexamined them by taking *adat* law as the guide (*executoir verklaaring*).[10] Up to this stage, the Indonesian Muslims had seen their law all but ignored. According to Hasbi,[11] the legal politics of the Dutch, which aimed at weakening both Islamic law and the Religious Courts, help explain why Indonesian Muslims rejected Islamic law and looked for another law.

The Toraja territory; 12. The Ternate archipelago; 13. Ambon and Moluccas (Seram, Buru, etc.); 14. Dutch New Guinea; 15. Dutch Timor with its archipelago; 16. Bali and Lombok; 17. Central and East Java, with Madura; 18. The Central Javanese Principalities; 19. West Java (Pesundan)." Van Vollenhoven, Van Vollenhoven on Adat Law, tr. J.F. Holleman et. al., ed. J.F. Holleman (The Hague: Martinus Nijhoff, 1981), 44. See also, R. Van Dijk, Pengantar Hukum Adat, tr. A. Soehadi (Bandung: Sumur Bandung, 1982), 15; and J.C.T. Simorangkir and Woerjono Sastropranoto, Peladjaran Hukum Indonesia (Jakarta: Gunungagung, 1958), 7.

[8]Zain Ahmad and Abdul Basit Adnan, Sejarah Singkat Peradilan Agama Islam di Indonesia (Surabaya: Bina Ilmu, 1983), 29.

[9]Shiddiqi, "Pemikiran Muhammad Hasbi," 3.

[10]See for example, R. Tresna, Komentar H.I.R. (Jakarta: Pradnya Paramita, 1979), 59.

[11]Hasbi, Sjari'at Islam Mendjawab Tantangan Zaman (Yogyakarta: IAIN Sunan Kalijaga, 1961), 41. See also, Shiddiqi, "Pemikiran Muhammad Hasbi," 3.

This deplorable condition was a consequence of a series of Indonesian defeats at the hand of the colonialists.[12] The Indonesian struggle against the latter changed in the beginning of the twentieth century. In addition to Islam, which was still a symbol of that struggle, there was now also a new consciousness based on nationalism. What had been separate, localized struggles, became, when having the same goals, united in the movement to shape an independent Indonesia. According to Roeslan Abdulgani, the Boedi Oetomo movement reflected cultural-nationalism, while the Indische Party wanted to complement it with political-nationalism.[13] Between these two movements, the Sarekat Islam sought to find a place for its own ideas, and to perfect Indonesian nationalism by adding the dimension of monotheism-religiousness-Islamism.[14] The Sarekat Islam, however, did not succeed in realizing its political ideas because it was divided into two groups: the White Sarekat Islam (Muslims) and the Red Sarekat Islam (Communists). The division reflected, according to Robert R. Jay,[15] the principal conflict in the 1930's. The situation was compounded by the conflict between Islamic groups and secular nationalists. It was in such a situation that Hasbi offered his "nationalist" idea that can be seen by his calling for "Indonesian *fiqh*," as opposed to "Aceh *fiqh*;" Aceh was where he was born, and by not naming *fiqh* after his birthplace, he reveals a movement towards a deeper nationalism.

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[12]For example, the troops of Sultan Agung of Yogyakarta sent in 1628 and 1629 to attack Batavia (the former capital city of the Dutch and now Jakarta) were defeated. In 1667 Sultan Hasanuddin of Makassar was forced to sign the Bongaya agreement. The Bone wars (1824-1858-1860, and 1905-1906) and the Aceh wars (1873-1942) ended with the victory of the Dutch.

[13]Roeslan Abdulgani, "Peranan Muhammadiyah dalam Perjuangan Bangsa," in Muhammadiyah: Sejarah, Pemikiran dan Amal Usaha, ed. Tim Pembina Al-Islam dan Kemuhammadiyahan Universitas Muhammadiyah Malang (Yogyakarta: Tiara Wacana, 1990), 44.

[14]Ibid.

[15]Robert R. Jay, "Santri and Abangan: Religious Schism in Rural Central Java," Ph. D. diss., Harvard University, 1957, 194 quoted in Zaini Muhtarom, "Santri and Abangan in Java," M.A. thesis, McGill University, 1975, 80.

According to Hasbi, the Indonesian Muslim jurists (*fuqahāʾ*) had little understanding of *fiqh*, and their knowledge could be summed up in just one word: "*taqlīd*" (imitation). This fact was clear in their attitude of neglecting Indonesian customary practice as a basis of law. Instead of making Indonesian custom a determinant factor in their practice of *fiqh*, the *fuqahāʾ* (Muslim jurists) forced the application of non-Indonesian custom, such as that of Hijaz, that of Egypt, and that of India, documented in the *fiqh* works of the Muslim jurists of these countries which were spreading in Indonesia.[16] As followers of the Shafiites, Indonesian Muslims followed the existing *fatwā*s without questioning their rationale.[17] "Even today," regretted Hasbi, "we all too often only imitate and follow the statements of such *fiqh* books used in our country as Fath al-Muʿīn,[18] al-Taḥrīr,[19] al-Bājūrī,[20] ect., which were written in the periods of the decline of *fiqh* and of the crystallization of blind *taqlīd*. We assume that everything written in these books must be obeyed. To deviate from that is deemed going astray."[21]

In addition, Indonesian Muslims had deviated from the teachings of their *madhhab's* founder, al-Shāfiʿī, because they did not directly follow his teachings but rather those of the later Shāfiite *ʿulamāʾ*. The standard *fiqh* books of Indonesian

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[16]Hasbi, Sjari'at Islam, 34, 41 and 42; idem, Perbedaan Mathla' Tidak Mengharuskan Kita Berlainan pada Memulai Puasa (Yogyakarta: Ladjnah Ta'lif Wan Nasyr Fakultas Syari'ah IAIN Sunan Kalijaga, 1971), 31. See also Shiddiqi, "Pemikiran," 4; and idem, "Hasbi Ash Shiddieqy," 442.

[17]Deliar Noer, Gerakan Modern Islam di Indonesia 1900-1942 (Jakarta: LP3ES, 1984), 320.

[18]The Fath al-Muʿīn was "written by the 16th century South Indian scholar Zayn al-Dīn al-Malībarī, a student of Ibn Ḥajar." Martin van Baruinessen, "Kitab Kuning: Books in Arabic Script Used in the Pesantren Milieu," Bijdragen, Deel 146 2e en 3e Aflevering 1990, 247.

[19]Hasbi Referred to Taḥrīr al-Tullāb. See Hasbi, Sjari'at Islam, 43.

[20]The Bājūrī is a *ḥāshiya* of the Fath al-Qarīb (of Ibn Qāsim d. 918/1512) by al-Bājūrī, d. 1277/1860-1. See Bruinessen, "Kitab Kuning," 245.

[21]Hasbi, Pengantar Hukum Islam, 6th edition (Jakarta: Bulan Bintang, 1980), I: 164.

Muslims were not those by al-Shāfiᶜī but consisted of both summaries and commentaries on his works by others. For example, the Tuhfa of Ibn Ḥajar al-Haythamī (d. 1565) and the Nihāya of al-Ramlī (d. 1596), much admired in the traditional institutions of learning, were actually the commentaries on the Minhaj al-Tālibīn of Nawāwī (d. 1277).[22] "Therefore," challenged Hasbi, "if we acknowledge that we follow (*mentaqlidi*) al-Shāfiᶜī, we should know that al-Umm has been published and can be bought cheaply. If we really follow al-Shāfiᶜī, let's get back to it [al-Umm]. We should follow and practice the teachings of al-Umm. We should exclude that which contradicts them. This is consistency."[23] Furthermore, according to Hasbi, "the existing *fiqh* books were, because of changing times, no longer adequate. The cases of assurance, cooperation, and trade, for example, all needed a new *ijtihād* because they were not dealt with in such prevalent works of *fiqh* as the Fath al-Muᶜīn, Tahrīr al-Tullāb, Tuhfat al-Tullāb,[24] al-ᶜIqnāᶜ,[25] Fath al-Wahhāb,[26] the Tuhfa, [27] the Nihāya,[28] and so on."[29]

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[22]Noer, Gerakan Modern Islam, 320. See also, Shiddiqi, "Hasbi Ash Shiddieqy," 462; Kusumadi Pudjosewojo, Pedoman Pelajaran Tata Hukum Indonesia, 6th edition (Jakarta: Sinar Grafika, 1990), 83-84; Bruinessen, "Kitab Kuning", 248-249; and Karel A. Steenbrink, Beberapa Aspek tentang Islam di Indonesian Abad Ke-19 (Jakarta: Bulan Bintang, 1984), 120.

[23]Hasbi, Pengantar Hukum Islam, I: 163.

[24]The Tuhfa al-Tullāb is Zakariyāʾ al-Anṣārī's commentary on his Tahrīr Tanqīh li al-Lubāb fī Fiqh al-Imām al-Shāfiᶜī based on al-Maḥāmilī's (d. 415/1024) Lubāb al-Fiqh. Bruinessen, "Kitab Kuning," 249.

[25]It is the work of "Sharbīnī (d. 977/1569/70." Bruinessen, "Kitab Kuning," 246.

[26]"The Fath al-Wahhāb [is] a commentary by Zakarīyā' Anṣārī on his Manhaj al-Tullāb, which is a summary of the Minhāj." Bruinessen, "Kitab Kuning," 246.

[27]Hasbi referred to Tuhfat al-Tullāb by Ibn Ḥajar al-Haytamī (d. 973/1565-6). Hasbi, Ruang Lingkup Ijtihād Para Ulama dalam Membina Hukum Islam (Bandung: Unisba, 1975), 16.

[28]Hasbi referred to Tuhfat al-Tullāb of Shams al-Dīn al-Ramlī (d. 1004/1595-6). Hasbi, Ruang Lingkup, 16-17.

[29]Hasbi, Sjari'at Islam, 43. See also, idem, Ruang Lingkup, 17.

Hasbi observed that the Islamic world, including Indonesia, experienced two different trends of Islamic reform when he began to undertake his Islamic legal reform. First, the rationalist-secularist (*ilḥād* and *zandaqa*) group which included men like Ṭāhā Ḥusayn, ᶜAlī ᶜAbd al-Rāziq (Egypt), Naẓīra Zayn al-Dīn (Lebanon), Mirza Ghulām Aḥmad (India), as well as Soekarno (Indonesia);[30] this group he rejected. Second, the [fundamentalist] group which advocated going "Back to the Qur'ān and the Sunna," with their components like Muṣṭafā Ṣadīq, Buḥait (Egypt), al-Ghalāyaynī (Lebanon), and a number of *ᶜūlamāᵓ* in India. Hasbi put Muḥammad Rashīd Riḍā (Egypt) at the top of the second group.[31] Taking his position in embarking on Islamic legal reform in Indonesia, Hasbi chose the second group. "As Muslims," he said, "we should insist that every rethinking of Islam aimed at damaging the rules of religion, damaging the *ᶜibāda* due to Allāh and neglecting the teachings of Allāh and His messenger, should be rejected. We should totally challenge it."[32] Given this orientation, Hasbi used the phrase "Indonesian *fiqh*" to express his notion of legal reform.

It seems that the term Indonesian *fiqh* is one that Hasbi employed to reconcile the Indonesian Muslim nationalists and the Indonesian Muslim Reformists. Making the Indonesian custom one of the sources of the Indonesian *fiqh,* he tried to render ineffective the Dutch legal politics of *divide et empera* which was inherent in the reception theory. Consequently, the policy of the government of the Indonesian Republic to give a greater chance to the *adat* law to serve as the basis of the development of the Indonesian legal system ceases to be a threat to

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[30]Hasbi, "Me'moedah'kan" I, 8404. On Seokarno's ideas of Islamic reform, see Badri Yatim, Seokarno, Islam dan Nasionalisme: Rekonstruksi Pemikiran Islam-Nasionalis (Jakarta: Inti Sarana Aksara, 1985), especially 119-187.

[31]Idem, "Me'moedah'kan" II, 8413.

[32]Ibid. See also, idem, "Me'moedah'kan Pengertian Islam" III, Pandji Islam Boendelan Tahoen Ketoedjoeh (1940), 8452.

Islamic law,[33] because, in his view, *adat* itself is Islamic. It is, of course, the responsibility of the Indonesian Muslim jurists to examine carefully Indonesian *adat* which will ultimately be submitted to the government with the view of passing it as legislation.

The foregoing does not mean, however, that the foundation of the Indonesianness, as established by Hasbi, ran smoothly and without criticism. Kuntowidjojo, for example, argues

> In the context of Indonesianization, Islam has degenerated to a certain degree. In other words, Islamic rationalization has fallen, becoming mystical, static, and local in terms of culture. We therefore can ask, if one wishes to 'Indonesianize' Islam, then in which direction should he proceed? Do we still hesitate over what is intended by Indonesianization, because Islam in Indonesia has fallen from a universal to a local stage? If there is to be Indonesianization again, then what would the shape [of Indonesianized Islam] be?[34]

Perhaps more to the point, Ali Yafi noted that "*fiqh* is the most concrete manifestation of Islam in social life. Since Islam is universal, so then is the *fiqh*. Its main source is the Qur'ān. Therefore, once again, the spatial and temporal *fiqh*, such as Indonesian *fiqh*, Pakistani *fiqh*, and so forth do not need to exist."[35] "I do not agree with term 'Indonesian *fiqh*'," says Ibrahim Hosen, "because *fiqh* is universal [while Indonesian *fiqh* is local]."[36] Further, while the debate on Indonesianness becomes more interesting,[37] the problem of Indonesian *fiqh* is

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[33]On this tension, see Ahmad Azhar Basyir, Hukum Adat bagi Umat Islam (Yogyakarta: Nurcahya, 1983), iii. See also, Bushar Muhammad, Asas-Asas Hukum Adat: Suatu Pengantar, 8th edition (Jakarta: Pradnyaparamita, 1990), 101.

[34]Kuntowijoyo, Dinamika Sejarah Umat Islam Indonesia (Yogyakarta: Shalahuddin Press, 1984), 43-44.

[35]Ali Yafi, "Matarantai yang Hilang," Pesantren No. 2/Vol. II/1985, 36.

[36]Ibrahim Hosen, "Pemerintah sebagai Madzhab," Pesantren No. 2/Vol. II/1985, 45-46.

[37]See for example, Rifyal Ka'bah, "Wawasan Keindonesiaan dalam Kontek Islam Universal," in Pembaharuan Pemikiran Islam di Indonesia, ed. Akmal Nasery B. (Bandung: Mizan, 1990), 16.

neglected. When dealing with the Indonesianness theme, one tends moreover to think of Abdul Mukti Ali (1979)[38] or Nurcholish Madjid[39] and not Hasbi as its founding father, "the Shaykh of Indonesian *Fuqahāʾ*" to use Ahmad Sjadzali's term.[40]

Before we proceed further, we must note that Hasbi's ideas will be discussed at two different levels. First, to understand their significance, they are elaborated in the context of the reform of Indonesian Islamic law, by taking only some aspects of Islamic law of the reform movements of Indonesia (Chapter I, section B).[41] Second, his theory of *ijtihād* is analyzed as both "passive" theory

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[38]See for example, Bassam Tibi, The Crisis of Modern Islam: A Preindustrial Culture in the Scientific-Technological Age, tr. Judith von Sivers (Salt Lake City: University of Utah Press, 1988), 57; and idem, Islam and the Cultural Accommodation of Social Change, tr. Clare Krojl (Boulder: Westview Press, 1990), 16. It is understandable that Tibi praises Ali, whom he considers successful in bridging the gap between the universality of Islam and its particularities in the Indonesian context, because the latter, as a graduate of a Western university (viz. the Institute of Islamic Studies at McGill University, 1957) wrote in English. See Howard M. Federspiel, Muslim Intellectuals and National Development in Indonesia (New York: Nova Science, 1992), 68. On the other hand, although Hasbi has the same ideas, and he presented them much earlier than Ali, the former wrote in the Indonesian language so that it is very difficult for non-Indonesian scholars who do know the language to become acquainted with his thought.

[39]Commenting on Madjid collection of essays, the publisher says: "from another aspect, as a supporter of Neomodernism, he [Nurcholish Madjid] tends to put the basis of Islamness in the national context--in this regard, the Indonesianness." See Nurcholish Madjid, Islam Kemodernan dan Keindonesiaan, ed. Agus Edi Santoso, 4th edition (Bandung: Mizan, 1990), backcover.

[40]Ahmad Sjadzali, "Pemikiran Prof. Dr. TM. Hasbi Ash Shiddieqy tentang Fiqh bagi Umat Islam Indonesia," National Seminar Paper, IAIN Sunan Kalijaga, 1986, 1.

[41]To answer the substantial question of his dissertation: "Who is the more devoted person in developing these aspects of law (*fiqh*), especially in Indonesia," Shiddiqi should have compared Hasbi with non-Indonesian Muslim jurists such as Abū Zahra (Egypt), ʿAbd al-Razzāq al-Sanhūrī (Egypt), and Ṣubḥī Maḥmāṣānī (Lebanon), if he wants to put Hasbi on an Islamic international scale, on the one hand. On the other hand, Shiddiqi should have compared Hasbi with Indonesian Muslim jurists such as A. Hassan and Hazairin to put Hasbi on a national Indonesian scale. Shiddiqi, however, compared Hasbi with Muḥammad ibn ʿĀbd al-Wahhāb and the *Padris* (Minangkabau, Indonesia), whom he classified as the reformers who stressed the Islamic theological purification; with Jamāl al-Dīn al-Afghānī (Afghanistan) and Cokroaminoto (Indonesia), whom he classified as the reformers who stressed the unification of Islamic politics; and with Muḥammad ʿAbduh (Egypt) and Ahmad Dahlan (Indonesia), who he classified as the

(Chapter II, section A), "active" (Chapter II, Section B). By "passive" theory, I mean that his ideas of *ijtihād* will be analysed in themselves, while "active" theory, his theoretical ideas of collective *ijtihād* as applied to Indonesian socio-political structures. For the latter two aspects of the study, his thought will be discussed essentially with reference to his own works, and secondary sources will be used rather sparingly, only to complement what can be learnt directly from Hasbi's own writings.

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reformers who stressed aspects of religious moral, social solidarity and educational improvement. See Shiddiqi, "Hasbi Ash Shiddieqy," 8. It follows that the scheme Shiddiqi (p. 58) coins to put Hasbi's position in the Islamic legal reform both in Indonesia and in the Islamic world, cannot consistently be understood from the criterion he makes because he compares uncomparable things. That is why the current thesis also dealts with the themes of Islamic legal reform in Indonesia.

CHAPTER I

THE REFORM OF INDONESIAN ISLAMIC LAW: HASBI'S POSITION

Dealing with Hasbi's participation in the Islamic legal reform movement in Indonesia amounts to discussing two interrelated aspects of the history of Indonesian law which have not thus far received sufficient attention by scholars. While the discussion of Hasbi's work has begun in academic circles, particularly in Indonesia,[1] Islamic legal reform in Indonesia has never been studied systematically, neither by Indonesian nor non-Indonesian scholars.[2] While many books have been written in a biographical style on the Indonesian Islamic legal reformists,[3] these,

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[1]Such as Ilmus, "Prof. Dr. Tgk. M. Hasbi Ash Shiddieqy. Ahli Hadits Ternama di Indonesia, Pengarang Kitab-Kitab Agama yang Laris, Putera Atjeh Pertama yang Mendjadi Professor," Gema Ar Raniri, Th. 1 no. 6 (1968); Zamahsari Junaidi, "Prof. Dr. TM Hasbi Ash-Shiddieqy dan Tafsirnya," Undergraduate thesis, IAIN Sunan Kalijaga, 1979; idem, "TM Hasbi, Mujtahid Muqorin yang Produktif," Pesantren No. 2, vol. II, 1985; Abdul Djalal, "Tafsir al-Maraghi dan Tafsir an Nur. Sebuah Studi Perbandingan," Ph. D. diss., IAIN Sunan Kalijaga, 1985; Nourouzzaman Shiddiqi, "Pemikiran Muhammad Hasbi Ash Shiddieqy tentang Pembinaan Hukum Islam di Indonesia," National Paper Seminar, IAIN Sunan Kalijaga, 1986; idem, "Muhammad Hasbi Ash Shiddieqy dalam Perspektif Pemikiran Islam di Indonesia," Ph. D. diss., IAIN Sunan Kalijaga, 1987; and Zainal Muttaqin, "Pola Ijtihad Hukum Muhammad Hasbi Ash Shiddieqy dan A. Hassan (Studi Komparatif: Sistem dan Metode Ijtihad Hukum Islam)," Undergraduate thesis, IAIN Sunan Kalijaga, 1990.

[2]For example, Anderson mentions Indonesia twice only. Norman Anderson, Law Reform in the Muslim World (London: The Atholone Press, 1976), 11 and 26. While he states (page 11) that: ". . . . and here [in Indonesia and much of Malaysian] the structure of society is largely matriarchal - especially for example, in the Minangkabau region of Sumatera," the matriarchal social structure is minority in Indonesia and not the majority. Bashir even believes that the matriarchal social structure is unique for Minangkabau. Ahmad Azhar Bashir, "Niẓām al-Mīrāth fī Andūnisiā: bayn al-ʿUrf wa al-Qānūn," M.A. thesis, Cairo University, 1964/1384, 135. Furthermore, Anderson's discussion on the reform of Indonesian Islamic law is a periphery and out of date.

[3]For example, Tamar Djaja, ed., Riwayat Hidup A. Hassan (Jakarta: Mutiara, 1980); Abdul Munir Mulkan, Warisan Intellektual K.H. Ahmad Dahlan dan Amal Usaha Muhammadiyah (Yogyakarta: Persatuan, 1990); and Panitia Penerbitan Buku Untuk Memperingati Prof. Mr. Dr. Hazairin, ed., Pembaharuan Hukum Islam di

unfortunately, do not treat the subject in a systematic manner. Two other characteristics of the writing on Islamic legal reform in Indonesia are that it is discussed as a part of Islamic reform in Indonesia[4] and as a facet of the development of the Indonesian legal system.[5] This chapter will place Hasbi in the context of Indonesian Islamic legal reform.

A. Biographical Sketch of Hasbi

Muhammad Hasbi Ash Shiddieqy was born in Lhok Seumawe, on March 10, 1904. According to family tradition, he was the thirty-seventh descendant of Abū Bakr al-Ṣiddīq, the first caliph of Islam.[6] Ḥasbi's father, Muḥammad Ḥusayn, was an *ᶜālim* (Islamic scholar). Like his father, his mother, ᶜAmra bint ᶜAbd al-

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Indonesia in Memoriam Prof. Mr. Dr. Hazairin (Jakarta: Universitas Indonesia Press, 1981).

[4]For example, B.J. Boland, The Struggle of Islam in Modern Indonesia (The Hague: Martinus Nijhoff, 1971; and Deliar Noer, Gerakan Modern Islam di Indonesia 1900-1942 (Jakarta: LP3ES, 1984).

[5]Such as Fathurrahman Jamil, "Upaya Pembaharuan Hukum Islam di Indonesia," Mimbar Agama dan Budaya, Th. II, No. 6, 1984; Muhammad Daud Ali, "The Position of Islamic law in the Indonesian Legal System," in Islam and Society in Southeast Asia, ed. Taufik Abdullah and Sharon Shiddique (Kuala Lumpur: Institute of Southeast Asian Studies, 1986); M. Rusaini Rusin, "Hukum Islam dalam Tata Hukum Indonesia," Studia Islamika 8/3 (Juli-September 1978); idem, "Prospek Hukum Islam dalam Negara Republik Indonesia yang Berdasarkan Pancasila," Studia Islamika 14/4 (Januari-Juni 1981); and S.A. Ichtiyanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia," in Hukum Islam di Indonesia: Pembentukan dan Perkembangan, ed. Tjun Surjaman (Bandung: Rosdakarya: 1991).

[6]His line of descent or *Silsilat al-Dhahab* is: "Abū Bakr al-Ṣiddīq, Muḥammad, Qāsim, Jaᶜfar, Yazīd, Ḥasan, ᶜAlī, Yūsuf, ᶜAbd al-Khāliq, ᶜArifīn, Muḥammad, ᶜAbd al-ᶜAzīz, Shams, ᶜĀmir Kilāl, Bahāᵓ al-Dīn, ᶜAlā al-Dīn, Yaᶜqūb, Marwā Jūd al-Dīn Muḥammad Zāhid, Darwīsh, Khawājikī, Muᶜayyid al-Dīn, Aḥmad al-Farr, Muḥammad al-Maᶜṣūm (Faqīr Muḥammad), Sayf al-Dīn, Aḥmad Ḍiyāᵓ al-Dīn, Fāṭimī, Muḥammad Tawfīqī, Muḥammad Ṣāliḥ, Shāṭiᶜ, ᶜAbd al-Raḥmān, Muḥammad Suᶜūd, Muḥammad Ḥusayn, Muḥammad Ḥasbi al-Ṣiddīqī." Djalal, "Tafsir an-Nur," 197 and 586. See also, Shiddiqi, "Hasbi Ash Shiddieqy," 500.

ᶜAzīz, also came from a *teungku (ᶜālim)* family.[7] Although hailing from a family which had an opportunity to acquire Western education provided by the Dutch, his education was apparantly chaotic. It was neither systematic nor regular because his father did not wish to have him enrolled in a Dutch school owing to apprehensions about a Dutch strategy to take Indonesian Muslims away from their religion.[8] His father even "prohibited him from learning the Latin alphabet because it was *kaphe* [derived from Arabic: *kufr*],"[9] and therefore he was illiterate of the alphabet. Instead, to sharpen his Islamic spirit his father sent him to *pesantren.*[10] From 1912 to 1915, he went to the *pesantrens* of *Teungku Chik*[11] Piyeung, of *Teungku Chik*

7Junaidi, "TM Hasbi," 61. *Teungku* is an "honorific title of *ᶜālim* in Aceh....for those who can show an expertise in various aspects of Islamic science." Djalal, "Tafsir an Nur," 196. See also, Nazaruddin Sjamsuddin, The Republican Revolt: A Study of Acehnese Rebellion (Singapore: Institute of Southeast Asian Studies, 1985), 31 and 338.

8On the Dutch strategy, see Robert van Neil, "From Netherlands East Indies to Republic of Indonesia, 1900-1945," in The Development of Indonesian Society From the Coming of Islam to the Present Day, ed. Harry Aveling (New York: St. Martin Press, 1980), 106. See also, Hamid Algadri, Politik Belanda Terhadap Islam dan Keturunan Arab di Indonesia (Jakarta: Haji Masagung, 1988), 56-57.

9Shiddiqi, "Hasbi Ash Shiddieqy," 158. The same thing was experienced by many others, including Harun Nasution, who said: "My grandparent always asked me not to learn Dutch. It was a language of the kafir (Arabic: *kāfir*) (unbeliever) because the language of Heaven would be Arabic. If you answer in Dutch, you would enter Hell." Harun Nasution, "Menyeru Pemikiran Rasional," in Refleksi Pembaharuan Pemikiran Islam: 70 Tahun Harun Nasution, ed. Panitia Penerbitan Buku dan Seminar 70 Tahun Harun Nasution Bekerjasama dengan Lembaga Studi Agama dan Filsafat (Jakarta: Lembaga Studi Agama dan Filsafat, 1985), 5.

