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# ISLAMIC LEGAL REFORM IN TWENTIETH CENTURY INDONESIA: A STUDY OF HAZAIRIN'S THOUGHT

by

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A Thesis Submitted to
the Faculty of Graduate Studies and Research
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for the Degree of Master of Arts

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# ABSTRACT

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The conflict between *adat* law and Islamic law is still a current issue in today's Indonesia. It is rendered even more controversial because it deals with the spheres of family law, marriage law and the inheritance system in particular. This is exacerbated by the fact that Indonesia is home to such a wide variety of social systems. Family structure patterns range from patriarchy to matriarchy and every shade between, with each system being supported by a nexus of indigenous or *adat* laws. To complete the confusion, there is the residual influence of Dutch policy.

Of the many attempts that have been made to resolve the situation, the contribution of Hazairin (1906-1975) deserves particular attention. Realizing that *fiqh* or Islamic law is the product of another place and time, he sought to accommodate it more to the realities of Indonesian Muslim society. For him this meant abandoning the Dutch legacy of privileging *adat* law over Islamic law, and replacing it with what he called a "bilateral system," based primarily on the Qur'ān and *ḥadīth*. This reflected his primary concern to introduce bilateral inheritance (*kewarisan bilateral*) into Indonesian law, which he saw as fundamental to the entire social system. To achieve this, he formulated the concept of a comprehensive understanding of the Qur'ān and *ḥadīth*, which he termed "neo-*ijtihād*," seeing it as leading to "an authentic *tafsīr*." Hazairin also contributed, in other ways, to the development of jurisprudence on family law. He is for instance most famous for his call for a "National *madhhab*" or an indigenous school of Islamic law. Ultimately, his goal was to homogenize Indonesian law for Muslims and to develop a concept of *maṣlaḥa* with Indonesian characteristics. However, given the complexity of Indonesian society, Islamic legal reform in Indonesia is still far from complete.

## RÉSUMÉ

Auteur : Sukiati Sugiono

Titre : La réforme légale islamique au sein de l'Indonésie du vingtième siécle: Une étude de la pensée de Hazairin.

Département : Institut des Études Islamiques, Université McGill

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Le conflit entre la loi *adat* et la loi islamique demeure toujours une question d'actualité en Indonésie d'aujourd'hui. Elle est d'autant plus contreversée puisqu'elle implique tout particuliérement la loi de la famille, le mariage et le système de l'héritage. Le probléme est exacerbé du fait que l'Indonésie inclut une grande variété de systèmes sociaux. Les structures familiales vont du patriarcat au matriarcat, chaque système étant appuyé par un réseau de lois indigènes, dites adat. Pour compléter la confusion, il existe une influence résiduelle des politiques néerlandaises.

Parmi les nombreuses tentative effectuées pour résoudre le probléme, la contribution de Hazairin (1906-1975) mérite une attention particuliére. Réalisant que le *fiqh*, ou loi islamique, est le produit d'un autre endroit et d'une autre époque, Hazairin a tenté de mieux l'accommoder avec les réalités de la société musulmane indonésienne. Pour l'auteur, cela signifiait qu'il fallait abandonner l'héritage néerlandais qui privilégiait la loi *adat* aux dépens de la loi islamique et la remplacer par ce que Hazairin appelait *système bilatéral,* fondé sur le Qur'ān et les Hadiths. Ce qui reflétait son intérêt pour introduire l'héritage bilatéral (*kewarisan bilateral*) au sein de la loi indonésienne qu'il qualifaiait de "*neo-ijtihad*" pouvant mener à un "*tafsir* authantique". Hazairin a aussi contribué, en d'autres façons, au développement de la jurisprudence de la loi de la famille. Il est par exemple célèbre pour son appel en faveur d'un "*madhhab national*", autrement dit une école légale islamique indigène. Son but ultime fut de rendre homogène la loi indonésienne pour les musulmans et de développer un concept de *maṣlaḥa* avec des caractéristiques indonésiennes. Toutefois, étant donné la complexité de la société indonésienne, les réformes légales islamiques dans se pays ne sont pas prêtes d'être complétées.

# NOTE ON TRANSLITERATION

In the transliteration of Arabic names and Islamic terms, we use the system of Arabic transliteration employed by the Institute of Islamic Studies, McGill University. The following is a transliteration table for the Arabic alphabet:

| | | |
|---|---|---|
| ا = a | ز = z | ق = q |
| ب = b | س = s | ك = k |
| ت = t | ش = sh | ل = l |
| ث = th | ص = ṣ | م = m |
| ج = j | ض = ḍ | ن = n |
| ح = ḥ | ط = ṭ | و = w |
| خ = kh | ظ = ẓ | ه = h |
| د = d | ع = ‘ | ة = h |
| ذ = dh | غ = gh | ي = y |
| ر = r | ف = f | |

Long vowels: ا, ـَا = ā, ـُو = ū, ـِي = ī.

Short vowels: ـَ = a, ـُ = u, ـِ = i.

The definite article ال is always written al-, regardless of whether it is followed by a "sun" or a "moon" letter, for example, *al-‘aṣaba* = العصبة, *al-thuluth* = الثلث

The *ta’ marbuta* (ة, ـة) is transliterated as "a" rather than "ah", for example, *shari‘a* rather than *shari‘ah*, *‘aṣaba* rather than *‘aṣabah*, except it is the first element in a construct, then it is written as "ah", e.g., *al-‘adah al-muḥakkama* = العدة المحكمة

Indonesian terms are written according to the *Ejaan Bahasa Indonesia yang Disempurnakan* (EyD) 1972, but the original spelling of names and the titles of books and articles will be retained when they are quoted.

## ACKNOWLEDGEMENTS

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the contributions of Salwa Ferahian and Wayne St. Thomas. They made the library a pleasant place to work. Nor can I forget to thank Stephen Millier for his editorial assistance in connection with this thesis.

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All are now beyond the reach of my thanks, but my indebtedness to them remains.

Montreal, June 1999.

Sukiati Sugiono

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# INTRODUCTION

Hazairin (1906-1975) was born to a family that could boast two generations of Indonesian intellectuals, and as one privileged to contribute to Indonesia's coming of age, was to make a substantial contribution of his own to the country's intellectual development. He participated in the wide-ranging debate over solutions to the stagnation of the development of Islam on the one hand, and over a possible reconciliation between Islamic law and *adat* law on the other.[1] The former issue invited remarkable discourse on the need for *ijtihād* (mental exertion), while the latter challenged legal scholars to decide whether or not *adat* and Islamic law could go hand in hand.[2]

Hazairin appears to have tried to reconcile Islamic law and *adat* law from an Islamic legal standpoint, based on the premise that Islamic law is a product of interpretation of the Qur'ān from both the social and cultural perspectives. On the other

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[1] At the end of nineteenth and the beginning of twentieth century Indonesia, the development of Islamic law was considered stagnant due to the belief that the gate of *ijtihād* was closed, giving rise to the practice of *taqlīd, bid'a,* and *khurafāt.* This in turn led to calls for reform such as "back to the Qur'ān and the ḥadīth" through fresh attempts at *ijtihād.* Such theme was proposed by for example, Sukarno, Ahmad Hassan and Hasbi Ash Shiddieqy. Fo their proposals see Sukarno, "Surat-Surat Islam dari Endeh," in *Di bawah Bendera Revolusi* (DJakarta: Panitya Di bawah Bendera Revolusi, 1964); Yudian Wahyudi, "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*" (M.A. thesis, Institute of Islamic Studies, McGill University, Montreal, 1993); Akh Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia (1887-1958)" (Ph.D. diss., McGill University, Montreal, 1997). At the same time the problem of relationship between *adat* and Islamic law raised and proposals made to overcome them. Indonesians after all are strongly attached to their traditions, so there is no wonder that Islamic law had difficulties in its encounter with *adat.*

[2] There were two assumptions as to the relationship between *adat* and Islamic law; that they are in conflict and that they are in a harmonious relationship. Even though the latter has been widely debated, it is generally rejected in view of Islamic legal viewpoint. Ratno Lukito, "Islamic Law and *Adat* Encounter: The Experience of Indonesia" (M.A. thesis, Institute of Islamic Studies, McGill University, Montreal, 1997), 4.

hand, Hazairin's postulate is grounded in the fact that Islamic law, especially in the sphere of family law, was inconsistently applied within Indonesian society due to the various social systems in force and the prevalence of *adat* law.

His ideas emerged in three stages. In the first place he realized that inconsistency in applying Islamic law and the stagnation of Islamic legal thought in Indonesia had been caused by a legal system inherited from Dutch government policy. Therefore the Indonesian legal system had in the first place to be liberated from the lasting influence of the Dutch. Second, he had come to the conclusion that Indonesian Muslims needed an Islamic law with Indonesian characteristics. Thus Islamic law had to be reformed and brought into line with local conditions. Finally, he became convinced that for reform to be effective, the government had to implement it and enshrine it in law so that it might apply to all Indonesian society. His specific solutions to these three problems, were, respectively: the *receptie* exit doctrine, designed to challenge the *receptie* theory of Christian Snouck Hurgronje; a proposal to institute a "bilateral system" in Indonesian family law, based on Islamic and *adat* notions; and lastly a national *madhhab* (school of law) designed to meet society's needs. For all of the above, moreover, "neo-*ijtihād*" was an essential tool.

Hazairin's actual contribution to Islamic legal reform may be seen in the Undang-undang Pembangunan Nasional Semesta Delapan Tahun 1961-1969 (Eight Year National Development Plan, 1961-1969). Point 402, subsection 4, which legalized the existence of a bilateral inheritance law; it was decreed by the Madjelis Permusjawaratan

Sementara (MPRS or National Consultative Assembly) on December 3, 1960, no. II.[3] In the latter case his contribution may especially be seen in the definition of substitute heirs and *kalāla* (one who has died without sons and/or father).

Until recently Hazairin was ignored as a contributor to Islamic law and scholars ignored his proposal to institutionalize Islamic law and formalize the Islamic legal system of Indonesia. While his eminence as a legal scholar in Indonesia has been acknowledged, especially in the field of *adat* law, his status as a scholar of Islamic law is a more controversial matter. An important reason for this controversy is that Hazairin never studied at an Islamic educational institution. Accordingly his Islamic legal contributions were often downplayed or even ignored by some reformists and legal scholars. This may explain why in some reference sources on Indonesian Islam Hazairin's name is not even cited.[4] Despite this fact, scholars who take a broader approach discuss him at some length, although not necessarily from the standpoint of Islamic law.

Among the Indonesian language works that have focused on Hazairin, we find, for the most part, studies of specific aspects of his thought. Damrah Khair, in his *Hukum Kewarisan Islam di Indonesia: Suatu Kajian Pemikiran Hazairin* (Islamic Inheritance

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[3] Nur Ahmad Fadhil Lubis, "Islamic Legal Literature and Substantive law in Indonesia," in *Studia Islamika*, 4/3 (1997): 54. His input was severely criticized by other scholars and rejected. See Sajuti Thalib, *Seminar Hukum Nasional: Azas-azas Tata Hukum Nasional dalam Bidang Hukum Waris* (Djakarta: Panitia Seminar, 1963).

[4] Hazairin receives no separate entry, for example, in three encyclopaedias of Indonesian Islam. The three are: Tim Penyusun Pustaka-Azet, *Leksikon Islam* (Jakarta: Pustazet, 1988); Dewan Redaksi Ensiklopedi Islam, ed., *Ensiklopedi Islam Indonesia* (Jakarta: Icthtiar Baru Van Hoeve, 1993); and Harun Nasution, et al., ed., *Ensiklopedi Islam* (Jakarta: Department Agama RI, 1987).

Law in Indonesia: A Study of Hazairin's Thought),[5] discusses Hazairin's position on Indonesian inheritance law, but devotes little attention to his contribution to the overall Indonesian legal system. Al Yasa Abu Bakar has given thorough attention to Hazairin's disposition on blood-relation heirs in his dissertation entitled "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran Fiqh Madzhab" (Blood-relation Heirs: A Comparison between Hazairin's Thought and *Fiqh Madhhab*).[6] Iskandar Ritonga for his part discusses Hazairin contribution in his "Pemikiran Hazairin Tentang Pembaharuan Hukum Islam di Indonesia" (Hazairin on Islamic Family Law Reform in Indonesia),[7] but his treatment of Hazairin's ideas on the institutionalization of Islamic law lacks substance.

Moreover, to my knowledge, there are not many works written on Hazairin in the English language. Yudian Wahyudi, for example, in his "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*"[8] touches on Hazairin and his role in legal reform in twentieth century Indonesia, but devotes only a few pages to the topic. Akh Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia" deals more with Hazairin's ideas but discusses them only from a historical perspective.[9] Moreover, neither of them treats Hazairin's substantial contribution to legal reform.

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[5] Damrah Khair, *Hukum Kewarisan Islam di Indonesia: Suatu Kajian Pemikiran Hazairin* (Bandar Lampung: BPPM IAIN Raden Intan, 1995).

[6] Al Yasa Abu Bakar, "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran *Fiqh* Madhhab" (Ph.D diss., IAIN Sunan Kalijaga, Yogyakarta, 1989).

[7] Iskandar Ritonga, "Pemikiran Hazairin tentang Pembaharuan Hukum Islam di Indonesia" (M.A. thesis, IAIN Jakarta, 1995).

[8] Yudian Wahyudi, "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*," 31-2.

[9] Akh Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia (1887-1958)," 59-61.

This thesis is therefore based on the premise that Hazairin's contributions to Islamic legal reform for Indonesians have been severely underestimated, especially in view of the fact that there are no full-length studies of this aspect of his thought. It will thus focus on Hazairin's overall legal understanding and show the extent of his attempts to maintain Islamic legal provisions within Indonesian law. This means that his treatment of Islamic law will be seen in the context of the relationship of Islamic law to *adat* law, in which latter field he had the most extensive training. To ignore this connection would lead to a one-sided discussion or simply a partial understanding of his legal thought. Finally, the thesis will also show that Hazairin, despite being misunderstood by others, was concerned about Islam and saw a role for it in the legal make-up of the country.

Although some works may have already touched on my theme, Hazairin's thought can serve as a basis for a general assessment of the dynamic of Islamic law in the twentieth century Indonesia. Moreover, Hazairin may be distinguished from other Muslim reformists since he is considered to have been a secular scholar on the basis of his educational background.

Furthermore, the study will endeavor to transcend earlier attempts at approaching the subject matter; to this end historical and legal approaches will be relied upon to provide a description of Hazairin's legacy in legal reform. To some extent, a comparative approach will also be applied to grasp the significance of the reforms proposed by Hazairin and those suggested by other scholars.

In order to appreciate Hazairin's legal thought and contributions, we will rely primarily on his own works, although in analyzing his ideas recourse will also be had to

secondary sources. The works of Hazairin himself are varied, and including monographs, articles and speeches and reports. Works by his contemporaries are also valuable as sources for his thought and aid in our comprehension of Hazairin's discussion.

In addition to an introduction and conclusion, the thesis will be divided into three chapters. The first chapter offers a biography of Hazairin, and will give an account of his early life and education, his career, and his work. It will then go on to deal with his concern about Islam to measure his acquaintance with the Islamic disciplines.

The second chapter will be devoted to Hazairin's legal thought as a whole. This chapter will deal with his concept of *receptie* exit as a reaction to the law inherited from the Dutch. We will then look at his proposal of a "bilateral system" as a means of bridging the gap between the Indonesian social system and Islamic law, especially in the sphere of family law. His intention to institutionalize Islamic law at the level of statute is also discussed here.

The last chapters will focus on the specific issues of Islamic legal thought that he addressed, particularly the issue of inheritance law and the lack of compatibility between Islamic law and *adat* law. Here we will address three topics, which may be regarded as representative of Hazairin's concept of the bilateral system. The three are: *'aṣaba* (collective transmission of inheritance property to male agnatic); orphaned children as substitute heirs; and *kalāla.* His contribution to the general institutionalization of Islamic law and the impact of his efforts will also be addressed in this chapter.

# CHAPTER ONE

## HAZAIRIN: A BIOGRAPHICAL SKETCH

Hazairin has been acknowledged as a prominent figure in Islamic law and *adat*[1] law.[2] His qualifications in Islamic law were not gained through formal study in any Islamic school, however he was an autodidact whose great work in Islamic law gained him authority in the field. Given this fact, he was not much respected during his lifetime by Muslims for his work on Islamic law. His expertise in *adat* law, on the other hand, was indeed achieved through formal schooling in the Dutch government period. His dissertation on this subject raised him to the status of an authority. This chapter provides a brief account of Hazairin's life, looking at his family, personality, education, school activities and career. It also surveys his published works.

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[1] *Adat* is an Indonesian word taken from the Arabic word *'āda* (synonymous with *'urf*) which essentially means habit, custom, usage, or practice. Furthermore, *'āda* means "repetition or recurrent practice, which can be used for both individuals (*'ādah fardīyah*) and groups (*'ādah jamā'īyah*)." Aḥmad Fahmī Abū Sinna, *Al-'Urf wa al-'Āda fī Ra'y al-Fuqahā'* (n.p.: Maṭba'at al-Azhār, 1947), 7-13; for more details on *'ada* and *'urf* also, Mohammad Hashim Kamālī, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Text Society, 1997), 283-84. Muḥammad Muṣṭafā Shalabī, *Uṣūl al-Fiqh al-Islāmī* (Beirut: Dār al-Nahḍah al-'Arabīyah, 1406/1986), 313-15; Ṣubḥī Maḥmaṣānī, *Falsafat al-Tashrī' fī al-Islām* (Beirut: Dār al-Kashshāf li al-Nashr wa al-Ṭibā'a wa al-Tawzī', 1371/1952), 179-81.

