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# Contents

**SHARIAH AND THE POLITICS OF PLURALISM IN INDONESIA: UNDERSTANDING STATE'S RATIONAL APPROACH TO ADAT AND ISLAMIC LAW**

*(Ratno Lukito | 1-18)*

**SOCIAL ENGINEERING THROUGH EDUCATION LAW: A COMPARATIVE ANALYSIS OF CULTURAL POLICIES BETWEEN THE DUTCH AND INDONESIAN CENTRAL GOVERNMENT**

*(Saifuddin Dhuhri | 19-34)*

**COMPATABILITY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND ISLAMIC LAW OR WAR (JIHAD)**

*(Faiz Bakhsh | 35-45)*

**HUMAN RIGHTS PERSPECTIVES ON ISSUES IN THE IMPLEMENTATION OF ISLAMIC CRIMINAL LAW IN MALAYSIA**

*(Mohd. Hisham Mohd. Kamal | 46-54)*

**INTEREST IN ISLAM AND CROSS RELIGIONS**

*(Muhammad Syauqi Bin Armia | 55-68)*

**THE GUARANTEEING CAPITAL PUNISHMENT IS PEACEFUL AND HARMONIOUS LIFE: PROOFING FROM AROUND THE WORLD**

*(Tajul Arifin | 69- 80)*

**THE CHILD RIGHTS IN ISLAMIC LAW WITH A SPECIAL FOCUS ON ACEH**

*(A. Hamid Sarong & Nur A. Fadhil Lubis | 81-92 )*

**THE CHANCE ON ISLAMIC FAMILY LAW STUDY IN INDONESIA**

*(Ali Abubakar | 93-106)*

## **SHARIAH AND THE POLITICS OF PLURALISM IN INDONESIA: UNDERSTANDING STATE'S RATIONAL APPROACH TO ADAT AND ISLAMIC LAW**

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**Abstract:** This article will explore deeply the implementation of Shariah law in Indonesia. To some extends, the Shariah law should be implemented with referring to Quran and Sunnah, however in the case of Indonesia not all of Shariah law has fully referred to Quran and Sunnah. Considering the legal pluralism in Indonesia, the Shariah law has to adjust several laws that has been practicing in Indonesia, including Islamic law, Adat law, and Colonial law. This phenomenon has forced the Sharia law to adapt himself to those laws. Consequently, the implementation the Shariah law is not fully referring to Quran and Sunnah. The new problem has appeared, because the Adat law and Colonial law must adopt as well. Adat law and Colonial law have come from the creation of human being, in contrast with Shariah law dominated by Holly Book. Thus, the contradiction Sharia law and human-being law will occur at any time, including interpretation of the meaning of holly text. Additionally, the political configuration has also influenced the legislation process, creating long debate in implementing Sharia law. This article will explore briefly this problem, using comparative law approach. Then, author will recommend the solution to solve this problem.

**Keywords:** Shariah And Political, Islamic Law, Adat Law

**Abstrak:** Artikel ini membahas secara mendalam pelaksanaan hukum Syariah di Indonesia. Hukum Syariah harus dilaksanakan berdasarkan Quran dan Sunah. Namun, di Indonesia, tidak semua hukum syariah sepenuhnya merujuk pada Quran dan Sunah. Mengingat pluralisme hukum di Indonesia, hukum Syariah harus menyesuaikan beberapa undang-undang yang telah dilaksanakan di Indonesia, termasuk hukum Islam, hukum Adat, dan hukum Kolonial. Fenomena ini memaksa hukum Syariah untuk menyesuaikan diri dengan hukum-hukum tersebut. Oleh karena itu, pelaksanaan hukum Syariah tidak sepenuhnya berdasarkan pada Al-Quran dan Sunah. Hal ini menimbulkan masalah baru, karena hukum Adat dan hukum Kolonial juga harus diadopsi. Hukum adat dan hukum kolonial adalah hukum yang diciptakan oleh manusia. Sebaliknya, hukum Syariah didasarkan pada kitab suci. Dengan demikian, kontradiksi antara hukum Syariah dan hukum yang dibuat oleh manusia akan terjadi kapan saja, termasuk pada penafsiran teks kitab suci. Selain itu, konfigurasi politik juga memengaruhi proses legislasi dan menyebabkan perdebatan panjang dalam mengimplementasikan hukum Syariah. Artikel ini akan membahas secara singkat masalah ini dengan menggunakan pendekatan hukum komparatif. Selain itu, penulis juga akan menyampaikan solusi untuk menyelesaikan masalah ini.

**Kata Kunci:** Syariah dan politik, Hukum Islam, Hukum Adat

## Introduction

The attitude of the state towards legal pluralism in Indonesia is basically never changed. For no less than six decades, we have been brought into a condition in which the role of the state is no dominant in regulating legal pluralism. This might be just a logical consequence of the civil law system embraced so far – inheriting the Dutch colonial civil law system implemented in the Dutch East Indie –, which places the institution of law as inseparable from the state itself. As a result, the creation and establishment of law are more understood as a process occurred merely through the state legislation, while any creative processes taking place beyond the estate will certainly be rejected. Although in practical terms the dialogue between the state and society is always needed in the process of law making, the decision is certainly a state business. This is the teaching behind the ideology of state positivism. And this is what the government of Indonesia has prescribed: that should the state maintain legal pluralism, it will always take a role as the sole institution in the process of legal canalization and legislation. Seen from the framework of legal pluralism, the strategy as such is what basically known as “state law pluralism”, in which legal pluralism in a nation-state is possible in as much as the state becomes the sole agent of law-making.<sup>1</sup>

Keeping in mind the Indonesian policy on legal pluralism, this article will basically try to understand the behaviour of the state in facing the existence of Islamic law and customary law (*adat*) – the two greatest legal tradition living in the country. The analysis will be focused on the fact of different development between the two non-state normative orderings as a result of different treatment the state has given to them. The adoption of the assertive strategy of “state law pluralism”, especially in the New Order era since 1970s, has proven to give a result of different attitude in the part of the state in handling the institution of *adat* and Islamic law. The question is what is the movie behind such a different strategy? This is a question that necessitates more a socio-political approach in the study of comparative law. In so doing, this article will therefore benefit that approach to analyse the subject, in which a number of regulations and acts related to *adat* and Islamic law are treated as the primary sources.