10As a traditional boarding school, it has five basic elements: *pondok* or *asram*; mosque; *santri* (student); teaching of Islamic classical books; and *kiyai* (the leader). See Zamakhsyari Dhofier, Tradisi Pesantren: Studi tentang Pandangan Hidup Kiyai, 4th edition (Jakarta: LP3ES, 45; and B. Lewis et al., eds., The Encyclopaedia of Islam, sv. "Islam in Indonesia" by C.A.O. van Nieuwenjuijze (Leiden: E.J. Brill, 971), III: 1227. Pesantren was the only place of education for the public before the school system existed. Ismail Yakub, "Gambaran Pedidikan di Aceh Sesudah Perang Aceh-Belanda Sampai Sekarang," in Bunga Rampai tentang Aceh, ed. Ismail Suny (Jakarta: Brata Karya Aksara, 1980), 322. "There generally speaking are two kinds of pesantren: (1) that of *salafī*, a pesantren that still maintains the teaching of classical Islamic texbooks as the core of pesantren education; (2) that of *khalafī*, a pesantren that has included secular subjects in *madāris* it develops." Pustaka Azet, Lexicon Islam, s.v. "Pesantren," 589. Hasbi belonged to the first category of the *pesantren.*

11*Teungku Chik* is *Teungku Besar* (Great *Teungku*) which is called *Teungku di Bale*, while *Teungku Rongkang* is a senior santri (student of pesantren) who

of Blang Kabu Geudong, and *Teungku Chik* of Blang Manyak Samakurok respectively, spending only one year at each. Hasbi spent two more years at *Teungku Chik* Idris of Tunjungan Samalanga, one of the best *pesantren* specializing in *fiqh*, and the *pesantren* of *Teungku Chik* of Hasan Krueng Kale. In 1920, he received a certificate from the latter, allowing him to open his own *pesantren*. Hasbi's father's prohibition against learning the Latin alphabet was stressed during his study in the *pesantren* because the *pesantrens* in Aceh were very anti-Dutch. Realizing the disadvantages of being disfamiliar with the Latin alphabet, Hasbi asked his friend *Teuku* Muhammad to teach it to him.[12]

Upon his return from Krueng Mane, Hasbi met Al-Kalali, who had just moved to Lhok Seumawe from Singapore. While in Singapore he was one of "the founders of Al-Imam [a modernist] journal in 1906,"[13] Al-Kalali founded the Islam Menjadi Bersatu (Islam Becomes United), a modernist organization, in Kutaraja in 1920. Al-Kalali lent Hasbi some of the works used by modernists such as Ibn Taymiyah's Fatāwā Ibn Taimiyah and Majmūᶜat al-Rasāᵓil, as well Ibn al-Qayyim's Zād al-Maᶜād, Iᶜlām al-Muwaqqiᶜīn, Badāᵓiᶜ al-Fawāᵓid and Shifāᵓ al-ᶜAlīl. Al-Kalali also accompanied Hasbi to Surabaya in 1926 to help deepen the latter understanding of modernist thoughts at Al-Irsyad school.[14] Upon his return from study at Al-Irsyad of Surabaya in 1927, Hasbi joined the Islam Menjadi Bersatu. In 1928 he was appointed the principal of a new Al-Irsyad school, which the

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teaches at the pesantren. Yakub, "Gambaran Pendidikan," 325. Yakub, however, uses the term *teuku* in the sense of *teungku*, and *vice versa*. *Teuku*, abbreviated T., is different from *Teungku* with Tgk. abbreviation. While the latter, as referred to, means *ᶜālim*, the former means the Achenese aristocracy. See Boland, The Struggle of Islam, 69; and Sjamsuddin, The Republican Revolt, 338.

[12]Shiddiqi, "Hasbi Ash Shiddieqy," 158.

[13]Endang Shaifuddin Ansari and Syafiq A. Mughni, A. Hassan: Wajah dan Wijhah Seorang Mujtahid (Bandung: Firma Persatuan Islam, 1985), 9.

[14]R.H.A. Soenarjo, Pidato Promotor Pada Upacara Pengerahan Derajat Doktor Honoris Causa, IAIN Sunan Kalijaga, 1975; 2; Shiddiqi, "Hasbi Ash Shiddieqy," 161-162; and Noer, Gerakan Modern Islam, 77.

Netherlands East Indies government had closed on the basis of the Teacher Ordinance of 1905 (*Staatblad* 1905: 550, and was renewed in 1925).[15]

In 1929, Hasbi was appointed the principal of the Al-Huda school, founded in Krueng Mane in the same year. In 1931, he was elected a leader of the Lhok Seumawe branch of the Jong Islamiten Bond,[16] an organization to the foundation of which he had contributed in his area. Hasbi moved from Lhok Seumawe to Kutaraja in 1933,[17] where he joined the executive board of the Nadil Ishlahil Islami

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[15]Shiddiqi, "Hasbi Ash Shiddieqy," 221. The Teacher Ordinance was "an ordinance meant to control teachers who taught Islam." See, for example, M. Hasbi Amiruddin, "Apresiasi Dayah Sebagai Suatu Lembaga Pendidikan dan Penyiaran Agama Islam," Ar-Raniry No. 68 1990, 68; Aqib Suminto, "Kata Pengantar Panitia," in Refleksi Pembaharuan , ix.

[16]Some members of Jong Java (founded on March 7, 1915) such as Agus Salim, Syamsurizal, and Kasman Singodimedjo were not satisfied with this organization which was secular. They felt that although etnically divided, Indonesia was after all made up of a Muslim majority. Consequently, they founded the Jong Islamiten Bondin January 1925, following the seventh Congress of the Jong Java (Yogyakarta from December 20 to 25, 1924), to unite Indonesia by offering Islam as the unifying factor. They worried about the disintegration of Indonesia for ethnic reasons, a process they feared had begun with the emergence of some local ethnic oriented youth organizations such as Jong Sumatra (founded on December 9, 1917) and Jong Ambon (founded in 1918). See, for example, Djauharuddin A.R., et. al., Peranan Umat Islam dalam Pembentukan dan Pembangunan Negara Berdasarkan Pancasila & UUD'45 (Bandung: Angkasa, 1985), 17-18; and Marwati Djoened Poesponegoro and Nugroho Notosusanto, Sejarah Nasional Indonesia, 4th edition (Jakarta: Balai Pustaka, 1990), V: 191.

[17]Hasbi's move was for political reasons: he tried to escape from the Dutch who controlled his actions in the Jong Islamiten Bond. Shiddiqi, "Hasbi Ash Shiddieqy," 172-173. Yakub, however, mentions that it was because of the traditional *ʿulamāʾs* reaction toward his article "Penoetoep Moeloet" (the Lid of the Mouth). In this article, Hasbi considered as *bidʿa* (innovation) some religious practices of Traditionalist Muslims such as *talkin* [*talqīn*] reciting *uṣallī* (I pray) in the beginning of prayer, and *selametan.* Yakub, "Gambaran Pendidikan," 339. Unfortunately, Shiddiqi (p. 214), although quoting at length Yakub's statement (p. 339), omits the passage according to which Hasbi had to move on account of writing the above-mentioned article. Shiddiqi does not include the episode of this article among the reasons which caused Hasbi's move (Shiddiqi, pp. 172 and 173), even though he does quote Yakub's statement that "because of his [Hasbi's] loud voice the people were startled," (Shiddiqi, p. 212; Yakub, p. 339). Shiddiqi also notes (p. 515) that the "Penoetoep Moeloet" was Hasbi's first work (p. 515). In the light of foregoing, it may be concluded that Hasbi had problems not only with the Dutch, for espousing the cause of Indonesian independence, but also with the *Kaum Tua* (old group) because of his support for Islamic legal reform.

Selametan is "(Javanese from Arabic) A communal feast, popular among the nominal Muslim (*abangan*) population on Java, given to commomerate important events in an individual's life. The ceremony attached to the meal has an animistic, and shamanistic flavor." Howard M. Federspiel, Persatuan Islam Islamic

(Club of Islamic Reform), which was founded in 1932 with T.M. Usman as its leader. The Union of All Aceh Islamic Teachers,[18] elected Hasbi its leader after its foundation in 1936. Besides teaching both at Jadam Montasik in 1937 and at the Iskandar Muda School in Lam Paku in 1940, he founded the Darul Irfan school in 1940.[19] As a member of the Muhammadiyah since 1933, he was appointed, after his election as the leader of Kutaraja branch, the Muhammadiyah Konsul (Leader) of Aceh for the period of 1943-1946.[20]

Hasbi, who was neither a member of the All Aceh Union of *ʿUlamāʾ* (PUSA)[21] nor a member of the Fujiwara movement,[22] was appointed to some important positions by the Japanese after their defeating the Dutch: he was made a member of the Islamic Court; Vice Leader of the Islamic Council for the Aid of

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Reformation in Twentieth Century Indonesia (New York: Cornell University, 1970), 209.

[18]The organization was established "with the aim at developing the quality of religious schools and move towards their perfection step by step." Penjiaran (Brochure) no. 2 tanggal 20 Oktober 1936 quoted in Yakub, "Gambaran Pendidikan," 352.

[19]Shiddiqi, "Hasbi Ash Shiddieqy," 218.

[20]Ibid., 171-175; Muttaqin, "Pola Ijtihad Hukum," 88-89; and MT. Arifin, Muhammadiyah Potret yang Berubah (Surakarta: Institut Gelanggang Pemikiran Filsafat Sosial Budaya dan Kependidikan Surakarta, 1990), 168.

[21]PUSA (Persatuan Ulama'-Ulama' Seluruh Aceh), "was founded in 1358 (A.D. 1939) as an othodox counterbalance against the reformist teachings of Muhammadiyah. The members of P.U.S.A. [PUSA] joined in the fight for independence, but when the fight was won they turned against the Indonesian Republic and tried to secede from it." P.A. Husen Djajadiningrat, "Islam in Indonesia," in Islam The Straight Path: Islam Interpreted by Muslims (Delhi: Motilal Banarsidas, 1958), 401. See also, Harry J. Benda, "South-East Asia in the Twentieth Century," in The Cambridge History of Islam, ed. P.M. Holt, Ann K.S. Lambton, and Bernard Lewis (Cambridge: Cambridge University Press, 1970), II: 198.

[22]Fujiwara was an intelligence agency of the Japanese. He then founded the Fujiwara-kikan movement with the aim at organizing the Acehnese popular resistance against the Dutch and at the same time to welcome the coming of the Japanese army which was portrayed as liberating the Acehnese people from the Dutch. After Penang was occupied by the Japanese on March 12, 1942, a number of young Acehnese belonging to the All Aceh Union of *ʿUlamāʾ* joined to the F-kikan movement in order to hasten the fall of the Dutch administration in Penang, Aceh. See, for instance, Yakub, "Gambaran Pendidikan," 335; and Taufik Abdullah, ed., Sejarah Umat Islam Indonesia (Jakarta: Majelis Ulama Indonesia, 1991), 274.

Greater East Asia; and a member of the Representatives of All Sumatera and Malay *ʿŪlamāʾ*'s Meeting in Singapore.[23] Based on *Aceh Syu Rei* no. 7, issued on May 17, he was appointed a member of the People's Representative Assembly of Aceh. In November, 1943, he was appointed a member of the People's Representative Assembly of Sumatra.[24]

The dictum that "a revolution often devours its own children" can be applied to Hasbi's experience in the early days of Indonesian independence. Beginning in March 1946, he was imprisoned for more than a year in both Lembah Burnitolang and Takengon, [25] without a valid reason and without a trial, by the so-called Social Revolutionary Movement in Aceh.[26] Moreover, for another year his movement was

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[23]Shiddiqi, "Hasbi Ash Shiddieqy," 185-186.

[24]Ibid., 187.

[25]According to Shiddiqi, Hasbi, after having been arrested here, wrote a preliminary draft of Al-Islam (1404 pages). Shiddiqi, "Hasbi Ash Shiddieqy," 200. In addition, according to Hasbi himself, he wrote Perbendaharaan (Kumpulan) Dzikir dan Do'a (The Collection of Remembrance and Praying) and Pedoman Shalat (The Manual of Praying) while he was being harassed by the Social Revolutionary Movement in Aceh. See Hasbi Ash Shiddieqy, Perbendaharaan (Kumpulan) Dzikir dan Do'a (Jakarta: Bulan Bintang, 1956), xxiv; idem, Pedoman Shalat, 3th edition (Jakarta: Bulan Bintang, 1957), 18.

[26]There were two social revolutions in Sumatra: that of East Sumatra led by Karim DP, a leftist, which took place in March 1946, and that of the Aceh Social Revolutionary Movement. The latter which was directed from Idi and was led by Husein Mujahid (a former Youth Leader of PUSA and a representative member in the meeting with The Highest Commader of Japanese Military in Shonanto (Singapore)), took place from the middle of December 1945 to January 1946. The latter represented a virtual "civil war" between the two main groups of Acehnese people: the *ʿulamāʾ* (*teungku*) and the aristocratic (*uleebalang*) groups.

According to the traditional Acehnese view, while worldly affairs were formally under the control of the *Sulṭān*, their daily application was left in the hands of about 100 district leaders, the *uleebalang* (feudal class), with traditional rights as Acehnese aristocrats. On the other hand, spiritual affairs were the domain of the *teungku*. This division of powers was broken by the Dutch and caused the Acehnese to proclaim a war which lasted from March 1873, to January 10, 1903. The Dutch now took the *Sulṭān* prisoner, and posted *uleebalangs* as civil administrative officers. These officers oppressed the Acehnese people by taking taxes arbitrarily, which caused tensions between them and the *teungkus*, who had formerly been their friends. After the defeat of the Dutch, the *teungkus* who united in the PUSA crushed the *uleebalangs*. "PUSA" now bore a different meaning, being understood as *Pembasmian Uleebalang-Uleebalang Seluruh Aceh*, (The Extenguishing of All Aceh Uleebalangs). See Boland, The Struggle of Islam, 72-73; George McTurnan Kahin, Nationalism and Revolution in Indonesia (Ithaca: Cornell University Press, 1952), 179; Leslie Palmier, Indonesia (New

restricted to particular geographical areas. Soon after regaining his freedom,[27] he joined the Majelis Syura Muslimin Indonesia (Consultative Political Party of Indonesian Muslims), and then became the leader of its *Kabupaten* [Regent] Aceh branch. Upon his return from presenting a paper at the Congress of Indonesian Muslims in Yogyakarta, entitled "Manual of Muslim Struggle on the Question of the State,"[28] Hasbi founded a Lhok Seumawe branch of Persatuan Islam (Islamic Unity) In 1951, at the invitation of the Minister of Religious Affairs of Indonesia, he went to Yogyakarta to be a lecturer at State Islamic Higher Education Institution.[29] He was sworn in as a member of the Constituent Assembly, representing the Masyumi, on November 10, 1956.[30]

As a government official, Hasbi held some important positions. He was the principal of the Preparation School for the State Islamic Higher Educational Institute, after he had begun his teaching career at the Teacher School for Islamic Judges. He was appointed[31] Dean of the Faculty of *Sharīᶜa* at the Sunan Kalijaga IAIN (State Institute of Islamic Studies), Yogyakarta, where he served until 1974. He has served as the Dean of the Faculty of *Sharīᶜa*, a branch of the Yogyakarta

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York: Walker and Company, 1965), 76; E. Nugroho, chief editor, Ensiklopedia Nasional Indonesia, s.v. "Revolusi Sosial Aceh," by Masyhuri (Jakarta: Cipta Adi Pustaka, 1989), 7: 47; and Harry J. Benda, "South-East Asian Islam," 204.

[27]In mid-1947 because of the intervention of both the national leader of Muhammadiyah, A.R. Sutan Mansur, and the Vice-President of Indonesia, Muhammad Hatta, Hasbi was released on the condition of remaining in the city. This condition was lifted in February, 1948, through a letter signed by the Vice-Resident of Aceh, Muhammad Amin. Shiddiqi, "Hasbi Ash Shiddieqy," 198-202.

[28]Tgk. Mohd. Hasbi Asdq [Ash Shiddieqy], "Pedoman Perdjuangan Umat Islam Mengenai Soal Kenegaraan," in Buah Kongres Muslimin Indonesia 20-25 Desember 1949, ed. P.P.K.M.I. (Yogyakarta: Badan Usaha & Penerbitan Muslimin Indonesia, 1950), 217-225.

[29]Thaib Thahir Abdul Muin, Pidato Promotor pada Pemberian Gelar Doktor Honoris Causa oleh Universitas Islam Bandung (Unisba) kepada Prof. T.M. Hasbi Ash Shiddieqy (Bandung: Unisba, 1975), 6.

[30] Shiddiqi, "Hasbi Ash Shiddieqy," 85-86.

[31]It was based on a decree of the Religious Minister of the Indonesian Republic (No. 35/1960).

IAIN in Aceh, which was founded in 1962. In addition, he was one of the Vice-Rectors[32] of the Sunan Kalijaga IAIN.[33] He was responsible for the Post Graduate Course in Islamic Law for Lecturers at Indonesian IAINs.[34] In addition, he was Professor[35] of *al-Siyāsa al-Sharᶜiyya* course at the Walisongo IAIN, Semarang. He also contributed to the development of private Islamic universities. While he was the Rector of Al-Irsyad University from 1961 to 1971, and some time the Rector of Cokroaminoto University, both of which were in Surakarta.[36] He taught at the Indonesian Islamic University in Yogyakarta from 1964 onwards. In 1975, the year of his death, he was still teaching and had been posted as the Dean of the *Sharīᶜa* Faculty of Sultan Agung University in Semarang.[37] He was appointed a Vice-Chairman of the Executive Committee for the Translation of the Holy Qurᵓān[38] that succeeded in accomplishing its task on March 1, 1971. These activities indicate Hasbi's contribution to academic life, and show that he was far from being an ivory-tower scholar, a fact which encouraged A. Hasymy to consider Hasbi one of Acehnese heroes of Indonesian independence.[39]

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[32]Hasbi occupied the post of Vice-Rector III, meaning he was responsible for students and alumni affairs.

[33]Soenaryo, Pidato Promotor, 204; and Djalal, "Tafsir an Nur," 204 and 212.

[34]It was from July 15 to October 10, 1971. Hasbi, Kumpulan Soal Jawab dalam Post Graduate Course Jurusan Ilmu Fiqh Dosen2 IAIN, (Jakarta: Bulan Bintang, 197), 5. See also, Muttaqin, "Pola Ijtihad Hukum," 94; and Junaidi, "Hasbi Mujtahid," 66.

[35]His appointment as professor was based on the Decree of the Religious Minister Number B. IV. I/3792 July 30, 1962, and was installed in office in 1963, on the basis of the Decree of the President of Indonesian Republic Number: 71/M-1, May 23 1963. Soenarjo, Pidato Promotor, 14; and Djalal, "Tafsir an Nur," 196.

[36]Soenarjo, Pidato Promotor, 2-3.

[37]Shiddiqi, "Hasbi Ash Shiddieqy," 232.

[38]It was based on a Decree of Religious Minister of Indonesian Republic No. 26 Year 1963. R.H.A. Soenarjo, "Kata Pengantar Ketua Yayasan Penyelenggara Penterjemahan/Penafsir Al-Quraan," in Al-Qur'aan dan Terjemahnya (Jakarta: Proyek Pengadaan Kitab Suci Al-Quraan Departemen Agama Republik Indonesia, 1978/1979), 9. See also, Shiddiqi, "Hasbi Ash Shiddieqy," 556.

[39]A. Hasymy, Peranan Umat Islam dalam Perang Aceh dan Perjuangan Kemerdekaan Indonesia (Jakarta: Bulan Bintang, 1976), 68.

Hasbi devoted much of his energy to the mass media. Benefiting from his experience as both a vice-editor of and a writer for the Soeara Atjeh (The Voice of Aceh) in 1933, he not only led Al-Islam, a monthly magazine of Islamic law published in Kutaraja, but was also the author of many articles in it, published in 1937. In 1939, he began writing a column on the history of Islamic law in the Pedoman Islam (Manual of Islam, Medan), using as his *nom de plume* "Ibnoelhoesein." He also wrote, using another *pseudonym* "Aboe Zoeharah," the column "Dewan Tafsir" in the same magazine. From 1940, he wrote the column "Iman dan Islam" in the Pandji Islam (Banner of Islam, Medan); and wrote the "Moeda Pahlawan Empat Poeloeh" (Youth of Forty Heroes) in the "Pandoe Islam" (Guide to Islam) column for the Lasjkar Islam (the Army of Islam) magazine (Medan). Hasbi also wrote a number of articles in other magazines, including Hikmah (Wisdom), Panji Masyarakat (the Banner of Society), Suara Muhammadiyah (the Voice of the Muhammadiyah), Aljami'ah (a journal of the Sunan Kalijaga IAIN), and Sinar Darussalam (the Light of Aceh Dār al-Salām).[40] The only opportunity he had to present his ideas outside of Indonesia was when he presented his paper in Arabic entitled "The Attitude of Islam Towards Knowledge (*'Ilm)*" at the International Islamic Colloquium held by the University of the Punjab in Lahore, from December 29, 1957, to January 8, 1958.[41]

On January 5, 1958 the *Himpunan Pengarang Islam* (Association of Islamic Authors) chose, on the basis of a poll held from November to the end of December 1957, the ten most popular of one hundred Islamic Indonesian authors, that Hasbi ranked number seven.[42] Among the other honours Hasbi received may be mentioned the Professorship of Ḥadīth at the Sunan Kalijaga IAIN in 1960;

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[40]Shiddiqi, "Hasbi Ash Shiddieqy," 555-556.

[41]Ibid., 85-86.

[42]Tamar Djaja, "Sepuluh Orang Pengarang Islam Terkemuka Sekarang," in Riwayat Hidup, 161.

Doctor Honoris Causa in the Field of Islamic law in 1975 from Bandung Islamic University; and Doctor Honoris Causa in the field of *Sharīᶜa* law from the Sunan Kalijaga IAIN on October 29, 1975.[43] Less than two months after he received this last honor, Hasbi died, on December 1975, at the Jakarta Islamic Hospital while preparing to undertake a *ḥajj*. He was buried in the cemetery complex of the Syarif Hidayatullah IAIN on December 10, 1975.[44]

Generally speaking, Hasbi's works can be classified into four fields: al-Qurᵓān,[45] *ḥadīth*,[46] *kalām*, and *fiqh*. The purpose of Hasbi's works, with their bulk, wide range, and comprehensive insights,[47] is to introduce reformist Islamic teachings to Indonesian Muslims, and to do so in the Indonesian language since most of the people did not know Arabic.[48] As a prolific and self-educated writer, Hasbi, unfortunately, was not without shortcomings. Inconsistencies in thinking constitute shortcoming of Hasbi's works. His ideas about the abrogating (*nāsikh*) and the abrogated (*mansūkh*) verses may be taken as an example. In February 1953,

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[43]Junaidi, "Hasbi Mujtahid," 66; Muttaqin, "Pola Ijtihad Hukum," 94-95.

[44]Ibid.

[45]Anthony H. Johns remarks: "of Indonesian scholars of the Qurᵓān, Hasbi Ash Shiddieqy (d. 1975) is one of the most venerated and best known on the national scene." Anthony H. Johns, "Islam in the Malay World," in Islam in Asia, ed. Raphael Israeli and Anthony H. Johns (Jerusalem: Magnes Press, The Hebrew University, 1984), 155.

[46]Federspiel says: "Muhammad Hasbi Ash Shiddieqy is perhaps better known for his work on translating and compiling a collection of *ḥadīth* into Bahasa Indonesia. 2002 Mutiara Hadiets (Djakarta: Bulan Bintang, 1954), 6 vols." Federspiel, Persatuan Islam, 17, note 24.

[47]Maarif, Islam dan Masalah Kenegaraan, 78 and 168; and Djaja, "Sepuluh Orang," 162.

[48]Hasbi often stresses in his introduction that his works are intended to meet a lack of Islamic literature in Indonesia. See for example, Hasbi, Pedoman Hukum Sjar'i Jang Berkembang dalam 'Alam Islamy Sunny (Jakarta: Pustaka Islam, 1956), I: 12; idem, Kulliyah Ibadah Di [?] tindjau dari segi Hukum dan Hikmah, 2nd edition (Jakarta: Bulan Bintang, 1954), I: 2; idem, Al-Ahkam (Pedoman Muslimin), 3th edition (Jakarta: Tintamas, 1982), 6; idem, Fakta Keagungan Syari'at Islam, 2nd edition (Jakarta: Tintamas, 1982), 6; idem, Pedoman Zakat, 7th edition (Jakarta: Bulan Bintang, 1991), 20; idem, Ichtisar Tuntunan Zakat dan Fitrah, 3th edition (Medan Islamiyyah, 1951), 4; idem, Pedoman Puasa (Jakarta: Bulan Bintang, 1954), 3.

he accepted without reserve, the principle of the abrogating and the abrogated verses, even recognizing it as one of the condition of *ijtihād* that a *mujtahid* should fulfill.[49] At the same time, however, he accorded a very limited function to this doctrine, restricting its applicability only "to the temporary and partial (*juzʾī*) rulings."[50] In July 1953, he changed his mind to adopt the view that there is no abrogation in the Qurʾān![51] In 1967, he accepted once again the doctrine of abrogation, provided it is endorsed by an explicit proof (*dalīl*).[52] In 1972, he again supported his position of 1967.[53] In 1974, he return to his earlier attitude of acknowledging abrogation of verses in the Qurʾan.[54] The difficulty in discerning his real attitude toward the matter under discussion is hardly resolved by such a simplistic statement as that of Shiddiqi, who says that according to Hasbi "the Qurʾān does not contain the abrogating and the abrogated verses."[55]

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[49]Hasbi, Pengantar Hukum Islam, I: 112, 117-118.

[50]Hasbi, Pengantar Hukum Islam, 6th edition (Jakarta: Bulan Bintang, 1981), II: 12-15.

[51]Hasbi, Sejarah dan Pengantar Ilmu Al-Qur'an/Tafsir, 13th edition (Jakarta: Bulan Bintang, 1990), 114-119.

[52]Hasbi, Ilmu2 Al-Qur'an Media Pokok Menafsirkan Al-Qur'an (Jakarta: Bulan Bintang, 1975), 18.

[53]Hasbi, Fiqih Islam Mempunyai Daya Elastis, Lengkap, Bulat dan Tuntas (Jakarta: Bulan Bintang, 1975), 18.

[54]Hasbi, Falsafah Hukum Islam, 78-79.

[55]Shiddiqi, "Hasbi Ash Shiddieqy," 392. Another shortcoming is a technical one. There are three technical weaknesses of his writings, which will be illustrated with reference to his work, Falsafah Hukum Islam (The Philosophy of Islamic Law). (Jakarta: Bulan Bintang, 1975). This book has been chosen as an example to represent his works because it reflects his maturity as professor who "completed," says Junaidi, "the writing manual of a thesis at the Faculty of *Sharīʿa* of the Sunan Kalijaga IAIN when he was the Dean of that faculty." Junaidi, "Hasbi Mujtahid," 67. The first shortcoming is that Hasbi often gives long quotation but does not provide references to them, which makes it difficult to find his original sources. See for example, pp. 44, 45, 46, 47, 56, 58, 59, and 61, where he mentions the authors whom he quotes but does not indicate their titles. Problems in bibliography is the second weakness. In his bibliography, he sometimes gives both the authors and their book titles at the end of every subject on which he writes, but often mentions the titles only--see pp. 156 (4x), 176 (2x), 279 (3x), 405 and 408 (5x); or the authors only--see pp. 104 (2x). Hasbi sometimes mentions both the author and the title with incorrect data: on page 196, bibliographical information on item no. 7 is as follows: "Mustafa Fahmi,

B. Hasbi's Participation in Islamic Law Reform

The term reform has a broad sense of renewal. When related to Islamic law in Indonesia, the direction of reformation is to purify Muslim practices from non-Islamic influences and to adapt Islam to social changes. The reformists, to achieve these goals, "advocated a return to the original Islam to free it from medieval schools of law,"[56] and wanted to create a system of law which would meet "the needs of society that are not satisfied by the existing law."[57] Thus, the reform is an endeavor to change the old and redundant conditions and to create new ones which are better, at least for those involved. Generally speaking, Islamic law reform in Indonesia has two basic themes: (1) a return "Back to the Qurʾān and the Sunna," and (2) "Indonesianness."

B. 1. "Back to the Qurʾān and the Sunna" Theme

The reformation movement, as defined above, claimed that Islamic law in Indonesia was limited to a very small circle of references. The traditionalists, who rejected *ijtihād* and recognized *taqlīd*, regarded *fiqh* as the essence of Islam.[58] Seeing this situation as being potentially dangerous, the reformists initiated a

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Terjemahan" (Translation). but such entry is inadequate and confusing if Fahmi has more than one work translated into Indonesian. Mistranslating is the third weakness of Hasbi's work. For instance, on page 309 he translates *muᶜāraḍa* (contradiction) into *mengetahui* (to know), as a result of which, the definition of juristic preference (*istiḥsān*) that he provides does not make any sense. The same mistake also occurs whe he on page 18 transliterates *filūsūfiyā* (*philo shopia*) into *Vila Shopia*, and *failūsūfūs* into *failosofus*, which betrays his lack of mastery over philosophical usage, and shows that he never checked these terms in a standard work of philosophy. Such incorrect transliteration are certainty nor in line with those of the Indonesian language.