[2] He was a professor on *adat* law and Islamic law in the University of Indonesia during the period 1952-1975. B. J. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1962), 168-9.

## A. His Early Life and Education

An only child, Hazairin was born on 28 November 1906 in Bukit Tinggi, West Sumatra and died on 25 December 1975 in Jakarta,[3] at the age of 69. His father Bahari and his mother Rasida were Bengkulunese and Minangkabauan, respectively. This type of marriage was unusual at the time, even though the Minangkabauans social structure made exogamy a fundamental practice. People were allowed to marry within their own country (*nagari*) and even within their *suku* (in the sense of a union of clans), as long as they married into a clan other than their own,[4] but marriage to people from other regions was unusual. Nevertheless, marriages between a Minangkabauan women and Bengkulunese men did sometimes occur, because both were known as tribes given to out-migration.[5]

Hazairin spent his early life in Bengkulu and Minangkabau, before eventually moving to Jakarta. It was in the first two regions, renowned for their religious character,

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[3] Damrah Khair, *Hukum Kewarisan Islam di Indonesia: Suatu Kajian Pemikiran Hazairin* (Bandar Lampung: BPPM IAIN Raden Intan, 1995), 17 and 20. See also Bismar Siregar, *Bunga Rampai Karangan Tersebar Bismar Siregar* 1 (Jakarta: Rajawali Press, 1989), 157. There are only a few accounts of his life available. Some aspects of Hazairin's biography were also recorded by Khair on the basis of his interviews with Hazairin's family and students. Even the date of his death is still disputed. One suggestion is 11 December 1975. See S.M. Amin, "Mengenang Almarhum Prof. Mr. Dr. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam di Indonesia* (Jakarta: University of Indonesia Press, 1976), 94. An attempt to write his biography during his own lifetime was made by his family (Khair, *Hukum Kewarisan*, 21), but this consists merely of notes on his life and education. Others have given accounts of his life, including Al-Yasa Abu Bakar, whose biography is not analytical or deeply attentive to the details of Hazairin's life. See his "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran *Fiqh* Madzhab" (Ph.D. diss., IAIN Sunan Kalijaga, Yogyakarta, 1989), 6-7.

[4] C. Van Vollenhoven, *Van Vollenhoven on Indonesian Adat Law*, trans. J. F. Holleman, Rachael Kalis, and Kenneth Maddock (The Hague: Martinus Nihoff, 1981), 134.

[5] Khair, *Hukum Kewarisan*, 17-8.

that he received his primary schooling. Minangkabau[6] in particular affected his later thought on Islamic family law due to its matrilineal system. There he witnessed at first hand the conflict and compromise between its *adat* and Islamic law, which is considered to be influenced by patrilineal bias, in the area of family law, especially marriage and inheritance.

According to family tradition, he was descended from a Persian ancestor who took a particular interest in philosophy. It is reported that his grandfather Bakar was a religious figure and his great-grandfather Leman a direct descendant of the Persian ancestor, although the exact line could not be substantiated.[7] Even so some scholars have attributed Hazairin's thirst for knowledge and zeal on behalf of his people to reasons of heredity.[8]

He married Aminah, whose parents were also Bengkulunese and Minangkabauan. He and his bride therefore shared a common background and experience of the customs of two regions and of two systems of *adat*. His marriage was a happy one, producing 13 children--seven daughters and six sons.[9]

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[6] These regions, especially Minangkabau, are worth noting, since their inhabitants follow a matrilineal kinship system. The region is nevertheless regarded as one of the most Islamized regions in Indonesia. G. H. Bousquet, *A French Views of the Netherlands Indies,* trans. Philip E. Lilienthal (London and New York: Oxford University Press, 1940), 6. Their systems of inheritance later influenced Hazairin's thought on how a bilateral system should be implemented in Indonesia

[7] Damrah Khair's interview with Zulkarnain, one of Hazairin's sons. Khair, *Hukum Kewarisan,* 12-4.

[8] Khair, *Hukum Kewarisan,* 17.

[9] Khair, *Hukum Kewarisan,* 18-9.

His education was essentially European in character. He graduated in 1920 from the Hollandsche Inlandsche School (HIS), a Dutch language elementary school in Bengkulu, and again in 1926 from the Middlebare Uigebreid Lager School (MULO) at Padang. He acquired his early education in his own country, and yet it was unusual in Minangkabauan society for a son to pursue his study at home, so close to his parents.[10] Perhaps this was because Hazairin was the "apple of his parents' eyes," and they would not have been happy to see their only son move far away.

There were two systems in education of Hazairin's day made available to native Indonesians. The first was offered by the *pesantrens* (Islamic boarding schools), which focused on religious knowledge. The second was that provided by the Western educational system established by the Dutch government, which aimed at preparing students for lower and middle-level administrative positions in government. However, few people were able to take advantage of these educational opportunities, especially those provided in the Western schools, as space was limited.[11] Still Hazairin did not study at a *pesantren*, but instead attended a Dutch school, which at the time was considered in certain quarters to be an infidel institution and a sure path to hell.[12] This

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[10] A Minangkabauan man is known as *perantau* i.e., one who needs to migrate for study and to earn his livelihood. The social system of the Minangkabau, which favors women over men, is one factor that has led to this phenomenon. Govindan Unny, *Kinship System in South and Southeast Asia: A Study* (New Delhi: Vikas Publishing House, 1994), 37-8.

[11] Nevertheless, Europeans and Eastern foreigners (the Chinese and the Arabs) had access to western schools of the highest quality. Sartono Kartodirdjo, *Modern Indonesia, Tradition and Transformation* (Yogyakarta: Gajahmada University Press, 1984), 119-20.

[12] At the time many parents or grandparents forbade learning of the Dutch language or even Latin alphabet, which they regarded as the language of unbelievers, and a sure path to eternal punishment. Harun Nasution, for example, encountered this attitude. See Harun Nasution, "Menyeru Pemikiran Rasional," in Panitia Penerbitan Buku dan Seminar 70 Tahun Nasution

was unusual because sending a son or daughter to study Islam in a boarding school was much more popular. With all this in mind, the fact that Hazairin went to a Dutch school has puzzled some scholars. Abdullah, however explains the tendency to send Indonesian children to Dutch schools as indicative of a desire on the part of parents to broaden their children's opportunities. His complaint in fact is that there were not enough of those schools.[13] For this reason, in view of his family's *pribumi* (indigenous) status, Hazairin was rather lucky to have attended a Dutch school.

In 1927, the young Hazairin moved to Bandung where he continued his studies at the Algemene Middlebare School (AMS), a general high school. Graduating from there, he went to Jakarta in 1935 in pursuit of higher studies at the Recht Hooege School (RHS), a school of law. After completing his studies he struggled for the next eight years with research on legal topics, especially on the subject of *adat* law. At the same institution he finished his dissertation on *De Redjang* (Today is Rejang, a name of a town in Sumatra Selatan).[14] This earned him the degree of *Meester in de Rechten* (MR, master of Laws), the Dutch title for a scholar of law. Later on, it also gave him prestige

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Bekerjasama dengan Lembaga Studi Agama dan Filsafat, ed., *Refleksi Pembaharuan Pemikiran Islam: 70 Tahun Harun Nasution* (Jakarta: Lembaga Studi Agama dan Filsafat, 1985), 5.

[13] Taufik Abdullah, *Schools and Politics: The Kaum Muda Movement in West Sumatera* 1927-1933 (Ithaca: Cornell University Press, 1971), 56-7.

[14] His dissertation surveys *adat* marriage law in Rejang – a town in Sumatera Selatan province – where marriage customs are similar to those of the Batak, although they are a different clan. Under the supervision of Mr. B. ter Haar, Hazairin completed his dissertation in only three months, receiving in the end a grade of *summa cum laude*. See Khair, Hukum Kewarisan, 21. See also Potan Arif Harahap, "Prof. Hazairin *Dalam Kenangan*," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam di Indonesia* (Jakarta: University of Indonesia Press, 1976), 57. For the dissertation, see Hazairin, *De Redjang* (Bandung: ACN & CO., 1936). It is reported that this dissertation has been translated into Indonesian but not yet published. Iskandar Ritonga, "Pemikiran Hazairin Tentang Pembaharuan Hukum Islam di Indonesia" (M.A. thesis, IAIN Jakarta, 1995), 17.

and entitled him to act as an *adat* legal adviser.[15] At that time, he was the only Indonesian ever to have obtained a master's degree at the law faculty. Indeed, he was only 29 years old, an age then considered quite young for such an achievement.

Because he pursued his formal education in the Dutch system, his family made itself responsible for his religious education. His father, his grandfather – both well-known religious leaders -- and other relatives and friends tried to ensure that he had a basic grasp of the fundamentals of his faith. In later years, however, Hazairin acquired much more knowledge of the Islamic disciplines through his own efforts. This disciplined attitude enabled him to master six foreign languages by himself.[16] In view of this fact it is easy to understand how he could become so well-versed in the Islamic disciplines without having undergone academic training in the field. This newly-acquired knowledge of Islam therefore supplemented his formal training in *adat* law.[17] In this way he differed from Hasbi,[18] the famous Sumatran scholar, who spent his life in *pesantren*, making him a fully qualified Islamic scholar, while at the same time

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[15] Daniel S. Lev explained that Hazairin was chosen by the Dutch government to be one of its advisors on *adat* law in addition to Soepomo, Joyodiguno, and Wirjono Projodikoro (Hazairin's colleague and *adat* scholars). During his association with Hazairin during 1960-1964, Lev found Hazairin to be an intelligent and spirited scholar. Daniel S. Lev, interview by author, 13 May 1999, Montreal, tape recording, Quality Hotel, Montreal.

[16] Al-Yasa notes from his interview with Hazairin's family that he mastered six languages besides his own: Dutch, English and French actively; Arabic, German and Latin passively. See al-Yasa, *Ahli Waris Sepertalian Darah*, 7.

[17] His specialty was family law and more specifically the different inheritance laws of the country. Nur A. Fadhil, "Islamic Legal Literature and Substantive Law in Indonesia," *Studia Islamika*, 4/3, (1997), 54.

[18] Hasbi was from Aceh and voiced a similar notion to Hazairin's in calling for a *madhhab* for Indonesian Muslims. See Nourouzzaman Shiddiqi, *Muhammad Hasbi Ash Shiddieqy dalam Perspektif Sejarah Pemikiran Islam di Indonesia* (Yogyakarta: IAIN Sunan Kalijaga, 1987), 158.

deepening his knowledge of *adat* on the side. Hazairin's background later led some of his critics to deny his competency as an authoritative Islamic thinker.

Hazairin was well loved by friends and students alike for his humorous and lively personality, and was extremely popular as a lecturer.[19] His students were nevertheless said to resent the tough questions he posed while teaching, since he scolded students who failed to answer his questions correctly.[20] As well, a student would often have to repeat exams in order to pass his courses.[21] But all apparently were proud to be numbered among his pupils. Hazairin's competency in his subject matter ensured that students were able to master the main elements of each subject.[22] He held students to the same standards of work he imposed upon himself, and insisted that to be a student one needed to have sufficient seriousness and avoid speculation.

In addition to his forceful approach, he spoke in a way that sometimes offended those who were not acquainted with his personality. Hazairin himself explained that the reason for his strictness and rigor was that he considered his relationship with a student an important responsibility. In a speech delivered to the Law Faculty of the University of Indonesia, he pointed out, "...for me, the relationship between a teacher and a student

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[19] Potan Arif Harahap, "Prof. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 95.

[20] Potan Arif Harahap, "Hazairin dalam Kenangan," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 95.

[21] Hasbullah Bakry, "Segi-segi Menarik dari Kepribadian Prof. Dr. Hazairin S.H.," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 29.

[22] Hasbullah Bakry, "Segi-segi Menarik dari Kepribadian Prof. Dr. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 29.

is that of a father and a son."[23] He was also well known for his fundamental approach to certain topics, on which he held strong belief. This may be seen, for example, in his attitude towards the application of criminal law in Islam, something he regarded as necessary for Indonesian Muslims.[24]

But he was not always austere. He had a sense of humor and liked to mock a person just to entertain him. He liked to joke at public forums, in class or in private conversations. He also did this in his writing. For example, in his comment on M. Amin's book *Indonesia Dibawah Rezim Demokrasi Terpimpin* (Under the Regime of Guided Democracy), Hazairin wrote, "When we [i.e., M. Amin and himself] were students, he liked to borrow my dictation, but was slow to return it. Thus I had to extend the length my studies to eight years, while he happily completed his in six, without giving me any compensation."[25]

He was also humble before people, even when proposing something new which he believed to be right. As an illustration of this, he once said to an audience:

> What I want to achieve is to give you a brief description of how the Qur'ān and the Prophet managed Islamic criminal law without the use of any jail. I may have committed an error, mistake or oversight in the conclusion, for which I apologize to you all and to God. I pray to God to

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[23] Hazairin, *Kesusilaan dan Hukum* (Djakarta: n.p., 1952), 18.

[24] His ideas on the application of Islamic criminal law, among other things, focus on its codification in Indonesia. Hazairin, *Tujuh Serangkai Tentang Hukum* (Jakarta: Tintamas, 1974), 50. For further explanation see Hazairin, "Negara tanapa Penjara," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 1-26. Hazairin, *Hukum Pidana Islam Ditinjau dari Segi-segi, Dasar-dasar dan Asas-asas Tata Hukum Nasional* (Djakarta: Tintamas, 1968). Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan Nomor 1-1974* (Jakarta: Tintamas, 1986), 9.

[25] S. M. Amin, "Mengenang Almarhum Prof. Mr. Dr. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 95.

> show us the way out and to find the right method of realizing what society needs in these modern times.[26]

B. His Career

Hazairin actually had two careers: one as an academic, the second as a politician, nationalist and administrator. He began his academic career in 1935 as a junior lecturer soon after his graduation from the RHS in the University of Indonesia. He taught *adat* and ethnology in the Law Faculty of that institution until 1938.

He gave up this post to work on the staff in the law court in Padang Sidempuan, Tapanuli Selatan in the southern part of North Sumatra. He held this post from 1938 to 1942, when the Dutch appointed him as an *adat* researcher for North Sumatra. He also became an assistant at the residency in Tapanuli, an opportunity he used to become involved with the Batak people of Tapanuli Selatan, and to study their *adat* and traditions. In this way, he was able to confirm his own knowledge of *adat* as a discipline of law, and to continue his fieldwork on the Batak. He wrote two interesting research reports written in good Dutch,[27] *De Gevolgen Van De Huwelijksontbinding in Zuid Tapanuli* (The Consequences of Divorce in Tapanuli Selatan) and *Reorganisatie Van Het Rechtwesen in Zuid Tapanuli* (Reorganization of Law in Tapanuli Selatan). For these two studies, the *Raja Adat* or the head of the Batak clan awarded him the honorific title of *Pangeran Alamsyah Harahap.*[28]

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[26] Hazairin, "Negara Tanpa Penjara," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 6.

[27] Lev, interview by author.

[28] This title was bestowed on Hazairin in recognition of his membership in the clan. Tim Redaksi Majalah Tempo, *Apa dan Siapa sejumlah Orang Indonesia 1981-1982* (Jakarta: Grafiti Pers, 1981), 219.

During the Japanese occupation, Hazairin became a legal advisor to the government of occupation and was also active in various organizations working for Indonesian independence. In 1945 he joined the guerrilla underground in order to oppose the Japanese. He was a leader of the Dewan Pertahanan Daerah (DPD) or Council of Regional Defense, which tried to consolidate power in certain areas. Between 1945 and 1949 he served with the Student Force in Tapanuli Selatan and Bengkulu, whereas for the period 1949-1950 he was commander of the Student Brigade in Sumatra Selatan.[29]

While active in the revolutionary movement he also took part in administrative and political activities. From February to April 1946, he was a regent in Tapanuli Tengah, Sibolga, in North Sumatra.[30] He also held a position in Tapanuli Selatan as both director of the civil court and president of the Komite Nasional Indonesia (KNI) or Indonesian National Committee. Moreover, from 1946 to 1950 he served as residency president in Bengkulu and, at the same time as an assistant military governor of the province of Sumatra Selatan. There, he tried to reorganize and improve the quality of religious officials in the area by requiring them to pass an examination. At the same time, he held that religious courts should have no jurisdiction over inheritance law, which accorded with the established Dutch view on the subject. Daniel S. Lev comments that this idea reflected his 1930s training in *adat* law in Tapanuli, where he was taught that inheritance was merely a matter of *adat* law.[31] Officials at the Ministry of Religious

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[29] Tim Redaksi, *Apa dan Siapa*, 219.

[30] S. M. Amin, "Mengenang Almarhum Prof. MR. DR. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 97.

[31] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley, Los Angeles and London: University of California Press, 1972), 98.

Affairs, who retained the purist Muslim perception that Islamic law was superior to *adat* law, were angered by this statement.[32]

In 1948, he also became vice-president of Partai Persatuan Indonesia Raya (PPIR)[33] based in Yogyakarta, which was then headed by Wongsonegoro. Shortly thereafter he accepted an appointment to serve as a civil law deputy, a post that he held from 1950 to1953, which period marked the height of the liberal Democracy era. During his tenure of this office he drew attention to the fact that Islamic courts had no basis in law at all in Sumatra, and stated that they should be closed down. This again angered many scholars, but Hazairin stood his ground, and criticized the religious courts for taking little notice of modernist legal ideas.[34] He observed that *adat* law was responsive to social dynamics and accommodative to Islamic law, even though *adat* legalists disregard this fact, and consider *adat* law to be frozen.[35]

Thanks to his position in the PPIR party, he was appointed Minister of Internal Affairs at some time between 1953 and 1954, but resigned from that position when Ali

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[32] Lev, *Islamic Courts,* 87-8.