## Continued Strategy of Legal Pluralism

Although different in its detail, the strategy of legal pluralism demonstrated by different regimes in Indonesia can be said to have been a constant endeavour. As stated earlier, such a behaviour is basically a reflection of the principle of state law pluralism strategy adopted by the government (even possibly without any plan) since the establishment of the state itself. The basic principle of this theory lays in granting the power of law making fully in the state institution, even though the state will possibly adopt some legal values living in society. Therefore, the state becomes a central agent in the process of creating the law, with legal traditions existing outside the state should always be in a peripheral position. Any legal traditions in the society will thus depend entirely on the state policies for their continuity, although they are rooted deeply in the everyday life of the community. The choice of such an ideology might be consequence of the formation of the state itself since the nation-state intended in Indonesia is basically a united state which can integrate all different values of culture and denomination that have characterized the multicultural society reside therein. Therefore, different strategy of legal pluralism that has been taken by each regime since the early independent until the current reformation era essentially

1 On the basic theory of legal pluralism see John Griffiths, “What is Legal Pluralism?” (1986) 24 *Journal of Legal Pluralism I*; Gordon R. Woodman, “The Idea of Legal Pluralism”, ed., Baudouin Dupret, Maurits Berger and Laila al-Zwaini, *Legal Pluralism in the Arab World* (The Hague, London & Boston: Kluwer Law International, 1999) e, esp. At 5.



reflects the same ideology of state positivism. Here, whatever the state's policy, the state will never go beyond the boundaries of its function as the sole agent of legal catalysator toward legal traditions existing in the society. In other words, state law pluralism is in itself a reflection of the state positivism ideology constantly embraced by the state.<sup>2</sup>

We see that the Old Order regime in the time of Soekarno seemed to have been less assertive in implementing their policy of pluralism.<sup>3</sup> They tended to stand aloof from many cases of law related with varied legal traditions and from making any new legal creations in response to legal pluralism, in spite of the *de facto* existence of many Dutch laws entrenched in the society. Take an example in the law of marriage. Although the need of creating a new law related to marriage was overwhelming, the government had only promulgated some regulations that touched only the surface of the problem, namely by homogenizing the matters of procedure rather than changing the substantive aspects of the marriage itself.<sup>4</sup> This means that the practice of marriage was left at its pluralism, even though the state had started to regulate its uniform procedure. The estate appeared to be too wary in dealing with the substance of marriage law that was factually plural in the society.

Yet, interestingly, the Old Order regime had acted differently in the matters of agrarian law. They seemed more self-assured that concerning the land, the state should since the first time persistent in its mission to legal unification. As early as 1960, Soekarno had signed the Basic Agrarian Law (Law No. 5 of 1960). With this Law, the plurality in the practice of land regulation, which in many cases was based on *adat* land law and a small nuance of Dutch law, was to be unified through the uniform law. As realized, the plurality of *adat* land law was no less than the variety of marriage law living in society. The plurality was not merely due to the influence of the *adat* tradition in concern of the land but also resulted from the influence of the Dutch land law gradually practiced in a number of groups of society. In such a great variety of land law, it was surely not easy for the young government to homogenize the law and put it into a uniform act. The promulgation of the Basic Land Law of 1960 was evidence that Soekarno's government at the time preferred to meet the challenge of majority *adat* protagonists, who would rather take the risk of plurality, than endangering the state into the plunge of controversy and disappointment of mostly Muslim groups if the marriage law was also homogenized through a uniformed law. This just shows that at least until 1960s the government succeeded only to create a uniform regulation in the matter of the land law without touching the plural tradition of marriage or family law in general.<sup>5</sup> In the latter, the matter of procedure seemed the only possibility for the government to take a part.

One thing to realize is that with the promulgation of the Law No. 5/1960 the position of *adat* law in the constellation of national law system seemed to be in jeopardy. Since

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2 Theoretical explanation on state positivism see Roscoe Pound, "Theories of Law", (1912) Yale Law Journal 114, also Jean Hampton, Hobbes and the Social Contract Tradition (Cambridge: Cambridge University Press, 1986), at 107-110; and Samuel L Shuman, Legal Positivism: Its Scope and Limitations (Detroit: Wayne State University Press, 1963), at 14-15.

3 Adam Schwarz . A nation in waiting: Indonesia's search for stability. Routledge, 2018. See Also Marcus Mietzner. "Authoritarian elections, state capacity, and performance legitimacy: Phases of regime consolidation and decline in Suharto's Indonesia." International Political Science Review 39.1 (2018): 83-96.

4 See a number of acts related with that: Law No. 22/1946 and Law No. 32/1954, basically supporting the Dutch regulation passed since 1895 in the Staatsblad No.198/1895.

5 G Christine Schenk. "Islamic leaders and the legal geography of family law in Aceh, Indonesia." The Geographical Journal 184.1 (2018): 8-18. See Also Julia Carter , and Duncan Simon . "Inventing Tradition: Cohabitation and Common Law Marriage." Reinventing Couples. Palgrave Macmillan, London, 2018. 79-114.

the first, the state was indeed always uncertain in seeing the existence of *adat* law. The main problem rested always in the gap between the philosophy of *adat* law and the ideal principle of national law to be built in the unified country of Indonesia. The state was thus constantly doubtful as to how to deal with the indigenous *adat* law. On one hand, there was a need to establish a system of national law independent from foreign legal traditions and as much as possible reflecting the values of indigenous culture<sup>6</sup>, but, on the other hand, the plurality and uncertainty of the unwritten *adat* law has always been a pitfall for nationalist jurists to choose *adat* as the source of modern law. This is clear in the case of land law above, in which *adat* land law has an uncertain position: the early consideration of the law explicitly mentions the important role of *adat* law as one source for making the national land law, yet some articles afterwards frankly decline the existence of *hak ulayat* (communal land rights), the core teaching of *adat* land law.<sup>7</sup>

In fact, the effort to abolish the existence of *adat* law has never been so obvious than the Old Order's behaviour towards *adat* judicial system. The government had as early as 1947 tried to abolish the *adat* courts spread all over the country. With law No. 7/1947 and Law No. 23/1947, Soekarno had assertively closed down the *adat* courts as they were seen as endangering the process of creating a unified judicial system, understood as a pretext of national state building. Not long after those two laws, the government again passed the Law No. 19/1948 on the judicial system in Indonesia, recognizing only three judicial system having rights to exist in the country, i.e., General, Military and Administrative Courts, with no mention at all about *adat* courts that had existed in the society of archipelago long before the birth of the nation-state of Indonesia itself. And this was candidly in contrast to the policy of the government was reluctant to mention them explicitly in the law of the judicial system, they never have the courage to give the same policy as what they did to *adat* courts. Therefore, even if many nationalist jurists in the country were indifferent to the existence of the religious courts, the state persistently maintained them, albeit with a minor treatment.<sup>8</sup>

Interestingly, such a different attitude that Soekarno gave toward both Islamic law and *adat* law was essentially not changed with the change of political power in the country. Although Soekarno was well known in his more forcefulness to put forward the dominant role of the state in any sphere of life of the country, he seemed also not too different from his predecessor in dealing with non-state legal institutions. This is seen at least from a number of laws and regulations promulgated in concern of *adat* law and Islamic law. We note that in its early power, the New Order has already a zeal for campaigning a national marriage law, although in so doing the state should face a big challenge posed by many groups disagree with such an idea. In this case, Muslim groups were apparently the main protagonists opposing the government plan to unify the marriage law. Although they did not fully reject the idea of nationalizing marriage law, their challenge was mainly focused on the substantive aspects of the bill they viewed as the nationalist' efforts to secularize the divine teachings of Islamic marriage law. Indeed, this is what the main problem haunted the government since the initial time: how to create a unified marriage law that can maximally incorporate many cultures and religious values living in society. Yet, whatever

6 This can be seen also in the Decision of the Preliminary People Assembly No.II/1960 deciding the *adat* law as a source for building national law system in the country.