[56]Boland, The Struggle, 212.

[57]Bismar Siregar, Islam & Hukum (Jakarta: Pustakakarya Grafikatama, 1990), 148. See also, idem, "Pembaharuan Hukum Pidana Nasional dan Prospek Hukum Islam di dalamnya," in Pemikiran dan Praktek, 155.

[58]Noer, Gerakan Modern Islam, 320.

reform, invoking the principle of "Back to the Qur'ān and the Sunna."[59] This reform process had, as its objective, the purification of Muslim practices from the non-Muslim influences, opening the gate of *ijtihād*, abandoning *taqlīd*, and allowing for *talfīq*, the comparative study of *fiqh*. In this stage, the reform was led by "religious scholars" who had only a limited understanding of the Indonesian legal system.

Although, as Nurcholish Madjid says, "there is no distinct delineation for the beginning of the reformation of Islam in Indonesia,"[60] purification of Islam from non-Muslim influences was the first issue to emerge in the reform of Islamic law in Indonesia. The purification initiated by the Padri movement[61] was continued by the Muhammadiyah (founded on November 18, 1912), Al-Irsyad (founded on September 6, 1914), and Persatuan Islam (Islamic Unity, founded on September 12, 1923) with the religious practices which were not based on the Qur'ān and the Sunna as their main targets.[62] The reformists called such practices "T.B.C." standing for *takhayul* [*takhayyul*] (superstition), *bid'ah* [*bid'a*] (innovation), and *churafat* [*khurafāt*] (myth).[63] The term *bid'a* and *sunna*, therefore, became the

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[59]Abdul Munir Mulkan, "Dakwah dan Strategi Pengembangan Sumber Daya Umat," in Pergumulan Pemikiran Islam dalam Muhammadiyah, ed. Abdul Munir Mulkan (Yogyakarta: Sipress, 1990), 73. See also, M. Amin Rais, "Konstruks Pemikiran Islam dalam Muhammadiyah," in Muhammadiyah dan Tantangan Masa Depan: Sebuah Dialog Intellektual, ed. Sujarwanto, Haedar Nashr, and M. Rusli Karim (Yogyakarta: Tiara Wacana, 1990), 231.

[60]Nurcholish Madjid, "The Progress of Islam and the Reformation Process," Mizan Vol. II no. 1 (1985), 51.

[61]On the *Padri* movement as the first initiatif for reform in Islamic law in Indonesia, see for example, William R. Roff, "South-East Asian Islam," 125; A John, "Tentang Kaum Mistik Islam dan Penulisan Sejarah," in Sejarah dan Masyarakat: Lintasan Historis Islam di Indonesia, ed. Taufik Abdullah (Jakarta: Pustaka Firdaus, 1987), 93; Taufik Abdullah, "Adat dan Islam," 119; and Shaik Abdur Rashid, "Renaissance in Indonesia," in A History of Muslim Philosophy, ed. M.M. Sharif (Karachi: Royal Book Company, 1983), II: 1623.

[62]See also, John Obert Voll, Islam: Continuity and Change in the Modern World (Boulder: Westview, 1982), 230.

[63]Rais, "Muhammadiyah Menyongsong," 115.

central points of discussion. *Talkin*[64] [*talqīn*], *tahlil* [*tahlīl*],[65] and *ziarah kubur [ziyārat al-qubūr]* (tomb visiting), which have always been practiced by the *Kaum Tua* (old group), were the targets of the *Kaum Muda* (young group) because the latter considered these religious practices a *bidᶜa*. A. Hassan (1887-1958) wrote many articles on these topics, such as "Tahlil" (Recitation),[66] "Tahlil dan Chandoeri" (Recitation and Feast),[67] and "Tahlilkan Orang Sudah Mati" (Promoting the confession of the faith from a person who is already dead).[68]

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[64] *Talkin* is "(Arabic) A term used to denote an instruction given by a religious teacher, and generally denoting instruction given to the deceased at the grave side at the case of the burial service." Federspiel, Persatuan Islam," 21.

[65] *Tahlil* is "(Arabic) The act of repeating the ejaculation *la illaha illa llah*!, i.e., 'There is no god but Allah!' It is believed by Muslims that repetition of the *tahlil*, will cleanse a person's sins and gain him religious merit." Federspiel, Persatuan Islam, 210.

The reformist criticism of *tahlil*, however, tends to neglect its socio-historical contexts. Indeed, at least in Java when someone died, the society would come together on the first, the seventh, the fortieth, and the one thousandth night in his or her house. They usually gambled and drank alcohol. It seemed that they were not sad, even though they had lost a member of their society. Both gambling and drinking traditions are forbidden by Islamic law. The *walīs* (Islamic saints) tried to change these habits.

It was Sunan Kalijaga who, according to some scholars, introduced a method: he converted the Javanese to Islam wisely, not destroying their institutions to avoid hurting the society. He allowed them to come together in the deceased's house at the same times as before. However, he changed the content of the institution. He asked them to repeat, in the ceremony, *Lā ilaha illā Allāh* (There is not God but Allāh) a certain number of times, recite parts of the Qurᵓān, and say prayers for the deceased, which came to be known as *tahlilan* in later times. The people came together and, unconsciously, they were islamized through the ceremony, because they, especially, the younger generation, thought that they had to come to the ceremony when someone died because it was a social obligation. Unfortunately, Indonesian Muslims who do not understand the history and strategies of Kalijaga consider *tahlilan* as *bidᶜa*. Islamic law, in this regard, faced and islamized the local practices, but it has been considered as *bidᶜa* by many modernist scholars.

[66] A. Hassan, Sual-Djawab, no. 8: 61-64 quoted in Federspiel, Persatuan Islam, 224.

[67] Hassan, Pembela Islam, no. 59, (Maret 9, 1933), quoted with its translation in Federspiel, Persatuan Islam, 224.

[68] Hassan, Sual-Djawab, no. 1: 18-20 quoted with its translation in Federspiel, Persatuan Islam, 224.

Ahmad Dahlan strongly supported the banishing of *bidᶜa* practices.[69] Moenawwar Chalil wrote, among others, the Back to the Qurᵓān and the Sunna.[70]

Hasbi too set out to take part in the purification movement. He remarked: "we would like to endeavour to eliminate all *khurāfāt* and *bidᶜāt* which people have attached to our religion, to remove them completely so that the dynamic of the real holy religion is alive. Its zest awakens our society to real progress."[71] He wrote, perhaps to strengthen his ideas at the "Penoetoep Moeloet" (the Lid of the Mouth), the Criterion between Sunna and Bidᶜa,[72] to root out the *bidᶜa* using *sunna* teachings. He observed that the truth was currently intertwined with the falsehood, leading to a misunderstanding of custom as worship and *vice versa*. Concerning Hasbi's contribution, Yakub says:

> (Prior to 1936) Hasbi's name became very popular, particularly in North Aceh because of his article "Penoetoep Moeloet" (the Lid of the Mouth) explaining totally and considering as *bidᶜa* some Muslim [religious] practices at that time such as talkin, reciting *uṣallī* (I pray) [in the beginning of prayer], *slametan*, and so forth. Aceh's *ᶜUlamāᶜ*, therefore, challenged him by saying that he went astray, and so on and so forth. It was because of his hard voice, that people were startled from their sleep.[73]

That is why Hasbi insisted in some parts of his book[74] that those who would sincerely wipe out *bidᶜa* could not be afraid of being accused of misleading.

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[69]See for example, Azet, Lexicon Islam, s.v. "Muhammadiyah," I: 249-250.

[70]Munawwar Chalil, Kembali Kepada Al-Qur'an dan Sunnah, 8th edition (Jakarta: Bulan Bintang, 1989). See also, Nasution et. al., ed. Ensiklopedia Islam di Indonesia, s.v. "Moenawwar Chalil, K.H.," 3 vols. (Jakarta: Departemen Agama RI, 1987-1988), II: 630.

[71]Hasbi, "Me'moedah'kan" I, 8452.

[72]Hasbi, Kriteria antara Sunnah dan Bid'ah, 8th edition (Jakarta: Bulan Bintang, 1990). Although first published in 1967, the book was written in 1343 A.H. [1931 C.E.] while he was still in Kutaraja. This means that he elaborated the ideas he had expressed in the "Penoetoep Moeloet."

[73]Yakub, "Gambaran Pendidikan," 339. See also, note number 17 in this chapter.

[74]Hasbi, Kriteria, 9, 62, 133, 134, and 160. See also, idem, "Menghidoepkan Hoekoem Islam dalam Masjarakat" I, Aliran Islam, Th. 1, (Nopember 1948), 46-47; and idem, "Menghidoepkan Hoekoem Islam dalam Masjarakat" II, Aliran Islam, Th. 1, no. 2 (Desember 1948), 104.

"Opening the gate of *ijtihād*" was an inseparable part of the Islamic legal reform in Indonesia because the reformists believed that "the closure of the gate of *ijtihād*" was the main factor that caused stagnation in the thinking about Islamic law in Indonesia.[75] The reformists were absorbed in promulgating their slogan that 'the gate of *ijtihād* has never been closed. They often collided with the traditional groups who defended the status quo in Islamic law.[76] The Nahdlatul Ulama's adherence to one of the four *madhhabs*,[77] was a reflection of the general attitude of the *Kaum Tua* (old group) which "viewed the world as unchanging."[78] This is entirely opposite the *Kaum Muda* (young group) which stressed the importance of *ijtihād*[79] because they "saw it [the world] as ever-changing in history."[80] Therefore, Muslims, according to the *Kaum Muda*, continually require new *ijtihād* to accommodate social changes.

Certain that *ijtihād* had been a main component in the development of the adaptability of Islamic law since the time of Prophet,[81] Hasbi considered the prevailing consensus that "the gate of *ijtihād* has been closed" to be an approach

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[75]Noer, Gerakan Moderen Islam, 11.

[76]Ibid. See also, Kuntowidjojo, Paradigma Islam, 49; K.H. Saifuddin Zuhri, Sejarah Kebangkitan Islam dan Perkembangannya di Indonesia (Bandung: Maarif, 1981), 600; and Faisal Ismail, "The Nahdlatul Ulama: Its Early History and Religious Ideology," M.A. thesis, Columbia University, 1988, 53.

[77]Pengurus Besar Nahdlatul Ulama, Risalah Politik, No. 3-4 (Djakarta: 1954), 17. See also, Nurcholish Madjid, "Aktualisasi Ajaran Ahlussunnah Wal Jama`ah," in Islam di Indonesia Menatap Masa Depan, eds. Muntaha Azhari and Abdul Mun`im Saleh (Jakarta: P3M, 1989), 77.

[78]Ira M. Lapidus, A History of Muslim Societies, 4th edition (Cambridge: Cambridge University Press, 1990), 765.

[79]See for example, Martin van Bruinessen, "Pesantren dan Kitab Kuning: Pemeliharaan dan Kesinambungan Tradisi Pesantren," Ulumul Qur'an Volume III, No. 4 Th. 1992, 74.

[80]Lapidus, Muslim Societies, 765.

[81]Hasbi, Dinamika dan Elastisitas Hukum Islam (Jakarta: Tintamas, 1975), 15; and idem, Fakta dan Keagungan Syari'at Islam, 2nd edition (Jakarta: Tintamas, 1982), 26.

that would destroy the *Sharīᶜa*,[82] since the significance of *ijtihād* as an "active, productive, and constructive theory"[83] was hampered by the consensus. Explaining his understanding of the history of the development of Islamic law, he insisted: "attention must be paid to the unaccepted slogan that 'the gate of *ijtihād* has been closed.' As far as I know, the way of *ijtihād* is now easier than it has been in the past."[84] The *mujtahid* must have always existed because "even though it is proclaimed everywhere that it has stopped, *ijtihād* never stops."[85] "Everybody in Islam," he continued, "had the right to conduct *ijtihād*, if he or she had the skill to do so. God not only gave the right of conducting *ijtihād* to Mālik, Abū Ḥanīfa, al-Shāṭibī, Aḥmad, Jaᶜfar, and Zayd ibn ᶜĀlī, but also to every Muslim who was able to undertake *ijtihād* in keeping with its determined basis."[86]

Taqlīd had, according to the reformists, been the principal consequence of 'the closure of the gate of *ijtihād*.'[87] According to A. Hassan, *taqlīd* contributed to a general Muslim decadence,[88] an opinion which was supported by many reformists. Chalil said: "it was the Muslim *ᶜulamāʾ*s and *zuᶜamāʾ* (leaders) narrowness and unhealthiness of mind in understanding and learning Islamic law that caused Indonesian Muslims to be so stagnant."[89] Inspired by Ibn Taymiyah, Jamāl al-Dīn al-Afghānī, and Muḥammad ᶜAbduh, the Indonesian reformists tried to break

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[82]Hasbi, Pengantar Ilmu Perbandingan Madzhab (Jakarta: Bulan Bintang, 1975), 57.

[83]Hasbi, Fakta Keagungan, 26.

[84]Hasbi, Sedjarah Peradilan Islam (Djakarta: Bulan Bintang, 1970), 43. See also, Shiddiqi, "Hasbi Ash Shiddieqy," 256.

[85]Hasbi, Beberapa Permasalahan Hukum Islam (Jakarta: Tintamas, 1975), 34.

[86]Hasbi, Fakta Keagungan, 230.

[87]Boland, The Struggle of Islam, 213-214.

[88]Cis Tamimi, "Hassan Bandung," in Riwayat Hidup, 125.

[89]Moenawwar Chalil, "Memperloeas dan Mempersehat dalam Memfaham Hukum Islam-hukum Islam," in Boeah Kongres, 194.

through the *taqlīd* fortress.[90] Another feature of *taqlīd* which did not allow *talfīq* ("moving from one *madhhab* to another"),[91] was considered to be fanatical by certain *madhhab*. The reformists deemed that the *talfīq* prohibition made it more difficult for Indonesian Muslims to practice Islamic teachings.[92]

The *madhhab* fanaticism, according to Hasbi, resulted in weakening the adaptability of Islamic law to the progress of society.[93] Differences of *ijtihād* based on differences of context are permitted,[94] and the results both of *ijtihād jamāʿī* (collective *ijtihād*) and *ijtihād fardī* (personal *ijtihād*) are not laws that should necessarily be applied to all the Islamic world forever. Based on these two principles, Hasbi asserts that "it is not correct to force Muslims to follow a certain *madhhab* in all aspecs [of life], which sometimes could not meet the interest of society, while there existed a basis in other *madhhab*s to accommodate those interests."[95] Therefore, Indonesian Muslims, as the followers of the Shafiite school of law should take as their own, for example, Ḥanbalite's opinion on certain cases as that of the Shafiite, when they are certain that the former accords with their interest while the latter does not.[96]

To ensure that *talfīq*, a term Hassan[97] considered to have been created by the Shafiites, would be allowed, the reformists introduced comparative studies in Islamic law.[98] "Under modernist influence," says Bruinessen, "*fiqh* works of a

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[90]Mulkan, K.H. Ahmad Dahlan, 41; and Rais, "Konstruks Pemikiran Islam," 231.

[91]Nasution et. al., eds., Ensiklopedi, s.v. "Talfiq," III: 943.

[92]Hasbi, Beberapa Permasalahan, 37. See also, Nasution et. al., eds., Ensiklopedi, s.v. "Talfiq," III: 943.

[93]Hasbi, Beberapa Permasalahan, 35 and 36.

[94]Ibid., 23.

[95]Hasbi, Dinamika Hukum Islam, 21.

[96]Hasbi, Beberapa Permasalahan, 37-39.

[97]A. Hassan, Risalah Al-Madz-hab: Wadjibkah Atau Haramkah Bermadz-hab (Bangil: Penerbit Persatuan Islam, 1956), 12-13.

[98]Hasbi, Beberapa Permasalahan, 37; and idem, Sjari'at Islam, 42.

different genre"--namely, that of comparative works such as Bidāyat al-Mujtahid by Ibn Rushd and Fiqh al-Sunna by Sayyid Sābiq--"are coming into use in pesantren as well."[99] The institutionalization of such study materialized, for example, with the establishment of the Majlis Tarjih of Muhammadiyah (1927). Likewise, the foundation of the *Madhhab* Comparative Department (*Jurusan Perbandingan Madzhab*) of the Sunan Kalijaga and the Syarif Hidayatullah IAIN's in 1988[100] was a systematic strategy aiming at eliminating the insularity and mutual isolation of *madhhab* fanaticism on the part of the reformists.

The comparison of *madhhab*s, according to Hasbi, is a necessary step for Indonesian Muslims to take, if they want to achieve their interests (*maṣāliḥ*) by reducing their fanatical following of a certain *madhhab*, not all of whose opinions are applicable to Indonesian society. "In Indonesia," Hasbi explained by giving an example, "it is very often that the grandson sheds tears when he does not receive an inheritance from his grandfather, if his father had predeceased his grandfather. Had his father survived him, the portion allotted to his father would be his."[101] To solve the problem, Hasbi encouraged the Indonesian *ʿulamāʾ* to apply the *waṣiyya wājiba*,[102] which was the solution of the Ẓāhirites and not that of the Shafiites. The comparison should be undertaken, not only between the Sunnite and non-Sunnite

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[99]Bruinessen, "Kitab Kuning," 244.

[100]It was based on the *Keputusan Menteri Agama Republik Indonesia Nomor 122 Tahun 1988 Tanggal 25 Juli 1988 tentang Kurikulum pada IAIN* (Decree of Religious Minister of Indonesian Republic, Number 122, Year 1988, July 25, 1988 Concerning the Curriculum of IAIN). Zarkasyi Abdussalam, the Chairman of the Comparative *Madhhab* Department of the Faculty of *Sharīʿa* of the Sunan Kalijaga IAIN, "Interview" by Siti Handaroh, IAIN Sunan Kalijaga, 1993. Prior to the foundation of this department, the comparative *madhhab* course had been introduced, for example, by the *Keputusan Menteri Agama Republik Indonesia Nomor 110 Tahun 1982 tentang Penetapan Pembidangan Ilmu Agama dalam Lingkungan Perguruan Tinggi Agama Islam* (Decree of Religious Minister of Indonesian Republic, Number 110, Year 1982, Concerning the Determination of Specialization in the Religious Sciences at the Islamic University).

[101]Hasbi, Beberapa Permasalahan, 36.

[102]Namely, "to give the portion of the grandson because his father died earlier than his grandfather." Hasbi, Beberapa Permasalahan, 36.

*madhhab*s, but also between all the *madhhab*s on the one hand and the Indonesian and International legal systems on the other. *ʿUlamāʾ* or professors, according to him, should be the first group of people to do so by deepening their own understanding of the subject matter to be ready to produce a new generation.[103] Hasbi wrote many books on a comparative approach to the *madhhab*s. Among these are: An Introduction to the Science of Comparative Madhhabs,[104] The Basic Principle of the Masters of the Madhhabs in Maintaining Islamic Law,[105] and The Causes of the *ʿUlamāʾ*s Different Views in Producing Islamic Law.[106] Hasbi is the first Indonesian jurist to have introduced the comparative study of *madhhab*s at the academic level.

B.2. Indonesianness Theme

Indonesianness was, on the one hand, a continuing theme of that of the 'Back to the Qurʾān and the Sunna,' and on the other a "return" to the traditional points of view which stood for maintaining Indonesian customs which where rejected by the reformists who wanted their comformity to the *Sharīʿa*. Indonesian Muslims aspired to have an Islamic law which had Indonesian characteristics by "liberating their [Indonesian] customs from those of the Middle East;"[107] Islam, for them, was not inextricably bound to Arabness. Likewise, they realized that "the geographical position of Indonesia was only on the periphery of the central lands of Islam,"[108] with much cultural differentiation between the centre and the periphery.

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[103]Ibid., 38-39. See also, idem, Sjari'at Islam, 42.

[104]Hasbi, Pengantar Ilmu Perbandingan Mazhab (Jakarta: Bulan Bintang, 1975).

[105]Hasbi, Pokok-Pokok Pegangan Imam-Imam Mazhab dalam Membina Hukum Islam (Jakarta: Bulan Bintang, 1973).

[106]Hasbi, Sebab-Sebab Perbedaan Faham Para Ulama dalam Menetapkan Hukum Islam (Yogyakarta: n.d.).

[107]Raharjo, "Melihat ke Belakang," 13.

[108]Nurcholish Madjid, "Akar Islam: Beberapa Segi Budaya Indonesia dan Kemungkinan Pengembangannya bagi Masa Depan Bangsa," in Nurcholish

While they would undertake *ijtihād* based on the Qurʾān and the Sunna, it would not impinge on the field of *ʿibāda.*[109] In other words, they differentiated between the eternal principles of Islam which, they agree, ought to control society and the historical principles of Islam which could be accommodated to social changes.[110] They also developed a constitutional approach which, however, was largely under the direction of the graduates of non-religious universities, who had a limited understanding of the concept of "Back to the Qurʾān and the Sunna."

The "national *madhhab*" was offered by Hazairin (1906-1975) as an alternative to the Indonesianness of Islamic law, by eliminating uncritical eclectic *taqlīd.*[111] The cultural differences between Indonesia as an importer of *fiqh* and the Arab countries as its exporters made it impossible for a *fiqh* developed elsewhere to be applied to Indonesian society.[112] Hazairin gave the example of a woman who must be represented by a *walī* (guardian) in marriage. He regretted the attitude of Indonesian Muslim jurists who uncritically accepted this Shafiite interpretation because, he maintained, in Indonesia there would be three possibilities. In Java, for

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Madjid, Islam Kemodernan dan Keindonesiaan, 4th edition, ed. Agus Edi Santoso (Bandung: Mizan, 1992), 67; idem, "Islam on the Indonesian Soil: An Ongoing Process of Acculturation and Adaptation," Arts: The Islamic World Number 20 1991: 66; and Azyumardi Azra, "Jaringan `Ulama Timur Tengah dan Indonesia Abad Ke-17 (Sebuah Essei untuk 70 Tahun Harun Nasution), " in Refeksi Pembaharuan, 359; and Maarif, Islam dan Masalah Kenegaraan, 2.

[109]In this regard, they seem to have supported the prevailing agreement among Muslim jurists that "as a result of reasoning, the *fiqh* concerned with *ʿibāda* aspects can be regarded as having been difenitively worked out in the time of the *imāms* of the *madhhabs*. [The task of] this generation is just to select the results of their reasoning while maintaining a critical attitude. On the other hand, what still develop is the social *fiqh*, by using the role of the *uṣūl al-fiqh.*" Nurcholish Madjid, "Aktualisasi Ajaran Ahlussunnah Wal Jama'ah," 62.

[110]Cees van Dijk, "The Re-actualization of Islam in Indonesia," RIMA (Review of Indonesian and Malaysian Affairs), Volume 25 No. 2 Summer 1991, 79.

[111]Hazairin, Hukum Islam dan Masjarakat (Jakarta: Bulan Bintang, n.d.), 8. See also, Bismar Siregar, "Prof. Mr. Dr. Hazairin," 4; and Shiddiqi, "Hasbi Ash Shiddieqy," 3.

[112]Hazairin, Hukum Kewarisan Bilateral menurut Al-Qur'an dan Hadith, 6th edition (Jakarta: Tintamas, 1982), 1 and 2. This edition, according to the publisher (p. vi), is a combination of Hazairin's two books, Hukum Kewarisan Bilateral menurut Al-Qur'an and Hukum Kewarisan Bilateral menurut Hadith.

example, the *walī* can be either from the father's or mother's side since the position of both sides is equal; in Minangkabau, the *walī* should be from that of the mother since the mother's position is higher than that of the father; in Tapanuli, we have the third possibility, similar to that of the Arab countries. Here the father should be the *walī* because the position of the mother's side is below that of the father. To further emphasize the validity of his criticism, Hazairin rethorically asks: "if we in Indonesia would bring this matter of the *walī* in line with our societal structures, would we cease to be followers of Muḥammad?"[113]

Believing that the appointment of the male agnate relatives (*ʿaṣābāt*) as the *walī* was not based on the Qurʾān, Hazairin challenged the opinion of the Indonesian *ʿulamāʾ*, who defended their position in terms of *ḥadīth* (Prophetic tradition) and *ijmāʿ* (consensus). Hazairin argued that: "what is sound and suitable *ḥadīth* and sound and suitable *ijmāʾ* to the Arabs should not always be considered suitable to Indonesian society."[114] It is here that he saw the significance of the national *madhhab*, an "imprecise term since [the term] 'national' generally means 'concerning all citizens,' while Muslims are only part of our Indonesian nation."[115] He acknowledged that "the term 'Indonesian *madhhab*,' which M. Hasbi Ash-Shiddieqy was using....was more appropriate."[116] The national *madhhab* for Hazairin consists in

> the reformed Shafiite teachings on, among other things, a) *zakāt* (alms) and *bayt al-māl* (state trust) which should be adapted to the modern demands of the Pancasila Indonesian Republic, b) marriage, which needs some reform in line with the progress of time, and the formation of the blessed-by-God society, namely the parental society, c) inheritance which should be adapted to the demands of the MPRS (Temporary People's Advisory Assembly),

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[113]Hazairin, Hukum Islam, 7-8.

[114]Ibid., 8.

[115]Hazairin, Hukum Kekeluargaan Nasional, 3th edition (Jakarta: Tintamas, 1982), 6. See aslo, Boland, The Struggle of Islam, 170-171.

[116]Hazairin, Hukum Kekeluargaan, 8.

> that is the parental inheritance which is in line with and suitable to the demands of the Qur'ān itself that knows its own principle (main line) of virtue and also the principle of replacement, and then to abrogate everything which was regulated generally by the state to apply to all citizens such as that of the *kitāb aḥkām al-buyū'* (chapter on commerce)..."[117]

Hazairin anticipated the proposed changes in Indonesian laws, by limiting the scope of his national *madhhab* to aspects of Islamic law that are not yet regulated by the state.[118]

The debate in the 1980's about the reactualization of Islam or the dynamics of Islamic law[119] was a continuation of the effort to reinterpret Islamic law in accordance with the Indonesian realities. Sjadzali, the initiator of the debate, put forward in this connection the examples of the approach to bank interest and the division of inheritance in Indonesia. These two old examples demonstrate the aforementioned tension, in which many Indonesian Muslims tend to show a duality of attitude. While they consider interest as *ḥarām* (prohibited), because it is a form of *ribā*, they nevertheless establish banks which are based on the interest system. Many even make the interest of their bank deposits their source of livelihood. Further, although they accept the Qur'ānic prescription (al-Nisā': 11) that the share to which the son is entitled in heritance is twice that of the daughter, they do not care about it in practice. Facing such realities, Sjadzali poses a question: Could the reactualization [in the sense of giving a greater opportunity to Indonesian Muslims to adapt Islam to social circumstances and changes] be accomplished?[120]

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[117]Ibid., 6 and also, 1.

[118]Unfortunately, this constitutional background of Hazairin's thought was not noticed by Abu Bakar; so he failed to understand Hazairin efforts for the codification of Islamic law. Abu Bakar in fact, gives Hazairin's biography only in footnote number 6 of his First Chapter. See Al Yasa Abu Bakar, "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran Fiqh Madzhab," Ph. D. diss., IAIN Sunan Kalijaga, 1989, 6-7.

[119]Sjadzali, "Reaktualisasi," 1.

[120]Ibid., 2 and 6. See also, Zarkasyi Abdussalam and Syamsul Anwar, "Tanggapan terhadap Makalah Reaktualisasi Ajaran-Ajaran Islam," Asy Syir'ah No. 1 TH. XIII. 1988, 13 and 15.