[33] Partai Persatuan Indonesia Raya (PPIR) or Great Indonesia Unity Party, was an organization convoked by nationalists who were at the time uninvolved in any political party. It was led by Sunardi Wongsonegoro and had 20 members seated in Dewan Perwakilan Rakyat Sementara, and three in the cabinet, including Hazairin. Nevertheless, at the 1954 Congress, this party broke into two factions, one pro-Hazairin, the other pro-Wongsonegoro. The party disbanded after its poor showing in the general election of 1955/1956. Soebagijo I. N. "Hazairin," in Nugroho et.al., ed., *Ensiklopedi Nasional Indonesia* (Jakarta: Cipta Adi Pustaka, 1989), 374.

[34] Lev, *Islamic Courts*, 88.

[35] Lev, interview by author.

Sastroamidjoyo reformed his cabinet that year.[36] Actually Hazairin was the focus of a dispute at the time, having disagreed with his party's leader Wongsonegoro over the economic policy followed by the government.[37] As the result of the dispute, the PPIR split into two wings, Hazairin's and Wongso's. On 21 July 1954, the PPIR congress discussed the situation and there was a general call for party members still in the government to leave the party. Hazairin and his supporters formed an alliance with the opposition party that at the time was Masyumi.[38]

Wongsonegoro's support came from the Javanese branches, while Hazairin's came from those members of the PPIR who had joined the cabinet of Sastroamidjoyo. Sastroamidjoyo judged that this fight would create trouble for the parliament and, on 18 November 1954 completely reshuffled the cabinet.[39] It was at this point that Hazairin took up his last official position as assistant to the Ministries of Justice and Education, a post that he held until 1959.

It was usual for an Indonesian scholar to pursue more than one career or interest, especially when social problem demanded so much attention. Hence, while his political career was underway, he was also active in Islamic and academic affairs. In 1950, Hazairin and his colleagues established the University of Islam Djakarta. He became a rector of that university and dean of the law faculty there. He was also a professor of

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[36] Al Yasa, *Hukum Kewarisan Sepertalian Darah*, 6. See also Hasbullah Bakry, "Segi-segi yang Menarik," 29.

[37] Ali Sastroamidjoyo, *Tonggak-tonggak di Perjalananku* (Jakarta: Kinta, 1974), 306-307.

[38] Sastroamidjoyo, *Tonggak-tonggak di Perjalananku*, 325.

[39] Sastroamidjoyo, *Tonggak-tonggak di Perjalananku*, 327.

Islamic and *adat* law at the law faculty of the University of Indonesia,[40] which officially recognized his professorship in *adat* and Islamic law on 13 September 1952. On that day, he delivered the required academic acceptance speech, choosing to speak on morality and law (*kesusilaan dan hukum*).[41]

He also began teaching at the University of Indonesia from the year 1950,[42] where he offered a course on the teaching of "special Islamic law," as he referred to it.[43] He was professor at several universities, including the Perguruan Tinggi Ilmu Kepolisian (Institute of Police Science) and Perguruan Tinggi Hukum Militer (Institute of Military Law). His courses in Islamic law drew the particular attention of his students, because of its "spirit of reform,"[44] which was very new at the time. This approach, which Hazairin called "a concrete scientific reform,"[45] is unique in the way it relates to his analysis to the Qur'ān.

This indicated his concern with Islam,[46] a concern that led him to correlate his teachings with legal reform. It is important to note that his idea of Islamic legal reform

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[40] Boland, *The Struggle of Islam in Modern Indonesia*, 168-169.

[41] Hazairin, *Kesusilaan dan Hukum,* title page. Here, he explains that the law should contain spiritual and ethical values.

[42] Hazairin, *Kesusilaan dan Hukum*, 4.

[43] Bakry, "Segi-segi yang Menarik," 29.

[44] Bakry, "Segi-segi yang Menarik," 29.

[45] Bakry, "Segi-segi yang Menarik," 29.

[46] Hazairin, *Hendak Kemana Hukum Islam* (Jakarta: Tintamas, 1976), 3.

was far different from any institutional treatment of this topic.[47] In teaching "Hukum Islam Khusus" (special Islamic law), which he mapped out on his own, he embarked on a reconstruction of the edifice of the Indonesian legal system from its base upwards. His discussion of Islamic law was characterized by a modern approach to recent social problems. Since he believed that educational institutions maintained the moral identity of a nation and could help develop Islam in accordance with social needs and modernity, he believed that this course would be significant.

C. His Works

Hazairin was a prolific writer. His works may be divided into two categories: legal and non-legal. His legal works are specific to family law, whether Islamic or *adat* in nature. He paid close attention to legal reform in this field. His non-legal works were written for special events, mostly national and religious occasions.

His dissertation, *De Redjang*, represents his first full-length study of any legal topic. The work examines *adat* family law in the Rejang region of Sumatra Selatan. His elucidation on *adat* and customary law may be considered complementary[48] to Snouck Hurgronje's work, *De Atjehers* (The Acehnese, which contains Snouck analysis of Aceh and its customary and political conditions) and M. Joustra's *Batakspiegel* (the Batak, which explains the life and customs of Batak society).

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[47] Before 1969, for example, the IAIN was oriented towards al-Azhar's curriculum and accepted the predominance of the Shafi'i school in its teaching. The IAINs even cooperated with al-Azhar by inviting its professors and sending students to study there. See the elaboration of this point by Boland, *The Struggle of Islam in Modern Indonesia*, 120-122.

[48] Potan Arif Harahap, "Prof. Hazairin Dalam Kenangan," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 55.

Other writings on *adat* law that followed were[49] "*De Gevolgen Van De Huwelijksontbinding in Zuid Tapanuli*" (The Consequences of Divorce in Tapanuli Selatan) and *Reorganisatie Van Het Rechswezen in Zuid Tapanuli* (Reorganization of Law in Tapanuli Selatan) both of which deal with the *adat* and customary law among the Batak people of Tapanuli Selatan in North Sumatra. He also wrote a book in French, entitled *Le droit sur le sol en Indonesie* (Agricultural Law in Indonesia), where he explains the land problem in his nation.

In regard to family law reform, Hazairin offered an alternative system of family law as a solution to the diversity of social and family systems[50] in Indonesia. His book, *Hukum Kekeluargaan Nasional* (National Family Law),[51] for example, makes the case for a national marriage law, proposing that a bilateral (parental) marriage system be applied universally in Indonesian society. It was also in this work that he first proposed a new *madhhab* (school of law) for Indonesians called a *madzhab nasional*,[52] which he later changed to *madzhab Indonesia*, the same term that Hasbi Ash-Shiddiqiey had used, and the form he felt more appropriate for Indonesian society. The reason is that of the

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[49] Both of the writings were published in Jakarta in 1941.

[50] An introduction of Indonesian social system has been delivered by Ter Haar. Ter Haar, *Adat Law in Indonesia*, trans. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), 51. For purpose of this study, however, three major social systems will be mentioned: the Javanese, which has a bilateral system; the Batak, which has a patrilineal system; and the Minangkabau, which has a matrilineal system. For detailed explaination see chapter II of this thesis.

[51] Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1982). This book is appended by the Bill of the National Constitution of Marriage and Inheritance law.

[52] Hazairin, *Hukum Kekeluargaan Nasional*, 6.

two words.[53] Hazairin argued that the word "nasional" implied that it would apply to all the citizens of Indonesia, whereas the name that he proposed could be thought of as applying only to those who were Muslims. Hence the word "*madzhab* Indonesia" is, according to him, more appropriate.[54]

The idea of establishing an Indonesian *madhhab* is also expressed in a work of his book entitled *Hukum Islam dan Masjarakat* (Islamic Law and Society).[55] This book bears two subtitles: *Qur'ān Bahan Bagi Ilmu Pengetahuan* (the Qur'ān as a Source of Science) and *Muhammad dan Hukum* (Muhammad and Law). In the first part, he propounds the importance of Islamic higher education, offering a common understanding of Islam to all Indonesian Muslims, thereby featuring various units of the community. He also saw this education imparting knowledge based on the Qur'ān, rather than other writings of Islamic theology and jurisprudence. In following this path, he hoped that educational institutions would produce new thinkers (*mujtahids*) who could serve Indonesian society by providing an appropriate response to modern conditions. In the second part, he explicates the authority of law, ethics and sources of law, as well as relationships between human beings and between man and God.

His idea of a *madzhab nasional* is elaborated most fully in his *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith* (Bilateral Inheritance System according to the

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[53] The word *madhhab* (Arabic) and *madzhab* (Indonesia transliteration from the Arabic) both convey the same meaning, which is that of a school of law.

[54] Hazairin, *Hukum Kekeluargaan Nasional*, 6. Fadhil Lubis, "Islamic Legal literature." 55. T. M. Hasby ash-Shiddieqy, *Sjari'at Islam Mendjawab Tantangan Djaman* (Jakarta: Bulan Bintang, 1966).

[55] Hazairin, *Hukum Islam dan Masjarakat* (Djakarta: Bulan Bintang, 1960).

Qur'ān and Ḥadīth).[56] This work undertakes a radical reconstruction of the edifice of family legal reform in Indonesia, especially inheritance law. He argues that the Qur'ān actually advocates a bilateral family system, on which Qur'ānic inheritance law is based, and expresses his willingness to undertake debate with Muslim reformist on the issue.[57]

In general his intention was to unify the practice of Islamic law in Indonesia. His *Indonesia Satu Masdjid* (Indonesia in One Mosque) [58] depicts his ideas on this issue, especially regarding the areas of property and economics as they are dealt with by Muslim jurists.

His ideas on Islamic criminal law are elaborated in his work *Hukum Pidana Islam Ditinjau dari Segi-segi, Dasar-dasar dan Asas-asas Tata Hukum Nasional* (Islamic Criminal Law from the Aspects, Bases and Principles of a National Legal System), where he supports institutionalizing Islamic criminal law in Indonesia.[59] In *Negara Tanpa Penjara* (State Without Prisons), he argues that a state would need no jails for criminals if people followed the criminal law outlined in the Qur'ān. After all, the

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[56] Hazairin, *Hukum Kewarisan Bilateral menurut al-Qur'an dan Hadith* (Jakarta: Tintamas, 1982). This work combines two of Hazairin's books: *Hukum Kewarisan Bilateral Menurut al-Qur'an* and *Hukum Kewarisan Menurut Hadith*. This new edition contains no changes from previous edition (p. vi). The first topic is an explanation of guidelines for inheritance rules according to the Qur'ān and an elaboration of the social system which is consistent with the Qur'ān. Hazairin appears to correlate the social system and the inheritance system intended by the Qur'ān. The second book includes an elucidation of inheritance rules according to *ḥadīths*. In it, he demonstrates the problems of inheritance and how these dealt with in the *ḥadīths*.

[57] Some specific issues on bilateral system of inheritance will be discussed in Chapter III of this thesis.

[58] Hazairin, *Indonesia Satu Masdjid* (Djakarta: Bulan Bintang, n.d.).

[59] Hazairin, *Hukum Pidana Islam Ditinjau dari Segi-segi, Dasar-dasar dan Asas-asas Tata Hukum Nasional* (DJakarta: Tintamas, 1968).

Qur'ān does not call for confinement, but provides instead for capital punishment, whipping, fines and *qiṣaṣ* (compensatory punishment).[60]

He also wrote a book on the relationship between *adat* and Islamic law, entitled *Pergolakan Penyesuaian Adat Kepada Hukum Islam* (Confusion of Adaptability *Adat* towards Islamic Law).[61] Taking the Minangkabau as an example, he asks whether *adat* law is superior to Islamic law, whether Islamic law is superior to *adat law*, or whether both are of equal value. He came to the conclusion that Islamic law and *adat* laws are of equal value and can exit side by side. He then elaborated this with respect to social conditions in Indonesia in his *Sekelumit Persangkut-pautan Hukum Adat* (A Few Thoughts on *Adat* Law).[62]

His *Tujuh Serangkai Tentang Hukum* (Seven Sequences on Law)[63] consists of seven speeches and articles -- *Negara Tanpa Penjara,*[64] *Sekelumit Persangkut-pautan Hukum Adat,*[65] *Fungsi dan Tujuan Pembinaan Hukum dalam Negara Republik Indonesia yang Demokratis dan Berdasarkan Hukum* (The Function and Goal of Developing Law in the Indonesian Republic which is based on Democracy and Law),[66] *Muhammad dan*

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[60] See Hazairin, "Negara Tanpa Penjara," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 1-26.

[61] Hazairin, *Pergolakan Penjesuaian Adat Kepada Hukum Islam* (Djakarta: Bulan Bintang, 1952).

[62] Hazairin "*Sekelumit Persangkut-pautan Hukum Adat,*" in Hazairin, *Tujuh Serangkai Tentang Hukum*, 27-50.

[63] Hazairin, *Tujuh Serangkai Tentang Hukum* (Jakarta: Tintamas, 1974).

[64] Hazairin, *Tujuh Serangkai Tentang Hukum*, 1-26.

[65] Hazairin, *Tujuh Serangkai Tentang Hukum*, 27-50.

[66] Here Hazairin concedes that the function and the goal of the legal system lies in establishing a state based on legal provisions. Hazairin, *Tujuh Serangkai Tentang Hukum*, 51-66.

*Hukum*,[67] *Kesusilaan dan Hukum* (Ethics and Law),[68] *Hukum Baru di Indonesia* (New Law in Indonesia),[69] and *Ilmu Pengetahuan Islam dan Masyarakat*.[70]

When the Indonesian Marriage Law was promulgated he wrote *Tinjauan Mengenai Undang-undang Perkawinan Nomor* 1 Tahun 1974 (Review on the Marriage Law No. 1/1974), the last book he wrote prior to his death in 1975. In it he explains, article by article, the Indonesian Marriage statute, followed by his comments and criticisms.

Besides law he wrote on several other matters; astronomy, politics and Christianity, among others. In connection with astronomy he wrote a book entitled *Djagat Raja Menurut al-Qur'an* (Universe According to the Qur'ān).[71] Here Hazairin draws on the Qur'ān to explain the human relationship with the universe, the creation of fire, light and the first human. He maintained that the Qur'ān contains modern scientific concepts, stating "The Qur'ān is the word of God alone and so his verses can never

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[67] Here he elucidates his two opinions on the law. Firstly, law is only the result of social relations in a society, which need rules. Secondly, law impacts not only on human relations but also on the relationship between man and God. Hazairin, *Tujuh Serangkai Tentang Hukum*, 67-73.

[68] He declares that the relationship between society and law is one of ethics, which society acknowledges. Hazairin, *Tujuh Serangkai Tentang Hukum*, 74-92.

[69] He illustrates his points on the possibility of formulating new laws suited to Indonesia's pluralistic society. This constitutes the text of a speech made before delegates to a conference on law on December 16, 1950. Hazairin, *Tujuh Serangkai Tentang Hukum*, 93-108.

[70] The importance of Islamic knowledge is briefly described here. Hazairin, *Tujuh Serangkai Tentang Hukum*, 109-120.

[71] Hazairin, *Djagat Raja Menurut al-Qur'an* (Djakarta: Tintamas, 1966).

contradict the scientific view, which is established because God has granted science itself to humankind."[72]

His political ideas are expressed in *Demokrasi Pancasila* (Pancasila Democracy),[73] where he analyses the state based on the principles of the *Pancasila*, and explains the philosophy of Indonesia as a republic as expressed in the "Jakarta Charter" (*Piagam Jakarta*). Also, he sometimes wrote in response to current issues. *Demokrasi Pancasila* was inspired by a seminar that he attended in December 1968.[74]

Another example of this type of writing is his *Isa al-Masih dan Ruh* (The Prophet Jesus and the Soul).[75] This book commented on the failure of inter-religious consultation between Christianity and Islam in the inter communal shrift in November 1967. This shrift sparked the publication of a number of works besides that of Hazairin.[76]

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[72] Amin, "Mengenang Almarhum Prof. Dr. Mr. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 96.

[73] Hazairin, *Demokrasi Pancasila* (Jakarta: Bina Aksara, 1983). This book discusses what bearing "Republik Indonesia" (Indonesian Republic) had on "Piagam Jakarta" (Jakarta Charter). This led to the philosophical "Pancasila vs. Islamic state" debate. Endang Saifuddin Anshari, *Piagam Jakarta: 22 Juni 1945* (Bandung: Perpustakaan Salman Bandung, 1981), 116. This book is helpful in that it clarifies Hazairin's opinion towards the historical development of Islamic law in Indonesia, especially as the author writes from a secular standpoint.

[74] Hazairin, *Demokrasi Pancasila*, 9-11. The seminar was called Hukum Nasional II (National Law II) and was held 27-30 December 1968.

[75] Hazairin, *Isa Al-Masih dan Ruh* (Djakarta: Tintamas, 1969).

[76] Boland notes that the polemic involved, among others, Arsjad Thalib Lubis, who wrote *Keesaan Tuhan Menurut Adjaran Kristen dan Islam* (Djakarta: n. p., 1968); Abujamin Roham, with his *Agama Kristen dan Islam serta Perbandingannja* (Djakarta: n. p., 1968); Hazairin, with his *Isa Al masih dan Ruh* (Djakarta: n. p., 1969); and H.M. Rasyidi, with his *Islam di Indonesia di Zaman Modern* (Djakarta: n.p., 1968). See B. J. Boland, *The Struggle of Islam in Modern Indonesia*, 240.