7 See further in Law No. 5 of 1967 on the forestry law in Indonesia, where the state was principally controlling the management of the Indonesian forests used to be managed through the *adat hak ulayat*.

8 Ahadian Shah . "Law and Religion in Indonesia: Conflict and the Courts in West Java." (2018): 706-710. See Also G Michael Peletz . Islamic modern: Religious courts and cultural politics in Malaysia. Vol. 11. Princeton University Press, 2018. See Also Rex Ahdar , and Aroney Nicholas . "The Shari' a in the Western Landscape." The Shari'a: History, Ethics and Law (2018).

the result, the New Order government has finally succeeded to promulgate the national marriage law after undertaking many ways of rapprochement and win-win solution to appease the conflict between the two groups. Both secular nationalist and Muslim groups have finally agreed to relinquish some articles in the bill seen as inconsistent with their ideas of law. The most important point here is the success of Muslim groups to infuse religion as the main principle of marriage; the marriage contract in Indonesia is therefore now not merely seen as a civil contract having no interference from the institution of religion, but more as a divine, legal agreement in which the role of religion is so prevalent in the processor building a marital relationship.<sup>9</sup>

Again, we see that the lenient attitude of the state toward Islamic law seemed to have been in contrast with their statue to *adat* law. No more than one year after assigning power, the New Order has directly passed the Law No. 5 of 1967 principally regulating the dominant role of the state in managing forests throughout the country. It was with this Law that the teaching of *hak ulayat*, especially related to *adat* forest rights still owned by many *adat* communities, was again devastated by the overriding role of the state to control the Indonesian forests.<sup>10</sup> This Law is of course a continuation of the Old Order policy that appeared to be oppressive enough to the rights of the *adat* communities to manage the forests by practicing the teaching of *hak ulayat*.<sup>11</sup> Tragically, three years later, the new Law No. 14 of 1970 on the judicial system continued to maintain the old scheme of national court institution that unrecognised the *adat* courts throughout the country. According to this Law, the state formally recognized four judicial institutions, i.e., General, Religious (Islamic), Military and Administrative courts.<sup>12</sup>

The main character of the New Order lays in its focus to strengthen the executive body in the process of law making. Many experts even see that the role of the legislative at the time was just a rubber stamp of the executive's dominant function to create laws. This is absurd, since the New Order's mission to build a modern legal system in the country will certainly be hampered by the deep interference of the executive in the process of law making. We note that many important regulations in the New Order era were mostly in the form of Government Regulation (*Peraturan Pemerintah*) and not that of the Act (*Undang-Undang*), an evidence that the executive was surpassing the role of the legislative assembly in the country's law-making.<sup>13</sup> It was not beyond this political constellation that we see the strengthening process of Islamic law in the system of national law during the New Order government. In his early government, Soeharto continued to improve the position of Islamic law in the country when he passed the Government Regulation No. 28 of 1977, basically implementing the Islamic law of endowment (*waqf*) in the national law system. The promulgation of this regulation was indeed focused on the need to complement the Basic Agrarian Law of 1960, especially in its relation with the property of the land owned by the individual party.<sup>14</sup> Yet, many jurists in the country also viewed that the appearance

9 In detail on the character of the system of marriage law see regulations complementing the Basic Marriage Law No. 1/1974, namely: Government Regulation No.9/1975, Regulation of the Minister of Religious Affairs No. 3 and 4 of 1975, and also Regulation of the Minister of Interior No. 221 a of 1975.

10 Hunggul Nugroho YSH, et al. "Expansion of traditional land-use and deforestation: a case study of an adat forest in the Kandilo Subwatershed, East Kalimantan, Indonesia." *Journal of Forestry Research* 29.2 (2018): 495-513.

11 See Kallie Szczepanski, "Land Policy and Adat Law in Indonesia's Forest", (2002) *I I Pacific Rim Law & Policy Journal* 231.

12 See Article 10 of Law No. 14/1970.

13 For instance, the data explained by Ramlan Surbakti, "Formal Political Institution", ed., Richard W. Baker, et al., *Indonesia: The Challenge of Change* (Singapore: Institute of Southeast Asian Studies, 1999) at 61.

14 The close relation between Government Regulation of the Waqf of Land with Individual Ownership and Law No.5/1960 or the land law is early reflected in that Regulation.

of the *waqf* regulation on the land was no more than a clear sign that the future was more promising for the growth of Islamic law, especially when compared to the fate of *hak ulayat* on *adat* land law to which the government persistently abolished since the early birth of the state itself.

Indeed, the fluctuation of the relationship between state and Islam influences the product of laws and regulations related to Islamic law. We note that in the time of Soeharto, the state-Islam continuum was mostly characterized by the political battle between Muslim and secularists as well as deviousness of most secular nationalists worrying that Muslim groups would always be persistent in their struggle to achieve their idea of creating an Islamic state. In the sphere of law, secular jurists mostly feared of the revitalization of the Shari'ah teachings reflected in the Jakarta charter of 1945. Most of them did not believe that the implementation of Islamic law in Indonesia could be undertaken without sacrificing the pattern of "state law pluralism" already proven as acceptable for all groups in the country. Some factors seemed to have been influencing here: *First*, until early 1980s, Soeharto's government seemed not to be able yet to formulate their fixed strategy in facing the fact forget their conflict in the problem of the Jakarta Charter. As a result, to what extent Islamic law could be accepted in the system of national law was always influenced much by the extent to which Islam could approach the state itself. In the heyday of Soeharto era during the decade of 1980s, the relation of both Islam and the state could be said as not so harmonious. At the time, Soeharto seemed to remain sceptical to the sincerity of Muslim groups for not continuing their Islamic state mission. And this was of course in conjunction with the struggle of the New Order to make Pancasila (the Five Principles) as the sole ideology of the state Islam would therefore be viewed as a pitfall for upholding the ideology of Pancasila.<sup>15</sup> During 1980s, therefore, Soeharto's government tended to be more careful in handling the issue of Islamic law. This appeared to be the main reason why since the promulgation of the Government Regulation on *waqf* in 1977, the state legislation of Islamic law was scarce.

Interestingly, the "positivization"<sup>16</sup> of Islamic law appeared again in line with the waning of Soeharto's charisma as the most powerful man since the end of 1980s. Even though his position was still strong, many experts saw that Soeharto was in fact lonely in his throne. That was why he seemed to start thinking about Islam as an alternative to support his power. It is in this context that we see the strong willingness of the New Order to promulgate the Law No. 7 of 1989 on the Religious Judicature. Undoubtedly, the birth of this Law was so surprising for most nationalist jurists who until the end of 1980s remained to believe in the cold relation between Islam and the state.<sup>17</sup> Therefore, their expectation was not changed yet, namely, maintaining the religious courts without the need to have the same level as the general courts. Again, we see here that the state factor decides the

15 Alex Chandra . "Terrorism And Radicalism, Threats For Ideology Pancasila." *Awang Long Law Review* 1.1 (2018): 44-51. See Also Meilin Zhang. *Pancasila: A Biography; Indonesian Nation-State Building*. MS thesis. 2018. Zhang . *Pancasila: A Biography; Indonesian Nation-State Building*. MS thesis. 2018. See Also Muhammad Chairul Huda. "Strengthening Pancasila As National Ideology To Implementate The Balancing Values To Improve Law's Application In Indonesia." *Jurnal Pembaharuan Hukum* 5.1 (2018): 1-12.