Responding to this question, many Indonesian Muslims have tried to rethink certain principles and concepts bearing on such problems as the classification of the Qur'ānic verses according to *nāsikh-mansūkh* [121] (abrogation), *qaṭ'ī-ẓannī*[122] (certain-probable), and *muḥkam-mutashabih*[123] (unequivocal-ambiguous) in order to determine the applicability of these verses to modern society. Although offering no clear methodologies, the participants in this debate here answered in principle that the reactualization of Islamic theachings and principles must be accomplished.[124]

Hasbi's participation in the Indonesianness of Islamic law set the tone for future debate, since he preceded both Hazairin and Sjadzali. Clarifying his own concept, Hasbi says: "our purpose is to be able to construct a *fiqh* in accordance with our own personality,"[125] an Indonesian *fiqh*. The "Indonesian *fiqh* is a *fiqh* which is determined according to Indonesian personality and characteristics,"[126] because "the *fiqh* which we respect is the Qur'ānic and Prophetic (*nabawī*) *fiqh*." As far as *fiqh al-ijtihādī* (Islamic law based on independent reasoning) is

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[121]See for example, Zarkowi Soejoeti, "Reaktualisasi Ajaran-Ajaran Islam," Asy Syir'ah, 9; Andi Rasdianah, "Pembahasan Terhadap Makalah Reaktualisasi Ajaran Islam," Asy Syir'ah, 21; Moh. Quraish Shihab, "Nasikh Mansukh dalam Al-Qur'an," Asy Syir'ah, 37-42; Rifyal Ka'bah, "Bawalah Kepada Kami Al Qur'an yang Lain," in Polemik Reaktualisasi, 61-64; Ali Yafi, "Antara Ketentuan dan Kenyataan," in Polemik Reaktualisasi, 100; and Ahmad Azhar Basyir, "Reaktualisasi, Pendekatan Sosiologis Tidak Selalu Benar," in Polemik Reaktualisasi, 104.

[122]See for example, Ali Darokah, "Reaktualisasi Mencari Kebenaran, Ikhtiar yang Wajar," in Polemik Reaktualisasi, 85-87.

[123]Masdar F. Mas'udi, "Memahami Ajaran Suci Pendekatan Transformasi," in Polemik Reaktualisasi, 182-185; and Amir Sjarifuddin, "Pokok-Pokok Pikiran tentang Reaktualisasi Ajaran Islam," Asy Syir'ah, 27.

[124]There are indeed some who reject the possibility of reactualization. Among them is Ahmad Husnan, for whose views see his book, Hukum Islam Tidak Mengenal Reaktualisasi (Islamic Law Does Not Recognize Reactualization) (Solo: Pustaka Mantiq, 1988). This book was not available to the present writer at the time this thesis was being completed. His ideas cannot, therefore, be discussed here more fully.

[125]Hasbi, "Me'moedah'kan" I, 8412.

[126]Hasbi, Sjari'at Islam, 42.

concerned, we must always take what is suitable for our nation."[127] When Boland interviewed him, Hasbi replied:

> I am a supporter of the 'new *ijtihād*' and even advocate the creation of our own *madhhab*. That is to say, in Indonesia we have to proceed from the Indonesian situation, and can only use those elements of Islamic law which are suited to modern Indonesia. Muslims who, for example, live in Holland ought to look there for an interpretation of Islamic precepts which suit the situation there. It is for this reason that I not only speak of an Indonesian *madhhab* --like Hazairin-- but of national *madhhab*s, suited for us in Indonesia, for Muslims in Holland, and so on.[128]

Hasbi's ideas on Indonesian *fiqh* will be developed in section B of Chapter II.

The campaign for Indonesianness became part of the constitution-making process and aimed at placing Islamic law in the Indonesian constitution at all possible levels. Muslim aspirations that Islamic law be recognized by the government receieved their first important expression when some Muslim representatives argued in the *BPUPKI*'s[129] debates that the nation to be, the Independent Indonesia, should be an Islamic state. "To Islamic reformers it meant a general proclamation of the principle that the state was in accord with Islamic law."[130] The aspiration, addressed in the meeting of a Small Committee[131] of the BPUPKI on June 1, 1945, succeeded in inserting the stipulation: "with the

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[127]Ibid.

[128]Boland, The Struggle of Islam, 271. See also, Hazairin's acknowledgement at page 34 of this thesis.

[129]The *BPUPKI (Badan Usaha Penyelidik Usaha Persiapan Kemerdekaan Indonesia, Dokuritsu Zyumbi Tyosakai,* Investigatory Committee for Indonesian Independentce Effort) was an institution founded by the Japanese on April, 1945, as a materialization of their promise of giving independence to Indonesia as announced by Prime Minister Koiso on September 9, 1944. Maarif, Islam dan Masalah Kenegaraan, 101, 102, and 126.

[130]Lapidus, Muslim Societies, 769.

[131]This committee consisted of nine members: Soekarno, Hatta, Maramis, Abikusno, Kahar Moezakkir, Agoes Salim, Soebardjo, Wahid Hasjim, and Jamin. See, for example, Arifin, Potret, 197.

obligation of practicing the Islamic *Sharīᶜa* for the adherence of Islam,"[132] into the Jakarta Charter (*Piagam Djakarta*).[133] This stipulation was validated as a decision of the Small Committee on June 22, 1945. However, after being disputed in a plenary meeting of the Committee on July 11, 1945, the stipulation was eventually replaced with *"Ketoehanan Yang Maha Esa"* (Belief in One God) in order not to harm non-Muslim Indonesians, particularly the Christians.[134] There is no indication that Hasbi took part in this process, although it is clear that, in principle, he was on the same side as those calling for the stipulation regarding the *Sharīᶜa*.

The "Indonesian Islamic State," which was proclaimed in August 1949, embodied in its constitution an orientation toward Islamic legal reform. It stated clearly in its *Qānūn Asāsī* (Constitution): "Both the basic values and the law which is applied to the Indonesian Islamic State are Islamic,"[135] (article 2) and: "The highest law is that of the Qurᵓān and the *Ḥadīth Ṣaḥīḥ*"[136] (article 2:2). This rebellion against the Indonesian Republic was supported by Kahar Muzakkar who proclaimed that "since August 7, 1953, South Sulawesi had become a part of the Indonesian Islamic State,"[137] and by Daud Berureueh who declared on September

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[132]Muhammad Jamin, Naskah Persiapan Undang Undang Dasar 1945 (Jakarta: n.p., 1959), vol. I: 154 quoted in Arifin, Potret, 198; the translation is quoted in Daniel S. Lev, The Transition To Guided Democracy: Indonesian Politics, 1957-1959 (Ithaca, New York: Cornell University Press, 1966), 128; see also, Islamic Courts, 42.

[133]It was "a gentlemen's agreement that bridged the disputation between the Muslim and non-Muslim groups in the *BPUPKI*." Arifin, Potret, 197.

[134]Arifin, Potret, 197.

[135]Pemerintah Negara Islam Indonesia, "Nota Rahasia," (22 Oktober 1950/10 Muḥarram 1370), quoted in Boland, The Struggle of Islam, Appendix II: 247.

[136]Ibid.

[137]Barbara Sillars Vervey, Pemberontakan Kahar Muzakkar Dari Tradisi Ke DI/TII (Jakarta: Gratifipers, 1989), 198-199. See also, Husayni Ismail, "Teungku Muhammad Daud Berureueh," Ar-Raniry No. 68 1990, 58-59; and Martin van Bruinessen, "Gerakan Sempalan di Kalangan Umat Islam Indonesia: Latar Belakang Sosial Budaya," Ulumul Qur'an Volume III, No. 1 Th. 1992, 16.

21, 1953, that Aceh was a part of the Indonesian Islamic State.[138] The Indonesian Islamic State, however, collapsed with the execution of its *Imām*, Sekarmadji Maridjan Kartosoewirjo, by the government of the Indonesian Republic in August, 1962, after he was captured on June 4, 1962.

As a nationalist Muslim, Hasbi did not support the rebellion of the Indonesian Islamic State against the Indonesian Republic. Instead, he preferred to put across his constitutional proposals through an institution officially recognized by the Indonesian Government. He adhered to the policy of the Congress of Indonesian Muslims, held from 20-25 December, 1949, a policy which did not officially support the Indonesian Islamic State. In the Congress, Hasbi stressed, among other things, two characteristics of the Islamic state which he proposed: that is, that the laws of God apply in it; and the Qurʾān and the Sunna are the foundations of *tashrīʿ* (legislation).[139] Furthermore, "from Atjeh, in April 1950," to quote Boland, "the well-known and still very productive Mohd. Hasbi Ash Shiddieqy published a brief summary and explanation of 'The Principles of Islamic Government' [Dasar-Dasar Pemerintahan Islam]."[140] There was a possibility that any group of people, including the members of the Indonesian Islamic State, might use his ideas as a foundation on which to base their aspirations to build an Islamic state. It was perhaps to avoid any political manipulation of his ideas that Hasbi expanded the book and replaced its title with a new one, the Asas-Asas Hukum Tata Negara menurut Sjari'at Islam (Principles of the Civics according to the Sharīʿa).[141]

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[138]Sjamsuddin, The Republican Revolt, 83 and 197.

[139]Hasbi, "Pedoman Perdjuangan," 220.

[140]Boland, The Struggle of Islam, 81. See also, M. Bambang Pranowo, "Islam dan Pancasila: Dinamika Islam di Indonesia," Ulumul Qur'an Volume III, no. 1 Th. 1992, 7.

[141]Hasbi, Asas-Asas Hukum Tata Negara menurut Sjari'at Islam (Yogyakarta: Matahari Masa, 1969).

Muslim endeavours at the meetings of the Constituent Assembly were the last legal steps taken to lead Islamic law along with the Constitution.[142] Until the last session of the Constituent Assembly debates regarding the constitution, on June 22, 1959, the traditionalist-supported reformist Muslims were unable to achieve the majority.[143] In order to change the constitution one of the two competing groups should have gained 2/3 of the votes or 66 2/3%, but they only got 48% of the votes as against the Pancasila supporters with 52% of the vote.[144] The Islamic reformists' failure was hastened by President Soekarno. Seeing the state in a dangerous situation, Soekarno issued the Presidential Decree of July 5, 1959, to dissolve the Constituent Assembly and decided to return to the Pancasila and the Constitution of 1945.

In a speech in the Constituent Assembly on human rights in Islam, Hasbi insisted that Indonesia would be safe and prosperious if it based its constitution on Islamic law, because Islamic law was progressive, dynamic, and ensured tolerance (*tasāmuḥ*). "In his fascinating closing remarks, Hasbi Ash Shiddieqy," says Maarif, "reminded the Constituent Assembly of the logic behind Islamic ideas as the basis of the Indonesian state."[145] This position was a continuation of his concept of the ideal Islamic state which he had set forth in the Congress of Indonesian Muslims. In terms of Voll's categorization of Muslim styles of action; namely, the adaptationist, the conservative, the fundamentalist, and the more personal and

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[142]It is "an *eenmalig (ad hoc)* institution which, according to the *UUDS* [Temporary Constitution of 1950], functioned to establish a Constitution." Rusadi Kartaprawira, Sistem Politik Indonesia: Suatu Model Pengantar (Bandung: Sinar Baru, 1983), 152.

[143]See also, Raharjo, "Melihat ke Belakang," 14.

[144]On the percentage of votes in the Constituent Assembly, see Muhammad Hatta, Menuju Negara Hukum (Jakarta: Idayu Press, 1977), 15; and Lev, The Transition, 124.

[145]Maarif, Islam dan Masalah Kenegaraan, 174.

individual aspects of Islam[146]-- Hasbi belongs at this stage to the third category. In essence, he appears as one who "insists upon a rigorous adherence to the specific and the general rules of the faith as presented in that generally accepted record of revelation."[147]

After these failures, the reformists softened their steps. Although they no longer aspired to build an Islamic state, they still had to face some constitutional obstacles. The first step involved discrediting the "reception theory" which, according to such scholars as Hazairin,[148] Mahadi,[149] and Basyir,[150] should have been constitutionally removed from the legal practice of independent Indonesia. Considering that the "reception theory" harmed Indonesian Muslims, and was also in conflict with the Constitution of Indonesia, the reformists sought to demolish it.[151] Hazairin even characterized the "reception theory" as the "theory of *Iblīs* " (Satan).[152] The reformists then proceeded with the compilation of books on Islamic law to help the government restore the Religious Courts. Although their position was equal to that of other Indonesian courts,[153] the Religious Courts had no

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[146]See Voll, Islam: Continuity and Change, 23-29.

[147]Ibid., 30.

[148]Ali, "The Position," 203.

[149]Ibid.

[150]Basyir, "Posisi Hukum Islam dalam Pembinaan Hukum Nasional," Media Dakwah 119 (Jumadil Awal 1411/Januari 1991), 50.

[151]Muhammad Daud Ali, "The Position of Islamic Law in the Indonesian Legal System," in Islam and Society in Southeast Asia, ed. Taufik Abdullah (Kuala Lumpur: Institute of Southeast Asian Studies, 1986), 203; Basyir, "Posisi Hukum Islam," Media Dakwah, 50.

[152]Hazairin, Hukum Kekeluargaan, 14.

[153]It was based on *Undang-Undang Nomor 14 Tahun 1970 tentang Kehakiman Jo Undang-Undang Nomor 14 Tahun 1985 tentang Mahkamah Agung* (Ordinance Number 14 of the Year 1970 on Justice Referring to Ordinance Number 14 of the Year 1985). Pemerintah Republik Indonesia, Kompilasi Hukum Islam: Hukum Perkawinan, Hukum Kewarisan, Hukum Perwakafan (Bandung: Humaniora Utama Press, 1992): *Penjelasan Umum* (General Explanation), 97. See also, Munawir Sjadzali, Islam dan Tata Negara, 2nd edition (Jakarta: UIP, 1990), 200-201.

standard and uniform books to guide Muslim judges. To reduce a variety of difficulties which might arise, the Religious Courts used thirteen *fiqh* works of the Shafiites.[154] Using these books, however, was not very helpful. To solve the problem of lack of standard books for the courts, the reformists endeavoured to produce a compilation of Islamic law, which, politically, was a shortcut for the reformists to reinstate Islamic law as a form of "*jurisprudensi*" (jurisprudence), one of the legal sources.[155] Two and a half years after the Supreme Court of Indonesia elaborated the judicial aspects of the Religious Courts in 1982, the idea of an Islamic compilation of law officially emerged.

A legal handbook, compiled in the form of ordinance, was the final result of the compilation of Islamic legal program. It would reduce disagreement because it constitutes the consensus of Indonesian *ʿulamāʾ* concerning aspects of Islamic law application.[156] The two principles which whould guide the program of the compilation of Islamic law are that discussion of the *fiqh* texts is to be left to the *ʿulamāʾ*, and the *ʿulamāʾ*s opinions are to be sought after concerning the matters arising in relation to this program. A reopening of jurisprudence, meaning that the decisions issued by the Religious Courts whould be reexamined and the ones which

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[154]They were as follows: (1). Bughyat al-Murtashidīn by Ḥusayn al-Baʿlawī; (2). Al-Farāʾiḍ by Shamsūrī; (3). Fatḥ al-Mubīn by al-Malībarī (ca. 975 A.H.); (4). Fatḥ al-Wahhāb by Anṣārī (d. 926 A.H.); (5). Al-Fiqh ʿalā al-Madhāhib al-Arbaʿa by al-Jazīrī; (6) Hāshiya Kifāyat al-Akhyār by al-Bājūrī (d. 1277 A.H./ 1860 A.D.); Muhgnī al-Muḥtaj by al-Sharbīnī (d. 977 A.H./1596 A.D.); (8) Qawānīn al-Sharʿiyya by Sayid Ṣadaqa Ṣanʿān; (9). Qawānīn al-Sharʿiyya by ʿUthmān ibn Yaḥyā (10). Sharh Kanz al-Rāghibīn by Qalyūbī and ʿUmayra; (11). Sharqawī ʿalā al-Tahrīr by al-Sharqawī; (12) Targhīb al-Mushtaqq; and (13) Tuḥfat al-Muhtaj by Ibn al-Ḥajar al-Haythamī (d. 973 A.H.). Bustanul Arifin, "Kompilasi: Fiqh dalam Bahasa Undang-Undang," Pesantren No. 2/Vol. II/1985, 27. See also, Muhammad Atho Mudhzar, "Fatwā of the Council of Indonesian ʿUlamāʾ: A Study of Legal Thought in Indonesia 1975-1988," Ph.D. diss., University of California, 1990, 79.

[155]Muchtar Zarkasyi, "Prospek Peradilan Agama di Indonesia," Studia Islamika No. 25 Juni 1988, 72. On jurisprudence as one of legal sources in Indonesia see, for example, Ahmad Sanusi, Pengantar Ilmu Hukum dan Pengantar Tata Hukum Indonesia (Bandung: Tarsito, 1984), 82-83.

[156]Arifin, "Kompilasi," 27-29.

could be applied would be chosen, was the third principle. The last principle involved a comparative study, in that the Indonesian *ʿulamāʾ* would study how other countries applied Islamic law, and to use the insights gained to the compilation of Islamic law in Indonesia.[157] After conducting a seminar held from February 2-5, 1988, in Jakarta, the Indonesian *ʿulamāʾ* accepted three books of Islamic Law Compilation Planning. They consisted of Book I on Marriage, Book II on Inheritance, and Book III on Endowment. This acceptance led the President of Indonesia to issue the Instruction from the President of the Indonesian Republic, Number 1, on June 10, 1991, on the Islamic Legal Compilation in Indonesia.[158] This was followed by a Decree of the Religious Minister of the Indonesian Republic Number 154, 1991, on the Implementation of Presidential Instruction Number 1, of June 10, 1991.[159]

By the time the idea of the Compilation emerged officially in 1982 (the Compilation itself was issued by the government in 1991), Hasbi had died. It does not mean, however, that he did not contribute to it. Given the emphasis on the comparative study of *fiqh*, "it can be concluded," says Shiddiqi, "that Hasbi inspired Indonesia to have the Compilation of Islamic Law with Indonesian characteristics. It is a book that consists of materials based on a comparative study [of Islamic jurisprudence] from which will be selected the more valid and more suitable laws for Indonesian society. [The purpose] also is to make Indonesian custom one of the *fiqh* elements, though the *Sharīʿa* whould serve as a yardstick

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[157]Ibid., and Mudzhar, "Fatwā," 82-83.

[158]Presiden Republik Indonesia, "Presiden Republik Indonesia Instruksi Presiden Nomor 1 Tahun 1991," in Pemerintah Republik Indonesia, Kompilasi Hukum Islam, 5.

[159]Menteri Agama Republik Indonesia, "Keputusan Menteri Agama Republik Indonesia Nomor 154 Tahun 1991 Tentang Pelaksanaan Instruksi Presiden Republik Indonesia Nomor 1 Tahun 1991 Tanggal 10 Juni 1991," in Pemerintah Republik Indonesia, Kompilasi Hukum Islam, 7.

[in terms of which to examine them]."[160] In any case, Hasbi's participation remained at the conceptual level since he had no opportunity to otherwise contribute to the constitutional process.

The third and the most important remaining step is to codify Islamic law in Indonesia.[161] Even though undertaken earlier, this is actually one step beyond that of the compilation. Using the rightful position of Islamic law in the Pancasila State as the basis for codifying Islamic law, the reformists succeeded in passing the *Undang-Undang Perkawinan* (Bill of Marriage) No. 1/1974.[162] The Bill, which had been proposed in 1958,[163] received a positive response from Indonesian Muslims because it was not in conflict with *uṣūl al-fiqh* reasoning. Thus, commenting on article 8:1 of the Bill, which stipulates that: "A marriage is only allowed when the groom is 19 year old and the bride is 16,"[164] and on article 39:1, stipulating that: "A divorce can only be undertaken in the Court after the Court tries, but does not succeed, to reconcile the couple." [165] Basyir[166] notes that these two articles are based on *maṣlaḥa mursala* (public interest) principle. Insofar as article 8: 1 is concerned, Basyir states:

> Islamic law does not clearly regulate such a stipulation of age, and hence a marriage of minors, when it is conducted by their *walīs* (guardians), is also

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[160]Shiddiqi, "Pemikiran Muhammad Hasbi," 22. See also, Sjadzali, "Pemikiran Prof. Dr. TM. Hasbi," 1.

[161]For example, Ahmad Hanafi says: "the Islamic law seminar held in 1963 and other law seminars are among methods, which were presented by scholars to promote the insertion of Islamic law into the Indonesian National Bill...." Ahmad Hanafi, Pengantar dan Sejarah Hukum Islam (Jakarta: Bulan Bintang, 1970), 238.

[162]Amalbakti, no. 87 Juni 1991, 30. See also, Natsir Zubaidi, "Dwi Fungsi ABRI dan Peranan Umat Islam Pasca Pemilu 1992," Suara Masjid Oktober 1992 no. 217, 8.

[163]Hanafi, Pengantar, 237.

[164]Pemerintah Republik Indonesia, U.U. No. 1 dan P.P. No. 9 Undang-Undang Perkawinan: Penjelasan dan Pelaksanaanya (Surabaya: Karya Anda, 1975), 8.

[165]Ibid., 20.

[166]He is currently the chairman of the Muhammadiyah.

> considered valid. However, if one discerns Islamic teachings about the goals of marriage, regarding which, among other things, it is mentioned in the Qurʾān (30: 21) that a marriage aims at looking for the *mawadda* (calm and quiet) of life so that the feelings of loving each other and *raḥma* (affection) can emerge, then the marriage of minors will not be able to reflect this objective of life. In order therefore to achieve this objective, the government, based on *maṣlaḥa mursala*, is justified in regulating the limitation of age for both grooms and brides as in the Bill of Marriage No. 1/1974.[167]

Concerning article 31:1, he states:

> Islamic law does not clearly regulate whether a divorce should be undertaken in the Court or not. Based on the *maṣlaḥa mursala* consideration, concerning the interest of society in marriage and in order to deny the husband the right to divorce his wife arbitrarily, the government is justified in legislating such rules as are mentioned in the Bill of Marriage. It will mean that a divorce undertaken outside of the Court is considered as never occurring, both according to the Bill and the Islamiyya *Sharīᶜa* (Islamic law).
>
> The obligation that divorce should be conducted in the Court is really in line with the intention of the *Sharᶜ* (Islamic law) according to which marriages should be [successful] and lasting. Divorce according to the Sunna of the Prophet (be peace upon him) is *ḥalāl* (lawful) but, nevertheless, it is very easy to make Allāh angry when it is not undertaken in accordance with the Islamic teachings on the subject of marriage or divorce.[168]

To outline and promote his own understanding of the Bill of Marriage Concept in 1973/1974, Hasbi sent a telegraph to the President of Indonesia.[169]

The Bill on the Islamic Religious Court No. 7/1989[170] was another codification, and hence a unification, of Islamic law. This Bill abrogates a variety of

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[167]Basyir, Hukum Adat, 19. It is, however, article 8: 1, and not article 1 as Basyir mentions in this book.

[168]Basyir, Hukum Adat, 19-20.

[169]The telegraph was published in Panji Masyarakat, Th. XV, No. 135 (15 September 1973), 14 quoted in Shiddiqi, "Hasbi Ash Shiddieqy," 304 and 516.

[170]While "its draft was submitted to the Plenary Session of the Indonesian Legislative Assembly on June 12, 1989," the Bill was issued on December 29, 1989 (Gazette, Indonesian Republic Number 49/1989). Munawir Sjadzali, "Landasan Pemikiran Politik Hukum Islam dalam Menentukan Peradilan Agama di Indonesia," in Hukum Islam di Indonesia: Pemikiran dan Praktek, 41; and Presiden Republik Indonesia, "Undang-Undang Republik Indonesia Nomor 7 Tahun 1989 tentang Peradilan Agama," quoted in Roihan AS. Rasyid, Hukum Acara Peradilan Agama (Jakarta: Rajawali, 1991), 274.

ordinances regulating the structure, jurisdiction, and procedural law of the Religious Courts. Therefore, the Religious Courts no longer have to base their application--because of the absence of the Ordinance, which according to the Constitution of 1945 and Ordinance Number 14/1970, should have regulated their structure as a part of the Indonesian court system--on three different ordinances. These ordinances were: first, the Government Ordinance on Religious Courts in Java and Madura (*Staatblad* Numbers 116 and 610); second, the Ordinance on Judges and Great Judge Meetings for Some Residences of South and East Kalimantan (*Staatblad* Year 1937 Numbers 638 and 639); third, the Government Ordinance Number 45, Year 1957, on the Formation of Religious Courts/*Maḥkama Shar*ᶜ*iyya* outside Java and Madura (*Staatblad* Year 1957 Number 99).[171] Commenting on this Bill, Muhammad Daud Ali says: "the Indonesian Muslims as part of the Indonesian population, are given the chance, through this bill, to obey Islamic law, which is an absolute part of their religious teachings, in accordance with the spirit of article 29 of the Constitution of 1945...."[172] Even though Hasbi clearly desired that Islamic law should be incorporated into the constitution,[173] he had no direct role in this success.

To sum up, the use of the books mostly dedicated to only one *madhhab* and to matters relating to *ᶜibāda*, did not succeed in stimulating the imagination of local

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[171]Ibid. See also, Zarkasyi, "Prospek Peradilan Agama," 73; and Noto Susanto, Organisasi dan Jurisprudensi Agama di Indonesia (n.p., n.d.), 11-12.

[172]Muhammad Daud Ali, "Peradilan Agama dan Masalahnya," in Pemikiran dan Praktek, 77. Although trying to comment on the results of the codification of Islamic law, Mulkan wrongly says, "the nationalization of Islamic law produced for the first time the Bill of Marriage of 1974 and the Bill concerning the Religious Courts of 1990." Abdul Munir Mulkan, Runtuhnya Mitos Politik Santri (Yogyakarta: Sipress, 1990), 10. What should be noted is that the phrase "for the first time" is confusing, because he mentions two bills legislated in two different years. Moreover, the year of the Religious Court is 1989 and not 1990 as he mentions.

[173]See, for example, Hasbi, Pengantar Ilmu Fiqh, 6th edition (Jakarta: Bulan Bintang, 1989), 93.

ᶜulamāᵓ; the initiative or courage to examine the opinions expressed in these books did not emerge from their study. The belief in the rectitude of the *Imām*, the founder of the school of law, had crystallized into a doctrine that the truth of the *madhhab*s should be trusted without attempting to understand the reasons on which such claims to thruth were based. Attachment to a *maddhab*, which was legitimized through the prohibition of *talfīq*, placed Indonesian Muslims in conflict each other. As well, it led them to practices involving *bidᶜa*, which, in turn, led a group of people to call for and initiate a reform. The reformists, with their slogan "Back to the Qurᵓān and the Sunna" tried to purge Muslim practices from the influences of non-Islamic teachings. They endeavored to reopen the alleged "closed" gate of *ijtihād. Taqlīd* and the fanaticism of loyalty to a particular *madhhab* were now softened by introducing comparative studies not only of Sunnite *madhhab*s but also that of the Shiite, as well as of the Indonesian and International legal systems. Comparative studies then became institutionalized through the foundation of the department of compartive *madhhab* at the *Sharīᶜa* faculties of some IAINs.

In its later development, the fundamentalist reform of "Back to the Qurᵓān and the Sunna" softened from a puritanical position to that of a localist. The shift was marked by the emergence of the "Indonesian *fiqh*," the "national *madhhab*," and the "debate about reactualization of Islam." In contrast with the theme "Back to the Qurᵓān and the Sunna," which radically tried to purify Muslim practices from the influences of the indigenous customs, "Indonesianness" has attempted to accept and accommodate the customs by making them a part of itself insofar as they have been selected. Politics and political considerations have been most influential in directing and establishing for the strengthening of the "Indonesianness" theme, which seeks to understand and to implement the will of the makers of the constitution for Indonesia, a former colony now trying to build its own legal system. It is here that we appreciate the significance of Hasbi, who bridged the gap

between two groups of reformists: the religious and the non-religious scholars. Hasbi was a reformist who contributed to all themes, albeit not all stages of Islamic law reform.

CHAPTER II

THE RELATIONSHIP BETWEEN *IJTIHĀD* AND INDONESIAN *FIQH*

Hasbi believes that God continuously sent down a series of messengers, providing them with a *Sharīᶜa* (Divine Law) which suited only the needs of a particular society at particular time. The replacement of a messenger (*rasūl*) meant a change of and improvement over the earlier *Sharīᶜa* in accordance with changing times. The series of messengers came to its culmination with Muḥammad (Q.38:40), and marked the readiness of the human kind to accept a universal message (Q.34:40; 21:107; 7:158) which could accommodate the changes in time and place.[1] Although he believes that *ijtihād* is the only way in which this last message, embodied in a divine but finite text, can accommodate the changes of time and circumstance, Hasbi places consensus (*ijmāᶜ*), analogy (*qiyās*), juristic preference (*istiḥsān*), public interest (*istiṣlāḥ*), and custom (*ᶜurf*), in two different positions. On the one hand, he makes them -- together with the Qur'ān and the Sunna -- the sources of *ijtihād*, and hence the sources of law (*al-maṣādir*). On the other hand, he also considers them to be the methods of *ijtihād* (*thuruq al-ithbāt* or *al-masālik*).[2] By using this dualism Hasbi tries to create an Indonesian *fiqh*.