D. His Concerns about Islam

As noted above Hazairin did not receive a formal Islamic education, but was interested in Islam as a Muslim and as a legalist. This section will try to show the deep interest he had in Islam – one that prompted him to develop considerable competency in the field of Islamic legal thought. Because he was self-taught, though, we have no clear information on exactly what Islamic books Hazairin actually read, but it can be speculated that he would have studied the more well-known books on the Qur'ān and *ḥadīth, tafsīr, fiqh* and *uṣul al-fiqh.*[77]

Apparently he was personally devout and he observed Islamic teachings in his daily life. [78] However, Lev observes that as a scholar Hazairin separated his analysis from his faith, while retaining some degree of Islamic perspective.

His training in Sumatra had led him to believe that *adat* was deeply rooted in the society, but he also recognized that it was challenged on the one hand by Islam and on the other by change within Indonesian society. As an illustration, he cited the case of circular migration where men left their native regions to work in cities and then returned for retirement. They came back to find an inheritance system that differed from what they had become used to elsewhere. Another phenomenon was the gradual move from

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[77] He might have read some of following books; *Bughyāt al-Mustarshidīn* by Husayn al-Ba'lawi, *al-Farā'iḍ* by Shamsūrī; *Fatḥ al-Mu'īn* by al-Malībārī, *Fatḥ al-Wahhāb* by al-Anṣārī; *Hashiyah Kifāyah al-Akhyār* by al-Bajūrī; *Mughnī al-Muhtāj* by al-Sharbīnī; *Qawānīn al-Shar'iyya* by Sayyid 'Abdu Allāh ibn Sadāqah San'ān. For radical Islamic thought Hazairin might also have read *The Spirit of Islam* by Ameer Ali. This book was well-known and attracted many Indonesian scholar for its radical thought of Islam at the time. See Sukarno, "Surat-surat Islam dari Endeh," in Panitya Di bawah Bendera Revolusi, *Di bawah Bendera Revolusi* (Djakarta: Panitya Dibawah Bendera Revolusi, 1964), 332 and 337.

[78] Amin, "Mengenang Almarhum Prof. Mr. Dr. Hazairin," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 95.

the extended to the nuclear family caused by growing urbanization and other factors. Both developments led to increased "individualization."[79] After independence, Hazairin drew the conclusion that *adat* would change under the pressure of so many influences. When he observed the conflicts between *kaum tua* (traditionalist) and *kaum muda* (modernist or reformist) occurring in Sumatra and Java, he was led to relate religious change to the fundamental role of change in society itself.

Hazairin's was primarily interested in establishing Islamic law at the institutional level.[80] Indeed, he was quite insistent in arguing that Indonesia ought to be based on Islamic law, though not to the extent that it should become an Islamic state.[81] Nevertheless, incorporating certain elements of Islamic law into the Indonesian legal

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[79] A family system, which is not, bound by the clan or tribe but rather depends on the family itself. Lev, interview by author.

[80] Bismar Siregar, "Prof. Hazairin: *Seorang Mujahid Penegak Hukum Berdasarkan Ketuhanan Yang Maha Esa*," in Sajuti Thalib, ed., *Pembaharuan Hukum Islam*, 1.

[81] The problem of whether or not the *sharī'a* should serve as the constitution of an Islamic state, and whether or not an Islamic state can have *sharī'a* rules has never ceased being debated. Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder* (Berkeley: University of California Press, 1998), 158-177 and 187. In Indonesia's political setting, the discourse on the Islamic state produced conflict and rebellion against the state. There have been some attempts to make Indonesia an Islamic state. Natsir, for example, debated Soekarno over Islam's suitability as the basis of statehood, and whether Indonesia needed Islam or Pancasila. See his book, *Islam Sebagai Ideologie* (Jakarta: Pustaka Aida, 1951). See also Ma'mur Ilzamuddin, "Abū al-A'la Mawdudi's and Mohammad Natsir Views on Statehood: A Comparative Study" (M.A. thesis, Institute of Islamic Studies, McGill University, Montreal, 1995). At its peak, in 1949, the idea of an Islamic state for Indonesia was expressed as Islamic legal reform. This idea gave way to rebellion against the government. In South Sulawesi, a revolt in favour of an Islamic State was led by Kahar Muzakar in 1953. In Aceh the attempt in 1953 to build an Islamic state was led by Daud Beureuh. By contrast, Hazairin hoped only to apply some elements of Islamic law in Indonesia. Hazairin, *Indonesia Satu Masdjid*, 5-6. Hazairin, *Hukum Kekeluargaan Nasional*, 1 and 6. Boland, *The Struggle of Islam in Modern Indonesia*, 169.

system was certainly a goal.[82] Boland observes that Hazairin's aim was to see "a partial realization of Islamic law for Muslim citizens."[83]

Although Hazairin asserted that Islamic law should be integrated into Indonesia's legal system, he also held that tolerance was essential to its success. He hoped that Islamic legal reforms would be applied to Muslim society, without Indonesia being transformed into an Islamic state. He maintained that this was a prerogative of other groups as well and if Christians wanted their biblical provisions to be enshrined in law, they could also propose this to the state.[84]

This fit in with his view of the Indonesian nation. Hazairin insisted that Indonesia is not a homogenous society. Since its establishment as an independent state, Indonesia had venerated its various founders and heroes, whatever their religion. All worked together to realize the dream of a Republic of Indonesia. According to Hazairin, therefore, Indonesia belonged to all of its people whatever religion. Hazairin even considered its heterogeneous character a virtue willed by God.[85]

The above gives an indication of Hazairin's view of the importance of Islam to Indonesia. We may conclude that Hazairin dedicated himself to education, social needs, public interest and religion. Later, he assumed an important role in achieving the independence of Indonesia, and accepted positions in the government and the civil

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[82] His attempt to introduce Islamic law into Indonesian statutory law was clearly aimed at ensuring that the legal system be equipped to handle cases of this nature. See his *Hukum Islam dan Masyarakat*. See also Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, 3-5.

[83] Boland, *The Struggle of Islam in Modern Indonesia*, 169.

[84] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, 7.

[85] Hazairin, *Hukum Islam dan Masyarakat*, 19-22.

service. He also worked tirelessly in pursuit of knowledge and contributed to scholarship until his death.

Hazairin's social and academic relationships, his writings and career, and his great interest in Islam, are all evidence of his qualifications as an Islamic legal scholar. He was a man of intelligence and discernment with respect to the religious disciplines of Islam. An historical and content analysis of Hazairin's thought should help us to identify his ideas on Islamic legal reform in Indonesia. In the next chapter, we will deal with this aspect of his thought.

# CHAPTER TWO

## HAZAIRIN'S LEGAL THOUGHT

There were three major aspects to Hazairin's legal thought. First, there was his refutation of the legal heritage of Dutch colonial policy, known as his *receptie exit* theory. His proposal here was to put an end to the authority of *adat* law over Islamic law. Second, effectively a continuation of the first, was his concept of a "bilateral system." This was a system of Islamic family law interpreted on the basis of the Qur'ān and adapted to Indonesian conditions, especially in the spheres of marriage and inheritance law. Last, there was his proposal to institutionalize Islamic law at the state level. The present chapter elucidates Hazairin's Islamic legal thought and the circumstances that shaped it. Our objective is to show how, in spite of being a product of the Dutch educational system, Hazairin recognized the value of Islamic law and the need to correlate it with *adat* law. As a background to Hazairin's theory of *receptie exit*, we begin this chapter with a survey of Dutch legal policy in the East Indies prior to Indonesian independence.

### A. On the *Receptie Exit* Theory

Despite the wide variety of customary laws in the colony, the Dutch government recognized the pervasive influence of Islamic law within Indonesian society. This is stated in the legislation known as the *Regalment op het beleid der Regeering van Nederlandsch Indie* (RR or Rule of the Management of India Netherlands), *Stbl.* No. 129

of 1854 and No.2 of 1855, and is explained more fully in Articles 75, 78 and 109.[1] Under the Daendels (1807-1811) and Raffles administrations (1811-1816)[2], Islamic law was officially recognized in matters of personal law, a recognition of its status in the hearts of the Indonesian people.[3] One of the first to realize Islam's influence on Indonesian society was Carel Frederik Winter (1799-1859), a Dutch expert on Javanese culture and author of several studies on Islam in Indonesia. His research was followed up by Solomon Keyzer (1823-1868), a scholar of linguistics and culture in the Netherlands Indies, who translated the Qur'ān into Dutch and summarized Winter's conclusions.[4]

When it was realized how important Islamic law was to Indonesian society the Dutch government began to pay particular attention to the Islamic legal system. This led to two, essentially contradictory, developments. Initially, Islamic law came to occupy a more privileged position than *adat* law. This approach was supported by L. W. C. van den Berg (1845-1927),[5] who had developed an interpretation of Islamic law based on his theory of *receptio in complexu.* Later, however, the view emerged that Islamic

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[1] Sajuti Thalib, *Receptio A Contrario: Hubungan Hukum Adat dan Hukum Islam* (Jakarta: Academica, 1980), 7. Sajuti Thalib, "Receptio in Complexu, Theorie Receptie dan Receptio a Contrario," in *Pembaharuan Hukum Islam di Indonesia* (Jakarta: Universitas Indonesia Press, 1982), 44.

[2] The latter was a British interregnum.

[3] Arso Sostroatmodjo and Wasit Aulawi, *Hukum Perkawinan di Indonesia* (Jakarta: Bulan Bintang, 1981), 11-2.

[4] Winter concluded that the living law within the indigenous society was Islamic. Thalib, *Receptio A Contrario*, 5.

[5] Van den Berg was the first Dutch scholar to be appointed as an advisor to the Dutch government regarding issues affecting Indonesian Muslims. He was also responsible for advising on the subject of eastern languages and Islamic law. Karel A. Steenbrink, "Foreword," in *Hadramaut dan Koloni Arab di Nusantara,* by L. W. C. van den Berg, trans. Rahayu Hidayat (Jakarta: INIS, 1989), xi-xxv.

law should come under the authority of *adat* law. This interpretation was advanced by Christian Snouck Hurgronje (1857-1936)[6] and was based on what he called the *receptie* theory.

The r*eceptio in complexu* theory acknowledged Islamic law as a positive law, fully implemented among the indigenous people.[7] Van den Berg maintained that Islam had been fully accepted as the living law of the inhabitants of the Netherlands Indies.[8] He came to this conclusion while working at the National Court of Semarang (Central Java) where he discovered the extent to which Islamic law was observed among the people, and as such believed that there was a need for it to be codified.[9] His theory of *receptio in complexu* was officially recgnized in Law No. 152 of 1882.[10] According to this legislation, the positive law for the indigenous people was to be their own religious law

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[6] Hurgronje was a Dutch scholar assigned as an advisor on Dutch policies towards Indonesian Muslims. He was born in Tholen City, Netherlands and studied theology and Arabic literature when he was young. His ambition to learn Arabic and study Islam led him to convert to Islam and perform ritual practices of Islam, but he is believed to have only pretended to be Muslim. For more information see for example, Danan Priyatmoko, "Christian Snouck hurgronje," in Nugroho et.al., ed., *Ensiklopedi Nasional Indonesia* (Jakarta: Cipta Adi Pustaka, 1989), 505-6.

[7] Thalib, "Receptio in Complexu," 45.

[8] C. Van Vollenhoven, *Van Vollenhoven in Indonesian Adat Law*, trans. J. F. Holleman, Rachael Kalis, and Kenneth Maddock (The Hague: Martinus Nihoff, 1981), 20.

[9] To this end he wrote "Mohammadenrecht" according to the Shafiite and Hanafite traditions, and a book on family law and inheritance law in which he studied its divergent trends in Javanese society. He then translated the book *Minhāj al-Ṭalibīn* by Nawawi into French, to use as a legal reference tool in the religious court. Thalib, *Receptio A Contrario*, 5-6. Steenbrink, "Foreword," xiv-xv.

[10]Asro Sosroatmodjo and A. Wasit Aulawi, *Hukum perkawinan,* 13; Ichtijanto, "Pengembangan Teori Berlakunya Hukum Islam di Indonesia," in Tjun Surjaman, ed., *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: PY Remaja Rosdakarya, 1991), 120.

-- in this case Islam -- and accepted in full.[11] Van den Berg is considered to have recognized Islam's existence.[12] In accordance with Van den Berg's policy, the Islamic courts continued their activities as religious institutions.[13] The initiative was then undertaken to implement officially the provisions of Islamic law in colonial statutes such as the rules concerning inheritance (*farā'iḍ*), marriage *(nikāḥ)* and divorce (*talāq*).[14]

However, the *receptie* theory of Snouck Hurgronje soon came to replace the *receptio in complexu* theory of Van den Berg. By contrast, Hurgronje's theory did not admit the close ties to Islamic law felt by the Indonesian people. He maintained on the contrary that it was customary law that was still predominantly observed by society. Hurgronje therefore maintained that Islamic law ought not to be implemented unless it accorded with customary law. The positive law of Indonesian Muslims, hence, was seen as rooted in the customary law of the people, not in the religious law.[15]

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[11]Van Vollenhoven, *Van Vollen Hoven in Indonesia Adat Law*, 20. Hooker considered Islam to be an essential element of Indonesian society, affecting its political, social and cultural life. M. B. Hooker, *Islamic Law in Southeast Asia* (Singapore: Oxford University Press, 1984), 248.

[12] B. J. Boland, *Struggle of Islam in Modern Indonesia* (The Hague Martinus Nijhoff, 1962), 216. Taufik Abdullah, *Islam and Masyarakat: Pantulan Sejarah Indonesia* (Jakarta: LP3ES, 1987), 108.

[13]The Islamic courts were founded by the early Muslim kings in different parts of Indonesia, which contributed to the spread Islam at the time. Under Dutch rule the Islamic courts survived expanded and won favor from Van Den Berg's policy. Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley, Los Angeles and London: University of California Press, 1972), 8-101; Hooker, *Islamic Law in Southeast Asia,* 249-55; Steenbrink, *Beberapa Aspek Tentang Islam di Indonesia abad ke –19* (Jakarta: Bulan Bintang, 1984). 213-33.

[14] Ichtijanto, "Hukum Islam di Indonesia," 121.

[15] Hooker, *Islamic law in South-East Asia,* 269. Daniel S. Lev, "Judicial Institutions and Legal Culture in Indonesia," in Claire Holt, ed., *Culture and Politics in Indonesia* (Ithaca: Cornell University Press, n. d.), 254.

Beginning with its official enactment in *Stbl.* No. 221 of 1929, Article 134 (2) of the *Wet op de staats Inriching van Nederlands Indie* (IS or the Law of the State Management of India Netherlands),[16] the *receptie* theory replaced Van den Berg's *receptio* theory, and was to remain in effect for the next seventeen years.[17] According to Thalib (b.1929), this regulation clearly determined that Islamic law could not be recognized as the positive law of Indonesian Muslims as long as local customary laws did not recognize it. In implementing his *receptie* theory, Hurgronje turned Van den Berg's theory upside down.[18]

Hurgronje nevertheless realized that Indonesian customary law was actually far from uniform. In some areas of Indonesia, for example, Islamic law was deeply rooted in the society, such as in Minangkabau. Hurgronje agreed that in these areas Islam had already existed for a very long time. But the fact that Islamic law was in conflict with customary law, especially in such areas as marriage and inheritance, showed that in fact customary law still made up the greater part of their living law.[19] He insisted that this was also the case in other parts of Indonesia, such as Aceh.[20]

Van Vollenhoven (1874-1933), who elaborated further on the *receptie* theory and criticized Van den Berg, supported Hurgronje's conclusion. "It would be incorrect to

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[16]Thalib, Receptio A Contrario, 27-9. Thalib, "Receptio in Complexu," 50-1. Abdul Mutholib, *Kedudukan Hukum Islam Dewasa ini di Indonesia* (Surabaya: P.T. Bina Ilmu, 1984), 29.

[17]Harry J. Benda, *The Crescent and the Rising Sun* (New York: Institute of Pacific Relations, n. d.), 20.

[18] Thalib, *Receptio A Contrario*, 29.

[19]Snouck C. Hurgronje, *The Achehnese*, trans. A.W.S. O'Sullivan (Leiden: E. J. Brill,1906), 316.

[20] H. Westra, "Custom and Muslim Law in the Netherlands East Indies," *Transactions of the Grotius Society* 25 (1939), 166.

assume that the priority given to religious law, and the identification of it with *adat* law, has always resulted from an inadvertent mistake, misconception and error."[21]

Like Van Vollenhoven, Vandenbosch maintained that religious law actually had little influence on other spheres of life. He believed that it was wrong to suppose that the influence of religious law on *adat* law was significant, just as it was a mistake to overstress the religious element in customary law.[22] Rather, as he put it, "Pagans have pagan law, Hindus have Hindu law, Mohammedans Moslem law...," which point he qualified, saying, "the influence of religious law is limited."[23] Westra voiced a similar opinion in support of Hurgronje's theory: "for a long time the importance of religious law in general and Muslim law in particular as compared with native customary law has been overestimated."[24]

However, modern Indonesian scholars are highly critical of Hurgronje's theory. For example, Hamid al-Gadri has lauded Van den Berg for his perspicacity and accused Hurgronje of attempting to limit the development of Islam in Indonesia. The Islamic policy that he designed had an even wider thrust, as is evidenced by the stress he placed on western education as a means of combating the influence of Islam in Indonesia.[25]

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[21] Van Vollenhoven, *Indonesian Adat Law*, 20.

[22] Amry Vandenbosch, *the Dutch East Indies: Its Government, Problems, and Policies* (Berkeley: University of California Press, 1944), 178.

[23] Vandenbosch, *Dutch East Indies*, 178.

[24] Westra, "Custom and Muslim Law,"151.