16 The term "positivization" here is basically defined as a kind of strategy of the state to adopt Islamic legal tradition into the system of secular state law. The character of Islamic law as a non-formal, varied and sacred law is therefore altered to become a formal, secular and homogeneous like a state law. The procedure and substance of the religious law thus also follow the character of state positive law.

17 Fuller; Graham. *A sense of siege: The geopolitics of Islam and the West*. Routledge, 2018. See Also Rudolph, Susanne H. *Transnational religion and fading states*. Routledge, 2018. See Also Zelizer, Barbie. "Cold War redux and the news: Islamic State and the US through each other's eyes." *Critical Studies in Media Communication* 35.1 (2018): 8-23.



case: although the debate on the draft of the Law was so strong within and without the parliament, the protagonists of the religious courts could finally win. What is clear is that the main point is not to what extent a certain law can be passed by the legislative but to what degree the promulgation of the law can give a maximal benefit to the state itself.

The strengthening position of the religious courts continued furthermore after the promulgation of the Law No. 7/1989. In 1991, President Soeharto, through the Presidential Instruction No. 1, issued the Compilation of Islamic Law in Indonesia, basically as a material resource for the judge in the religious courts to decide the family law cases brought to the court. The religious court is now not only strengthened in its institutional legal standing but also in its substantive jurisdiction. And the picture is of course in contrast to that of *adat* courts that have already been demolished since the early independent, while the substantive aspects of *adat* law are for the judge to make discretion when the case is brought to the general courts. The state accommodation towards *adat* and Islamic laws indeed different here. And this is basically a constant policy of the government in the matters related to *adat* and Islamic law until the end of the New Order in the end of 1990s.

Indeed, many hopes that the appearance of the so-called "reformation era" in the post Soeharto government will result in the change of the state's attitude towards non-state normative orderings, end especially in their proclivity to dominantly interfere all aspects of life of the people. In the sphere of law, many jurists believe that the fall of the New Order would reduce the domination of the executive in the process of law making by giving more appreciation to the legislative assembly in their role of law creation. Yet, changing the tradition is indeed not as easy as clapping the hands. The hope that the state will orient itself towards people's need was in fact not realized; and the state has thus always tended to continue their old pattern of governance whereas the interest of the state is always the first to consider. The improvement in the matters of law has therefore never been fully implemented in the reformation era except for the fact that the role of the legislative in the process of making the laws seems to have been improved. Thus, the attitude of the state toward both *adat* and Islamic law is not changed, i.e., that the position of Islamic law in the system of national law is constantly improved in the midst of the continued degradation of *adat* law in the country.<sup>18</sup>

The unequal treatment of the state towards both legal traditions of *adat* and Islamic law is therefore continued unabated in the reformation era of Indonesia. Seen from a number of laws and regulations, the post-Soeharto government tends to strengthen furthermore the position of Islamic law in the society while nothing is done to improve the marginalized position of *adat* law in the structure of national law. In this case, Habibie was the most phenomenal president: although his term was not very long, he was noted to have promulgated a lot of laws formally upholding the practice of Islamic law in the society. In this context, there were at least 5 acts produced by the regimes in the post-Soeharto era that can be set forth here as an example. From those 5 acts, 4 acts were promulgated during Habibie's term, while the current government of Susilo Bambang Yudhoyono passed the other law. Those four Habibie's acts are Law No. 41/1999, as an amendment of the forest law passed in the 1967, Law No. 17/1999, law No. 38/1999, and Law No. 35/1999. The first law relates directly to the problem of *hak ulayat*, while the three others concern with Islamic law. While the newest law is Law No. 3/2006 amending the Law No. 7/1989 on

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18 Montgomery McFate. "A Military Anthropologist Looks at Islamic Insurgency in Aceh." *Orbis* 62.4 (2018): 632-654. See Also Imam Mawardi. "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13.1 (2018): 1-24. See Also Rachmi Sulistyari, et al. "The Contact Point of Customary Law and Islamic Law (Legal History Perspective)." *International Journal of Social Sciences and Management* 5.2 (2018): 51-59.

the Religious Judicature. We see here that the pattern is in fact not changed that in the problem of legal pluralism the government tends to maintain the previous model of the strengthening the already strong tradition of Islamic law.

As an amendment of the Law No. 5/1967, the Law No. 41/1999 is in fact meant to be an improvement of the law of forest in Indonesia. Since the first, the old forest law of 1967 had regulated that the management of forest should be controlled fully by the central government. Either the communal or the individual right of managing the forest usually maintained through the *adat* forest law was therefore practically abolished with the Law No. 5. Although the Law considered the people welfare as the main consideration for managing the forest, in practice the power of the state to dominate all forests in the country became the state's justification to restrain the local community's rights to cultivate the forests, which were usually maintained through the inherited *adat* law. Unfortunately, this attitude is basically maintained in the new Forest Law of 1999, although the wave of reformation has resulted in the decrease of the state's prerogative right to dominate the forest. According to the new Law, private cultivation of the forests is allowed even though the state remains the only right of the government (Article 4). Interestingly, Art. 1 of the Law mentions that the *adat* forest is basically the forest owned by the state in spite of its location in the communal *adat* land. Art. 4 (3), therefore, states very clearly that management of the forests should consider the *adat* law, yet as long as the law is "still existent" and "recognized and not in contrary to the state interest". This means that the *adat* land rights are recognized but placed under the interest of the state itself. This is absurd since although in theory the Law upholds the *adat* forestry rights, in practice those rights will usually be ignored if the government sees as opposing to the state's interests. The new Forest Law is a proof that in the substance of *adat* land law, the state's behaviour is never changed. The recognition and accommodation given to *adat* law is in reality just a lip service strategy since the *adat* existence is seen as threatening the power of the state to control all lands in the country.<sup>19</sup> Maintaining the *adat* land rights may hence only mean to challenge the state's power over the land, water, air and all their contents existing under the state's jurisdiction.