Hasbi, however, does not put forth his ideas regarding an Indonesian *fiqh*, as derived through *ijtihād*, in a single systematic work. Thus, some difficulties

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[1]Hasbi, Sjari'at Islam, 7; idem, Pengantar Ilmu Fiqh, 176; idem, Perbandingan Madzhab, 10 and 15; idem, Fiqih Islam, 17; idem, Falsafah Hukum Islam, 280; idem, Hukum Antar Golongan dalam Fiqih Islam (Jakarta: Bulan Bintang, 1971), 16; idem, Ilmu Perbandingan Madzhab, 10; idem, Kumpulan Soal-Jawab, 61.

[2]Hasbi, Pengantar Ilmu Fiqh, 196; idem, Ushul Fiqh, 3-25; idem, Falsafah Hukum Islam, 210; and idem, Fiqih Islam, 54-55.

emerge when one tries to reconstruct from his various works a comprehensive system.[3] In view of some inconsistencies in his writings, the present thesis will choose only the most consistent ones, viz. those writings which help discern a broadly consistent pattern in his thought.[4] In order for the methodologies of Indonesian *fiqh* to be well understood, his basic ideas of *ijtihād* will be discussed in detail. Although Hasbi bases his Islamic legal theory (*uṣūl al-fiqh*) on such medieval and modern classics as al-Risāla,[5] al-Muṣtaṣfā,[6] al-Muwāfaqāt,[7] Irshād al-Fukhūl,[8] al-Iḥkām,[9] al-Muᶜtamad,[10] ᶜIlm Uṣūl al-Fiqh,[11] Uṣūl al-Fiqh,[12] and Falsafat al-Tashrīᶜ fī al-Islām,[13] no effort will be made here to compare him to other writers. While his ideas concerning *ijtihād* will essentially be described (Section A), they will be compared to Indonesian realities wherever necessary (Section B).

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[3]Shiddiqi, "Hasbi Ash Shiddieqy," 480.

[4]The divergences will be indicated in the footnotes.

[5]Muḥammad ibn Idrīs al-Shāfiᶜī, al-Risāla, ed. Aḥmad M. Shākir (Cairo: Maṭbaᶜā Muṣṭafā al-Bābī al-Ḥalabī, 1940).

[6]Abū Ḥāmid al-Ghazālī, al-Muṣtaṣfā min ᶜIlm al-Uṣūl (Cairo: Maṭbaᶜā Būlāq, 1907).

[7]Abū Isḥāq al-Shāṭibī, al-Muwāfaqāt (Tunis: Maṭbaᶜa al-Dawlatiyya, 1884).

[8]Muḥammad ibn ᶜAlī al-Shawkānī, Irshād al-Fukhūl ilā Taḥqīq al-Ḥaqq min ᶜIlmu al-Uṣūl (Cairo: Idāra al-Tibaᶜa al-Munīriyya, 1347/1932.

[9]Sayf al-Dīn Āmidī, al-Iḥkām fī Uṣūl al-Aḥkām (Cairo: Maṭbaᶜa Bāb al-Ḥalabī, 1351/1932).

[10]Abū Ḥusayn al-Baṣrī, al-Muᶜtamad fī Uṣūl al-Aḥkām, ed. M. Hamidullah et al. (Damascus: Maṭbaᶜa al-Kathūliqiyya, 1964).

[11]ᶜAbd al-Wahhāb Khallāf, ᶜIlm Uṣūl al-Fiqh (Cairo: Maṭbaᶜa al-Islāmiyya, 1954).

[12]Muḥammad Khuḍarī Bīk, Uṣūl al-Fiqh (Cairo: Maṭbaᶜa Istiqāma, 1934).

[13]Ṣubḥī Maḥmaṣānī, Falsafa al-Tashrīᶜ fī al-Islām (Beirut: Dār al-Kashshāf li al-Nashr wa al-Tibaᶜa wa al-Tawzīᶜ, 1952).

A. Hasbi's Theory of *Ijtihād*

A.1. Definition and proofs of *ijtihād*

Ijtihād, according to Hasbi, signifies "the use of all capabilities of reason (*ʿaql*) in deducing law from its proof (*dalīl*), by way of an inquiry which lead to the law," or it signifies "doing research on a particular question in a scientific manner, and to using the capacity of reasoning to the utmost."[14] By proof (*dalīl*) he literally means an indication towards something which may be intended, or a sign indicating something, and coming from sensory perception (*ḥissī*), from the intellect (*ʿaqlī*), or from a religious text (*sharʿī*). In the context of *ijtihād* , Hasbi defines *dalīl* as "something by which one can reach a ruling,"[15] and he explains it through three classifications. Regarding its sources, the proof is classified into that which is textual (*al-dalīl al-naqlī*), including the Qurʾān, the Sunna, and the consensus of the Companions (*ijmā madhhab al-Ṣaḥāba*); and that which is rational (*al-dalīl al-ʿaqlī*), including analogy, juristic preference, public interest, presumption of continuity (*istiṣḥāb*), and custom. In its scope of application, it includes (1) the specific type which indicates only one ruling (*al-dalīl al-juzʾī* or *al-tafṣīlī*), consisting of the Qurʾān, the Sunna, consensus or analogy, and (2) the universal type which indicates generalities (*al-dalīl al-kullī*), consisting of the Qurʾān, the Sunna, or universal legal norms (*al-qawāʿid al-kulliyya*). Seen in term of its strength and weakness, the proof is divided into that which yields certainty (*al-dalīl al-qaṭʿī*) because it comes down in a recurrent (*mutawātir*)[16] way, and that which

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[14]Hasbi, Ruang Lingkup, 5. See also, idem, Pengantar Ilmu Fiqh, 192; idem, Pengantar Hukum Islam, I: 62-63.

[15]Hasbi, Pengantar Hukum Islam, I: 172.

[16]The translation of the term '*mutawātir*' is taken from Wael B. Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought," in Islamic Law and Jurisprudence: Studies in Honour of Farhat J. Ziadeh, ed. Nicolas Heer (Seattle and London: University of Washington Press, 1990), 10.

indicates probability (*al-dalīl al- ẓannī*) because it does not come in a recurrent (*mutawātir*) fashion.[17] When the Qurʾān, Sunna, consensus, analogy, juristic preference, public interest, and custom are taken as proofs (*adilla*), they are, Hasbi suggests, used as sources of *ijtihād.* His discussion of these sources may be summarized as follows:

The position of the Qurʾān[18] as a source of *ijtihād* does not, according to Hasbi, need any proof. He classifies the rulings of the Qurʾān, which he calls *fiqh* al-Qurʾān, into the rulings concerning matters of basic belief (*aḥkām al-ʿaqāʾid*) such as belief in God, the holy books, the messengers, the angels, the last day, as well as in *qaḍāʾ* and *qadar*, all of which belong to the sphere of Islamic theology; those of morality (*aḥkām al-akhlāq*), which belong to sociology and ethics; and ruling regulating practice (*aḥkām ʿamaliyya*), which Hasbi divides into those of worship (*ʿibāda*) and those of human relationship (*muʿāmalāt).* The *aḥkām al-ʿibāda*, meaning "all rulings issued to regulate the relations between human beings and God," include physical worship (*al-ʿibādāt al-badaniyya*) such as prayer and fasting; monetary and social worship (*ʿibāda al-māliyya al-ijtimāʿiyya*), in the form of alms and charity; and spiritual-physical worship (*ʿibādāt al-rūḥiyya al-badaniyya*), such as pilgrimage to Mecca, holy war and sacred vows (*nidhr*). The Qurʾān provides the rulings of *ʿibāda* in one hundred and forty verses. As for the *muʿāmala* rulings, namely, "all rulings issued to regulate the relations between one individual and another, and between an individual and a social group," they have seven branches: (1) *aḥkām al-aḥwāl al-shakhṣiyya*, that is, the rulings pertaining to personal status, such as those dealing with family regarding which the Qurʾān provides seventy verses; (2) *aḥkām al-muʿāmala al-madaniyy*a, that is, the rulings

[17]Hasbi, Pengantar Hukum Islam, I: 172-175.

[18]Quoting the *uṣūliyyūn*, Hasbi defines the Qurʾān as "God's statements sent down to Muḥammad, written down in the *muṣḥaf* in Arabic, transmitted to us Muslims through a *mutawātir* way, beginning with the *Fātiḥa* [chapter] and ending with the *Nās* [chapter]." Hasbi, Pengantar Hukum Islam, I: 169-170.

of commerce, regarding which the Qur'ān provides seventy verses; (3) criminal laws, or rulings issued to maintain human life, dignity, and property, about which the Qur'ān has thirty verses; (4) international law; (5) procedural and testimonial law, with which the Qur'ān deals in twenty verses; (6) constitutional law, viz. laws issued to regulate the relations between subject and state, for which the Qur'ān provides thirty-five verses; and (7) rulings on state finance, regarding which the Qur'ān provides ten verses.[19]

Hasbi holds that the intent of the Qur'ān in determining a ruling is to achieve three levels of public interest (*maṣlaḥa*). The necessary public interest (*al-maṣlaḥa al-ḍarūriyya*), that is, a *maṣlaḥa* at once religious and profane which must exist for the sake of human life, is the highest *maṣlaḥa* and has five foci: religion, soul, intellect, progeny, and property. To preserve religion, the Qur'ān 'legislates' the principles of faith and *ʿibādāt* such as *ṣalāt*, and at the same time protects them by punishing those who destroy them. Otherwise, religion would be damaged. To preserve the soul, the Qur'ān allows human beings to eat good foods, to wear good things and permits other *muʿāmala*s such as commerce and at the same time 'legislates' certain rulings necessary to avoid injury to the soul. Otherwise, the interest of looking after the soul would be lost. To preserve intellect, the Qur'ān allows human beings to benefit from everything that guarantees their safety, and at the same time prohibits everything that can damage it. In the interest of the offspring or progeny, the Qur'ān prescribes marriage and at the same time prohibits adultery. To guard property, the Qur'ān 'legislates' the rulings of *muʿāmala*, and at the same time prohibits any transaction that would corrupt it. Otherwise, the interest of

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[19]Hasbi, Ilmu Al-Qur'an/Tafsir, 160-164; idem, Pengantar Hukum Islam, I: 120; idem, Sejarah Pertumbuhan dan Perkembangan Hukum Islam (Jakarta: Bulan Bintang, 1971), 19; idem, Pengantar Ilmu Fiqh, 37-38; idem, Fiqih Islam, 50-51.

property would be damaged.[20]

The second level of public interest is that of the complementary requirements (*al-maṣāliḥ al-ḥājiyyāt*), that is "everything that human beings need to facilitate the undertaking of their obligations and their life."[21] These include all elements that avoid hardship, alleviate the difficulty of their obligations, and facilitate human relationships. Therefore, when these complementary requirements cannot be achieved, human beings will face many problems even though such problems may not life-damaging.[22] The complementary requirements are in principle covered in the necessary public interests, such as rulings that permit Muslims to combine the noon and afternoon prayers at noon or in the afternoon when they are traveling. The Qurʾān 'legislates' everything that is not included in the *ḍarūriyyāt* and whose absence will not damage basic public interest in protecting the soul and intellect. These things, like food, drinking and shelter, belong to the *muʿāmala* section. The Qurʾān 'legislates' a variety of *muʿāmala* rulings and at the same time forgives certain small and unavoidable matters pertaining (for instance) to rulings on the protection of property.[23]

The last and lowest level of *maṣlaḥa* that the Qurʾān wants to achieve is that of embellishments (*taḥsīniyyāt*), or everything that human beings need to embellish their life. This belongs to custom and ethics. Although its absence will decrease the feeling of beauty and perfection, it neither destroys life nor results in hardship. Like the *ḥājiyyāt*, the *taḥsīniyyāt* are covered in the *ḍarūriyyāt*. To protect religion, for example, the Qurʾān 'legislates' various kinds of cleanliness (*ṭahāra*). To protect the soul, the Qurʾān 'legislates' ethical actions and prohibits human beings from eating

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[20]Hasbi, Pengantar Hukum Islam, I: 81-85; idem, Ushul Fiqh, 12-13.

[21]Hasbi, Pengantar Hukum Islam, II: 82.

[22]Ibid., II: 82, 86-87. See also, idem, Fakta Keagungan, 15-26.

[23]Hasbi, Pengantar Hukum Islam, II: 86-87.

and drinking unclean foods. To protect decency, the Qurᶜān has rulings for good relations between husband and wife. To protect the intellect, the Qurʾān prohibits human beings from the use of alcohol. To protect property, the Qurʾān commands human beings to avoid unlawful actions.[24] It is thus apparent that in order to achieve its goals of legislation (*maqāṣid al-sharᶜiyya*), the Qurʾān, according to Hasbi, applies the principle of dualism: to command something through a particular ruling and at the same time to protect it through other rulings.

In legislating its rulings, the Qurʾān does not complicate the subject but rather makes it easier [*ᶜadam al-ḥaraj li al-mukallaf*] as stated in Q.2:7, 185, and 286; Q.5:7; Q.4: 42; and Q.22:78.[25] Nor does the Qurʾān make the subject heavier by increasing the burden as stated in Q.5:101. The Qurʾān gives the rulings gradually and not all at once. For example, in order to prohibit alcohol, the Qurʾān began by comparing the advantages and disadvantages of alcohol and gambling (Q.2:219). It then prohibited prayers in a drunken condition (Q.4:43), and only later came to an explicit prohibition of alcohol (Q.5:95).[26] To achieve its goal as the universal message (*raḥmatan li al-ᶜālamīn*), the Qurʾān expresses its rulings in two different styles: in a detailed manner (*mufaṣṣal*, *mufassar* or *juzʾī*), or in a broad, global manner by introducing general purposes and universal legal maxims.[27] In contrast with the detailed rulings that apply forever, such as those of worship and family,[28] the general ones, such as "*muᶜāmala*, constitutional, international,

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[24]Ibid., 83, and 88.

[25]Hasbi, Ilmu Al-Qur'an/Tafsir, 136-237; idem, Falsafah Hukum Islam, 119.

[26]Hasbi, Ilmu Al-Qur'an/Tafsir, 136-137; idem, Dinamika dan Elastisitas, 24-25; idem, Fakta Keagungan, 19-20.

[27]Hasbi, Pengantar Ilmu Fiqih, 37, 171-172; idem, Ilmu Al-Qur'an/Tafsir, 134-135, and 159-161; idem, Fiqih Islam, 36-37; idem, Falsafah Hukum Islam, 280-281; idem, Beberapa Permasalahan, 28-29; idem, Pertumbuhan dan Perkembangan, 18-19; idem, Ilmu Perbandingan Madzhab, 11; and idem, Ruang Lingkup, 3.

[28]Hasbi, Fiqih Islam, 51; idem, Ilmu Al-Qur'an/Tafsir, 163; idem, Ushul Fiqh, 25; idem, Dinamika dan Elastisitas, 127. It is worth noting, however, that Hasbi also put the *ᶜibādāt* laws under the classification of the global (*mujmal*) ones.

economics and financial laws,"[29] change depending on the changes of context within which Muslims live. Furthermore, the Qur'ān guides Muslims to do justice, to consult each other (*shūrā*), to avoid both hardship and injury, to look after rights, to be trustworthy (*yu'tī al-amāna*), to consult the experts concerning important matters, and other general principles needed for public interest and the happiness of Muslims, which Hasbi considers to be the foundations and maxims needed by any constitution (*undang-undang*).[30]

In commanding something, the Qur'ān, according to Hasbi, uses ten different styles of language (*uslūb*): (1) it explicitly uses the word "command" (*amara*) (e.g. Q.16:90 and Q.4:58); (2) it explains that the action is obligatory (*furiḍa*) upon those who come under the command (e.g. Q.2:178); (3) it informs that the action has been made obligatory (*furiḍa*) upon all human beings or on some group only (e.g. Q.3:97); (4) it specifies who is required to undertake an action (e.g. Q.2:228); (5) it commands by using the imperative mode or by the present tense followed by *lām* indicating an imperative [*fi'l al-muḍāri' al-muqārin bilām al-amr*] (e.g. Q.2: 238); (6) it uses the word "obligation" (*farḍ*) (e.g. Q.33:50); (7) it mentions an action as a reward or an answer as a condition (e.g. Q. 2:280) (although Hasbi states that this style is not common); (8) it mentions an action followed by the word "better" (*khayr*) (e.g. Q.2:220); (9) it mentions an action followed by a promise of reward (e.g. Q.2:245); and (10) it explains that an action is good or leads towards good (e.g. Q.3:39).

On the other hand, in prohibiting something, the Qur'ān uses nine different styles of language: (1) it clearly uses the verb "to restrain" (*nahā*) (e.g. Q.16:90), (2) "to prohibit" (*ḥarrama*) (e.g. Q.24:3), (3) and "to be unlawful" (*lā yaḥill*) (e.g.

See Hasbi, Ilmu Al-Qur'an/Tafsir, 164; and idem, Beberapa Permasalahan, 28.

[29]Hasbi, Fiqih Islam, 51; idem, Ushul Fiqh, 26; and idem, Ilmu Al-Qur'an/Tafsir, 164.

[30]Hasbi, Pengantar Hukum Islam, II: 81.

Q.6:120, and 33:48); (4) the present tense preceded by a prohibition [*fiʿl al-muḍāriʿ yataqaddammuhu nahy*] or the imperative tense indicating a prohibition (e.g. Q.6:152; Q.6:120, and 33:48) is employed; (5) it negates an action (e.g. Q.2:193), (6) or good deeds from an action (e.g. Q. 2:189); (7) on occasion, it mentions an action by clarifying that whoever performs it is sinful (e.g. Q.2:181); (8) or follows the mention of it by a threat (e.g. Q.9:34); (9) or else an action is simply characterized as wicked (e.g. Q.3:180). When giving the right to human beings to choose, the Qurʾān uses three different styles of language: (1) it relates the word "lawful" (*ḥalāl*) to an action (e.g. Q.5:1); (2) it negates a sin [from an action] (e.g. Q.2: 173); (3) it negates heavy heartedness [from an action].[31]

In understanding the Qurʾān, one cannot separate Qurʾānic verses one from the other. However, this does not mean, according to Hasbi, that their position as proofs of *ijtihād* is at the same level, because while they are equally certain in their mode of transmission (*qaṭʿī al-wurūd*), not all of them are certain in their indications (*qaṭʿī al-dalāla*). Therefore, if a general meaning contradicts a specific one, the latter takes precedence over the former, because while the latter is certain the former is only probable. If a homonym indicates both the etymological and the religious meanings, then the latter takes precedence over the former because while the latter is certain, the former is probable. If a metaphorical meaning contradicts the literal one, then the latter takes precedence over the former because while the latter is certain the former is probable. If an absolute meaning contradicts the confined one, the latter would take precedence over the former, provided that both are the same in terms of law and cause; both should be applied in their own context when both are different in their cause; and the confined cannot take precedence over the absolute if both are different in the rulings they indicate. The process should be given a historical perspective by putting the analyzed word into the meaning it presumably had when

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[31]Hasbi, Ilmu Al-Qur'an/Tafsir, 165-168.

the Qur'ān was revealed, in the context of occasion of Qur'ānic revelation (*sabab al-nuzūl*) if any, and in the biography of the Prophet (*sīrat al-nabī*). The last step is to base this deduction of law on the sciences related to the matters under discussion.[32]

Hasbi refers to twenty-one Qur'ānic verses, which are as follows: Q.16:44, and 64; Q.7:156; Q.59:47;Q.4:65;Q.3:31, 32, and 164; Q.8:[?]; Q.4:80; Q.24:47-54, and 62; and Q.33:36,[33] to strengthen his arguments that *ḥadīth* is the second source of Islamic law, and hence that of *ijtihād*. Generally speaking, he classifies the content of *ḥadīth* into history, morality, belief, and law, none of which can deviate from Qur'ānic principles. The quality of a *ḥadīth* as a proof of *ijtihād* varies depending on the number of its transmitters. Following the classification common among the experts on *ḥadīth* (*al-muḥaddithūn*), Hasbi divides *ḥadīth* into *al-ḥadīth al-mutawātir, al-ḥadīth al-mashhūr*, and *al-ḥadith al-aḥādī*. Because it is related by many people who neither lived in the same place nor were likely to lie, the information conveyed by *al-ḥadīth al-mutawātir* is certain, and hence is regarded as proof (*ḥujja*). Hasbi's consideration of *al-ḥadīth al-āḥādī al-ṣaḥīḥ* (sound Prophetic tradition related by one person) as proof (*ḥujja*), provided that it does not contradict a stronger proof such as Qur'ānic verses, means, of course, that he also accepts the proof-value (*ḥujjiyya*) of *al-ḥadīth al-mashhūr* because the latter, which is related by two or more people, is higher in terms of its certainty than the former which is related by one person only. He insists, "if we reject all information (*khabar*) related to us in a *mashhūr* way, then all regulations will be ineffective in this universe."[34]

When related to the Qur'ān as the first source of *ijtihād, ḥadīth* functions, according to Hasbi, to particularize the general provisions of the Qur'ān (*bayān al-*

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[32]Hasbi, Pengantar Hukum Islam, II: 53-59; idem, Ilmu2 Al-Qur'ān, 220-221;

[33]Hasbi, Problematika Hadits sebagai Dasar Pembinaan Hukum Islam (Jakarta: Bulan Bintang, 1964), 7.

[34]Ibid.

tafṣīl or *bayān al-tafsīr*), as in explaining the manner of conducting prayers and pilgrimage. This function includes the specifying explanation (*bayān al-takhṣīṣ*), regarding which Hasbi notes that: "We specify the Qurʾān with the Sunna when their levels are the same, namely: both are certain, and *vice versa*"[35]; it also comprises the strengthening explanation (*bayān al-taʾkīd*). The second function is to 'legislate' a ruling that the Qurʾān does not mention (*bayān al-tashrīᶜ*), such as the prohibition of eating animals that have tusks and claws.[36] Hasbi, however, rejects the possibility of *ḥadīth* abrogating Qur'anic verses (*bayān al-taghyīr* or *bayān al-tabdīl*). He says that: "at best, we can only use *ḥadīth* to state which one of two contradictory verses is abrogated."[37]

Given that Muḥammad is not only a man but also a messenger, as stated in Q.18:111, Q.41:6; and Q.17:93, Hasbi divides *ḥadīth* into legal (*ḥadīth al-tashrīᶜ*) and non-legal (*ḥadīth ghayr al-tashrīᶜ* or *ḥadīth al-irshād*). Muḥammad met his natural needs as a man, and not as a messenger of God, so that his private actions did not bind Muslims. Hasbi insists: "Obviously, nothing related from the Prophet, be it his statements or his actions, be it on his manner of eating, drinking, dressing, sleeping, sitting, walking, and acting that he conducted as a man to fulfill his natural needs is a general ruling (*tashrīᶜ al-ᶜāmm*) and therefore, we are not obliged to do as he did."[38] Muḥammad's opinions on worldly affairs based merely on his personal thinking and experiences belong to this category. His statements or actions as a messenger, however, belong to category of the general legislation (*al-tashrīᶜ al-ᶜāmm*), such as specifying the general meaning of a Qurʾānic verse. When he acted

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[35]Hasbi, Ilmu Al-Qurʾān/Tasir, 177.

[36]Hasbi, Fiqih Islam, 52-53; idem, Beberapa Permasalahan, 29; idem, Pengantar Ilmu Fiqh, 176; idem, Sejarah dan Pengantar Ilmu Hadits, 178-187; idem, Ilmu2 Al-Qur'an, 222; and idem, Pengantar Hukum Islam, I: 194.

[37]Hasbi, Problematika Hadits, 36.

[38]Ibid., 48.

as the head of the state as when he installed a governor, his action related to the sphere of legal tradition but not to that of the general legislation, because such an action can only be conducted by a state head or with his permission. When he acted as a judge, his action belongs to the category of the legal tradition but not to that of the general legislation, because the action should be performed only by a judge. Similarly, his legal action, based on the customs of his own society or in its interest, belongs to the legal but not the general tradition. As Hasbi puts it! "If it [the legislation of the Prophet] is particular to the Arabs and is based on their customs, it does not apply to other nations and customs."[39] Hasbi places actions based on the special status of the Prophet (*khaṣā'iṣ al-nabī*) in between: while they do not belong to the legal tradition, they are also not permitted to be conducted by anyone else.[40]

If two *ḥadīth*s that seem to contradict each other cannot be combined (*taufīq*), the *mujtahid*s should examine the history of their transmission (*wurūd*) with the consideration that the earlier *ḥadīth* is abrogated (*mansūkh*) by the later. Conversely, if the history of their *wurūd* cannot be determined, the *mujtahid*s should conduct a *tarjīḥ*, that is, select the stronger one. The *tarjīḥ* should be undertaken from three respects: chain of transmission (*sanad*), content (*matn*), and indication (*madlūl*). It is necessary, however, that both the traditions which are to be mutually compared to determine the preferred one (*tarjīḥ*): (1) are equal in position, such as *ḥadīth āḥād* is to be compared with *ḥadīth āḥād*, not a *ḥadīth mutawātir* with *ḥadīth āḥād*; and that (2) both *ḥadīth*s should apply to the same place and time. Seen from the chain of transmission, preference should be given to that *ḥadīth*: which has the following features: it is related by a larger number of people; its transmitters show evidence of a stronger memory; the transmitters' justice are

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[39]Hasbi, Ushul Fiqh, 30.

[40]Hasbi, Problematika Hadits, 48-51; idem, Pengantar Hukum Islam, I: 197-200; and idem, Fiqih Islam, 154-155.

agreed upon by the *ʿulamāʾ*; the transmitters have received the *ḥadīth* in question when they were sexually mature (*bāligh*); it suits better the explicit text of the Qurʾān; its transmission is agreed upon by the ʿulamāʿ; in which the *marfūʿ* is agreed upon by the ʿulamāʿ; it is *muttaṣil*; it is followed by an action; it contains an explicit ruling; it is oral (*al-ḥadīth al-qawlī*); the *ḥadīth* relating the speech and action of the Prophet (*bi al-qawl wa al-fiʿl*) is to be preferred over anything arrived at through deduction (*istidlāl*) and *ijtihād*; the *ḥadīth* related by someone who experienced the event [reported in the *ḥadīth*] is to be preferred over that which is related by someone who did not directly experience it.

As far as its content is concerned, priority should be given to a specific *ḥadīth* over a general *ḥadīth*; to the real meaning over a metaphor unless it is the metaphorical meaning that should be applied to the case; to the *ḥadīth* that does not use a pronoun over that which does; to the *ḥadīth* that signals the existence of effective cause over that which does not. Insofar as indication (*madlūl*) is concerned, preference should be given to the *ḥadīth* that strengthens *ḥukm al-aṣl* without ruling [*al-barāʾa al-aṣliyya*] over that which brings about a ruling; to the *ḥadīth* that is closer to the *iḥtiyāṭ* over that which is not; to the *ḥadīth* that determines a ruling over that which negates a ruling; to the *ḥadīth* which contains a lighter ruling over that which gives a heavier one. Some other factors in *tarjīḥ* are that preference is to be given to the *ḥadīth* supported by another proof over that which is not; to the *ḥadīth* practiced by the majority of the *Salaf* over that which is not; to the *ḥadīth* that suits the practices of the four caliphs over that which does not; and to the *ḥadīth* that conforms to the opinion of the *ʿulamāʾ* of Medina over that which does not.[41]

The third source of *ijtihād*, according to Hasbi, is consensus (*ijmāʿ*).

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[41]Hasbi, Pokok-Pokok Ilmu Dirayah Hadith, 5th edition (Jakarta: Bulan Bintang, 1981), II: 274-282.