[25] Harry J. Benda, "Christian Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia," A. Ibrahim et al. (eds), *Readings on Islam in Southeast Asia* (Singapore: Institute of Southeast Asian Studies (ISEAS), 1985), 64-5.

According to al-Gadri, Hurgronje advised the government to send Indonesian students to study in Leiden in order to prevent them from becoming religious fanatics.[26]

Benda maintains that Hurgronje saw Islam as potentially a powerful religious or political force in Indonesia. His *receptie* theory therefore was a preventative measure. Unlike others, therefore, who have accused Hungronje of opposing Islam as a religion, Benda argues that the enemy perceived by Hungronje was not Islam the faith but Islam the political doctrine – one which could stir up local passions and lead to Pan-Islamism.[27]

Hazairin, for his part, was strongly opposed to Hurgronje's *receptie* theory, which he believed had been assimilated into the Indonesian legal system of the post-independence period. He saw the Dutch intention as an attempt to minimize the role of Islam at every level of society and administration, if not eliminate it completely.[28] This intention took the form of rules limiting the function of the Islamic courts, especially in cases of inheritance.[29]

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[26] Hamid al-Gadri, *Dutch Policy Against Islam and Indonesians of Arab Descent in Indonesia* (Jakarta: LP3ES, 1994), 102-10.

[27] Harry J. Benda, "Christian Snouck Hurgronje," 63-4. On Hurgronje's refutation of Pan-Islamism, see Hamid al-Gadri, *Dutch Policy Against Islam,* 82-110.

[28] Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1982), 7. Hazairin, "Negara Tanpa Penjara," in Hazairin, *Tujuh Serangkai Tentang Hukum* (Jakarta: Tintamas, 1974), 25-6. Yahya Harahap, "Praktek Hukum waris Tidak Pantas Membuat Generalisasi," in Iqbal Abdurrauf Saimima, ed., *Polemik Reaktualisasi Ajaran Islam* (Jakarta: Pustaka Panjimas, 1988), 126.

[29] The Islamic courts, according to Arifin, are based on the *devide et impera* (a slogan that is believed to prevent the unity of Indonesian society) of the Dutch government. Bustanul Arifin, *Perkembangan Hukum Islam di Indonesia* (Jakarta: Gema Insani Press, 1996), 48.

Hazairin remarks in one of his works that, especially in cases of inheritance, the influence of the *receptie* theory in Indonesian legal institutions is obvious:[30]

> Supporters of the reception theory pointed to the situation of the *adat* among Muslims, for example Muslims in Java, to whom Islamic inheritance rules were applied only if they went to an Islamic court, but who, if they divided an inheritance in the village, followed *adat* law. Look (said advocates of the reception theory): the *fara'id* law is not yet received by *adat* law and is therefore not the law that applies; therefore, Islamic courts must be separated from their jurisdiction over inheritance. And so there arose Islamic courts with competence only over *nikah*, *talak*, *rudjuk*, *mahar* and *wakaf*.[31]

According to Hazairin, Dutch policy aimed to arrest the development of Islamic law, by interfering with its application in such areas as inheritance. *Receptie* policy had declared Islamic inheritance law to be incompatible with *adat* law. Nor was it considered the positive law of Muslims themselves, so that the authority of the Islamic courts was accordingly limited. The authorities therefore considered themselves justified in removing inheritance from the competence of the Islamic courts.[32] Referring to *Stbl.* 1937: 116, Hazairin explains that the limitations placed on the Islamic courts in Indonesia in cases concerning *nikaḥ*, *ṭalāq* and *rujū'* increased the difficulty of giving judgements in the area of Islamic inheritance.[33]

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[30] Hazairin, *Hukum Kekeluargaan Nasional*, 8.

[31] Cited in Lev, *Islamic Courts in Indonesia*, 197.

[32] Hazairin, *Hukum Kekeluargaan Nasional*, 8-9.

[33] The regulation of the Dutch government which removed jurisdiction over inheritance from the Islamic courts was seen as politically motivated, and caused great distress among Muslims. Thus, the competence of Islamic courts in inheritance was regarded as a victory for Islam, in larger historical, social and political sense rather than merely a narrowly legal one. Lev, *Islamic Courts in Indonesia*, 198. See also the first chapter of this thesis.

Hazairin tried to replace Hurgronje's idea by advancing his own *receptie exit* theory,[34] referring to *receptie* itself as "*teori iblis*" (the devil's theory).[35] He invited Indonesians thus to "exit" Hurgronje's theory, on the grounds that it was contrary to the Constitution of 1945 (Undang-undang Dasar 1945) and the five principles which served as the basis of the Indonesian state (Pancasila), which clearly stated that Indonesian law should be based on religious belief.[36] Moreover, Hurgronje's theory, according to Hazairin, conflicted with the principles laid down in the Qur'ān and Sunna.[37] Undoubtedly, Hazairin was against Hurgronje's theories as representative of a colonist mentality and as part of legacy that should be jettisoned by an independent Indonesia; significantly he found an Islamic justification for doing it.

Furthermore, for Hazairin, the *receptie* theory only encouraged people to set themselves against the will of society.[38] He reasoned that *receptie* theory gave an opportunity to people to adopt *adat* practices that might be forbidden by religion.[39] If *receptie* theory was still a feature of the Indonesian legal system, Hazairin declared, this

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[34] Hazairin, *Tujuh Serangkai Tentang Hukum*, 95. Ichtijato, "Hukum Islam di Indonesia," 101.

[35] Hazairin, *Tujuh Serangkai Tentang Hukum*, 95. Sajuti Thalib. "Receptie in Complexu," 52; Deliar Noer, *Administration of Islam in Indonesia* (Ithaca: Cornell University Press, 1978), 47; Daniel S. Lev, *Islamic Courts in Indonesia*, 197. Hazairin tried to explain why he named it *teori iblis* or Satan theory by speaking ironically on behalf of *adat* as follows: "O Muslims, even though the Qur'ān prohibits the adultery on pain of criminal sanction, don't worry about committing adultery as long as by the *adat* of your society adultery is still a matter of choice..." Hazairin, *Hukum Kekeluargaan Nasional*, 6-9.

[36] Ictijanto, "Hukum Islam di Indonesia," 100, 128-31.

[37] Hazairin, *Hukum Kekeluargaan Nasional*, 9.

[38] Sajuti Thalib, "Receptie in Complexu," 52. Hazairin, *Hukum Kekeluargaan Nasional*, 8; Hazairin, *Tujuh Serangkai Tentang Hukum*, 95.

[39] Hazairin, *Hukum Kekeluargaan Nasional*, 8.

meant Indonesian Muslims were not comprehensively applying Islamic teachings.[40] Hazairin was then one of the first scholar to demonstrate systematically how Indonesia's legal structure was in large part, if not entirely, a legacy of the Dutch period.

Among the documents that Hazairin considered to be a rejection of *receptie* theory was the "Piagam Jakarta" (Jakarta Charter) of 22 June 1945.[41] Seven words in the Charter, for him, invalidated the effects of *receptie*: "*dengan kewajiban menjalankan syari'at Islam bagi pemeluknya*" (with the obligation to carry out *sharī'a* Islam for its adherents).[42] Moreover, he argued that the Constitution of 1945 contained Islamic elements which effectively over-rode *receptie* theory.[43] Indeed, Hazairin states, obedience to the 1945 Constitution is obedience to Islamic law.[44] A third document that Hazairin regarded as an "exit" from *receptie* theory in the area of inheritance was TAP MPRS No. II/1960, a decree passed by the People's Consultative Assembly as part of its eight- year plan.[45] Nevertheless, even with the above documents, a clean break from the effects of *receptie* theory had never actually been achieved, Hazairin claimed. What was

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[40] Hazairin, "Negara Tanpa Penjara," 43.

[41] Hazairin, *Hukum Kekeluargaan Nasional*, 10.

[42] The transliteration is taken from Saifuddin Anshari, "The Jakarta Charter of June 1945: A History of the Gentlemen's Agreement between the Islamic law and the Secular Nationalist in Modern Indonesia" (M.A. thesis, Institute of Islamic studies, McGill University, Montreal, 1976), 40.

[43] Lev, *Islamic Courts*, 198. Hazairin, *Hukum Kekeluargaan Nasional*, 10. Hazairin, *Demokrasi Pancasila* (Jakarta: Bina Aksara, 1983), 56-9. The elements of Islamic law that he is referring to we found in article 29 of the Constitution of 1945.

[44] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan No.1/1974* (Jakarta: Tintamas, 1986), 6.

[45] This plan had admonished the government to pay attention to religious factors in establishing the new family law, once the *receptie* theory had been discarded. Lev, *Islamic Courts in Indonesia*, 198.

needed to exit from *receptie* theory, he added was for Islamic law to be made binding upon Indonesian Muslims, both legally and institutionally, at the state level. Once Islamic law served as the positive law of all Indonesian Muslims, *receptie* theory would finally have been eliminated.

Hazairin's student, Sajuti Thalib (1929-) later developed Hazairin's ideas by putting forward a theory that he called *receptie a contrario.*[46] According to him, after independence, there was no excuse for Dutch laws to continue to encumber the Indonesian people. In accordance with the Pancasila and the constitution of 1945, religious law ought to be the law of the nation's indigenous peoples. According to his understanding, customary law should be applicable to Muslims only if it did not contradict the provisions of Islamic law.[47] Thalib's theory was supported by the realities of the development of Islam in Java, Aceh, and Minangkabau, where Islamic law was applied by people as the living law, and customary (*adat*) law only insofar as it accorded with the provisions of Islamic law.[48] As the name of the theory itself indicated, Thalib has turned Hurgronje's theory upside down.

The theories of Van den Berg, Hurgronje, Hazairin and Thalib all had in common perception of Islamic law as in some way playing the role of a positive law for all Indonesians. However, while Van den Berg was referring to a situation that actually

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[46] This theory is often erroneously attributed to Hazairin. Thalib merely developed it based on Hazairin's idea. Sajuti Thalib, *Receptio A Contrario: Hubungan Hukum Adat dengan Hukum Islam* (Jakarta: Bina Aksara, 1982), 70.

[47] Ichtijanto, "Hukum Islam di Indonesia," 132. Thalib, *Receptio A Contrario*, 47.

[48] Ictijanto, "Pengembangan Hukum Islam di Indonesia," 132-5.

existed, Hazairin and Thalib were making the case for its full implementation for Indonesian Muslims.[49]

One significant difference between Hazairin's and Van den Berg's theories lay in the areas of the law which ought to be applicable to Indonesian Muslims. For Hazairin, the answer was that all aspects of Islamic law, including inheritance should be included. Van den Berg seems to have been less dogmatic about this question, even though he was aware of the divergences in inheritance cases among Javanese Muslims. In view of this fact, the Islamic judicial authorities had been in the habit of throwing out inheritance cases, especially in Java, Madura and South Kalimantan, where the Islamic courts had been set up by the Dutch government.[50]

Although Hazairin fundamentally supported Islamic law, at other times he clearly acknowledged that *adat* was still a living force in society. This recognition is clearly shown in his opinion that *adat* law had the power to bind people together through the constitution. [51] The importance of *adat* law was proven by the fact that there were certain provisions of Islamic law which could not be applied because they seemed to run contrary to the *adat* of Indonesian Muslims. Thus it was recognized that it is difficult to apply Islamic law and to implement a system uniformly in such a way as to conform to *adat* law.[52] A striking example was the conflict over rules of inheritance.[53] Here,

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[49] Akh. Minhaji, "Ahmad Hassan and Islamic Legal Reform in Indonesia (1887-1958)" (Ph.D diss., Institute of Islamic Studies, McGill University, Montreal, 1997), 60.

[50] Arifin, *Perkembangan Hukum Islam,* 48.

[51] R. Soepomo, *Pertautan Peradilan Desa Kepada Gubernemen* (Djakarta: Bhratara, 1972), 10.

[52] See his explanation on this, Hazairin, *Hukum Kekeluargaan Nasional,* 7-9.

Hazairin was actually in partial agreement with Hugronje's theory that *adat* law played an important role in Indonesian society. [54]

This points up an inconsistency in Hazairin's thinking, for in advancing his *receptie exit* theory, he was tending to ignore that *adat* law in Indonesia had (and still has) a very important function. The conflict between *adat* law and Islamic law, as in the case of Minangkabau, can in fact be seen as a positive dynamic. Bousquet for one was moved to declare that *adat* law renders Indonesia one of the most remarkable of all countries.[55]

Hazairin and Thalib were clearly biased in their approach to *receptie* theory and *adat* law. Neither took the whole picture into account. They were ready to condemn Dutch attempts at law – seeing them as self-centered and wrong. And yet, while there were times that this was the case, it was nevertheless also true that it was often done for the purpose of giving Indonesian society a firm set of legal guidelines that reflected their tradition.

Thus, Hazairin and Thalib aimed to position Islamic law somewhere beyond *receptie* theory. Hazairin's goal of *receptie exit* theory was, therefore, to place Islamic law in a position of reconciliation, if not in superiority over *adat*. In other words, while he had no wish to dismiss *adat* law from the Indonesian legal system, his ideas show that in his eyes Islamic law could be reconciled with *adat* law. It was therefore merely his intention to end the impact of *receptie* theory, which according to him limited the

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[53] In a speech delivered in Bukit Tinggi in 4 and 5 May 1952 he explained that his main reason for reconciling Islamic and *adat* inheritance law in Minangkabau, was their apparent its incompatibility. See Hazairin, *Pergolakan Penjesuaian Adat Kepada Hukum Islam* (Djakarta: Bulan Bintang, 1952).

[54] Akh. Minhaji, "Ahmad Hassan and Islamic Legal Reform," 60-1.

[55] G. H. Bousquet, *Introduction a l'étude d l'islam Indonesien* (Paris: P. Guthner, 1938), 241.

application of Islam. In this way, Islamic law would have a chance to function as a positive law inasmuch as the majority of Indonesian Muslims would implement it.

It is fair, we think, to say that here that Hazairin benefited from Hurgronje's *receptie* theory in that it gave him a clear target in the form of *adat* authority. Hurgronje's conclusion, to some extent, must have motivated Hazairin to attempt to reconcile Islamic law and *adat* law. However, Hazairin's theories have not been universally accepted by Indonesian jurists, who are divided between those who support Islamic law and those who promote non - Islamic law or, as they call it, a national law. It is a debate that continues to this day.[56]

Among those who supported Hazairin's idea were Adnan and Mahfoeld, both leaders of the *penghulu* (judges in Islamic district court) association and prominent religious figures of Hazairin's day.[57] They argued that applying *adat* law in inheritance cases was damaging to the holy principle of succession, since according to *adat* law an illegitimate child or even an adopted child could inherit.[58] Worse still, the *adat* could not give equal legal status to all people, for nearly every district or ethnic group had its own *adat* laws, few of which were cognizant of contemporary societal conditions or in touch

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[56] Lev, *Islamic Courts in Indonesia*, 199. Again, the conflict represents the old struggle between Islam and *adat*, which, transposed to the present day, becomes struggle between Islam and "national" principles.

[57] Mohamad Atho Mudzhar, "Fatwa's of the Council of Indonesian 'Ulamā': a Study of Islamic Legal Thought in Indonesia, 1975-1988" (Ph.D. diss., University of California Los Angeles, 1990), 72.

[58] According to Islamic law illegitimate and adopted children do not inherit. See for example, Bernand Durand, *Droit musulman droit successoral: Farā'idh* (Paris: Librarie de la cour de cassation, 1991). See also Reuben Levy, *the Social Structure of Islam* (Cambridge: Cambridge University press, 1962), 147-149.

with political and economic realities.[59] Hence, the inheritance system had to be made more uniform.

Conversely, Ter Haar and his student Supomo, both proponents of *adat* law, argued that Islamic laws on inheritance could not even be applied in Indonesian society. According to them, these laws were originally drawn from Arab lands and had been little if at all, influenced by the local inheritance practices of Indonesians. Using a similar illustration as that proposed by Adnan and Mahfoeld, Ter Haar and Soepomo took the example of adopted children excluded from inheritance in Islamic law, and contrasted this with the fact that adoption with the right of inheritance is widely practiced in Muslim (Javanese) society.[60] Furthermore, those who favored *receptie* theory pointed out that Javanese Muslims referred to Islamic inheritance only if they went to the *priesterraad* (*maḥkama sharī'a* or Islamic court). However, whenever they faced issues beyond the court's authority they preferred the *adat* law to Islamic law. In this sense, the argument of Ter Haar and Supomo holds up, for the same pattern could be observed in many other regions. For example, the Batak (the people of North Sumatra) made it obligatory to include adopted children in inheritance, because they regarded them as their natural children and as the parent's full responsibility.[61] *Adat* laws were in fact deeply rooted and difficult to displace.

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[59] Lev, *Islamic Courts in Indonesia*, 22-3.

[60] M. B. Hooker, *Adat Law in Modern Indonesia* (Kuala Lumpur: East Asian Historical Monograph Oxford University Press, 1978), 104.

[61] J. C. Vergouwen, *The Social Organisation and Customary Law of the Toba Batak of Northern Sumatra* (The Hague: Martinus Nijhoff, 1964), 281.

Hazairin agreed with the argument put forward by Ter Haar and Supomo that Islamic laws on inheritance could not be implemented as they stood. First, Islamic law came from Arabia and had been formulated more than a thousand years previously.[62] Second, Indonesia was home to a great many social systems, some patrilineal, some matrilineal, and others bilateral (parental), patrilineal alternating or double unilateral.[63] Hazairin therefore stressed the need for a new set of laws in Indonesia that homogenized all the systems in existence. It may have been this consideration that inspired Hazairin to design his "bilateral system" as a means of bridging this gap.