Yet, interestingly, the positive attitude toward Islamic law has always been maintained by the regimes. The three laws passed by Habibie's government during the short time of his presidency gave a strong indication of the state's proclivity to support the existence of Islamic law in the country. First, Law No.17/1999 on the management of the pilgrimage. This Law basically gives an opportunity for non-government institutions to take a role in managing the practice of pilgrimage to the Holy Lands (Makkah and Medina) in Saudi Arabia. This is a positive attitude shown by the state since the management of the pilgrimage was before a monopoly of the government. That was why some Muslim groups suggested the government to reduce its domination by giving more chance towards non-government sectors. Thus, the appearance of the Law No. 17 was no more than a positive answer given by Habibie's administration on this case. Second, Law No. 38/1999 on the administration of *zakat* (Islamic charity). The promulgation of this Law was also a big step taken by Habibie in concern of the need of Muslims to practice the teaching of *zakat*. Legally speaking, the Law itself reflects an enthusiasm of Habibie's government to formally legitimate the Islamic teaching of *zakat* in the country since historically Soeharto's long government before had never dealt the case with such a strong legal instrument as an act.

19 Adam Schwarz . A nation in waiting: Indonesia's search for stability. Routledge, 2018. See Also Eko Bambang Supriyadi , et al. "Legal Position of Forest Area in Giving Land Rights Related to the State Land of Indonesia." *JL Pol'y & Globalization* 77 (2018): 128. See Also David E Gilbert , and Afrizal. "The land exclusion dilemma and Sumatra's agrarian reactionaries." *The Journal of Peasant Studies* (2018): 1-21.

Soeharto only benefited the legal instrument of government regulations to deal with the complicated case of *zakat*. The promulgation of the Law was indeed a big surprise as this could reflect a formal recognition of the state on the importance of Muslims to practice the teaching of Islamic charity.<sup>20</sup>

In conjunction with the two Laws before, Habibie had also succeeded to pass the Law No. 35/1999 amending the Law No.14/1970 on the judicial system in Indonesia. What the most important to note here is on how the state gives its different in the country under the single roof of the Supreme Court. As the main mission of the Law No. 35 is basically to put all judicial systems under the management of the Supreme Court, the exception given to the religious courts in this case might well be questionable. Here, the religious courts were remaining under a double organization as has been ruled in the Law No. 7/1989, i.e., under the Ministry of religious Affairs for their non-judicial (administrative) matters, while the Supreme Court will manage their judicial aspects. Although such a special treatment of the religious courts has now been amended with the Law No. 4/2004, it can effectively give a sign of Habibie's government to give unfair treatments in the matters of judicial system in the country. The proclivity seemed to always be given towards maintaining an advance position of the religious courts vis-a-vis the other courts. And this way only due to the suppression of many Muslim leaders and organizations for not integrating the institution of religious courts with any other courts, worrying that such an integration might result in a muddling up the religious institution with the secular one. The maintenance of the soluble organization of the religious courts was just a leeway to keep the sacredness of the courts, even though in so doing the effectiveness of the court management should be sacrificed. Although the new Law No. 4/2004 has changed this policy as it regulates the single roof management of all courts in the country, five years of special treatment to the religious courts is a clear indication of the state to constantly give a better place to the institution of Islamic law. Let alone, if this is compared to the already disregarded existence of *adat* courts.

However, that does not mean that the positive treatment the state has given to the religious courts is diminished in the current time of Yudhoyono's era. Yudhoyono seems even to fortify further this religious institution by promulgating the Law No. 3 of 1006 amending the Law No. 7 of 1989 on the religious judicature. Among others, the most important new aspect set forth in the new Law is basically to expand the jurisdiction of the religious courts. The court is now not only dealing with the cases of Islamic family law (marriage, divorce, inheritance and almsgiving, and other related cases) as have already been regulated in the previous Law No. 7/1989 but moreover expanded to include the conflicts arose in the matters of Islamic business law.<sup>21</sup> Article 49 of the Law No. 3/2006 regulates that the religious courts are authorized to process and settle the cases in the subjects of Islamic economy, besides other old cases related to Islamic family law among Muslim people.

Although it remains unclear how and to what extent those new cases will be handled in

20 Timur Kuran . "Islam and economic performance: Historical and contemporary links." *Journal of Economic Literature* 56.4 (2018): 1292-1359. See Also Md Abu Sayem. "Islamic Teaching and Practice of Environmental Ethics in Bangladesh: A Case Study." *QUEST: Studies on Religion & Culture in Asia* 3 (2018). See Also Carl Morris . "Re-Placing the Term "British Muslim": Discourse, Difference and the Frontiers of Muslim Agency in Britain." *Journal of Muslim Minority Affairs* 38.3 (2018): 409-427.

21 Compare: the Art. 49 of Law No. 7/1989 that states taht the jurisdiction of the religious courts includes: a) marriage; b) inheritance, bequest and gift, processed in the basis of Islamic law; and c) endowment and shadaqah, with the Art. 49 of Law No. 3/2006 which expands the jurisdiction of the religious courts to include: marriage, inheritance, bequest, gift, endowment, Islamic charity, donation, almsgiving and Islamic economy. See these two laws in Mahkamah Agung RI, Undang-Undang Republik Indonesia Nomor 3 tahun 2006 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama (Jakarta: Direktorat Jenderal Badan Peradilan Agama, Mahkamah Agung RI, 2006) at 20, 61.

the courts as their material bases have not been formulated, one thing for sure has now been legally established that the courts have a greater juridical competence not limited to only deal with the traditional matters of Islamic family law but to include also the conflicts in the matters of Islamic business law. This is not but a crystal clear that the existence of Islamic law in the country is furthermore reinforced through a formal legal instrument of the state. The expansion of the religious courts' jurisdiction has only reflected the state's willingness to fortify the courts as the centre for implementing all aspects of Islamic law in the country, regardless of the fact that the courts may have not been prepared yet to do so. The promulgation of the Law No. 3/2006 seems even give a hint that the state has already been and continued to always be very supportive towards the courts (and Islamic law generally) even without seeing the institutional capacity of the courts themselves. It is clear therefore that the state has given a very positive accommodation towards Islamic law in the system of national law in the country. However, such an accommodation is unfortunately not applied equally to the institution of *adat* law existing also in the society. The question is then what in fact the motive behind such a different treatment? This is the topic we want to deal in the next pages.

### **Rational Choice and the Strategy of Legal Pluralism**

From the above paragraphs, we can see how the strategy of state law pluralism adopted since the early state formation era has given a positive result to the existence of Islamic law, while *adat* law has constantly been in an unfortunate position in the system of national law. As stated, earlier, the state's attitude has never been basically changed to always strengthen the implementation of Islamic law in society, even to do so the teachings and character of the law believed as derived from the divine teachings should be altered to become a formal and homogenized law parallel to the state, secular law. This seems the consequence of the ideology of state positivism itself. However, beyond the facts of its transformed character, Islamic law is undoubtedly more fortunate in the process of state accommodation to non-state legal tradition. Our question is what the reasons of the state to uphold such a strategy? Is this based merely in the ideology of state positivism itself or other factors have factually influenced the state to treat differently those non-state legal traditions?

Theoretically, the adoption of state law pluralism strategy should bring a positive effect to the existence of any legal traditions living in society as the theoretical perspective of that concept dictates the state to recognize equally all non-state normative orderings. And in fact, this is what is prescribed in the theory of national law: the state's main duty in the program of establishing legal system is to adopt those non-state normative orderings as much as possible in line with the mission of national law. Yet, no one can deny the influence of political factors in the program of law making since the adoption of certain legal traditions into national law system is relied not only on the mere substantive aspects but also some factors beyond the normative teachings of certain legal tradition. Even in many cases, the non-substantive factors are found as deciding the whole process of that adoption. It is here that we need to understand the state's behaviour in the process of legal creation.