Together with the Qur'ān and the Sunna, he considers it to be pure religious legislation (*al-shar' al-mahḍ*). The *ijmā'* as "a consensus of *mujtahid*s or *faqīh*s about a particular thing"[42] has a different meaning than that signified by *ijmā'* of the times of Abū Bakr and 'Umar. At that time, *ijmā'* was "a consultation conducted by those deemed able to represent their people under the instructions of the head of the state,"[43] to guide the *ūlū al-amr* in managing the affairs of their people.[44] By *ūlū al-amr* he means the representatives of the people who consult [to determine] the interest of both the people and the state.[45] Thus, Hasbi's concept of consensus involves state legislation, as will be apparent from the following elaboration.

As to *ahl al-ḥall wa al-'aqd*, Hasbi differentiates between the political institution and the legislative institution by saying: "obviously, we have two institutions, albeit both are called '*ahl al-ḥall wa al-'aqd*.' It is better for us to name the *ahl al-ḥall wa al-'aqd* of *imāma*, the political institution (*hay'at al-siyāsa*); and *ahl al-ḥall wa al-'aqd* of *uṣūl al-fiqh*, the legislative institution (*hay'at al-tashrī'iyya*)."[46] While the members of political institution are "the members of the legislative assembly elected by and from the people and represent the people's authority,"[47] the members of legislative institution should be *mujtahid*s in the sense of being experts (*ahl al-ikhtiṣāṣ*) in *uṣūl al-fiqh* and they should those who completely meet the conditions of *ijtihād*. In performing their functions as the members of the board, the representatives are to materialize the interest of the people. Hasbi says:

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[42]Hasbi, Pengantar Hukum Islam, I: 201.

[43]Ibid.

[44]Hasbi, Ushul Fiqh, 31.

[45]Hasbi, Asas-Asas Hukum Tata Negara, 37; idem, Kriteria, 110; idem, Pengantar Hukum Islam, I: 280; and idem, Falsafah Hukum Islam, 150.

[46]Hasbi, Ilmu Kenegaraan, 68.

[47]Hasbi, "Pedoman Perdjoeangan," 217.

> The task of *shūrā* (consultation) in Islam is limited to the major aspects [of the application of Islamic law]: (1) to seek ways of applying the Divine texts; and (2) to legislate concerning matters not regulated by an explicit revealed text , in accordance with the aim and spirit of the consultation. The texts of the Qurʾān point out . . . .. the universal rulings and determine the ways they should be practiced. The rest is left to the *ahl al-ḥall wa al-ʿaqd* or *ūlū al-amr*. They legislate. However, the laws they enact should be in line with that which Islam determines.[48]

In view of the fact that they not only review the results of previous consensus but also mutually consult to arrive at a new ruling, the members of the legislative institution "are permitted to look for and adopt the easiest solutions from Islamic law, so as to select with greater ease and facilitate such rulings from the various *madhhab*s which are suitable to their place and milieu."[49]

The ruling resulting from the consensus is certain (*ijmāʿ al-qaṭʿī*) if the process of decision-making is based on the Qurʾān or the *ḥadīth*. An example of such a consensus on the basis of the Qurʾān is the prohibition to marriage to one's grandmother, as laid down by the verse "*wa ḥurrimat ʿalaykum ummahātukum*;" [Q. 4:23] and "the consensus which explains that the Prophet gave 1/6 portion of inheritance to grandmother" is an instance of a consensus based on *ḥadīth*.[50] In addition, "when all *mujtahid*s," says Hasbi, "put forward their opinions, either orally or in writing, explaining their agreement as to the opinion of a *mujtahid* of their times," that consensus is called certain (*ijmāʿ al-qaṭʿī*), oral (*ijmāʿ al-qawlī*), or explicit (*ijmāʿ al-ṣarīḥ*). On the other hand, the ruling will be probable (*ijmāʿ al-ẓannī*) if it is based on the probable proof, viz. *ḥadīth al-āḥād* or analogy, such as drawing analogy between the caliphate and leadership in prayer.[51] In addition, "when they [the *mujtahid*s] just keep silent neither for fear nor shyness, the consensus is only a probable one *(ijmāʿ al-ẓannī)* or one derived from source in the

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[48]Hasbi, Fiqih Islam, 65.

[49]Ibid., 47; idem, Falsafah Hukum Islam, 315 and 375.

[50]Hasbi, Fiqih Islam, 54.

[51]Hasbi, Pengantar Ilmu Fiqh, I: 180.

form of silence (*ijmāᶜ al-sukūtī*)."[52] Certain consensus is binding, provided that: those reaching it are selected by and on behalf of the people; the decision they make neither contradicts the rulings of the Qurᵓān nor that of *Sunna al-mutawātira*; the decision is taken independently without political oppression from either internal or external forces; and the decision safeguards public interests. When the decision is replaced with another consensus of the same level, however, it is the latter which is the applicable.[53] On the other hand, probable consensus, according to Hasbi, is disputable.[54]

When the members of the *ahl al-ḥall wa al-ᶜaqd* come to a deadlock because two groups among them defend their respective opinions, the majority will take precedence. Hasbi says: "when dealing with the principle of *ijmaᶜ*, the *uṣūliyyūn* say that the majority constitutes an authoritative reference (*ḥujja*). The Prophet himself directed Muslims to support a majority if a crisis emerged."[55] If the two opinions are equally strong, the government should establish a committee to reconcile them; Hasbi calls such an expedient the Arbitration Committee (*Majlis al-Taḥkīm*). If the problem cannot be resolved even then, the committee should submit the conflicting views to the head of the state to choose that which he considers of more beneficial to his subjects. This last resort for determining and securing the interest of the people leads Hasbi into a dilemma: while saying that the result of consensus constitutes pure religious ruling (*al-Sharᶜ al-mahḍa*), and that the result of a probable consensus is disputable, he leaves the final decision to the state head who is entirely a man of worldly affairs.

At the time of the Prophet's companions, says Hasbi, analogy (*al-qiyās)*

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[52]Hasbi, Pengantar Hukum Islam, I: 203; idem, Fiqih Islam, 54.

[53]Hasbi, Asas-Asas Hukum Tata Negara, 37-51.

[54]Hasbi, Pengantar Ilmu Fiqh, 180; idem, Fiqih Islam, 54; idem, Pengantar Hukum Islam, i: 203.

[55]Hasbi, Ilmu Kenegaraan, 68.

meant "referring something to the aim of *Shar*ᶜ, to general legal maxims, and to the effective causes (*ᶜillas*) which are easily understood and indisputable."[56] As a source of *itjihād,* analogy is, according to Hasbi, mentioned in the Qurᵓān forty-one times.[57] Based on the definition of analogy as equalizing the ruling of two similar things and distinguishing the ruling of two different things, he acknowledges *qiyās al-ᶜilla* and *qiyās al-dalāla* only.[58] By *qiyās al-ᶜilla* he means "combining an original case (*al-aṣl*) and a new case (*al-farᶜ*) on the basis of the effective cause (*al-ᶜilla*),"[59] such as analogizing God Who will give life to a dead person to God Who gives life to the earth. By *qiyās al-dalāla* he means "an analogy which indicates a ruling on the basis of the proof of the effective cause, or combining an original case with a new case on the basis of the proof of effective cause,"[60] such as analogizing any intoxicating item to arak on the grounds that both produce an intoxicant. Hasbi considers these two analogies as the only form of a valid *qiyās.*[61]

Every analogy, according to Hasbi, consists of four pillars (*arkān*) as follows: (1) *aṣl* and a *maqīs ᶜalayh*, that is, an event whose legal status is mentioned by a revealed text ; (2) *farᶜ* and *maqīs*, or an event whose legal status is not mentioned by a revealed text and is analogized to the original case to determine its legal status; (3) *ḥukm al-aṣl*, meaning a legal status of any event whose legal status is mentioned by a revealed text; (4) *ᶜilla al-ḥukm*, that is, a consideration upon which the *Shar*ᶜ determines the *ḥukm* (legal status) of the *al-aṣl.*[62] The principle (*asās*) of analogy is ratiocination of the divine text (*taᶜlīl al-naṣṣ*) to ascertain the

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[56]Ibid.

[57]Hasbi does not specify where these are mentioned.

[58]Hasbi, Ushul Fiqh, 6-7; idem, Falsafah Hukum Islam, 329.

[59]Hasbi, Pengantar Hukum Islam, I: 223.

[60]Ibid., I: 223-234.

[61]Ibid., I: 278.

[62]Hasbi, Ushul Fiqh, 6-7; idem, Pengantar Hukum Islam, I: 216; idem, Pengantar Ilmu Fiqh, 184.

principle upon which the *Shar*^{c} prescribes a ruling. To accept analogy implies accepting the purposes of legislation in the Qur$^{\circ}$ān and Sunna, called *ḥikmat al-ḥukm*. The effective cause of a ruling is "an attribute in the original case upon which the determination of the ruling in the new case is based."[63] Hasbi agrees, then, with the Muslim legal theorists that the effective cause of a ruling, which is different from the reason of a ruling (*sabab al-ḥukm*) can be clearly understood from the prescription of the *Shar*^{c} on the ruling. For example, to intoxicate is an attribute of arak which becomes the basis of its prohibition. It also helps to understand the status of any intoxicating liquor. It is this attribute which causes a strong presumption (*ẓann*) that *Shar*^{c} has a definite proposed (*ḥikma*) in this ruling, in terms of which a general prohibition of the drinking of intoxicating substances in effected.[64]

To be the bases of analogy, an effective cause should meet four conditions: first, it should be a clear attribute, the presence of which can be determined through the senses, such as the intoxicating attribute of arak. Second, it should be an attribute that has a *ḍābiṭ*, a sustained, consistent reality. Third, it should be a *munāsaba* attribute, that is, there should be a correlation between the attribute and the ruling, based on the general purposes of a ruling (*ḥikma al-ḥukm*) for example, an intentional killing has a rational correlation to the necessity of sentencing the killer to retribution (*al- qiṣāṣ*), to prevent others from killing because the soul should be protected. Fourth, it should be an attribute that exists only in the original case, because the main purpose of the ratiocination of rulings is to apply the ruling of the original case to the new case. For example, one cannot ratiocinate that arak is prohibited by saying that it is a submergence[65] of wine that has somehow become

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[63]Hasbi, Ushul Fiqh, 9.

[64]Ibid., 10.

[65]It seems that Hasbi here refers to an Indonesian traditional way of producing arak (*tuak*). Some of Indonesian people submerge the matters of the arak in a well. In this regard, the essential attribute of the arak is intoxicating, and not the

arak (*tuak*).[66]

Hasbi divides the effective cause into four categories: first, whether or not it has been acknowledged (*muᶜtabara*) by the *Sharᶜ*. This category is itself divided into four sections: (1) *munāsiba al-muʾaththir*, that is, a rational relation that the *Sharᶜ* clearly mentions, which leads to the ruling; this type is called *ᶜilla al-manṣūṣa* (clearly stated effective cause), such as in prohibiting arak; (2) *munāsib al-mulāʾim*, that is, a rational relation that the *Sharᶜ* does not acknowledge as the effective cause of the ruling under consideration but does clearly acknowledge as the effective cause of a ruling which has clear affinity with the case under consideration. For example, the effective cause of the guardian to have an authority to marry off his young daughter is that she is still young. The *Sharᶜ* acknowledges it as the effective cause concerning managing the property of the young; (3) *munāsib al-mulghā*, meaning an effective cause that externally seems to be the foundation of the determination of a ruling because it leads to a strong assumption of the existence of *ḥikma*, but the religious proof does not acknowledge but rather prohibits it; for example, to equalize the portion of son and daughter in inheritance is illegal; (4) effective cause that encourages a *mujtahid* to think that to base a ruling on it will materialize the benefit, but the religious proof neither acknowledge nor nullifies it. Regarding this type the Muslim legal theorists require taking public interest (*al-maṣlaḥa al-mursala)*, which will be explained in more detail in the following category.

The second division is that in which the effective cause acknowledges a benefit on which a strong presumption of the effective cause is based. In this category, the effective cause should be a reason that materializes the proposed benefit in the prescription of ruling, that is, the *ḍarūrī*, the *ḥājī* and the *taḥsīnī*

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submergence. I owe this remark to Ms. Qomariyah.

[66]Hasbi, Ushul Fiqh, 11.

maṣāliḥ.[67] The third division is that which stresses the effective cause in terms of the proposed aim (*al-maqṣūd*). The acceptance of the effective cause differs depending on the level of the indication to the aim. If materializing the *ḥikma* and leading us convincingly to the aim, the effective cause is considered the *ʿilla* because it has a rational relation (*munāsib*). If leading us in a speculative way to the aim, the position of effective cause is the same as that of certain cause. Based on this principle, if the effective cause leads metaphorically (*majāz*) to the same weight between indicating and not indicating the aim, the effective cause should be considered as leading to the aim because it still has the *munāsiba* in the sense of the possibility to materialize the aim. For example, to marry to a menopausal woman could prevent one from having children, but there is still a possibility that she will become pregnant. If an effective cause leads to both a benefit and an injury, then its rational relation is considered lost when the latter is stronger and *vice versa*, since Islam acknowledges the principle that "*idhā taʿāraḍa al-māniʿ wa al-muqtaḍī rujjiḥa al-māniʿ, wa idhā taʿāraḍa al-muḥarrim wa al-mubīḥ rujjiḥa al-muḥarrim*," meaning that to avoid an injury is given priority over deriving a benefit.[68]

Masālik al-ʿilla, methods by which one can determine an existing effective cause in a ruling, take four forms. First is the text of the Qurʿān or *ḥadīth* with the following possibilities: (1) effective cause clearly stated (*ʿilla manṣūṣ ʿalayhā*), meaning a text explicitly indicating that the attribute of a ruling concluded from words of text indicating effective cause might actually indicate non-effective cause; (2) *ṣarīḥa ẓanniyya* that is an indication of the text indicating the effective cause; it might also indicate a non-effective cause. The indication in the text is sometimes by sign and caution.[69] Second is consensus, in the sense that there have been many

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[67]On the elaboration of these three levels of *maṣlaḥa*, see pp. 50-52 of this Chapter II.

[68]Hasbi, Ushul Fiqh, 14.

[69]That is to say: an indication (*dalāla*) is attained from the prescription of the ruling of an attribute which the togetherness of the ruling and the attribute impresses

ʿillas produced by the consensus by which the following *ʿulamāʾ* can use them as *ʿillas*. Thus, in this regard the consensus constitutes a source of *ʿilla*. Third comes *al-sabr wa al-taqsīm*, a process of collecting and selecting, for there is neither text nor consensus, nor attributes of the legal case which is appropriate to be the *ʿilla*. This process is also called *takhrīj al-manāṭ*, and is different from *tanqīḥ al-manāṭ* as *maslak al-ʿilla* that functions only to isolate from the effective cause any attribute which does not belong to the cause. Hasbi, however, reminds that while analogy is merely used in human relationships only when it is necessary, it becomes invalid as soon as one finds a clear revealed text (*naṣṣ al-ṣarīḥ*) contradicting it.[70] While Hasbi here puts the reason under the direction of the revelation, he will move toward a liberal interpretation when dealing with juristic preference.

The position of juristic preference as a source of legal extension is, according to Hasbi, stated in the Qurʾān.[71] By juristic preference he means

> to move, on the basis of religious proof -- be it a revealed text, a notion understood from an effective cause, public interest, or custom -- from one ruling to another both of which are indicated by the revealed text and intended by Islamic legal maxims; to leave a ruling and to take another; to exempt one aspect of a universal ruling, or to set aside some general individuals through a special ruling.[72]

Sometimes he also defines juristic preference as "moving from obvious analogy to hidden analogy, or from a universal ruling to an exceptional ruling because there is a proof which is considered stronger."[73] This definition implies three kinds of juristic preference: (1) juristic preference respecting a ruling given up in favor of another, such as turning from obvious analogy to hidden analogy, (2) juristic preference turning from the will of the general text to that of the particular one; (3)

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the latter is the effective cause (*ʿilla*) of the ruling, such as "Do not a judge decide a case when he is angry."

[70]Hasbi, Ushul Fiqh, 14.

[71]Ibid., 132; and idem, Pengantar Hukum Islam, I: 240

[72]Hasbi, Ushul Fiqh, 17.

[73]Hasbi, Pengantar Ilmu Fiqh, 185.

juristic preference turning from the general ruling to the exceptional one.[74]

In dividing juristic preference into the proofs which determine it, Hasbi makes several categories: (1) juristic preference based on a revealed text [*al-istiḥsān bi al-naṣṣ*], meaning that the revealed text brings about an exceptional ruling which is different from that of general determination by a general revealed text or by a general maxim, such as the system of order (*ᶜaqd al-salam*); (2) juristic preference based on consensus [*al-istiḥsān bi al-ijmāᶜ*], resulting from a legal opinion of *mujtahid*s which contradicts either a analogy or a general proof, or their not criticizing a custom which contradicts a ruling of analogy; (3) juristic preference based on necessity for eliminating hardship [*istiḥsān bi al-ḍarūra li dafᶜ al-ḥaraj*], meaning an exception from a general proof to eliminate hardship, by using proofs for eliminating hardship. For example, while being a witness by proxy in principle is prohibited, it is allowed in a *ḍarūra* (necessary) situation, such as when the real witness had died, and the problem cannot be solved because of his absence; (4) juristic preference based on a public interest that does not come to a necessary situation, and in which a ruling included in a general revealed text cannot be applied for it will damage public interest. The ruling is therefore exempted by giving a ruling needed by the public interest, such as giving an inheritance to the husband whose wife converts to another religion (*murtadda*) when she is on her deathbed. The juristic preference here is to oppose her strategy, so that her conversion does not prevent the husband's inheritance; (5) equity based on custom [*al-istiḥsān bi al-ᶜurf*], or exception based on custom. For example, while endowment (*waqf*) should, in principle, be an unmovable object, it is allowed to give an endowment of those movable objects to which society has become accustomed, such as books.[75]

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[74]Hasbi, Ushul Fiqh, 15.

[75]Hasbi, Falsafah Hukum Islam, 312-314; idem, Pengantar Ilmu Fiqh, 186; and idem, Pengantar Hukum Islam, I: 239-243.

Juristic preference serves not only to facilitate adherence to religious ruling, as seen, but also to prohibit, and hence, to block those otherwise permitted things which may result in injury or harm if conducted. Concerning the latter, the ruling is not original and it is specific with a particular which can change when its cause has disappeared; this is called *al-dharīᶜa*. The aims of *Sharᶜ*, viz. to achieve benefits for human beings and to prevent injury to them, should be implemented through a contextual procedure. Hasbi says: "we should conduct actions leading us to benefit and should not conduct actions leading to injury. It is illogical if the *Sharᶜ* prohibits something yet allows us the means by which we could reach it."[76] Instead, the aims should be implemented by prohibiting both an action that directly leads to injury, such as killing, and an action that does not directly lead to it, such as secluded meetings (*khalwa*) that might lead to adultery, even though the action *per se* is permitted and brings no injury. Emphasizing the point with reference to government action, Hasbi says:

> using the mechanism of blocking the means (*sadd al-dharīᶜā*), the government (*al-ḥākim*) can prohibit some permissible actions which could lead to injury to the people, and this policy can be regarded as action based on legal principles (*uṣūl al-aḥkām*), provided that these prohibited permissible actions are those which can most certainly lead to injury.[77]

On the significance of juristic preference, Hasbi says: "it is hoped that we will be able to produce jurists who can use juristic preference in ushering Islamic developments in Indonesia,"[78] because "by using juristic preference we might cope with problems of banking, which is the basic means for economic development in the modern era."[79] Hasbi opens more Islamic law to the development of social changes, by supporting the proof of juristic preference with that of public interest.

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[76]Hasbi, Falsafah Hukum Islam, 321.

[77]Ibid.

[78]Ibid., 314.

[79]Hasbi, Pengantar Fiqh, 230.

Consideration of public interest (*istiṣlāḥ* or *al-ᶜamal bi al-maṣlaḥa al-mursala*) is, according to Hasbi, "the deduction of a ruling to determine the legal status of cases for which no revealed text or consensus exists. It is based on the consideration of public interest which the *Sharᶜ* neither confirms nor nullifies."[80] He stresses that to practice *maṣlaḥa al-mursala* actually is "to ratiocinate (*taᶜlīl*) that the *Sharᶜ* does not textually state the benefit of a ruling,"[81] on the ground that to avoid hardship when *mujtahid*s do not find a *maqīs* of rulings that have already existed, the *Sharᶜ* not only ratiocinates by an effective cause that exists in an action, but also ratiocinates by interest. For *maṣlaḥa*, according to Hasbi, must meet three stipulations: (1) it should be a real public interest (*maṣlaḥa al-ḥaqīqiyya*) decided by the *ahl al-ḥall wa al-ᶜaqd* (*ahl al-dhikr, aṣḥāb al-shaᵓn wa al-ikhtiṣāṣ*), meaning that the ruling actually brings benefit to human beings, or actually avoids evil; (2) it should be general not exclusive for some individual or group, and should suit the aims and principles of Islam; (3) it should not be a prohibited benefit. To achieve benefit, the *Sharᶜ* takes two different ways, on the one hand, by producing a ruling that will lead human beings to it and, on the other, by producing a ruling that indicates the negativeness of the benefit.

In a normal (*ikhtiyār*) situation, according to Hasbi, it is impossible for benefit to contradict a certain revealed text of clear significance (*naṣṣ qaṭᶜī al-wurūd wa al-dalāla*). If a contradiction happens in a necessary situation, he gives priority to the necessary ruling, based on Q.6:119, 97, 98, and 126; Q.2:173; and Q.16:115, over the revealed text.[82] If a ruling is determined on the grounds of a text of probable significance, while the benefit is determined through certainty, then the benefit becomes the benefit determined by the *Sharᶜ*. He says:

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[80]Hasbi, Ushul Fiqh, 19.

[81]Hasbi, Falsafah Hukum Islam, 349.

[82]Ibid., 351, 354, and 360.

> Obviously, when a benefit of the Muslim community contradicts a revealed text and consensus, one should maintain the benefit. In this regard, one cannot be considered as contradicting the revealed text or consensus because the *ḥadīth* "*lā ḍarara wa lā ḍirār*" (No harm shall be inflicted or reciprocated in Islam) specifies the revealed text. The *ḥadīth* "*lā ḍarar wa lā ḍirār*" should be put at the end of every revealed text, as an exception. The revealed text, therefore, means like this: 'Do not do this, unless when the benefit clearly seeks it. Do not do that, unless the benefit needs it.
>
> It follows that one should follow a *ḥadīth* of worldly affairs when it does not contradict a benefit. When the *ḥadīth* contradicts the benefits, one [should] consider the former as contradicting the foundation that the Qurʾān and *Sunna al-Rasūl* support. As well, in this case one cannot be considered as "leaving the *ḥadīth*" because one actually leaves it for a stronger proof. Therefore, when one finds that a religious proof does not meet the benefit, one understands that the *Sharʿ* asks us to produce the benefit by way of maintaining it.[83]

Hasbi says further: "in fact, when considering each and every ruling based on maintaining the public interest, one will clearly see that it is very often that even when contradicting the Qurʾān, Sunna, or analogy the public interest is given priority."[84] If a benefit could lead to an injury, and in fact, no benefit can entirely prevent an injury and *vice versa*, the benefit that prevents a greater injury takes precedence, such as *maṣāliḥ ḍarūriyyāt* over those of *ḥājiyyāt* and the those of *ḥājiyyāt* over those of *taḥsīniyyāt*. Likewise, if an individual benefit contradicts that of the community, the latter, according to Hasbi, should take precedence. Although the paths which human beings take to achieve a benefit change depending on context, Hasbi --basing himself on the Qurʾān 4:38 and 3:159-- insists that it is *ahl al-ḥall wa al-ʿaqd* who should determine the rulings based on benefit.[85] "He who uses the *maṣlaḥa*," says Hasbi, "actually understands that *mujtahid*s should not limit themselves to analogy in undertaking *ijtihād*. They [should] deduce a ruling based

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[83]Hasbi, Pengantar Hukum Islam, I: 250-251. The translation of the *ḥadīth* is taken from Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (Cambridge, Islamic Text Society, 1991), 269.

[84]Hasbi, Falsafah Hukum Islam, 370.

[85]Ibid., 373 and 383.

on benefit as intended by the *Shar*ᶜ,"[86] because "if the always changing benefit has neither legal status nor *maqīs ᶜalayh* to analogize to (*qiyās*), then it becomes itself the religious proof by which one will determine the ruling of God."[87] The proof of public interest makes Islamic law come to the Indonesian earth when Hasbi relates the proof to custom.

The position of custom (*ᶜurf*) as a source of *ijtihād* is, according to Hasbi, stated in the Qurᵓān in many verses, such as Q.4:19 and 114; Q.65:2 and 6; Q.13:15; and Q.40:6, with the aim of enabling human beings to implement Islamic teaching (*riᶜāyat al-maṣlaḥa*) and at the same time protecting them from hardship.[88] By custom he means "the statements and actions which are well-known to people and upon which they base their actions."[89] He classifies *ᶜurf* into: (1) *ᶜurf al-lisān*, meaning "something understood from a word according to the language;"[90] (2) *ᶜurf al-qawlī*, referring to "a meaning usually used by the people for a word,"[91] such as using the word "*walad*" only to indicate "son," and the word "*lahm*" to indicate any flesh but that of fish;[92] (3) *ᶜurf al-ᶜamalī* or *al-fiᶜlī*, meaning "a word used to indicate two things but generally used by people only for one of them."[93] This he calls general custom *(al-ᶜurf al-ᶜāmm)*, such as the custom of transaction undertaken by giving-and-taking but without mentioning the *ijāb* and *qabūl*, while "a term used by a group of people to indicate a meaning,"[94] is called "a particular custom" (*al-*

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[86]Ibid., 357.

[87]Ibid., 331.

[88]Ibid., 87.

[89]Hasbi, Ushul Fiqh, 20; idem, Pengantar Hukum Islam, I: 244; and idem, Pengantar Ilmu Fiqh, 182.

[90]Hasbi, Pokok-Pokok Ilmu Dirayah Hadits, 7th edition (Jakarta: Bulan Bintang, 1987), I: 34.

[91]Ibid.

[92]Hasbi, Ushul Fiqh, 20.

[93]Hasbi, Dirayah Hadits, I: 182.

[94]Ibid., 183.

ᶜurf al-khāṣṣ); (4) *ᶜurf al-Sharᶜ*, meaning "something understood by *mujtahids* from a word which they make a foundation of law," such as the term '*najis*' indicating an obligation to cleanse anything that happens to it; and (5) *ᶜurfiyya al-sharᶜiyya*, meaning "the sense in which the *Sharᶜ* uses a word to indicate what it intends by leaving other meanings it contains," such as *al-ṣalātwāt*.[95] Custom is not independent proof (*al-dalīl al-mustaqill*). To be the source of *ijtihād*, and hence that of law, custom, according to Hasbi, should meet three stipulations: (1) that it does not contradict the explicit divine text; (2) that it always applies in society; and (3) that it is general. Consistent with his orientation towards the constitutional implication of the consensus, he adds that the custom should be determined by *ahl al-ḥall wa al-ᶜaqd*. "It should be insisted," he says, "that the accepted custom in this regard is that which is acknowledged by *ahl al-ḥall wa al-ᶜaqd*, and not every custom."[96]

Thus he classifies custom, from the viewpoint of its validity or invalidity as a source of Islamic law, into: (1) valid custom, that is, that which neither allows the prohibited things nor prohibits the lawful ones, or that which neither contradicts a revealed text nor destroys public interest, nor brings about injury, such as the custom of giving a present to a groom. Therefore, a *mujtahid* should take into consideration this kind of custom in his *ijtihad*. In issuing a ruling, the *Sharᶜ* to some extent took Arab custom into consideration, as in making heavier the male agnate relatives of the killer (*ᶜaṣābāt*) in paying compensation or blood-money (*diya*) and requiring social equality (*kafāᵓa*) in marriage. In addition, a statement and practice that has become custom in society becomes a life order, which explains the juristic principle that "*al-maᶜrūf ᶜurfan ka al-maᶜrūf sharṭan;*" (2) invalid custom, that which allows the prohibited things and *vice versa*, or that which contradicts the

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[95]Ibid.

[96]Hasbi, Kriteria, 99.