## B. The Bilateral System

Before moving on to a discussion of Hazairin's ideas on the bilateral system it is necessary that we first provide a description of the Indonesian social system. What we will attempt to draw here is a general outline of the three most representative patterns, since discussing all the variations is impossible.

### 1. The Indonesian Social System

Given Indonesian's plethora of social systems and *adat* laws, we will limit our discussion to an account of a matrilineal, a patrilineal and a bilateral (parental) social structure and the characteristics of the *adat* laws that apply in each case. Our example of a matrilineal system is taken from the Minangkabau, where the female line of descent is preferred in matters of family authority and property. The patrilineal system is

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[62] Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 1974), 115.

[63] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith* (Jakarta: Tintamas: 1982), 1.

illustrated by the Batak, who favor the male line. Finally, there is the bilateral or parental system demonstrated in Javanese society, where no distinction is made between the male and female lines.[64]

The central genealogical group in the matrilineal family is formed by a mother and her children, whether sons or daughters, and then the children of the daughters alone.[65] The lineage descent is drawn from the female line. The father does not belong to the household; rather, it is the mother's uncle who is responsible as guardian and who generally runs the affairs of the system,[66] holding a position on behalf of but outside the family. In other words, the father does not belong to the family of his wife because he is an outsider, and in fact still belongs to his own mother. The same is true of his wife's father and his own father, in fact of any male related by marriage. Similarly, grandsons and so on are not taken into account, as members of the family, while the sons of a brother belonging to one's sister-in-law are included.[67]

Thus even after marriage the husband remains a part of his own kinship group, although as an individual component of the marriage he is admitted to association with his wife's family. He is, in fact, taken from his clan and brought to the household of his wife. He nevertheless frequently "goes back to this mother's house during the

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[64] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith,* 11-13. Daniel S. Lev, *Islamic Courts in Indonesia,* 91. Ter Haar, *Adat Law in Indonesia,* trans. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), 51.

[65] Hazairin, *Hendak Kemana Hukum Islam* (Jakarta: Tintamas, 1976), 6. See also Govindan Unny, *Kinship Systems in Southeast Asia: A Study* (New Delhi: Vikas Publishing House, 1994), 5.

[66] Unny, *Kinship System,* 5.

[67] Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam Dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984), 232.

daytime."[68] In contrast to the patriarchal pattern, where the women belong to the husband's family after a marriage, the women here remain within their own kinship group while the children belong to the mother's clan. Such is the situation among the Minangkabau and Kerinci.[69]

The family and social system is formed in clans or *sukus* (tribes). To preserve the matrilineal system, the marriage system is exogamous. Endogamous marriage within the same clan or *suku* is strictly forbidden. Consequently, marriage to cousins (whether cross-cousins or parallel-cousins) is avoided.[70] Those who engage in this kind of marriage are normally considered to be outside the family and social system.

Again, in keeping with the matrilineal system in force, inheritance is strictly limited to females.[71] Males inherit practically nothing at all. The heirs are ranged on one side of the lineage, that is, the mother's lineage system, which Syarifuddin refers to by the term "unilateral matrilineal."[72] This is because the property inherited is collectively transferred to the daughters or the nieces from the female side without its being divided

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[68] Ter Haar, *Adat Law in Indonesia*, 175. Unny, *Kinship System*, 16.

[69] The Minangkabau people are situated mainly on the West Coast of Sumatra, while the Kerinci are situated in the south part of Sumatra. Syarifuddin remarks that the word Minangkabau refers to a socio-cultural system rather than a specific region. Syarifuddin, *Pelaksanaan Hukum,* 122. Ter Haar, *Adat Law*, 168.

[70] A cousin is a relative descended from an uncle or aunt whether from the same grandfather or not. Cross-cousins are relatives when the mother of one and the father of the other are not in the same line of descendant. They have different grandparents. Parallel cousins are relatives when either their fathers or their mothers are in one line of descendants. Hazairin, *Hendak Kemana Hukum Islam,* 4-5. This ban is similar to the case within the patrilineal system of Arab society, which prohibits marriage within the *'uṣba* (clan), Hazairin, *Hendak kemana Hukum Islam*, 12.

[71] Govindan, *Kinship System,* 3 and 19.

[72] In this system, the descendant is traced along the female side. Amir Syarifuddin, *Pelaksanaan Hukum,* 21.

into smaller shares. The females benefit the estate on behalf of family members, an arrangement which emphasizes collectivism rather than individualism. Thus women are considered as the sole eligible heirs, reflecting a social system where women are at the center of the matrilineal structure. If a family does not have any female members, this can lead to a breakdown in its structure. [73]

In patrilineal society, the immediate genealogical unit generally consists of a father, sons, uncles and uncles' son.[74] The family lives within the society, inhabits its own territory,[75] and seems to distinguish itself from one sub-clan to another. In contrast to the matrilineal system, the patrilineal system operates along the male side. However, the system of marriage and inheritance, like that of the matrilineal system, is unilateral.

As in the matrilineal system, marriage in the patrilineal system is exogamous, a system which ter Haar calls "asymmetrical marriage."[76] Marriage to a woman or man within the clan or *marga* is considered marriage to a cousin, which is forbidden. Women and children furthermore belong to the husband's clan. The woman's tribe, after marriage, lies outside her own family and society.

Hence, inheritance in such a system is limited to the male side, whence the description "unilateral patrilineal." Women are not entitled to inherit any of the

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[73] For more information on the Minangkabau inheritance system see for example, Franz Von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationship through Time in Minangkabau, West Sumatera* (The Hague: Martinus Nijhoff, 1979). Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung 1984).

[74] J. C. Vergouwen, *The Social Organisation and Customary Law of the Toba Batak of Northern Sumatra* (The Hague: Martinus Nijhoff, 1964), 21.

[75] Ter Haar, *Adat Law*, 65.

[76] Ter Haar, *Adat Law*, 65.

deceased's property.[77] The transmission of the property is here again collective, rather than individual.[78] As in the matrilineal system, the system operates on behalf of the whole family and their interests. Its most important feature is perhaps that it maintains the patrilineal system within the family and society. The outstanding example of a patrilineal system at work in Indonesia is that of Batak society.[79]

The male is the center of the family system. A family without son(s) is considered to be on the point of collapse; hence, sons are considered essential. Where there are no sons the family may adopt male children as substitutes, who acquire the same rights and responsibilities as true sons do. Accordingly, an adopted son inherits the estate of the father who adopted him.[80]

The bilateral system, which is largely observed by the Javanese and Dayak people,[81] recognizes descent from both sides -- female and male, mother and father. The system of marriage may be either endogamous or exogamous. Because the family

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[77] By and large, the fact is that the distinctive characteristic of *adat* law is the exclusion of women from inheriting the deceased's property. This is true of many developing Muslim countries, especially patrilineal ones. J. Schacht, "*Mirāth*," in C. E. Bosworth, E.Van Donzel, W. P. Heinrichs, ed., *Encyclopaedia of Islam,* vol. VII (Leiden: E.J. Brill, 1993), 111.

[78] For a further account of the Batak inheritance system see, for example; Herman Slaats and Karen Portier, *Traditional Decision-Making and Law: Institutions and Processes in an Indonesian Context* (Yogyakarta: Gadjahmada University Press, 1992); J. C. Vergouwen *The Social Organisation and Customary Law of the Toba-Batak of Northern Sumatra* (The Hague: Martinus Nijhoff, 1964).

[79] The Batak people dwell for the most part in the north of Sumatra island. Other societies with a patrilineal system include the Gayo and the Alas in Aceh, Ambon, Irian Barat, Timor and Bali in Eastern part of Indonesia.

[80] Koentjaraningrat, *Beberapa Metode Anthropologi Dalam Penjelidikan Masjarakat Dan Kebudajaan di Indonesia* (Djakarta: Penerbitan Universitas, 1958), 129; Vergouwen, *The Social Organization*, 281.

[81] The Javanese live mainly in the central and eastern regions of the island of Java. The Dayak people inhabit the western region of Kalimantan Island.

system does not form part of a clan or tribal system, marriage does not affect its structure. Indeed, marriage to cousins is not forbidden in bilateral society.

As far as inheritance is concerned, both sons and daughters inherit from either parent. If someone dies before his or her parents that person's children can inherit in his or her stead. This is also the case in matrilineal and patrilineal society (the Batak and Minangkabau), but the transmission of substitution in these cases follows the gender line, i.e., male or female only.

Unlike in patrilineal and matrilineal systems, where the estate is transmitted collectively, the bilateral system of the Javanese recognizes only individual inheritance. In the former the question of rights and portions does not arise, whereas in the latter the heirs who are entitled to inherit must be determined, and the estate's apportionment agreed upon by family members.

In matrilineal society, the male occupies a subordinate position, with the paternal or agnatic relationship lying outside the tribal system of the society. In patrilineal society by contrast, women find themselves in an inferior position. The maternal or uterine relationship rests outside the structure of tribal ties and responsibilities. Under these circumstances the exploitation and preservation of the position meant, *inter alia,* the exclusion of the female or male relative from inheritance and the enjoyment of a monopoly of rights of succession.

2. Hazairin's Bilateral System

Hazairin's bilateral system is based on the concept of a "bilateral system" in family and inheritance law. These laws represent something of an enigma within Indonesian

society. His vision of a bilateral system was that the resulting Islamic law would be a combination of "divine law" and "local culture." It is within this framework that Hazairin sets forth his "bilateral system," since it represents the "divine message of the Qur'ān and the Sunna,"[82] on the one hand, and the needs of current Indonesian society, so rich in *adat* and culture, on the other.

Islamic law or *fiqh*,[83] in Hazairin's case the Shāfi'ī *madhhab*, in particular, had been formulated centuries earlier in the central Islamic lands and for a patrilineal society.[84] There was little knowledge available at the time to help the (classical) *mujtahids*

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[82] The word Sunna in this context has the same meaning as *ḥadīth* in that it represents the body of legal notions handed down from the Prophet.

[83] Islamic law or *fiqh*, according to Hazairin, is human thought about man's relationship with God, his fellow humans, creatures, and even things. This thought leads to the creation of norms. These can be arrived at through interpretive methods, that is, *uṣūl al-fiqh*. Hence Hazairin maintains that Islamic law is a human intellectual output. Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith* (Jakarta: Tintamas, 1982), 61. Hazairin's theoretical *uṣul al-fiqh* relies heavily on *ijtihād* to achieve *maṣlaḥa*, and tries to cultivate a sense of ethics and justice. However, Hazairin affirms that one should consider the Qur'ān and the Sunna as the principal sources of Islamic law; Hazairin, "Hukum Baru di Indonesia," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 104. Hazairin, "Muhammad dan Hukum," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 69.

[84] What he meant by Islamic law in this case is the Islamic law that came to and spread throughout Indonesia by way of the writings of previous legal scholars, especially those of the four monumental legal schools (*madhhabs*) and Shi'i as well. Of the four legal schools (Malikite, Hanafite, Hanbalite and Shāfi'ite), it is the Shafi'ites who are dominant in Indonesia. Hazairin, "Hukum Baru di Indonesia," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 104. Hazairin maintains that the Shāfi'ī *madhhab* is ideal for Indonesians but should be reformed in order to fit Indonesian needs. Hazairin, *Hukum Islam dan Masjarakat* (Djakarta: Bulan Bintang, 1960), 16. The historical record shows us, however, that Indonesian Islam owed its predominance to the fact that it was popular in the Coromandel and Malabar Coasts. Drewes, "Indonesia: Mysticism and Activism," 287. According to Abbas, the teachings of the Shāfi'ī school have predominated since the coming of Islam to the region. Siradjuddin Abbas, *Sejarah dan Keagungan Madzhab Syafi'i* (Jakarta: Pustaka Tarbiyah, 1994), 239-47. Siradjuddin Abbas, *40 Masalah Agama*, vol. 1 (Jakarta: Pustaka Tarbiyah, 1980-1981), 8-9.

compare the Arab family structure and inheritance system with those other societies.[85] Social anthropology only emerged as a discipline in the 19th century; therefore, according to Hazairin the "bilateral system" inherent in the Qur'ān would have been interpreted by the classical *mujtahid*s as a patrilineal system.

Powers notes that the science of Islamic inheritance or *'ilm al-farā'iḍ* (science of the shares) was produced by Muslim scholars living at the end of the first century A. H. Muslim scholars applied their hermeneutic skills to several Qur'ānic verses and Prophetic *ḥadīth*s on inheritance.[86] Since that time, however, Islamic inheritance has interacted with local ideas, customs, norms, and processes relating to the intergenerational transmission of property. Islamic inheritance may have emerged from Islamic legal doctrine, but Muslim scholars have achieved their desired goals in formulating it.[87]

When Islamic inheritance law came to be applied in Indonesian society, those deciding the cases were faced with the powerful influence of *adat* laws. Indonesian

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[85] Hazairin then adds that this kind of interpretation is a deviation, since the intention of the Qur'ān was to change Arab society. Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 75.

[86] David S. Powers, "The Islamic Inheritance System," *Islamic Law and Society* 5/3 (1998), 285.

[87] On the Inheritance system and the influence of local custom, see for example David S. Powers, "The Art of the Judicial Opinion: On Tawlīj in Fifteenth –Century Tunis," *Islamic Law and Society* 5/3 (1998), 359-381. See also Franz von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property relationships Through Time in Minangkabau, West Sumatra* (The Hague: Martinus Nijhoff, 1979). Another tension between the Islamic inheritance rules and local social process of inheritance system is analyzed by John R. Bowen "You May Not Give it Away: How Social Norms shape Islamic Law in Contemporary Indonesian Jurisprudence," *Islamic Law and Society* 5/3 (1998), 382-408.

society is, after all, known to hold very strongly to *adat*.[88] In other words, Islamic inheritance rules were not fully accepted. One other reason for the difficulty may have been the terms under which Islam spread in Indonesia, which did not give much weight to *shari'a* based interpretations of the family and the inheritance system.[89] As a result, cases of inheritance became increasingly complicated for Muslims in Indonesia.[90] Even today, in cases of inheritance, there is still considerable doubt as to where *adat* law ends and Islamic law begins.

In such circumstances, according to Hazairin, human beings had to exercise their own judgement to determine the appropriate course of action in applying Islamic law.[91] This inevitably involved *ijtihād*, of which Hazairin was a staunch advocate. Supporting

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[88] It is understandable that Indonesian Muslims should adhere so strongly to *adat* and older traditions. Since it was through *taṣawwuf* that local people were first converted to Islam. Even the new teachings were given new meaning and importance. Howard M. Federspiel, *Persatuan Islam: Islamic Reform in Twentieth Century Indonesia* (Ithaca: Cornell Modern Indonesia Project, 1994), 2; Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942* (Singapore: Oxford University Press, 1973), 12; Benda, *The Crescent and the Rising Sun*, 12; William R. Roff, "Southeast Asian Islam in the Nineteenth Century," in P. M. Holt, Ann K. S. Lambton, and Bernard Lewis, eds., *the Cambridge History of Islam*, vol. 2. (Cambridge: Cambridge University Press, 1970), 155-6.

[89] The *Sharī'a* (Islamic law) is believed to have had less influence in the spread of Islam in Indonesia, so it makes little sense to argue that Islamic inheritance law is commonly accepted there. Cf. G. W. J. Drewes, "Indonesia: Mysticism and Activism," in G. E. von Grunebaum, ed., *Unity and Variety in Muslim Civilization* (Chicago: University of Chicago, 1955).

[90] Lev observes that inheritance laws in Indonesia are confusing and have invited "intricate and lively debate among legal professional and political activists." Lev, *Islamic Courts in Indonesia*, 185. Current research shows that inheritance cases are still resolved in different ways. Some apply the rules of Islamic inheritance, while some apply the rules of *adat* inheritance. In many cases people mix Islamic and *adat* practices. For example, see the research in *Laporan Hasil Penelitian Tentang Pelaksanaan Pewarisan di Kalangan Orang-orang Islam di Beberapa Daerah di Jawa Tengah* (Semarang: Lembaga Penelitian, Pengembangan dan Pengabdian Masyarakat IAIN Walisongo, 1982/1983); see also Institut Agama Islam Negeri Sumatera Utara, *Laporan Study Kasus Hegemonitas Keluarga dan Keragaman Beragama dalam Masyarakat Batak Karo* (Jakarta: Proyek Kerukunan Hidup Beragama, Depag RI, 1980).

[91] Hazairin, *Hendak Kemana Hukum Islam*, 18.

what he called neo-*ijtihād*, he believed that the notion that the gate of *ijtihād* has opened wide arose because people had lost their trust in the mercy of God or "*rahmat Allah*":[92]

> In the twentieth century people do not consider certain human beings as having super powers allowing them to act as God; therefore they regard other *mujtahids* (as human beings). The value of their work is equal to what they have done, in the same way in accordance with the time. As long as people believe that the spirit is alive and trust that the mercy of God is never withheld, accordingly we have the right to trust that a new gate for new *mujtahids* is certainly open.[93]

*Ijtihād* as an interpretive method was becoming the preferred means to revise Islamic traditionalist thought in the light of changing circumstances. Consequently, Hazairin determined that *mujtahids* in Indonesia were needed to meet the demand of *neo-ijtihad.* A new class of *mujtahids* could be created through Islamic educational reform based on the teachings of the Qur'ān.[94] Islamic institutions could produce *mujtahids* able to interpret the Qur'ān and *ḥadīth* in accordance with the needs of society.[95] In this respect Hazairin held a view about the formulation of new laws much different than those of modernist reformers since he saw society as the primary institution to be served while

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[92] Hazairin, *Hukum Islam dan Masyarakat* (Jakarta: Bulan Bintang, 1960), 16. See also, Hazairin, "Ilmu Pengetahuan Islam dan Mayarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum,* 115.