In the view of Max Weber, the recognition and incorporation of the state to certain non-state normative orderings are basically a logical consequence of the rationalization of the state's role itself.<sup>22</sup> This means that the legitimation of the state is in fact just a validation

22 Weber himself defined the state as: "A compulsory political association with continuous organization (politischer Anstaltsbetrieb)... if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order." This is different to what he called as the church where its staff can claim the monopoly of the use of "hierocratic" coercion. See Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and



of the state's monopoly in the process of the law creation, in which the state needs to amalgamate many various legal traditions existing in the society. As can be seen in the case of Indonesia such a rationalization is basically done to maximally preserve the right of the state as the sole agent of law making. Therefore, some strategies to accommodate any legal traditions, especially Islamic law and *adat* law, done so far by different regimes in the country, such a centralization, or even (using Weber's term) "profanization",<sup>23</sup> were chosen with one purpose, namely, to strengthen the state's position itself. Understood in this way, we can say that the policy of incorporation of those non-state normative orderings is not seen as endangering but even strengthening the ideology of state legalism itself. In line with Weber's thought, Van Cott has also explained this analysis when he described the same kind of phenomenon in the Latin America. In his view, the utmost reason of the state's recognition in the need of the estate to ensure its role in the society. Any strategy of accommodation towards legal tradition living in the country is taken for the sake of improving the authenticity of the state law, besides other reasons such as improving the harmony of the state-society relations.<sup>24</sup>

It is understandable, therefore, that for achieving its legitimacy, the state should always be ready to adopt and adapt itself with the legal traditions achieving most supports from the people in general. This is done with an expectation that the state will get much benefit from that strategy. The reasons behind that policy can be so varied, ranging from such classical one as evading legal vacuum to the state's need to expand its authority throughout the country. Indeed, from the experience of many countries in the world, the state accommodation to the non-state normative orderings basically reflects the state ambition to get more political supports from the citizens, or reduce the possible conflicts or even maintain the state's interest in the peripheral regions.<sup>25</sup> Beside that, the accommodation can also be done for increasing the people participation or upholding the plurality of the society.<sup>26</sup> Therefore, it is not exaggerating the case to say that the policy

Talcott Parsons (New York: The Free Press, 1947) at 154,, 156; also Roger Cotterrell, "Legality and Political Legitimacy in the Sociology of Max Weber", ed., David Sugarman, *Legality, Ideology and the State* (London: Academic Press, 1983) 69 at 73-81, especially on the discussion of Weber's theory of legal domination and its relevance to the modern state.

23 The use of the term "profanization" here is influenced by Weber's logic in using the term profane (Alltag) in contrast to the sacred in his explanation about Charisma. See Weber, *ibid.* At 361. Weber used the two antitheses of Charisma and Alltag in two meanings: first, a temporary and extraordinary in contrary to everyday and routine; and second, sacred as an opposite of profane. The term profanization thus can be used here to connote the government's efforts to change the tradition of non-state laws derived from a charismatic/sacred authority to become a profane law by way of permeating non-sacred factors inside the sacred law since the law is now derived from the state rational authority. On codification see Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (Cambridge: Harvard University Press, 1954) at 256-283.

24 Donna Lee Van Cott, "A Political Analysis of Legal Pluralism in Bolivia and Columbia", (2000) 32 *Journal of Latin America Studies* 207 at 210. On the example of the authority of law and its relation with the change in Islamic law in Malaysia, see Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change II" (1994) 42 *American Journal of Comparative Law* 543.

25 See further, for instance, Jack Spence, "Institutionalizing Neighborhood Courts: Two Chilean Experiences," ed., Richard L. Abel, *The Politics of Informal Justice*, vol. 2 (New York: Academic Press, 1982) 215 at 243-247; Boaventura de Sousa Santos, "Law and Revolution in Portugal The Experience of Popular Justice at the 25<sup>th</sup> of April 1974", ed., Richard L. Abel, *The Politics*, 251; Van Cott, *ibid.*, at 210 ("Political elites... understand the urgency to provide a cheaper, more accessible, more face to face form of justice administration, particularly in rural areas, in order to legitimize the authority of the state and extend the institutions of non-formal law see Boaventura de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism", ed., Richard L. Abel, *The Politics*, 249.

26 Van Cott, *supra* note 15 at 232 ("Most contemporary cases reflect the efforts of post-colonial or multiethnic states to accommodate the claims of sub-state groups in order to reduce inter-ethnic conflict, as well as to serve other state aims, such as extending the rule of law and state authority into

of accommodation is always done for the sake of the cost benefit calculation of the state itself.<sup>27</sup> Following this logic, the state policy of legal pluralism in Indonesia is no more than a result of the state's rational choice in the process of national law making and not just a continuation of the colonial inherited strategies. That is why since the early independence the path of pluralism in the country has never been going to a different direction. This is true especially in respect to the treatment of *adat* and Islamic law in the country, where the consistency to fortify the position of Islamic law is maintained in the midst of the continued degradation of *adat* law.

The institution of the state is therefore merely a self-interested actor. The strengthening or declining of a legal tradition in a certain state is just a manifestation of the state's own selfishness; in this case, the process of law creation done with the cost and benefit calculation will always be consistent with the interest of the regime in power.<sup>28</sup> In other words, any kinds of policy given by the Indonesian government concerning the existence of Islamic law and *adat* law and to what extent the accommodation is possible towards those non-state laws is totally an expression of the regime's cost benefit calculation.<sup>29</sup> Their consideration is of course not limited to merely the aspects of legal strategies, but to include also the wider spectrum of analysis, such as the factors of socio-politics and security of the state, together all compounded into one objective, namely, to avoid the conflicts arose as a result of legal pluralism, beside certainly the expansion of the state legitimation throughout the country.<sup>30</sup>

However, it is not correct to assume that in its development the application of the rational choice strategy is state. It is in fact depended much on many different calculations in conjunction with the change of the political structure occurred in the country as well as the state-society relationship. Therefore, albeit having the same pattern of policy, the change of the regime's attitude in handling the problem of Islamic law and *adat* law in Indonesia is merely a reflection on the regime's different strategy.<sup>31</sup> The proclivity of the Old Order

peripheral areas." In the case of India, see Susan Hoeber Rudolph and Lloyd Rudolph, "Living with Difference in India", eds., David Marquand and Ronald L. Nettler, *Religion and Democracy* (Oxford: Blackwell Publishers, 2000) 20 at 21-22.

27 On the choice of cost and benefit approach in legal pluralism see John Griffiths, "Four Laws of Interaction in Circumstances of Legal Pluralism: First step Towards Explanatory Theory", ed., Anthony Allot and Gordon R. Woodman, *People's Law and State Law* (Dordrecht: Foris Publications, 1985) 217 at 219-222.