*Shar*ᶜ, brings about injury or impedes benefit such as the custom of serving alcohol to guests at a wedding party. *Mujtahid*s, therefore, cannot maintain this sort of custom in their *ijtihād*. However, when the custom comes out of *ḍarūra*, they are permitted to exempt it from prohibition, such as in a pawning transaction (*ᶜaqd al-rahn*) which makes the taker of the pawn benefit from the pawned item by requiring it in the transaction, or as insurance. Hasbi says:

> it is this opinion [maintaining that every custom applying to every place can be a source of law for that place] that we [Indonesian Muslims] should hold, because every country or region has its own custom. A general custom can be used to specify a verse or *ḥadīth*, and it is given priority over analogy. Therefore, we [Indonesian Muslims] should give priority to our [Indonesian] customs over the *ijtihād*s of previous Muslim jurists, because they in many cases issued a legal opinion based on the custom of their own regions and societies.[97]

Shiddiqi concludes that "in determining a ruling custom should, according to Hasbi, be given priority over *ijtihād* reached through analogy."[98] The result is that the law based on a custom will change when the custom changes.[99] In order to make *fiqh* more elastic in accommodating social changes, Hasbi suggests that Muslims apply five basic principles: to prevent anything that harms; to allow anything that benefits; to oblige everything that must be taken for the completion of an obligation; to allow everything prohibited by a revealed text in a necessary condition; and to allow everything to block evil when a benefit or interest is involved -- in the context of the changes in custom.[100] To neglect custom would make it difficult for Muslims to practice Islamic rulings. Stemming from Islamic social philosophy teaching that human beings have the same position (Q. 49:13), Hasbi makes Indonesian customs one source of Indonesian *fiqh*. In the following discussion, the consensus, analogy,

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[97]Hasbi, Sjari'at Islam, 34. See also, idem, Pengantar Hukum Islam, II: 58; and Shiddiqi, "Pemikiran," 9.

[98]Shiddiqi, "Pemikiran Muhammad Hasbi," 9.

[99]Hasbi, Ushul Fiqh, 20-22.

[100]Hasbi, Pengantar Hukum Islam, II: 282-283; idem, Dinamika dan Elastisitas, 36; and idem, Fakta dan Keagungan, 30-31.

juristic preference, and custom will be dealt with in the context of the methods of *ijtihād.*

A.2. The Conditions of *Ijtihād*

Given that the Qurʾānic injunctions may be absolute, confined, general and detailed, the deduction of rulings cannot be achieved by everybody, but rather only by a *mujtahid,* who meets the following conditions. First, he should know the Qurʾānic verses dealing with legal matters. In this regard, he should know whether a verse is absolute or confined, whether it is general or detailed, whether it is abrogating or abrogated, in order not to base his *ijtihād* on the abrogated verses, whether it is general or particular. Moreover, he must know the occasions of Qurʿānic revelation. Second, he should know the prophetic traditions dealing with legal matters (*aḥādīth al-aḥkām*). He should also be able to distinguish sound traditions from weak ones; he should know the narrators of *ḥadīth* well, the reliability of the *ḥadīth* and the background which led to the emergence of the *ḥadīth* (*asbāb al-wurūd*). Although he need not memorize the *ḥādīth al-aḥkām,* he should know the written *aḥādīth* in the standard books. Third, because the Qurʾān and the Sunna as the sources of Islamic law are sent down in Arabic, a *mujtahid* also should be a master of the language, which Hasbi classifies as the first pillar (*rukn*) of *ijtihād.* Fourth, he should know the matters agreed upon by the experts. Fifth, he should know the consensus of the Companions on basic beliefs and matters of worship.

To know Arabic well, however, does not mean that one is able to undertake *ijtihād.* Therefore, one should know *uṣūl al-fiqh,* as the sixth condition. The seventh condition is to understand the secrets of Islamic law in regulating things (*asrār al-Sharīʿa),* which Hasbi considers the second pillar of *ijtihād* because the capability of properly understanding the purposes of Islamic law in legislating

something is a basis of the process of legal deduction. The general legal maxims or *asrār al-Sharīᶜā* are needed to determine the aims of *Sharᶜ* when it imposes an obligation upon the subject of law and also to compare these general legal maxims to the detailed proofs. Eighth, he should know the maxims of Islamic jurisprudence deduced from universal legal maxims and the aims of Islamic law. While a *mujtahid muṭlaq* who undertakes *ijtihād* in all aspects of *fiqh* should meet these stipulations, a *mujtahid fī al-masāʾil* should know the proofs dealing with what he undertakes in *ijtihād*. To the above mentioned objective stipulations for *ijtihād*, Hasbi adds that of morality, that is, a *mujtahid* should be just, honest, and good in his conduct.[101]

The foregoing classification of the conditions for undertaking *ijtihād* implies that all *mujtahid*s are not at the same level. Hasbi distinguishes four kinds of *mujtahid*s. First, *mujtahid fī al-Sharᶜ* or *al-mujtahid al-mustaqill* namely a *mujtahid* who founded a school of law (*madhhab*) such as Abū Ḥanīfa, Mālik, al-Shāfiᶜī, Aḥmad ibn Ḥanbal, al-ʾAwzāᶜī, Dāwud ibn Khalaf, al-Ṭabārī, and Jaᶜfar al-Ṣādiq. Second, *mujtahid fī al-madhhab*, namely a *mujtahid* who while following an *Imām*, undertakes his own *ijtihād* on basic as well as subsidiary matters, differing from his *Imām*; examples of such *mujtahid*s are Abū Yūsuf for Ḥanafīs, and al-Muzānī for the Shāfiᶜīs. Third, *mujtahid fī al-masāʾil* or *mujtahid fī al-futyā*, meaning a *mujtahid* who undertakes *ijtihād* only in some cases and not in the essential ones, such as al-Tahānawī for the Ḥanafīs, al-Ghazālī for the Shāfiᶜīs, and al-Karkhī for the Ḥanbalīs. Fourth, *mujtahid al-muqayyad* or *mutjahid fī al-madhhab*, meaning a *mujtahid* who, although he understands the proofs of Islamic law and the ways of arriving at them (*madārik al-aḥkām*) and their indications, adheres to the opinions of the *Salaf*. His capacity to determine the soundest of different opinions and to distinguish the strong transmission of *ḥadīth* from the weak classifies him among the *aṣḥāb al-takhrīj;* examples include al-Karkhī and al-

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[101]Hasbi, Pengantar Hukum Islam, I: 115-117.

Qadurī for the Ḥanafīs, and al-Rāfiᶜī and al-Nawawī for the Shāfiᵓīs.[102] In other words, while such a scholar is one who is able to evaluate proof, he does not want to stray from the particular proofs discussed by an *Imām*. The *mujtahid al-muqayyad* uses and does not depart from the principles of the Imām. He just adds new opinions that were given by the Imām of his *madhhab*. He, according to Hasbi, does not belong to the category of *mujtahid*. *al-Mujtahid al-muntasib* is anyone who meets the conditions of *ijtihād*. However, he binds himself to a *madhhab*. For example, Abū ᶜAlī al-Sinj is a *mujtahid muntasib* of the Shāfiᶜīs. While using the legal maxims and/or bases of the *Imām*'s opinions, the *muntasib mujtahid* sometimes arrives at a conclusion different from that of his *Imām*. The role of such *mujtahid*s in the development of Islamic law is, according to Hasbi, very important. He says: "In fact, our *mujtahid*s, whether the *al-mujtahid al-muntasib*, *mujtahid fī al-madhhab*, *fuqahāᵓ al-nafs* (those who only undertake *tarjīḥ* of *ᶜulamāᵓ*s opinions), have rendered a service in maintaining the development of Islamic law. With their endeavors, *fiqh* has never been stagnant."[103]

A.3. The Scope of *Ijtihād*

Ijtihād, a source of law which complements the Qurᵓān and *ḥadīth* -- the two fundamental sources of law -- has its scope limited by both. All rulings of the *Sharᶜ* are, according to Hasbi, deduced from two sources. First, rulings which are deduced from *naṣṣ qaṭᶜī al-wurūd wa al-dalāla* or those determined by very sound reason which does not result in doubt. These rulings can be divided into three categories: (a) the rulings of basic belief, determining whether someone is a believer or not, such as the belief that God is one; (b) the rulings of practice determined by a *naṣṣ qaṭᶜī al-wurūd wa al-dalāla* such as those of prayers, fasting, and the

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[102]Ibid., I: 118; idem, Beberapa Permasalahan, 33-34.

[103]Hasbi, Beberapa Permasalahan, 33-34.

prohibition of fornication; (c) the universal legal maxims, which were deduced from a clear divine text, such as the legal maxim: "*Lā ḍarar wa lā ḍirār*" (No harm shall be inflicted or reciprocated in Islam)· No *mujtahid* is permitted to conduct *ijtihād* on these three aspects.

Secondly, there are rulings which are determined by probable proof. They include: (a) theories disputed by Muslim theologians, so that they cannot be considered as fundamental beliefs of Islam. For example, some Muslim theologians, to support the principle that 'God is perfect,' say that He should, owing to His perfection, do the best for human beings, while another group says that He should not; (b) practical fields determined by a probable proof. For example, the *ʿulamāʾ* disagree concerning a person who has been forced to kill. Those who stress that the person forcing him is the cause of the death and not the actual killer say that the former should be sentenced to retribution. Those who stress the act of killing itself say that it is the actual killer who should be sentenced to retribution and not the one who forced him. The third group of *ʿulamāʾ* say that the actual killer, since he killed, as well as the person forcing him to commit this crime, should both be punished; while the fourth group says that both should pay a *diya* (blood-money) and should not be sentenced to retribution, (c) legal maxims of Islamic legal theory of a certain school of law. For instance, if a *ḥadīth* comes to add a ruling to a matter which has already been determined by the Qurʾān, then the *ḥadīth*, according to the Ḥanafīs, abrogates the verse, so that the *ḥadīth* cannot be applied. Another group, however, say that the *ḥadīth* should be applied because it does not abrogate the verse. In responding to these three categories of probable rulings, thus the mujtahid is free to do his own *ijtihād*.[104]

The *mujtahid* should endeavor to deduce the ruling from a text which is probable in its transmission (*naṣṣ al-ẓannī al-thubūt aw al-wurūd*) such as *ḥadīth*

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[104]Hasbi, Pengantar Hukum Islam, I: 118; idem, Beberapa Permasalahan, 33-34.

āḥād, in which case the scope of *ijtihād* is limited to aspects of understanding the revealed text and strengthening one of its meanings which seems appropriate to the revealed text itself, or strengthening a revealed text which externally seems to contradict another. He should endeavor to study a revealed text of probable indication (*naṣṣ ẓannī al-dalāla*), by way of analogy, juristic preference, public interest, and presumption of continuity, to find out the ruling it contains.[105] He should endeavor to arrive at a ruling that neither a revealed text nor consensus determines, by looking for indications that the *Sharᶜ* might give guidance to arriving at the ruling. He should also endeavor to deduce the law of the *Sharᶜ* by way of applying the universal Islamic legal maxims because analogy, juristic preference, and other methods cannot be applied in this regard.[106] He should act as follows: before undertaking *tarjīḥ* of one of two contradictory proofs, he should first attempt to reconcile them. He should look for *ḥadīth mutawātir* and only then for the *ḥadīth āḥād* when he does not find an applicable Qurʾānic verse. Before taking the legal opinions of Companions a consideration, he should investigate the actions and *taqrīr*s of the Prophet himself. If he finds nothing from the above possibilities, he should undertake analogy, juristic preference, custom, or public interest.[107]

B. Methodologies of Indonesian *Fiqh*

Certain that the function of *ijtihād* is to serve as a bridge by which *mujtahid*s may solve the tension between the temporally circumscribed divine text and the ever changing actuality, Hasbi makes *ijtihād* the foundation of the Indonesian *fiqh* he proposes. Realizing that any attempt at reform without a clear

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[105]Hasbi, Pengantar Hukum Islam, I: 65-66.

[106]Hasbi, Ruang Lingkup, 6.

[107]Hasbi, Pengantar Hukum Islam, I: 1: 52.

methodology would damage the reformed law, he offers the following methodologies by which Indonesian *fiqh* can be created: (1) the distinction between *Sharīᶜa* and *fiqh* to determine the scope of Indonesian *fiqh*; (2) a historical understanding of the development of *fiqh* (*tārīkh al-tashrīᶜ*) to justify the existence of regional *fiqh*, in particular the Indonesian *fiqh*; (3) the comparative study of Islamic jurisprudence (*dirāsat al-muqārana al-fiqhiyya*), and (4) social and cultural analysis needed to solve the legal problems that Indonesian Muslim jurists might encounter. The creation of Indonesian *fiqh* depends very much on the courage of Indonesian Muslims to apply these methodologies to their *ijtihād* by making Indonesian custom one of its sources.

In Indonesia, according to Hasbi, there are three different terms which unfortunately are often used to mean the same thing. The use of the term '*hukum Islam* ' (Islamic law) by faculties of law of the universities under the Ministry of Culture, to denote "subject matters dealing with aspects of marriage, inheritance, testament and endowment"[108] means that two other terms, '*Sharīᶜa Islam*' and '*fiqh Islam*' -- used by the academic circles of Ministry of Religion, in particular those of *Sharīᶜa* faculties of the IAINs -- lose some of their meaning and appeal. Subsuming the aforementioned legal matters under '*Sharīᶜa Islam*' and '*fiqh Islam*' is imprecise because the role of *ijtihād* in regulating such matters is ignored and the very extensive scope of the areas designated by the terms is itself reduced. If the *Sharīᶜa*, which literally means "a straight path," includes the laws of *ᶜamaliyya*, *ᶜaqīda*, and *akhlāq*, *fiqh* in its standard usage denotes "the laws of *Sharᶜ* produced from their proofs."[109] *Fiqh*, as a part of the *Sharīᶜa*, covers the fields of *ᶜibāda* and *muᶜāmala*, so that it is wider than '*hukum Islam*,' the latter being known very well to

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[108]Hasbi, Dinamika dan Elastisitas, 9-11.

[109]Shiddiqi, "Pemikiran Muhammad Hasbi," 5.

Indonesian [secular] jurists.[110]

To equate *Sharīᶜa* with *fiqh* suggests that both are universal, absolute, and everlasting.[111] Realizing this consequence, Hasbi says that only *Sharīᶜa* is universal and everlasting. "In this understanding. . . .," says Shiddiqi, "it can be said that *Sharīᶜa* is a law in *abstacto.*"[112] Conversely, as an "applied law based on a deep understanding of its source," *fiqh* is a law in *concreto.*[113] Furthermore, Hasbi divides *fiqh* into the Qurᵓānic *fiqh*, namely, the *fiqh* that the Qurᵓān clearly mentions; the *nabawī fiqh*, namely, the Prophetic (*nabawī*) *fiqh* which *ḥadīth* clearly mentions; and the *ijtihādī fiqh*, namely, laws derived through the *ijtihād* or *istinbāṭ* of *mujtahids.*[114] *Ijtihādī fiqh*, as the core of Indonesian *fiqh*, is dynamic and elastic, since it changes in response to the needs of time and space. It is thus local, temporal, and relative.[115] Although the majority of *fiqh* collections is the result of *ᶜulamāᵓs ijtihād*, there have been many *ᶜulamāᵓ*, according to Hasbi, who no longer differentiate between the fundamental rulings of the *Sharīᶜa* themselves, and the rulings of *Sharīᶜa* produced through the *ijtihād* of the *ᶜulamāᵓ*. "This mixing up, therefore, causes our society to believe that all rulings have the same value, [that] all should be [equally] respected and non can be 'disturbed'."[116] In order to create an Indonesian *fiqh*, therefore, Indonesian Muslims should "place the Islamic *fiqh*, as an inheritance of our *ᶜulamāᵓ*, in its right place. We should not mix the revelation and the rulings arrived at through the *ᶜulamāᵓs ijtihād.*"[117] Thus, Hasbi has shown

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[110]Hasbi, Dinamika dan Elastisitas, 9-11.

[111]Shiddiqi, "Pemikiran Muhammad Hasbi," 5.

[112]Ibid., 6.

[113]Ibid.

[114]Hasbi, Pengantar Hukum Islam, I: 35; idem, Fiqih Islam, 158; idem, Sjari'at Islam, 42.

[115]Hasbi, Pengantar Ilmu Fiqh, 105; idem, Falsafah Hukum Islam, 337.

[116]Hasbi, Fiqih Islam, 158.

[117]Ibid., 157. Unfortunately, Hasbi equates the three terms: "*hukum Islam*" (Islamic law), "*fiqh Islam*" (Islamic jurisprudence), and "*Syari'at Islam*" (Islamic

that the criticism of both Yafi and Hosen is ineffective in arguing against his Indonesian *fiqh*, especially because he stresses that the scope of his Indonesian *fiqh* is limited to the field of human relationships only.

To justify the existence of Indonesian *fiqh*, Hasbi resorts to the historical development of Islamic law (*tārīkh al-tashrīᶜ*).[118] The history of Islamic law, according to him, indicates that an independent school of law emerged in almost every city of the Arab empire since very early in Islamic history; these included the Ḥanafī school in Kufa, the Mālikī in Medina, the Shāfiᶜī in Baghdad (*madhhab al-qadīm*) and then in Egypt (*madhhab al-jadīd*), and that of the Ḥanbalīs in Baghdad. Hasbi says: "The places where the *madhhab*s were born are different; their customs were different, so that they automatically resulted in different legal opinions, bringing about disagreement among the *madhhab*s. The disagreement was caused not only by the spirit of different *mujtahid*s, but also by the differing circumstances in which their schools of law were born."[119] "Although there is only an Islamic law," as Bassam Tibi has remarked, "there are nevertheless differing historical and geographical notions of Islamic law."[120] The existence of a local *fiqh* for Indonesia is legitimized by the history of Islamic law. For the future of Indonesian *fiqh*, Hasbi suggests, this historical approach should be based on two foundations: (1) a study of the case study (*dirāsa al-wāqīᶜiyya*) of Indonesian society and of its contemporaries from the perspective of the sociology of law; (2) a study of law in general, other than the Islamic, with a view to ascertaining both their influence in

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Sharīᶜa). See Hasbi, Falsafah Hukum Islam, 44.

[118]Hasbi, Sejarah Pertumbuhan dan Perkembangan, 50; idem, Perbandingan Madzhab, 31; idem, Fiqih Islam, 159; and idem, Sedjarah dan Perkembangan Hadits (Djakarta: Bulan Bintang, 1973), 5. See also, Shiddiqi, "Pemikiran Muhammad Hasbi," 11.

[119]Hasbi, Pengantar Hukum Islam, I: 92. See also, idem, Pengantar Ilmu Fiqh, 95-104; Sjari`at Islam, 34; idem, Dinamika dan Elastisitas, 16-17; and Shiddiqi, "Pemikiran Muhammad Hasbi," 9.

[120]Tibi, Islam and the Cultural Accommodation, 66.

their respective societies and their capability in meeting the peculiar needs of their own societies.[121]

Hasbi asks Indonesian Muslims to use the comparative method when the legal status of the problems they are facing has been provided by the *ijtihād* of *madhhabs*.[122] This comparison, aimed at giving a greater chance to Indonesian *fiqh* to accommodate to social changes, is not limited to the Sunnite schools of law. Indonesian Muslims, therefore, "should learn Islamic jurisprudence from the books of the *mujtahid ʿulamāʾ* and deem that all *madhhabs* to be complementing each other."[123] "The opinions of the *mujtahids* should be reviewed," continues Hasbi, "to take the one [most] suitable to the time, space, and characteristics of the *umma*."[124] Developing the method of *takhayyur* (eclectic) espoused by Abduh's followers, Hasbi divides this method into two steps: first, to select the ruling, most beneficial for Indonesian Muslims, from the four *madhhabs*. He says: "we [Indonesian Muslims], although we are the followers of Shafiite school of law, should accept Aḥmad [ibn Ḥanbal's] opinion when we are sure that it is more compatible with our society. We should adopt [the Ḥanbalī opinion] as the Shāfiʿī opinion."[125] Second, to select the most beneficial ruling for Indonesian Muslims from *madhhabs* and not just from the four Sunnī ones. Indonesian Muslim jurists should take the most suitable ruling for their society, irrespective of whether it comes from al-Thawrī, Ibn Jarīr, Dāwud [al-Ẓāhirī], Zayd in ʿAlī, or Jaʿfar al-Ṣādiq.[126]

Hasbi praises the Egyptian Government for applying the Imamite Shiite

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[121]Shiddiqi, "Pemikiran Muhammad Hasbi," 18.

[122]Hasbi, Fiqih Islam, 7; see also, idem, Pengantar Hukum Islam, I: 162.

[123]Hasbi, Beberapa Permasalahan, 38-39.

[124]Ibid., 37.

[125]Hasbi, Beberapa Permasalahan, 35; idem, Perbandingan Madzhab, 38.

[126]Hasbi, Fiqih Islam, 46.

opinions to the case of a thrice divorced couple, which becomes irrevocably divorced (*bāʾin*), and to the issue of bequest to heirs, and for basing the *waṣiyya wājiba* on the opinion of the Ẓāhirī school. Hasbi states: "we [Indonesian Muslims] can take the experiences of other nations concerning what does not exist in our *Sharīᶜa*, provided that it does not contradict the spirit and the goals of Islamic legislation and provided it can bring about a benefit as well."[127] Furthermore, "in anticipating these *Sharᶜ* details, it is all right for us [Indonesian Muslims] to take over the experiences or the prevailing customs of other nations, provided that they do not contradict the aim of the *Sharᶜ* and suit both the condition and structure of our society."[128] Hasbi is certain that Indonesian *fiqh* will be very flexible when it is backed up by systematic comparisons between *fiqh* and [Indonesian] *adat* law, between *fiqh* and the Indonesian legal system, between *fiqh* and other *Sharīᶜas*, and between *fiqh* and international systems of law.[129]

Hasbi encourages the Indonesian jurists to use the method of rational deduction when facing the indifferent things whose legal status the earlier previous Muslim jurists did not determine. "We already know," says Hasbi, "that the way which we should take to arrive at a ruling is that of *al-ijtihād bi al-raʾy* on the basis of the Kitāb (Qurʾān) and Sunna. "[130] By *al-ijtihād bi al-raʾy* he means "to use the capability of *ijtihād* to derive a ruling on a case that no divine text regulates by using reason and means (*wasīlāt)* indicated by the *Sharᶜ* for deducing such a ruling."[131] In other words, it is "to determine a ruling based on benefit, general legal maxims, and the effective cause of a ruling."[132] He suggests analogy, juristic

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[127]Ibid., 63.

[128]Hasbi, Pengantar Ilmu Fiqh, 34.

[129]Hasbi, Falsafah Hukum Islam, 348.

[130]Hasbi, Ushul Fiqh, 1.

[131]Hasbi, Falsafah Hukum Islam, 348.

[132]Hasbi, Pengantar Ilmu Perbandingan Madzhab, 13.

preference, public interest, and custom,[133] as the ways by which Indonesian *mujtahid*s should proceed in deducing a ruling (*ṭuruq al-ithbāṭ*).[134] The ruling is to be arrived at through a collective *ijtihād (al-ijtihād al-jamāʿī)* or consensus -- in the sense of "legislation, whether based on the Qurʾān, Sunna, or *raʾy*, through consultation under the instructions of the head of state,"[135] not individual *ijtihād (al-ijtihād al-fardī*). For Hasbi believes that while the latter would only result in a variety of opinions, the former will offer much more qualitative choices because many heads are better than one.[136]

For the purpose of this collective *ijtihād*, the *mujtahid*s of Indonesian *fiqh* should found the board of *ahl al-ḥall wa al-ʿaqd*,[137] as explained in the section on consensus.[138] However, some of the institutions which the Indonesian Muslims have established did not yet exist when he expressed his ideas using Arabic terms taken form the history of Muslim society; it would be helpful therefore to try to relate them to some of the institutions of Indonesian society and politics. One may say, for example, that Hasbi's legislative institution is the Council of Indonesian *ʿUlamāʾ* (Majelis Ulama Indonesia),[139] with the "*ahl al-ijtihād*" being the representatives of such Muslim organizations as the Nahdlatul Ulama, Muhammadiyah, Persatuan Islam, and Al-Irsyad. The *ahl al-ikhtiṣāṣ* of Hasbi may be equated with the Association of Indonesian Muslim Intellectuals (Ikatan

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[133]Ibid. For detailed information on these methods, see also pp. 64-75.

[134]Hasbi, Pengantar Hukum Islam, I: 70; idem, Kriteria, 99.

[135]Hasbi, Beberapa Permasalahan, 39-40.

[136]Hasbi, Falsafah Hukum Islam, 329 and 354.

[137]Ibid., 329 and 354.

[138]See also p. 61 of this Chapter II.

[139]It was founded on July 26, 1975/Rajab 17, 1395. Dewan Pimpinan Majelis Ulama Indonesia, "Kata Pengantar" in 15 Tahun Majelis Ulama, H.S. Prodjokusumo et al., eds. (Jakarta: Sekretariat Majelis Ulama Indonesia, 1990), vii.

Cendikiawan Muslim Indonesia).[140] Furthermore, the political institution as envisaged by Hasbi to be seen as a combination of the Indonesian Legislative Assembly (Dewan Perwakilan Rakyat Indonesian) and the Indonesian Peoples Advisory Assembly (Majelis Permusyawaratan Rakyat Indonesia). If all members of the *ahl al-ḥall wa al-ᶜaqd* agree to issue Islamic law to apply to Indonesian Muslims, the bill is to be regarded as a manifestation of Indonesian *fiqh*; it can be reviewed by another consensus of the board if for a specific reason it wishes to do so.[141] However, if the board does not agree to issue the bill, it can be issued by the Council of Indonesian *ᶜUlamāʾ* as a legal opinion, or the latter can postpone the matters for a certain period and then take it up again later. If a custom of a certain region cannot be applied to all Indonesian Muslims, it can be issued at the provincial level or even the municipal level. In this regard, it is the duty of the Council of Indonesian *ᶜUlamāʾ*, the Association of Indonesian Muslim Intellectuals, and the Legislative Assembly at the Provincial levels to issue the bill only for the region concerned. This liberal interpretation of Hasbi's theoretical ideas of collective *ijtihād* or consensus will, if carried out, automatically paralyze the "reception theory."

Hasbi reminds us that the core of the *mujtahids* for his legislative institution should be prepared systematically, otherwise the creation of Indonesian *fiqh* would take a long time, and may even prove impossible to achieve. He believes that it is

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[140]It was founded on December 8, 1990. For detailed information on the Association of Indonesian Muslim Intellectual, see Sekretariat Pusat Ikatan Cendikiawan Muslim Se-Indonesia, ICMI Ikatan Cendikiawan Muslim Se-Indonesia dalam Sorotan Pers Desember 1990-April 1991 (Jakarta: Sekretariat Pusat Ikatan Cendikiawan Muslim Se-Indonesia, 1991); and ICMI dan Harapan Umat, ed. Abrar Muhammad (Jakarta: Yayasan Pendidikan Islam RUHAMA, 1991).

[141]In this sense it is not exaggerative to say that the Bill of Marriage of 1974, the Bill of Religious Court of 1989, and the Compilation of Islamic Law in Indonesia of 1991 are the manifestations of Indonesian *fiqh*.

the responsibility of IAINs to produce such *mujtahid*s.[142] He further suggests that the *mujtahid*s of Indonesian *fiqh* base their expertise on a broad-based and wide-ranging knowledge. They should support their ongoing comparative study of Islamic jurisprudence with a comparison of Islamic legal theory as developed in each school of law, which may result in a reconciliation between them and perhaps even a union, which he calls *taqrīb al-uṣūl wa-tawḥīduhā*. For such comparative studies, Hasbi suggests the following steps: (1) to study the fundamentals adhered to by all masters of the schools of law as well as matters about which they disagree by investigating their causes; (2) to study the proofs that they hold and disagree about; (3) to study the arguments and justifications offered by the master of each school of law concerning the disputed proofs and to select the strongest of such arguments. These steps should begin with the establishment of a Faculty of Islamic Legal Theory (*Uṣūl al-Fiqh*), or at least a Department of Islamic Legal Theory.[143]

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[142]Hasbi, Sjari'at Islam, 43.