[93] Hazairin, *Hukum Islam dan Masyarakat,* 16. Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," 115.

[94] Hazairin, *Hukum Islam dan Masjarakat,* 18-20. Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum,* 109-20. He was convinced that reform through the efforts of the *mujtahids* depended in the first place on educational improvement. That is why he embarked on establishing an Islamic University.

[95] Hazairin, *Hukum Islam dan Masyarakat,* 17-9. See also his *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith,* 61. Nur Ahmad Fadhil Lubis, "Islamic Legal Literature and Substantive law in Indonesia," *Studia Islamika,* 4: 3 (1997), 54.

most other reformers were interested simply in applying Islamic law. It was a matter of approach.

Despite the fact that *ijtihād* has had a problematic history,[96] Hazairin sought to institutionalize it so that new *mujtahids* would be qualified not only in religious knowledge but in modern science as well. This was in order that *ijtihād* should be able to answers the needs of contemporary society. Hazairin argued that performing *ijtihād* was a social responsibility [97]-- in this he anticipated Hallaq's definition of *ijtihād* as "a religious duty (*farḍ kifāya*) incumbent upon all qualified jurists whenever a new case should appear."[98]

Hazairin offered a socio-anthropological interpretation of the Qur'ān aimed at showing its compatibility with society's needs. He insisted that Islam, as a body of teaching, has not as yet been finalized or made definitive. Islam is constantly open to reinterpretation in accordance with new demands and developments. He came to the conclusion that Qur'ānic laws may be applied in any part of the world, as long as one does not rely on *taqlīd*[99] with respect to the classical '*ulamā'* who had conducted their

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[96] The problem of the gate of *ijtihād* has been intensely discussed to this day by scholars. Hallaq, for example, has discussed this in "The Gate of Ijtihād: A Study in Islamic Legal History" (Ph.D. diss., University of Washington, 1983). See also Wael B. Hallaq, "Was the Gate of *Ijtihād* Closed?'" *International Journal of Middle East Studies* 16 (1984): 3-41.Hallaq's contribution to the debate is analyzed in Michel Hoebink's *Two Halves of the Same Truth: Schacht, Hallaq and the Gate of Ijtihad an Inquiry into Definition into Definition* (Amstersdam: MERA, Middle East Research Associates, 1994).

[97] Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum*, 115-116.

[98] Hallaq, "Was the Gate of *Ijtihād* Closed?," 5.

[99] *Taqlīd* means to depend on the legal interpretations of recognized scholars without oneself examining the process by which that interpretation was reached.

*ijtihād* more than a thousand years ago. According to Hazairin we should conduct our own *ijtihād* of the Qur'ān and *ḥadīth* in a manner compatible with current social conditions and in accordance with justice.

Hazairin simply took upon himself the task of exercising *ijtihād* in an effort to develop "bilateral system," which he admitted to be the product of his "personal *ijtihād*." The system that he proposed was one that he considered ideal for any family and society, although he may have been drawing on some Indonesian models. The consequence of a bilateral system, he realized, would be nothing less than the collapse of the clan system in Indonesia. Since the system would completely transform the family and social system of Indonesian society by making it into one, uniform system. Hazairin referred to it as a "*revolusi sosial.*"

The "bilateral system" would be acceptable for several reasons in his eyes. First, it would not be opposed to any religious law. Here, regrettably, Hazairin did not explain how and why this would have been the case. Second, the system was in accordance with what the Qur'ān intended. The Qur'ān, he insisted, is "anti-unilateral society" and preferred a bilateral system of society. Basing himself on the verses in the Qur'ān concerning marriage and inheritance,[100] Hazairin concluded that *adat* practices in marriage and inheritance among Indonesians that were unilateral in nature, were non-Qur'ānic.[101] Hazairin remarks, "I am sure that the Qur'ān only blesses societies which are bilateral."[102]

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[100] In defining inheritance, one cannot escape the question of marriage law, for inheritance rests upon the two principal grounds of marriage and blood relationship. N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 10.

[101] Hazairin, *Hendak Kemana Hukum Islam*, 12-3.

Third, the system would lead to the disappearance of clans, and all that this would entail.[103] Hazairin's training in *adat* law led him to the conclusion that external factors, such as modernization and urbanization, would change society from a "non-bilateral" into a "bilateral society." He predicted that women would favor the bilateral system at an early stage in their emancipation. This would also lead to gender equality in family and social systems, and consequently equal inheritance rights for the male and female lines. Hazairin saw social change as hastening this adoption of a bilateral system and concluded that Islam supported it.[104] Hazairin embraced this process as a leading motivation behind achieving the Qur'ānic goal of unifying society in a "bilateral system."

Basing himself further on a method of understanding the Qur'ān which he defined as "*tafsir yang otentik*" (authentic interpretation)[105] -- i.e., the interpretation of the Qur'ān using modern science -- Hazairin used a socio-anthropological approach he had developed himself. He concluded that the system favored by the Qur'ān is *bilateral sui generis.*[106] This meant a "bilateral system unique to the Qur'ān," not the bilateral system currently in existence.[107] Accordingly, Hazairin interpreted the marriage and

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[102] Hazairin, *Hukum Kekeluargaan Nasional,* 5.

[103] Hazairin, *Hukum Kewarisan Bilateral menurut al-Qur'an dan Hadith,* 1; Hazairin, *Hukum Kekeluargaan Nasional,* 4; Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 18-19.

[104] Lev, interview by author, 13 May 1999, Montreal, tape recording, Quality Hotel, Montreal.

[105] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith,* 3 and 63.

[106] Hazairin, *Hendak Kemana Hukum Islam,* 14. Anwar Harjono, "Hukum Kewarisan Bilateral menurut al-Qur'an: Komentar Singkat Atas teori Prof. Hazairin," in Sajuti Thalib, *Pembaharuan Hukum Islam,* 67.

inheritance verses of the Qur'ānic as a unit. The result was that every interpretation of the marriage verses was linked to the inheritance verses.[108]

Hence, the traditional interpretations of the Qur'ān were not to be taken as binding upon modern Muslim societies. Hazairin offered a new interpretation of the social system which he believed was intended by the Qur'ān. The concept of "bilateralism" needed to be explained in exegetical terms which transformed it into social practice. The verses treating specifically of marriage and inheritance are IV: 23 and 24, IV: 11, 12 and 176.[109] Hazairin, for example, considered verse IV: 23: "Prohibited to you (for marriage) are your mothers, daughters, sisters; father's sisters, mother's sister...except for what is past, for Allah is Oft-Forgiving, Most Merciful," and verse IV: 24: "Also prohibited are women already married, except those whom your right hands possess, thus that Allah ordained (prohibitions) against you: except for these, all others are lawful..." For Hazairin, these verses had no resemblance to the marriage system then being practiced in Indonesian Muslim society. For instance, the phrase from verse IV: 24 ..."except for these, all others are lawful"[110] (*wa uḥilla lakum mā warā'a dhalikum*) indicates that marriage to cross-cousins and parallel-cousins is not forbidden. The Qur'ān thus

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[107] For example, the bilateral system of inheritance among the Javanese, according to Hazairin, does not entirely reflect the Qur'ānic version for in some cases women are excluded from marriage and inheritance cases. As a clear illustration of this witness the marriage known as *maggih koyo* (a practice of polygamy), in which the second and the next wife are not considered as a part of the family and do not have rights to their husband's property. Hazairin, *Hukum Islam dan Masyarakat,* 17.

[108] Since inheritance is so closely linked to marriage practice, any discourse on one topic must consider the other. Inheritance is rooted in the family system, and the family system is rooted from the marriage system, and both will influence the social system. Hazairin, *Hendak Kemana Hukum Islam,* 14.

[109] All translations of the Qur'ān verses in this thesis are taken from 'Abdullah Yūsuf 'Alī, *The Meaning of the Holy Qur'ān* (Brentwood: Amana Corporation, 1994).

challenges the marriage system of unilateral society, whether patrilineal such as among the Batak, or matrilineal as among the Minangkabau, with their prohibition on marriage between cousins.

Hazairin furthermore argued that there is no abrogation[111] in the Qur'ān. Accordingly, all verses in the Qur'ān should be taken as guidance.[112] The Qur'ān should moreover be understood to be comprehensive, and all its parts interrelated. Basing himself on this notion, Hazairin maintained that the idea of abrogation is rejected by the Qur'ān itself. The Qur'ān III: 7; II: 85; and IV: 82 are, according to Hazairin, verses that reject the idea of abrogation.[113] There is not a single verse that is abrogated by the another verse.

*Ḥadīth*s function as a supplement to the Qur'ān and are therefore indispensable to the Qur'ān's interpretation. Hazairin believed that *ḥadīth*s do not contradict the Qur'ān and that the inheritance *ḥadīth*s should be interpreted in concert with the Qur'ān, even if this had not always been the case. *Mujtahid*s in classical times evaluated *ḥadīth*s on the

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[110] "Except for these" means except for all women who are forbidden to marry.

[111] Abrogation represents the term *naskh* in Arabic. One use of this term is as a technical term used by Islamic scholar to designate a variety of alleged 'phenomena' discussed in the area science of *uṣūl al-fiqh*. The 'phenomena' had a general basis in the concept of replacement earlier sources by the latter sources. The term *naskh* does not only denote a single theory concerned with problems of Qur'ān but also of *ḥadīth*. The implications for the operation are three. First is replacement the *ḥukm* (legal consequences) and the text. Second is replacement the *ḥukm* only and third is replacement the text only. The result is the abrogated (earlier sources) is no longer valid. For detailed information see, Abū 'Ubaid al-Qāsim bin al-Sallām, *Kitāb al-Nāsikh wa al-Mansūkh*, trans. E. J. W. Gibb Memorial, ed. John Burton (England: E.J.W. Gibb Memorial Trust, 1987), 1-42. See also Ibn al-Qaṣṣār, *al-Muqaddima fī al-'Uṣūl* (Beirut: Dār al-Gharb al-Islāmī, 1996)

[112] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 63.

[113] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 63 and 86-7.

basis of their *isnād* (chain of transmitters) rather than on their *matn* (the content of the text). While the *matn*, according to Hazairin, conveys no absolute meaning, it is often interpreted without regard for the contextual meaning of the Qur'ānic verses, and often with a patrilineal bias.[114]

Of course Hazairin still recognized that certain verses on inheritance appear to argue for a "less than gender-equal social system," given that they stipulate double the share for males as compared to females. But even here he sees extenuating circumstances that need reinterpretation. Much of his detailed analysis of the issue pertains to cases of inheritance involving such issues as '*aṣaba* (agnatic relative), *kalāla* and orphaned grandchildren,[115] for these three issues are directly related to the problem of the Islamic and *adat* inheritance laws of Indonesian society.

Hazairin attempted to create a new and solid system, which differed from the traditional one. He discarded the tradition of applying *naṣṣ* (legal basis from either Qur'ān or *ḥadīth*) to practical cases, and grounded them in considerations of socio-cultural benefit. This practice, according to him, would be guided by "*tambal-sulam*" (providential) activity.[116] He thereby proposed an argument combining empirical reality with Islamic values.

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[114] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 75. Hazairin's argument here is about the *ḥadīth* of Ibn 'Abbās on '*aṣaba* (agnatic relatives). This is will be examined more closely in the third chapter of this thesis.

[115] These analyses will be explained in chapter three of this thesis.

[116] John R. Bowen, "Qur'ān, Justice, Gender: Internal Debates in Indonesian Islamic Jurisprudence," *History of Religions* 38/1 (1998), 69. *Tambal sulam* activity here, according to Hazairin may be defined as an activity of interpretation of the Qur'ān relating to social conditions and vise-versa.

Distancing himself from classical interpretations of the Qur'ānic inheritance verses, Hazairin advanced his own interpretation on the basis of a semantical approach[117] and the verses as the basis for reconstructing what he called "the bilateral inheritance system according to the Qur'ān and *ḥadīth*."[118] He also developed a detailed analysis of "replacement heirs," people who are linked to an eligible heir who dies before they do. In various Indonesian societies, according to Hazairin, should someone who ought have inherited die prior to doing so, his/her descendants would receive his/her share.

He argued that the bilateral inheritance system operated on general and universal principles, most notably the principle that both females and males inherit property, and that daughters and sons have equal rights to the property of their parents.[119] Hazairin is believed to have been the first legal authority to put forward an Indonesian "sense of justice" (*rasa keadilan*) and ethics, particularly with respect to the gender bias in the transmission of property and within the discussion on Indonesian *maṣlaḥa* in Islamic reform.[120]

In addition to the Qur'ān and those provisions of the *ḥadīth* pertaining to the theory of bilateralism, Hazairin recognized the need to use *qiyās* (analogy). He drew his own

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[117] His argument relates to IV: 176 where the word *kalāla* figures. See Al-Yasa wrote that in *uṣul al-fiqh* there are three categories for interpreting the names (*al-asmā*). First, *ḥaml* (a belief that this is what God intends); *isti'mal* (based on the tradition of the Arab society during the Prophet time), *waḍ* (semantic analysis). Hazairin, al-Yasa adds, put himself in a position of al *ḥaml* and *al waḍ*. Abu Bakar al-Yasa, "Hukum Waris Sepertalian Darah: Kajian Perbandingan terhadap Penalaran Hazairin dan Penalaran *Fiqh* Madhhab" (PhD. Diss., IAIN Sunan Kalijaga, Yogyakarta, 1989), xvi.

[118] This prominent idea is expressed in his book *Kewarisan Bilateral Menurut Qur'an dan Hadith*.

[119] Hazairin, *Hukum Kekeluargaan Nasional*, 4.

[120] Bowen, "Qur'ān, Justice, Gender," 68.

analogy between what the classical *mujtahids* did in the past and what *mujtahids* had to do today. If classical *mujtahids* performed *ijtihād* according to the needs of their society, then modern-day *mujtahids* are entitled to perform *ijtihād* in the same way, as long as *maṣlaḥa*, ethics and justice are taken into consideration.[121]

Hazairin also saw the relationship between law and social change a dynamic one. He believed that, when times change, the law must also change. Hazairin's conclusions anticipated June Collier's assertion that: "at the same time that we attempt to analyze other societies, however, we must examine our own. As thinkers, we are products of our time and situation...."[122] In its historical development, Islamic law alone recognized this dialectic whereby the law changes and adapts to time and place (*ṣāliḥ li-kulli zamān wa-makān*).[123]

Thus, Hazairin tried to reform not only Indonesian *adat* inheritance rules but Islamic inheritance law as well. In addition to introducing uniformity into *adat* inheritance systems on the one hand, he wanted to reform on the other, certain aspects of the classical Islamic inheritance system by reinterpreting the Qur'ān. As a matter of fact,

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[121] Hazairin, *Hukum Islam dan Masjarakat, 14-5.*

[122] June Collier, "Legal Process," *Annual Review of Anthropology* 4 (1975), 135-6.

[123] Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997), 248. Flexibility is valued in Islam itself, the early scholars recognized it through *qā'ida* by way of " *al-'ādah al-muḥākama*" or "*Mughayyiruh al-ḥukm tataghayyur al 'azminah wa al-amkina.*" Shāfi'ī himself had two sets of opinions, *qaul qadīm* and *qaul jadīd*, reflecting the influence of different places and times, the former when he was in Baghdad and the latter when he was in Egypt. This was commonplace among the classical '*ulamā*'. N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), viii; N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 20-5.

some recent studies point to similar moves in this direction, such as Kimber's "The Qur'ānic Law of Inheritance"[124] and Carrol's "Orphaned Grandchildren."[125]

It is easy to see that his formal training as a professor of *adat* law had a great impact on his mode of analysis, and that it caused him to read the Qur'ān and the Sunna in a new light. He also drew heavily on the social sciences, particularly *adat* law and ethnology. His analysis then was a unique interpretation of the Qur'ān and the *ḥadīth* in particular, and of law as a comprehensive system in general. Although Hazairin humbly claimed that his work was no more than a contemporary reading of the Qur'ān, being in no way an exegetical or a legal work, his thought reflects considerable depth and range, and stands apart from other modern treatments of the subject.

Hazairin's approach is to some extent similar to that of the Syrian scholar Muḥammad Shaḥrūr. In this context it is useful to consider Hallaq's comments on similar issues and on Shaḥrūr's approach to the interpretation of the Qur'ān in particular.[126] Shaḥrūr, according to Hallaq, takes an approach which consists in a "re-reading" of the Qur'ān and the Sunna based on modern and natural sciences.[127] Shaḥrūr,

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[124] Richard Kimber, "The Qur'ānic Law of Inheritance," *Islamic Law and Society* 5 (1988), 291-325. Here Kimber proposes a new interpretation of the relevant texts and examines the inheritance system in the light of its classical interpretation.

[125] Lucy Carrol, "Orpahned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan," *Islamic Law and Society* 5 (1988), 409-47.

[126] In *A History of Islamic Legal Theories* Hallaq has noted Shaḥrūr's notion of using modern sciences in approaching Islam; see especially pages 245-54 and 259 of this book.

[127] Hallaq, *A History of Islamic Legal Theories,* 246.

an engineer specializing in mathematics and physics, bases his interpretation on a "contemporary reading" of the Qur'ān as an exegetical or a legal work.[128]

In this context, both Shaḥrūr and Hazairin utilize modern science to interpret the Qur'ān and the Sunna. Although coming from different backgrounds -- Shaḥrūr being a trained engineer ad Hazairin an ethnologist and legal scholar -- they both saw the need to undertake a re-reading of the Qur'ān and the Sunna, which Hazairin accomplished through his *tafsir yang otentik* (authentic interpretation), and Shaḥrūr through his "contemporary reading."