28 See Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988) at 3 ("... all the actors who compose the policy, including the policymakers, are rational and self-interested. ... they calculated the costs and benefits of proposed actions and choose the course of action most consistent with their fixed preferences. ... that actors who compose the state have interests of their own, derived from and supported by institutional power:").

29 A theoretical explanation of cost-benefit approach see Richard Posner, *The Economics of Justice* (Cambridge, Massachusetts: Harvard University Press, 1981) esp. At 76 ("Another implication of the wealth-maximization approach, however is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of product is negative, he would have no right to the means of support even though there was nothing blameworthy in his ability to support himself."); in general, see Richard Posner, *Economic Analysis of Law* (Boston: Little Brown Company, 1986).

30 On the interest of the regime to expand its legitimacy by way of recognizing pluralism, especially through the development of judicial system, see Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: The University of Chicago Press, 1981) at 22-24. (At 22: "Conquerors use courts as one of their many instruments for holding and controlling conquered territories. And more generally, governing authorities seek to maintain or increase their legitimacy through the courts. Thus a major function of courts in many societies is a particular form of social control, the recruiting of support for the regime.").

31 Tim Lindsey, and Butt Simon. *Indonesian Law*. Oxford University Press, 2018. See Also Rachmi Sulistyarini, et al. "The Contact Point of Customary Law and Islamic Law (Legal History Perspective)." *International Journal of Social Sciences and Management* 5.2 (2018): 51-59. See Also Iskandar Syukur

to carefully treating Islamic law, in contrast to the New Order's relatively more assertive policy, is basically just a derivation of their cost-benefit calculations in facing the problem of legal pluralism. And this must also be influenced by different socio-political situations encountered by both regimes. In the time of Soekarno, the early power transition from colonial to post-colonial government had led to unstable political situation, making a frontal change in the law abide by the people would endanger the life of the country. The state would thus be better to take more cautions here, especially toward a dominant legal tradition having much support from the society. This seems to be the main part of the cost-benefit calculation: the inclination of the Old Order not to give an active response to a sensitive problem might even prove as more appropriate to the country than sacrificing the more important mission of the young state towards unification.

It is not a surprise therefore to see the Old Order's proclivity not to promulgate many laws related to the substance of Islamic legal teachings. In the law of marriage, as stated above, the state was understandably more concerned with the matters of procedure and not that of substance, to which the government preferred to maintain its plural practice. On the contrary, in the matters related to the basic philosophical idea of the state building, the young government had already been very forceful to uphold its ideology of legal uniformism. The *adat* land law was therefore the victim here since here since the *adat* teaching of *hak ulayat* was nothing but in opposition to the ideology of "modern" individual land rights, idealized to build in the country. Therefore, although the state necessitated the political support from the society in order to expand its legitimacy, it preferred to take a risk to eliminate the practice of *hak ulayat* for the sake of building legal unification and uniformity throughout the country. This is clearly the reason also behind the Old Order's early policy to obliterate the *adat* courts, even though that was absolutely not popular. The existence of the *adat* courts was already viewed as transgressing the unificationist idea of the judicial system, as the latter reflects the ideology of the state unification. Following this perspective, we can say that the locality and plurality of the *adat* law became a detrimental factor for its own existence, especially in its encounter with the idea of centralizing the formal and uniform legal creation understood as the main key of national unity. Thus, the process of legal nationalization would certainly bring a bad impact to the institution of *adat*, which was born since the first time from a plural and local community. Since the locality and variety of *adat* law contrivance the philosophy of national law, obliterating the law must have been seen as more beneficial to the state itself.<sup>32</sup>

Interestingly, such a strategy was basically not changed with the change of the regime from the Old Order to the New Order. Thus, it is not a surprise that although in theory *adat* might be accepted as the source of national law building, the life of *adat* law continued to be weakened since all legal policy was focused more on the system of law that is homogeneous and centralized.<sup>33</sup> Here, the inclination of the New Order to always centralize its management gave a further effect to the institution of *adat* law, speaking a lot on localism and pluralism. It was difficult indeed for the government to defend the *adat* institution as it was viewed as jeopardizing the idea of legal modernization idealized by the founding fathers of the state. Therefore, although the project of centralization and

, and Yurni Ahmad Sulastry Noor. "The Indonesian Islam: Law and the Ideological Perspective." AL-ADALAH 12.2 (2018): 235-248.

32 Moreover, on the analysis of the fate of adat law in the post colonialism Indoneisa, see Ratno Lukito, "Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia", (Doctoral Dissertation, McGill University, 2006) at 226-238.

33 On the example of the family cases that can describe the dgree of interaction between the idea of national law and adat law as well as the domination of national law in the cases in concerned, see John R. Bowen, Islam, Law and Equality in Indonesia (Cambridge: Cambridge University Press, 2003) at 53-54, 58-59.

uniformation of the legal system was much more costly than maintaining the *adat* courts throughout the country, the government had finally chosen the first as it could promise a bigger benefit to achieving the ideal of national law. Thus, the more efficient strategy was ignored for the sake of realizing a bigger program, i.e., the unity of the country, reflected mainly from the unity of the courts.

In conjunction with the rationalization of the state treatment to the *adat* courts, the same analysis can also be implemented here to understand the state behaviour in the case of religious courts. Hence, although the reason can be so different, the main objective is still the same, namely the realization of the state program to strengthen its position in handling legal pluralism in the country. This means that whatever the motive and rational behind the state's attitude, all come into one objective to make the state as the sole agent of law making. Surprisingly, this strategy is even advantageous to the position of Islamic law. The character of Islamic law as a uniform and nationalized legal tradition, as it is built on one Islamic ideology, is a good asset for the religious law to become a partner of the state in the process of building national law. As a result, whatever the degree of the state's power to dominate the institution of law in the country, the position of Islamic law is always secure in the wave of the state legal campaign. The main factor indeed rests on the fact of its national scope; thus, different to *adat* law which is so local and plural, Islamic law is epistemologically close to the state law since the two laws are basically developed on the idea of the one law for all, i.e., all Indonesian people without provincial or local discrepancies. That is why, in contrast to the fate of *adat* courts, which was already demolished in the face of the state courts, the institution of Islamic courts has always been secured, and even now more strengthened notwithstanding the political upheavals in the post Soeharto era.

As explained above, another factor that can support the existence of Islamic law is the scope of its implementation. It is understandable here that the factor of adherent must have given a strong influence to the position of certain legal tradition. And this is shown in the history of Islamic law in Indonesia: the implementation of the Islamic legal teaching by such a wide spectrum of national devotees has become a dominant factor in the effort to maintain the tradition in the midst of the challenge of the secular state law.<sup>34</sup> In other words, seen from its position as a religious law followed by the majority population in the country, the tradition of Islamic law can certainly be more sustainable in the life of the society despite its struggle of existence in facing the domination of the state law system. Thus, there appears a general rule that can be derived from the experience of Islamic law vis-a-vis the state law: the more number of people following this religious law, the stronger position of the law in the face of the state law. And this is of course an important basis for the government to consider Islamic law in the process of policy making.