[143]Hasbi, Pokok2 Pegangan Imam2 Madzhab, 32.

SUMMARY AND CONCLUSION

We have so far discussed the tension in Islamic law between revelation and reality in Indonesian society. Politically, Indonesia was colonized, mostly by the Dutch, who consistently tried to weaken the official application of the Islamic law for the Muslims. To achieve their goals, the Dutch implemented some legal policies, not only altering the beneficial articles of any bill for the Indonesian Muslims, but also narrowing the jurisdiction of the Religious Courts. The Dutch then justified their political moves through the "reception theory," which reversed the "*reception in complexu*" theory. The former policy was very effective for the Dutch in their attempts to divide and rule Indonesia, with the result that Islamic law was all but ignored. It was not until the beginning of the twentieth century that Indonesian strategies against the Dutch changed significantly with the emergence of nationalism. Although Muslims constituted the majority within the Indonesian nationalism, most nationalists wanted to build a state based on Indonesian identity, not an Islamic state. To the Muslim reformists, this secular aspiration was a constitutional challenge to achieve Islamic legal reform.

Culturally, the level of understanding Islamic law was low among Indonesian Muslim jurists. Their weaknesses can be seen in their attitudes towards many aspects of Islamic legal practice. Although they believe in custom as one source of Islamic law, they did not make Indonesian custom the source of their practice in Indonesia. They even forced the application of non-Indonesian customs upon their own society, resulting in weakening Islamic law. While they were the followers of the Shafi'ite school of law, they did not directly refer to Shāfi'ī's works, but rather to those of his commentators and

summaries by others. This diviation from the founder of their school of law led Indonesian Muslims not only to *bidᶜa* practices, but also to accept every legal opinion of the Shafiᶜite *ᶜulamāᵓ* without reserve. Seeing these practices as dangerous, some people, in turn, began their efforts to conduct a reform of calling Indonesian Muslims "Back to the Qurᵓān and the Sunna." Beginning with the purification of Indonesian Muslim practices from non-Islamic elements, the reformists calling for opening the allegedly closed gate of *ijtihād*, bringing an end blinding imitation and allowing *talfīq*, by establishing the comparative study of Islamic law. The interaction between the reformists calling "Back to the Qurᵓān and the Sunna" and the Muslim nationalists encouraged the former group to pay more attention to Indonesian realities. Among the group was Hasbi who put forth his own ideas about Indonesian *fiqh*.

While Indonesian *fiqh* represents the earliest initiative towards the Indonesianization of Islamic law, it is also to be seen as a bridge between the theme "Back to the Qurᵓān and the Sunna" and Constitutional Indonesianness. Criticisms of Indonesian *fiqh* largely comes from those who believe that *fiqh* is universal. Such is not the position of Hasbi, who, for this point, divides *fiqh* into that which stems from the Qurᵓān, that which comes from Prophet, and that which is the product of *ijtihād*. Indonesian *fiqh* finds its scope within the *fiqh al-ijtihādī*. It is local, temporal, and hence, dynamic. The methodologies of *ijtihād* through which Indonesian Muslims can, according to Hasbi, create Indonesian *fiqh* are the same as those used by Muslims elsewhere in the Islamic world. These involve consensus, analogy, juristic preference, consideration of public interest, and custom. These methodologies are the indicants and sources of *ijtihād*, and thus they perform a dual function. The scope of Indonesian *fiqh* is limited to the affairs pertaining to human

relationships. While the *Sharīᶜa* is divine, it is at the same time a product of human legislation (*tashrīᶜ al-waḍᶜī*) because it is a result of the effort, on the part of the Indonesian *mujtahid*s, to arrive at an understanding of how divine injunctions apply to the particular circumstances they find before them; Indonesian *fiqh* adds to the classifications of *mujtahid*s found in traditional Islamic law the category of a *mujtahid* who takes a comparative view of Islamic law as a whole (*mujtahid al-muqārin al-jamāᶜī*).

A new element in Islamic legal reform in Indonesia is Hasbi's equation of customary practices of Indonesia with those of other Muslim countries; indigenous customs are considered to be one of the sources of Islamic law as applied in those countries. Recognizing Indonesian custom as source of Indonesian *fiqh*, Hasbi proposed to do away with the divisiveness inherent in the "reception theory." In addition, he proposed collective *ijtihād* as a mechanism for creating Indonesian *fiqh*, visualizing the involvement of people from different backgrounds and schools of thought, such that their participation would create a sense of unity. Further, by making the state the legislator of Indonesian *fiqh*, Hasbi tried to lead Islamic law peacefully in the direction of the Constitution. If Indonesian *fiqh* now supports the legal system of the Indonesian Republic, it only reflects the vision of Hasbi, a man, who is more often criticized than defended. Hasbi also suggested that Indonesian Muslims, together with the government of the Indonesian Republic, conduct a reform of Islamic education. Whether his proposals and theories can materialize or not will depend very much on the Indonesian Muslims themselves. Hasbi, of course, never said that he alone could create the Indonesian *fiqh* to which he aspired. He wanted all concerned to contribute in the effort.

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APPENDIX

HASBI'S WORKS[1]

A. Books

I. Al-Qurʾān

1. Beberapa Rangkaian Ajat (Some Series of the Qurʾānic Verses). Bandung: al-Maarif, n.d. (1952 ?). The book is intended as a lesson for beginners. 44 pp.
2. Sejarah dan Pengantar Ilmu al-Quran/Tafsir (History and Introduction to the Qurʾānic Science/Exegesis). Jakarta: Bulan Bintang, 1954; '55; '61; '65; '72; '74; '77; '80. 308 pp. The book is a revision of a previous work entitled Sejarah dan Pengantar Ilmu Tafsir (History and Introduction to the Science of Exegesis).
3. Tafsir al-Quranul Majied "An-Nur" (Arabic: Tafsīr al-Qurᶜān al-Majīd "al-Nūr"). 30 volumes. Jakarta: Bulan Bintang, 1956-1973; 1956; '65; '76. Every volume contains about 300-360 pp. The system of interpretation follows al-Marāghī paragraph by paragraph (*qiṭᶜa*). The method of interpretation is a combination of that of *al-Riwāya (maʾthūr)* and *bi al-Dirāya (maᶜqūl)*. The book also deals with the occasions of Qurᶜānic revelation (*Asbāb al-Nuzūl*).
4. Tafsir al-Bayan (Arabic: Tafsīr al-Bayān). 4 volumes in paper back and 2 volumes in hardcover. Bandung: al-Maarif, 1966. 1647 pp. This is primarily a translation with several explanatory annotations, in the manner of Tafsir Departemen Agama (The Tafsīr of the Departement of the Religious Affairs of the Indonesian Republic).
5. Mu'djizat al-Quran (Arabic: Muᶜjizat al-Qurʾān). Jakarta: Bulan Bintang, 1966. 56 pp. The book was originally a speech given at the first Lustrum of the Sunan Kalijaga IAIN held on June 3, 1965.
6. Ilmu-ilmu al-Quran: Media Pokok dalam Menafsirkan al-Qur'an (The Sciences of the Qurᶜān. The Major Media in Interpretating al-Qurᶜān). Jakarta: Bulan Bintang, 1972. 319 pp.

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[1] The following bibliographical list is taken from Shiddiqi, "Muhammad Hasbi," 557-569.

II. *Ḥadīth*

1. Beberapa Rangkuman Hadits (Some Collection of Tradition). Bandung: al-Maarif, [1952 ?]. 45 pp.
2. Sejarah dan Pengantar Ilmu Hadits (History and Introduction to the Science of Hadīth). Jakarta: Bulan Bintang, 1954; '55; '65; '74; '77; '80. 420 pp.
3. 2002 Mutiara Hadits (2002 Pearls of Hadīth). 8 vols., Jakarta: Bulan Bintang, 1954-1980. Volome. I: 1954; '55; '61; '75; 540 pp. Volume II: 1956; '75; '81; 588 pp. Volume III: 1962; '77; 668 pp. Volume IV: 1977; 692 pp. Volume V: 1977; 672 pp. Volume VI: 1979; 628 pp. Volume VII: 1980; 584 pp. Volume VIII has not been published.
4. Pokok-pokok Ilmu Dirayah Hadits (Fundamentals of Hadīth Research Science). 2 volumes. Jakarta: Bulan Bintang, volume I: 1958; '61; '67; '76; '81.410 pp. Volume II: 1958; '61; '67; '76; '81. 427 pp.
5. Problematika Hadits Sebagai Dasar Pembinaan Hukum Islam (The Problem of Hadīth as a Basis of the Development of Islamic Law). Jakarta: Bulan Bintang, 1964. The book originally was a speech delivered at the Dies Natalis of the (Sunan Kalijaga) IAIN of Yogyakarta held on December 4, 1962.
6. Koleksi Hadits-hadits Hukum. Ahkamun Nabawiyah (A Collection of Legal Hadīths. Aḥkām Nabawiyya). 11 volomes. Bandung: al-Maarif, 1970-1976. Volume I: 1970; '72; '81. 380 pp. Volume II: 1972. 400 pp. Volume III: 1972; ?; '81. 493 pp. Volume. IV: 1972. 379 pp. Volume V: 1976. 369 pp. Volume VI: 1976. 307 pp. Even though the drafts of Volumes. VII to XI have already completed, they have not been published.
7. Ridjalul Hadits (The Exponents of Hadīth). Yogyakarta: Matahari Masa, 1970. 121 pp.
8. Sejarah Perkembangan Hadits (The History of the Development of Hadīth). Jakarta: Bulan Bintang, 1973. 187 pp.

III. *Fiqh*

1. Sedjarah Peradilan Islam (The History of Islamic Court). Jakarta: Bulan Bintang, 1950; '55; '70. 92 pp.
2. Tuntunan Qurban (A Guide to Sacrifice). Jakarta: Bulan Bintang, '50; '55; '66. 68 pp.
3. Pedoman Shalat (The Manual of Prayer). Jakarta: Bulan Bintang, 1951; '55; '57; '60; '63; '66; '72; '75; '77; '82; '83; '84. 592 pp. The first publication of the book was undertaken by Islamiyah in Medan in 1950.
4. Hukum-hukum Fiqh Islam (Laws of Islamic Jurisprudence). Jakarta: Bulan Lintang, 1952; '55; '62; '70; '78. 677 pp. In its first publication by Pustaka Islam Jakarta, the book was entitle Hukum Sjar'y yang Berkembang dalam

Kalangan Sunni (Islamic Law as Developed Among the Sunnite). The book deals with laws of all four Sunnite schools.

5. Pengantar Hukum Islam (Introduction to Islamic Law). 2 volumes. Jakarta: Bulan Bintang, volume I: 1953; '58; '63; '68; '75; '80. 280 pp. Volume II: 1953; '58; '63; '68; '75; '81. 288 pp.
6. Pedoman Zakat (The Manual of Alms). Jakarta: Bulan Bintang, 1953; '67; '76; '81. 316 pp.
7. Al-Ahkam (Pedoman Muslimin) (Laws: A Manual for Muslim). 4 volumes. Medan: Islamiyah, 1953. About 240-250 pp.
8. Pedoman Puasa (The Manual of Fasting). Jakarta: Bulan Bintang, 1954; '59; '60; '63; '67; '74; '77; '81; '83. 384 pp.
9. Kuliah Ibadah (Lecture on Worship). Jakarta: Bulan Bintang, 1954; '61; '63; '68; '76. 272 pages.
10. Pemindahan Darah (Blood Transfusion) Dipandang dari Sudut Hukum Agama Islam (Blood Transfusion Seen from Islamic Law). Jakarta: Bulan Bintang, 1954. 25 pp. The book was originally a speech delivered at the third Dies Natalis of PTAIN held on September 26, 1954.
11. Ichtisar Tuntunan Zakat & Fitrah (A Summary Guide of *Zakā* and *Fitra*). Jakarta: Bulan Bintang, 1958. 64 pp.
12. Sjari'at Islam Mendjawab Tantangan Zaman (Islamic Law Responses the Challange of Time). Yogyakarta: IAIN Sunan Kalijaga, 1961. The second edition was published in Jakarta: Bulan Bintang, 1966. 46 pp. The book was originally a speech delivered at the Dies Natalis of IAIN of Yogyakarta held on *Rabīᶜ al-Awwal* 1381/1961.
13. Peradilan dan Hukum Acara Islam (The Islamic Court and Processual Law). Bandung: al-Maarif, 1964 [?]. 156 pp.
14. Poligami Menurut Sjari'at Islam (Poligamy According to Islamic Law). Jakarta: Bulan Bintang, (?). 40 pp. The book was originally a speech delivered at the Dies Natalis of Sunan Kalijaga IAIN.
15. Pengantar Ilmu Fiqh (Introduction to Islamic Law). Jakarta: Bulan Bintang, 1967; '74. 227 pp.
16. Baitil Mal. Sumber-sumber dan Penggunaan Keuangan Negara Menurut Adjaran Islam (Bait al-Māl. State Source and Monetary Usage According to Islamic Teachings). Yogyakarta: Matahari Masa, 1968. 48 pp.
17. Zakat Sebagai Salah Satu Unsur Pembinan Masjarakat Sedjahtera (Alms as One Element of the Establishment of A Prosperous Society). Yogyakarta: Matahari Masa, 1969. 71 pp. The book was originally a speech delivered at the ninth Dies Natalis of the Sunan Kalijaga held on Mey 19, 1969. The title of the second edition of book is Beberapa Permasalahan Zakat (Some Problems of *Zakā*), published in Jakarta: Tintamas, 1976.
18. Asas Hukum Tatanegara Menurut Sjari'at Islam (The Foundations of Civil Responsibility According to Islamic Law). Yogyakarta: Matahari Masa, 1969. 88 pp.

19. Sedjarah Pertumbuhan dan Perkembangan Hukum Islam (The History of the Development of Islamic Law). Jakarta: Bulan Bintang, 1971. 292 pp.
20. Hukum Antar Golongan dalam Fiqh Islam (Law on Ethnic Groups in Islam). Jakarta: Bulan Bintang, 1971. 163 pp.
21. Perbedaan Mathla' Tidak Mengharuskan Kita Berlainan pada Mulai Berpuasa (The Difference in Matlaᶜ Should Not Result in Different Opinion on the Beginning of Fasting). Yogyakakarta: Ladjnah Ta'lif wan Nasjr Fakultas Sjari'ah IAIN Sunan Kalijaga, 1971. 35 pp.
22. Ushul Fiqh. Sekitar Ijtihad Bir Ra'ji dan Djalan-djalannya (Uṣūl al-Fiqh. On Ijtihād bi al-Raᵓy and Its Methods). Yogyakarta: IAIN Sunan Kalijaga, n.d. 32 pp.
23. Ilmu Kenegaraan dalam Fiqh Islam. Jakarta: Bulan Bintang, 1971. 139 pp.
24. Beberapa Problematika Hukum Islam (Some Problems of Islamic Law). Yogyakarta: Lembaga Hukum Indonesia, 1972. 40 pp. The title of the second edition of the book is Beberapa Permasalahan Hukum Islam (Some Problems of Islamic Law) published in Jakarta: Tintamas, 1975. 40 pp.
25. Kumpulan Soal Jawab (An Antology of Question-Answers). Jakarta: Bulan Bintang, 1973. 108 pp.
26. Pidana Mati Dalam Sjari'at Islam (The Capital Punishment in Islamic Law). Yogyakarta: Lembaga Penerbitan IAIN Sunan Kalijaga, n.d. 40 pp. The book was originally a speech delivered at the Dies Natalis of the Sunan Kalijaga IAIN held in September 1968.
27. Sebab-sebab Perbedaan Faham Para Ulama Dalam Menetapkan Hukum Islam (The Causes of ther Differences among the *ᶜUlamāᵓ* in Determining Islamic Law). Yogyakarta: IAIN Sunan Kalijaga, n.d. 19 pp.
28. Pokok-pokok Pegangan Imam-imam Madzhab dalam Membina Hukum Islam, (Basic Reasonings of the Madhāhib Imāms in Developing Islamic Law). 2 volumes. Jakarta: Bulan Bintang, volume.I: 1973. 224 pp. Volume II: 1974. 336 pp.
29. Pengantar Fiqh Mu'amalah, Serie I (Introduction to the *Fiqh Muᶜāmala*). Volume I. Jakarta: Bulan Bintang, 1974. 215 pp.
30. Fakta-fakta Keagungan Syari'at Islam (Facts of the Greatness of Islamic Law). Jakarta: Tintamas, 1974. 54 pp. The first edition was published in Jakarta: Pudjangga Islam, n.d.
31. Falsafah Hukum Islam (The Philosophy of Islamic Law). Jakarta: Bulan Bintang, 1975. 488 pp.
32. Fiqih Islam Mempunyai Daya Elastisitas, Lengkap, Bulat dan Tuntas (Islamic Law Is Elastic, Final, and Complete). Jakarta: Bulan Bintang, 1975. 168 pp.
33. Pengantar Ilmu Perbandingan Madzhab (Introduction to the Science of Comparative Madhhabs). Jakarta: Bulan Bintang, 1975. 92 pp.
34. Ruang Lingkup Ijtihad Para Ulama dalam Membinan Hukum Islam The *ᶜUlamāᵓ*s Scope of *Ijtihād* in Developing Islamic Law). Bandung: Unisba, 1975. 40 pp. Hasbi's speech as a promovendus in receiving the title of

Doctor Honoris Causa from the Universitas Islam Bandung (Bandung Islamic University) held on March 22, 1975.

35. Dinamika dan Elastisitas Hukum Islam (The Dinamics and Elasticity of Islamic Law). Jakarta: Tintamas, 1976. 40 pp.

36. Pedoman Haji (The Manual of Pilgrimage). Jakarta: Bulan Bintang, 1976; '78; '83. 262 pp.

IV. *Tawḥīd* and *Kalām*

1. Peladjaran Tauhid (Lesson on Islamic Theology). Medan: Fa. Madju, n.d. (1954 ?). 56 pp.

2. Sedjarah dan Pengantar Ilmu Tauhid/Kalam (History and Introduction to Islamic Theology). Jakarta: Bulan Bintang, 1973; '76; '83. 208 pp.

3. Fungsi Akidah dalam Kehidupan Manusia dan Perpautannya dengan Agama (The Function of Belief in Human Life and Its Relation to Religion). Kudus: Menara Kudus, n.d. (1973 ?). 41. pp.

4. Sendi 'Aqidah Islam (Foundation of Islamic Belief). Jakarta: Publicita, 1974. 52 pp.

5. Hakikat Islam dan Unsur-unsur Agama (The Essence of Islam and the Religious Elements). Kudus: Menara Kudus, 1977. 117 pp.

V. General

1. Al-Islam (Islam). 2 volomes. Jakarta: Bulan Bintang, volume.I: 1952; '56; '64; '71; '77. 652 pp. Volumes.II: 1952; '56; '69; '77. 746 pp. The first publication was published in Medan: Islamiyah, 1950. The book deals with sixty nine of the faith frameworks (*kerangka*).

2. Pedoman Berumah Tangga (The Manual of Family Life). Medan: Fa. Madju, n.d. (1950 ?). The book was published six times. 80 pages.

3. Sedjarah Peradilan Islam (The History of Islamic Court). Jakarta: Bulan Bintang, 1952; '55; '70. 91 pp.

4. Dasar-dasar Ideologi Islam (The Bases of Islamic Ideology). Medan: Saiful, (?) 1953. 181 pp.

5. Sedjarah Islam. Pemerintahan Amawiyah Timur (The History of Islam.The Reign of the Eastern Umayyads). Yogyakarta: Serikat Siswa PHIN, 1953/1954.

6. Sedjarah Islam. Pemerintahan Abbasiyah (The History of Islam. The Reign of the Abbasids). Yogyakarta: Serikat Siswa PHIN, 1953/1954.

7. Peladjaran Sendi Islam (Lesson on the Foundation of Islam). Medan: Pustaka Madju, n.d. 67 pp.

8. Sedjarah dan Perdjuangan 40 Pahlawan Utama dalam Islam (The History and the Struggle of the 40 Main Islamic Heroes). Jakarta: Pustaka Islam, 1955. 93 pp.

9. Dasar-dasar Kehakiman dalam Pemerintahan Islam (Foundations of the Judgeship in Islamic Government). Jakarta: Bulan Bintang, 1955. 93 pp.

10. Pedoman Dzikir dan Do'a (The Manual for Remembrance and Prayer). Jakarta: Bulan Bintang, 1956; '64; '68; '74; '77; '82; '83. 556 pp.

11. Kreteria antara Sunnah dan Bid'ah (The Criterion between Sunna and Bidᶜa). Jakarta: Bulan Bintang, (?); 1967; 1970; 1974. 128 pp.

12. Lembaga Pribadi (Personal Institution). Medan: Fa. Madju, n.d. (1956 ?). 175 pp.

13. 'Ulum al-'Arabi (Ilmu-ilmu Bahasa Arab) (Sciences of the Arabic Language). 3 volumes. Yogyakarta: Fakultas Sjari'ah IAIN Sunan Kalijaga, n.d. (1967?). Volume I: 134 pp.; volume.II: 148 pp.; volume III: 120 + 31 pp.

14. Problematika Bulan Ramadlan (Problems of the Fasting Month). Kudus: Menara Kudus, n.d. 59 pp.

15. Lapangan Perjoangan Wanita Islam (The Field of Struggle for Muslim Women). Kudus: Menara Kudus, n.d. 40 pp.

16. Problematika 'Idulfitri (Problem of the ᶜĪd al-Fiṭr). Kudus: Menara Kudus, n.d. 34 pp.

17. Gubahan Dzikir dan Do'a. Istimewa dalam Pelaksanaan Ibadah Haji (A Treatise on Remembrance and Prayer. Especially in Conducting Pilgrimage). Yogyakarta: n.p., n.d. (1975?). 14 pp.

B. Articles

1. "Ilmoe Moesthalah Ahli Hadits" (Science of the Muṣṭala al-Ḥadīth)." Pedoman Islam. *Boendelan Tahoen Kedoa.* (1940): 25-31. 1983.

2. "Sjarah Hadits-hadits Tasjri'" (The History of the Legal Tradition). Ibid. [Pedoman Islam]: 80-8; 140-45; 223-27; 242-46; 295-300; 349-52; 481-82; 554-60.

3. "Dewan Tafsir" (the Exegesis Collection). Ibid. [Pedoman Islam]: 109-19; 168-79; 213-17; 281-87; 332-37; 422-31.

4. "Hoekoemnya Perempoean Keloear ke Tanah Lapang Boeat Mengerdjakan Sembahjang Hari Raja atau Mendengarkan Choetbah" (The Law for the Woman Who Goes to the Square to Pray at *ᶜĪd* or to Listen to the Speech). Ibid. [Pedoman Islam]: 486-89.

5. "Islam Memboetoehi Pemoeda" (Islam Needs the Young). Aliran Islam, Th. I, No. 1 (April 1940): 6-11.

6. "Moeda Pahlawan Empat Poeloeh" (The Youth of the Forty Heroes). Ibid. [Aliran Islam]: 72-8.

7. "Pandoe Moeslimin. Moeda Pahlawan Empat Poeloeh" (Islamic Guide. The Youth of the Forty Heroes). Lasjkar Islam. *Boendelan Tahoen Pertama* (1940): 181-85; 293-96; 347-49; 373-78.

8. "Mengoepas Faham Soekarno tentang Memoedakan Pengertian Islam" (Discussing Soekarno's Concept of Rejuviniting Islamic Understanding). Ibid. [Lasjkar Islam]: 159-64; 239-51.

9. "Kewadjiban Kembali Kepada Al-Qur'an dan As-Sunnah" (The Necessity of Going Back to the Qurʿān and the Sunna). Ibid. [Lasjkar Islam]: 205-11.

10. "Iman dan Islam" (Iman and Islam), Pandji Islam. The Binding of the Seventh Year (1940). Ibid. [Pandji Islam]: 7695-96; 7736-37; 7750-51; 7776-77; 7791-92; 7821-22; 7836-37; 7868-69; 7892-93; 7914-15; 7932-33; 7952-53; 7974-75; 8011-12; 8044-45; 8065-66; 8080-81; 8003-04; 8124-25; 8146-47; 8166-67; 8203-04; 8221-22; 8248-49; 8262-63; 8284-85.

11. "Choetbah 'Idul Adlha" (Speech of ʿĪd al-Fiṭr) Ibid. [Pandji Islam]: 7725-28.

12. "Maulid Nabi Sepandjang 'Ilmoe Fiqih dan Tarich" (The Birth of the Prophet according to Islamic Law and History). Ibid. [Pandji Islam]: 7979-81.

13."Me"moeda"kan Pengertian Islam" (To Rejuvination of Islamic Understanding). Ibid. [Pandji Islam]: 8404-05; 8412-13; 8452-53; 8473-74; 8497-98; 8545-46; 8574-75.

14. "Maksoed-maksoed dan Toedjoean al-Qur'an" (The Meanings and Purpose of the Qurʾān). Ibid. [Pandji Islam]: 8406-07; 8457-59; 8478-79; 8499-; 8578-79; 8645-46; 8666-67.

15. "Poeasa Ramadlan dan Hoekoem-hoekoemnya" (The *Ramaḍān* Fasting and Its Legal Status) Ibid. [Pandji Islam]: 8435-39; 8468-; 8495-96.

16. "Toentoenan Berhari Raja Menoeroet Agama Islam" (Guide to Conducting *ʿĪd*s of the *Fiṭr* and *Aḍḥā* According to Islam). In ibid. [Pandji Islam]: 8505-6.

17. "Menghidupkan Hukum Islam dalam Masjarakat" (To Give Life to Islamic Law in Society), Aliran Islam, Th. I, No. 1 (November 1948) and No. 2 (Desember 1948): 100-4.

18. "Tugas Hidup Pribadi Muslim Terhadap Dirinja" (The Duty of A Muslim to Himself). Ibid. [Aliran Islam]: Th. IV, No. 25 (Juni 1951): 1450-57.

19. "Status 'Aqiedah dalam Agama Islam" (The Status of Belief in Islam). Hikmah, Th. V, No. 24 (21 Juni 1952): 25-27.

21. "Hukum-hukum Penjembelihan Qurban" (Laws of Slaughtering Animals for Sacrifice). Ibid. [Hikmah]: No. 35 (16 Agustus 1952): 19-21.

22. "Kembali kepada Sunnah Dasar Persatuan Ummat Islam jang Kokoh" (Return to the Sunna Is the Foundation of Strong Muslim Unification). Ibid. [Hikmah]: No. 47-48 (25 November 1952): 12-15.

23. "Dasar-dasar Pokok Hukum Islam" (The Basic Foundations of Islamic Law). Ibid. [Hikmah]: Th. VII, No. 25 (19 Juni 1954): 21-22; No. 26 (26 Juni 1954): 20-22; No. 27 (3 Juli 1954): 192-22.

24. "Perguruan Tinggi dan Masjarakat" (Higher and Society). Ibid. [Hikmah]: Th. VIII, No. 43-44 (26 Oktober 1955): 17-18.

25. "Apa Sebenarnya Hukum Islam Itu" (What Is Truly Islamic Law). Ibid. [Hikmah]: Th. IX, No. 18 (19 Mei 1956): 5-7 and 14.

26. "Pemeliharaan Anak-anak Jatim dalam Islam" (The Care of Children in Islam). Lustrum II Rumah Penjantun Muhammadiyah Kutaradja. (28Pebruari 1943-1953): 5-9.

27. "Menghadapi Bulan Radjab. Bulan Sembahjang dan Rahasia-rahasia yang Terpendam di dalamnja" (Welcoming The Rajab Month. The Month of Prayer and Its Secreets). Asj-Sjir'ah. Gema Fakultas Sjari'ah, No. 2 (Oktober 1966): 3-12.

28. "Apakah Hukumnja Membatasi Kelahiran Ditinjau dari Segi Hukum Sjara'" (What Is the Legal Status of Family Planning in Islamic Law). Ibid. [Asj-Sjir'ah. Gema FAkultas Sjari'ah], No. 3 (Januari 1967): 31-33.

29. "Kedudukan Keadilan dalam Pembangunan Masjarakat" (The Position of Justice in the Development of Society). Ibid. Asj-Sjir'ah. Gema Fakultas Sjari'ah]: No. 5 (1967): 1-6.

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