Accordingly, we can now understand why Islamic law has relatively a strong position in facing the wave of the state law campaign. In its simple analysis, it is not mistaken to say that the nationalized scope of Islamic law in terms of its adherents has given a result of its firm position in the country. Thus, considering the strong efficacy of Islamic legal tradition in the country – either from the perspective of the number or the scope of its adherents, it is more realistic for the state to give a supportive accommodation to the religious law, in the hope that it will mutually give more benefit to the state itself. Here, seen from the principle of cost-benefit calculations, it is more reasonable for the government to

34 Mark Bratton . "Shari'a Law and Modern Muslim Ethics." (2018): 358-360. See Also A Arif Jamal . Islam, Law and the Modern State:(Re) imagining Liberal Theory in Muslim Contexts. Routledge, 2018. See Also Muhammad Hifdil Islam . "ISLAMIC LAW IN INDONESIA (Tradition, Thought, Political Law and Legal Products)." *As-Syari'ah: Jurnal Hukum Islam* 4.1 (2018): 31-50.



support the development of Islamic law in the system of national law and assign it as one of the most important sources of law-making.<sup>35</sup> This means that the proper treatment is to preserve Islamic law since its elimination in the system of national law will certainly endanger the position of the state itself. Strengthening Islamic law will improve the state legitimacy, and this in turn helps strengthening the position of the state in the face of the people.<sup>36</sup>

Hence, the main motive of the state's positive accommodation toward Islamic law is clear. Especially since the administration of Habibie, the motive behind such a government policy has been very aptly based on the expectation of the state to get more support from Muslim society. Mainly in the time when the socio-political condition of the country was not very stable due to the political turmoil of the post New Order era, the strong support of Muslim society – which is the majority population – would be beneficial to strengthen the position of the regime in the process of stabilizing the state. It is not a surprise therefore that in a relatively short period of power, Habibie could pass three acts specifically improving the efficacy of Islamic legal teaching. Here, it works the principle of symbiosis mutualism between the state and Muslim society: the state will give a positive recognition to the practice of Islamic law in the national law system, and so as the state that will get the strong legitimacy from Muslim community. This means that the positive attitude toward Islamic law is basically based on the rational calculation of the state itself. And this may be made subjectively without consideration of the substantive aspects of the religious.

In sum, logically, to what extent the state will accommodate certain non-state normative ordering depends to a great extent on the degree of benefit the state will acquire from such an accommodation, and less from the mere substantive legal consideration. This answers the question why during the expansion of the state campaign of national law system in Indonesia, Islamic law has always been more fortunate competed to *adat* law that is constantly marginalized both its institution and substantive matters.<sup>37</sup> One thing is clear: different to Islamic law that is nationalized is just impossible. And this certainly gives a result of different treatment the state gives to the two legal traditions.

### **Conclusion: A Theoretical Appraisal**

The above explanation is intended to set forth a thesis that the change of political power in Indonesia during more than five decades has not followed by a basically different policy of legal pluralism. The strategy of state law pluralism that might be implemented without any real deliberation has resulted in the same pattern of legal strategy, i.e., the strengthening position of Islamic law in the midst of the weakened *adat* law in the system of national law. The choice of such a pluralism strategy has proven as basically a result of the state's cost-benefit calculation. Therefore, to what extent the accommodation to the non-state normative orderings is given merely depends on the benefit given to the state itself.

Concerning the state attitude towards those legal traditions, some factors may be explained here: *first*, the distinction in the normative character of legal traditions will give an effect of the state different attitude to those traditions. In the case of Islamic law and *adat* law in

35 Gray, Christine. *International law and the use of force*. Oxford University Press, 2018.

36 Vandewalle, Dirk. *Libya since independence: oil and state-building*. Cornell University Press, 2018. See Also Bryson, John M. *Strategic planning for public and nonprofit organizations: A guide to strengthening and sustaining organizational achievement*. John Wiley & Sons, 2018.

37 Ben Hillman . "The Limits of Gender Quotas: Women's Parliamentary Representation in Indonesia." *Journal of Contemporary Asia* 48.2 (2018): 322-338. See Also W Robert Hefner . "Introduction: Indonesia at the crossroads: imbroglis of religion, state, and society in an Asian Muslim nation." *Routledge Handbook of Contemporary Indonesia*. Routledge, 2018. 3-30. See Also Aurel Croissant, and Lorenz Philip . "Indonesia: Challenges of Conflict and Consensus in the Era of Reformasi." *Comparative Politics of Southeast Asia*. Springer, Cham, 2018. 71-111.

Indonesia, we see that although having different basic character in terms of its foundation of legal creation, Islamic law can relatively be closer to the character of the state law, which is uniform and nationally effective. It is clear here that the nationalization of Islamic law built on the basis of its adherents, and not on the tribe, clan, language, or other local denominations, becomes an effective tool for its rapprochement with the state law, which is also nationalized on the basis of citizenship. Thus, although it is not possible to equalize Islamic law and state law due to the sacredness of the religious law, the scope in the efficacy of both laws can be an effective means of legal rapprochement. This is however not the case with *adat* law. The character of *adat* law as a local and heterogeneous legal tradition is intrinsically not in line with the philosophy of national law, which is anti-localism and homogeneous. It is just impossible to bring *adat* law to become an effective law for all Indonesian citizens. As a result, the rapprochement is difficult between *adat* law and state law.

*Second*, the factor of challenge given by the adherents of certain legal traditions to the state law will also influence the behaviour of the state towards those traditions. Here the degree of challenge set forth by the follower of Islamic law and that of *adat* law is also different. The fact of national character of the adherent of Islamic law has helped to alleviate the bargaining position of the religious law vis-a-vis the state law. The state cannot therefore ignore the fact of Islamic law as one of the dominant legal tradition in the country due to its majority number of population (Muslims) following the legal teaching of the religious law. This is different to *adat* law whose locality and plurality has made the law difficult to adjust with the idea of one law for all Indonesian people brought by the state law. The challenge given by the protagonist of *adat* law towards the state law is thus always dispersed and isolated locally; making the bargaining position of *adat* law is also weak and unorganized nationally. This makes the state having a tendency to marginalize *adat* law in the legal constellation of the country.

From the above factors, we can safely assume that the state's recognition of the legal tradition living in the society is basically based on, first, the flexibility of those legal traditions to approach the state law. The closer the non-state normative orderings towards the state law, the greater the possibility of the state to adopt them take a part in the system of national law. Second, the level of challenge posed to the state law. Here, the greater challenge given by the non-state laws, the higher possibility of the state law and non-state normative orderings we can thus understand why the position of Islamic law is constantly strengthened in the constellation of legal politics in the country, while *adat* law is marginalized. Such a different pattern in the development of those two legal traditions is in fact not merely the consequence of the state as a self-interested actor in the problem of legal pluralism. But also depending on the capability of the legal traditions to proactively approach the state law. This theoretical deliberation of course needs further studies.

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