From a social anthropological perspective, Hazairin's approach may be considered valid. There is after all a close correlation between anthropology and law. Since we need to understand the relationship between society and legal development, it is helpful to view the legal problem from this perspective. Social anthropology tries to understand many aspects of social life-- culture, religion, traditions, etc. In a complex society like Indonesia, of course, pluralism is based on several *adat* legal systems and on the legal relationships of numerous groups that comprise a polyethnic, or multi-interest social system. Social anthropology can therefore open windows for those seeking to understand the evolution of a society in terms of its legal institutions.[129] Hazairin's socio-anthropological approach to Islamic legal reform seems to be set against this background.[130]

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[128] Hallaq, *A History of Islamic Legal Theories,* 246; see also Muhammad Shaḥrūr, *al-Kitāb wa al-Qur'ān: Qirā'a Mua'ṣṣira* (Cairo and Damascus: Sīnā li al-Nashr, 1992), 45.
[129] Hazairin, *Hendak Kemana Hukum Islam,* 3.

[130] Socio-anthropological and ethnographical approaches towards legal discourse have often been adopted. Rene R. Gadacz, *Towards an Anthropology of Law in Complex Society: An Analysis of Critical Concepts* (Alberta: Western Publishers, 1982). Many scholars maintain that reform is based on a recognition of the *sharī'a* itself, fashioned from the raw material of local

Hazairin claimed that when the Islamic law of the classical '*ulamā'* is applied in a certain society there is no guarantee that it will fit, since each society has its own culture. *Adat* law, as a product of that culture, is therefore certain to have an influence on the provisions arrived at so long ago by these *'ulamā'*. This can be seen from the development of Islamic inheritance law, which was itself influenced by pre-Islamic Arab practices.[131] If this theory is valid, it demonstrates that the Islamic law contained in the Qur'ān is flexible enough to be interpreted in any society. The interpretation of the Qur'ān as a divine law must meet the needs and reflect the culture of a society. Thus, Hazairin's interpretation of the Qur'ān showed how the Qur'ān can be interpreted as long as there is no deviation from the Qur'ān itself.[132]

Hazairin, furthermore, was fully aware of Indonesia's social problems and the values inherent within its different cultures. He saw these problems as being rooted in the confusion over the respective applications of *adat* law. Hazairin therefore took both Islamic and *adat* legal values into consideration. He saw it as important to begin any social engineering with legal reform. He tried to develop a hypothesis on the basis of a comparison of Indonesian and Arab social conditions, given that Islamic law had first

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necessity and administrative practice, systemized and Islamized by the work of early jurists. See for example, Norman Anderson, *Law Reform in the Muslim World* (London: The Athlone Press, 1976), 86.

[131] The system of '*aṣaba* in Islamic inheritance law, for example, is believed to have been heavily influenced by the rules of pre-Islamic Arab family structure. N. J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), 8-11. Abdullah Syah, *Integrasi antara Hukum Islam dan Hukum Adat dalam Kewarisan Suku Melayu di Kecamatan Tanjung Pura* (Jakarta: Badan Penelitian dan Pengembangan Departement Agama RI, 1980), 38-9. See also Lev, *Islamic Courts*, 219; Reuben Levy, *the Social Structure of Islam* (Cambridge: Cambridge University press, 1962), 147-149.

been formulated in the latter context. He came to the conclusion that his bilateral system could provide a way out of the social complexity that Indonesia faced. But to do this, Islamic law had to be incorporated at the state level.

C. On the Institutionalization of Islamic Law

Hazairin's thinking on the institutionalization of Islamic law favored a bilateral system with both a contextual (empirical or socio-cultural) and a textual (transcendental) basis.[133] Hazairin relied on his interpretation of Qur'ān IV: 59; "O ye who believe! Obey Allah, and obey the messenger, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allah and His Messenger...." His argument was that every Muslim must obey the rules set by God, the Prophet and the *ūlī al-amr* (leaders).

Based on this verse, Hazairin posited three legal sources for deriving Islamic law. The first consists of the Qur'ān; indeed, all believers have an obligation to obey the guidance of God as stated in the Qur'ān. The second is constituted of the Sunna of the Prophet, which serves to explain the Qur'ān. He conceded that the Prophet may have provided new information which cannot be found in the Qur'ān, but which is no less valid and whose application is mandatory. Interpreting *ḥadīth*s need not contradict the Qur'ān; indeed they should be seen as complementary to the latter. The third and final source is "those in authority (*ūlī al-amr*)." Wherever there is no text that offers a solution, and whenever Muslim scholars are unable to agree on a solution, their

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[132] *Naṣṣ* (the Qur'ān and *ḥadīth*) contains an eternal message which is adaptable to any time and any place. Amiur Nuruddin, *Ijtihād 'Umar Ibn al-Khattāb: Studi Tentang Perubahan Hukum Dalam Islam* (Jakarta: Rajawali Press, 1987), xv and 170.

[133] Bowen, "Qur'ān, Justice, Gender," 69.

agreement constitutes *ijmā'* in his eyes. If the case differs from the particulars stated in the Qur'ān or Sunna, the *ūlī al amr* may resort to analogy. This method can be extended to many diverse issues.[134]

Legal innovation, thus, is achieved through the *ūlī al-amr's* proper interpretation of the Qur'ān and the *ḥadīth* and by reference to the conditions of Indonesian society. For this to be achieved, however, by codification of the law was imperative. To accomplish this, Hazairin called for a "national *madhhab,"* or "Indonesian *madhhab*"-- a new school of Islamic law with Indonesian characteristics. This new *madhhab* would take full account of the social and historical context of Indonesia. To follow the provisions of the constitution would mean to follow the *ūlī al-amr* and in turn obey Islamic law.[135] An outspoken movement based on this idea emerged in the 1950s.[136]

In attempting to transform his bilateral system into a national *madhhab*, Hazairin became directly involved in the Bill for the Undang-undang Pembanguman Nasional Semesta Delapan Tahun 1961-1969 (Constitution of National Development for Eight Years 1961-1969). Point 402, subsection 4 legalized the existence of a bilateral inheritance law, which was decreed by the Madjelis Permusjawaratan Sementara (MPRS) as Decree No. II, December 3, 160.[137]

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[134] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 65.

[135] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 6.

[136] See Hazairin, "Ilmu Pengetahuan Islam dan Masyarakat," in Hazairin, *Tujuh Serangkai Tentang Hukum,* 109- 120.

[137] Many Muslim leaders debated Hazairin over these changes to the constitution. See, Sajuti Thalib, *Seminar Hukum Nasional: Azas-azas Tata Hukum Nasional dalam Bidang Hukum Waris* (Jakarta: Panitia Seminar, 1963).

In the sphere of property, and as an adjunct to his bilateral inheritance system Hazairin also called for the establishment of a "*bayt al-māl,*" an organization for collecting *zakā* (alms) from Muslims. *Zakā* is one way to advance Muslim economic fortunes for the benefit of Muslims and non-Muslims alike. Hazairin believed that *zakā,* in ensuring the economic well-being of Muslims, also benefited non-Muslim society.[138]

To deal with Islamic law as interpreted in Indonesia, Hazairin suggested what he defined as a *mazdhab* Indonesia. The *madhhab* Indonesia would essentially consist of the Shāfi'ī *madhhab,* but in this case tailored to meet the needs of Indonesian society. Its activities would embrace three matters: first, *zakā* and a *bayt al-māl* with Indonesian characteristics; second, the reform of marriage law in accordance with Islamic law-- i.e., a bilateral system reflecting Indonesian realities; and third, inheritance which is bilateral based on the MPRS decree, as mentioned above.[139]

Hazairin argued that the need for an Indonesian *madhhab* was logical because *fiqh* or Islamic law, which is derived from Arab society, was ill adapted to Indonesian society. The incompatibility was due to the fact that the Indonesian and Arab social structures are different.[140] He then questioned whether Indonesian Muslims would cease to be followers of the Prophet if Islamic law were to some extent formulated along Indonesian lines in the form of an Indonesian *madhhab.*[141]

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[138] Hazairin, "Hukum baru di Indonesia," in Hazairin, *Tujuh Serangkai Tentang Hukum,* 97 and 108. Hazairin, *Indonesia Satu Masdjid* (Djakarta: Bulan Bintang, n. d.), 12.

[139] Hazairin, H*ukum Kekeluargaan Nasional,* 6.

[140] Hazairin, *Hukum Islam dan Masyarakat,* 14-5.

[141] Hazairin, *Hukum Islam dan Masyarakat,* 7-8.

Institutionalization also led to the idea of establishing a body or an organization designed to help the Muslims of Indonesia resolve disputes over points of law. The organization would function as a "*majlis fatwā*" (*fatwa* council), designed to work towards *ijmā'* and *ijtihād*, or consensus through discussion.[142] He saw as well the need for other religious groups to set up similar councils to decide matters of concern to them. This *majlis* would reflect an "Islamic democratic system according to the Qur'ān and *ḥadīth*."[143]

In terms of institutionalization, Hazairin may be said to have taken a middle position on the living law -- both Islamic and *adat* law-- in order to establish a positive, sovereign law. In positive law, a law must be subordinate to the lawmaker. This theory, according to the proponents of legal positivism, upholds the maxim "law is a command of the lawgiver."[144] The lawgiver or government can only make a rule binding by virtue of its authority, since authority alone has certainty in law. Hazairin therefore suggested that Islamic law be formally enacted by government and implemented on the basis of formal law.[145]

Hazairin's position seems to conform to the theory of legal positivism developed by John Austin (1790-1859).[146] The latter believed that "a law is a command, which obliges

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[142] Hazairin, *Indonesia Satu Masdjid*, 8.

[143] Hazairin, *Indonesia Satu Masdjid*, 8-9.

[144] Darji Darmodiharjo, Shidarta M. Hum, *Pokok-pokok Filsafat Hukum: Apa dan Bagaimana Filsafat Hukum Indonesia* (Jakarta: Gramedia pustaka Utama, 1995), 110.

[145] Hazairin, "Hukum Baru di Indonesia," in *Tujuh Serangkai Tentang Hukum*, 101.

[146] John Austin is the father of Legal Positivism, according to which theory law is the command of authority. Austin's thought occupies an important place in the history of English utilitarianism. He wrote a monumental work called *the Province of Jurisprudence Determined*, a

a person or persons.... Laws and other commands are said to proceed from superiors, and to bind or oblige inferiors."[147] Furthermore, Austin emphasized that the government's command is sovereign. Sovereignty is to force others to obey, to orient attitudes in a desired direction. After all, a law may be just, wise or obligatory.[148] Based on this view, Islamic law has to be determined through the authority of the lawgiver, and given legal certainty. In other words, legal validity is in the hands of the government.[149] In this manner, Hazairin intended to make the living law the command of lawmaker. However, it is true that Hazairin was biased in considering Islamic law alone for this role, and in downplaying *adat* law as a basis for legislation.

Analyzing Hazairin's intentions from an anthropological perspective can be instructive in this regard. Anthropologists see the law as one aspect of a society's culture, one that the lawmaker needs for social control. Thus, when *adat* law coincides with another type of law, in this case Islamic law, the lawmaker has the authority to

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collection of lectures, first published in 1832. See M.P. Golding, *the Nature of Law* (New York: Random House, 1966), 77; Darji Darmodiharjo and Shidarta, *Pokok-pokok Filasafat Hukum,* 97.

[147] As quoted from Darji Darmodiharjo, Shidarta, *Pokok-pokok Filasafat Hukum,* 97. For further information on Austin's work see John Austin, "A Positivist Concept of Law, from the Province of Jurisprudence Determined (1832," in Joel Feinberg and Hyman Gross, eds. *Philosophy of Law* (New York: Wadsworth Publishing Company, 1995), 31-42.

[148] John D. Finch, *Introduction to Legal Theory* (London: Sweet &Maxwell, 1979), 26-7. D. Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1983), 7-8.

[149] Another school of law, the historical school (*Historische Rechtsschule*), says that positive law is the living law of society. For this school, positive law embodies the customary law of a society. Von Schmid, *Pemikiran tentang Negara dan Hukum dalam Abad Kesembilan Belas,* trans. Boetarman (Jakarta: Pembangunan & Erlangga, 1979), 62-3; S. Soekanto, *Perspektif Teoritis Studi Hukum dalam Masyarakat* (Jakarta: Rajawali Press, 1985), 20-1. See also Darmodiharjo, etal., *Pokok-pokok Filsafat Hukum,* 111.

reorganize it.[150] The Indonesian government was therefore in a position to rearrange *adat* and to bring it more closely in line with Islamic law.

In this sense, Hazairin agreed that *adat* law is a living law, but one subject to alteration, since *adat* may be said to be a product of the culture that authorized its making. Hence, Hazairin was convinced that *adat* law could be re-authorized by Islamic law. Just as classical '*ulamā*' had created a *fiqh* (Islamic law) for Arab society, Islamic law as a divine law could still be influenced by the culture of a local society. This is in line with the maxim of *al-ādah muḥakkama* (*adat* can be a (Islamic) law). Thus it is no wonder that most *fiqh* is male-oriented, by reason of the fact that it was influenced by Arab society, which was patriarchal.

Hazairin held that the legal authorities in Indonesia had the right to deal with *adat* as they saw fit, since the 1945 constitution allows the government to decide whether to regulate *adat* law or not, based on the *Aturan Peralihan* (Rules of Amendment) in Chapter Two, which state in part: "Any state body and rule will continue to be in effect as long as they are not changed according to the constitution." According to Hazairin, though, the constitution did not grant the power to change religious law, no matter what the belief, except when the religion went against the Pancasila. Chapter 29 of the constitution-- "The State guarantees the freedom of every citizen to hold his/her own religion and to practice it"-- made provision for religious protection. The constitution of

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[150] On the relationship between law and the authority, Ter Haar, *Adat Law in Indonesia*. trans. E. Adamson Hoebel and A. Arthur Schiller (New York: Institute of Pacific Relations, 1948), 235.

1945 was a major ally therefore in putting Islamic law into effect, at least from the perspective of Muslims.[151]

[151] See the text of the Indonesian Constitution of 1945 in John Surjadi Hartanto, ed., *Memahami UUD 1945 P4 GBHN 1993-1998 Waskat* (Surabaya: Indah, n.d.), 26.

# CHAPTER THREE

## HAZAIRIN ON SPECIFIC ISSUES

In chapter two we surveyed some of Hazairin's legal notions, especially those related to his proposal of a bilateral system of family law for Indonesia. The present chapter attempts to elucidate his thought on certain specific issues, by considering how this system would have been applied in the area of inheritance. We will look at three topics in particular, i.e., *'aṣaba* (agnatic relatives) orphaned children (substitute heirs) and *kalāla* (one who dies without sons and/or father). In addressing these issues Hazairin sought to construct a comparison of Islamic law and *adat* law in order to critique both systems as practiced in the Indonesia of the 1950s. He drew on principles familiar to all Indonesians in urging a new understanding of the Qur'ān.[1] Thus he construed the concept of *'aṣaba* in the Qur'ān as referring to heirs, so as to introduce changes to Islamic and *adat* law, especially with regard to unilateral patterns of inheritance. He analyzed the rights of orphaned children (substitute heirs) in support of *adat* law, and here tried to reform Islamic law by refining the Sunni concept to bring it in line with Indonesian practice. He also re-examined the issue of *kalāla* with a view to reforming Islamic law. These reforms were aimed at achieving greater balance and gender equality in the inheritance system in particular and in property rights in general. In fact, he held that it is a combination of the Qur'ān and Indonesian practice that ought to be followed by Indonesian Muslims.

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[1] Bowen, "Qur'ān, Justice, Gender: Internal Debates in Indonesian Islamic Jurisprudence," *History of Religions* 38/1 (1998): 73.

## A. Hazairin on Inheritance Issues and Responses

### 1. On Inheritance Issues

The points that Hazairin makes with respect to a "bilateral system" in inheritance are not very far from the classical Sunni interpretation, except on certain issues. The main difference lies in the division of the group of legal heirs. Sunni Islamic law allows for three groups[2]: *zaw al-furūḍ*[3] (the heirs who have a fractional share), *'aṣaba*[4] (those who are in the male line) and *zaw al-arḥām*[5] (those who are relatives). Hazairin's

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[2] According to Hazairin, *'aṣaba* and *zaw al-arḥām* were influenced by patrilineal notions. Since Arab society upheld the bond of *'aṣabiyya* or *'uṣba* – descent through male links from a common ancestor, it is easy to understand why the Islamic inheritance system reflects the Arab social system. In keeping with the unilateral social system in Indonesia, the Batak will take *'aṣaba* (male agnatics) from the male side because their system is patriarchal, while the Minangkabau will take *'aṣaba* from the female (female agnatics) side, for their system is matriarchal. Hazairin, *Hendak Kemana Hukum Islam* (Jakarta: Tintamas, 1976), 14.

[3] *Zaw al-furūḍ* denotes the heirs whose share is determined by the Qur'ān or *ḥadīth*. This category includes the father, mother, husband, wife, daughters, granddaughters (from sons), sisters, and half-sisters of the same father, half-sisters and brothers of the same mother, grandmother and grandfather. On the division of the shares see Muhammad 'Alī Al-Ṣābūnī, *al-Mawārīth fī al-Sharī'ah al-Islāmiyyah fī Ḍau' al-Kitāb wa al-Sunna* (Cairo: Dār al-Ḥadīth, 1968), 47-62 and 93-112. See also Ahmad Azhar Basyir, *Hukum Waris Islam* (Yogyakarta: Universitas Islam Indonesia, 1990), 29-43.

[4] *'Aṣaba* indicates the male agnatic heirs of the deceased. The *'aṣaba* will inherit the balance of the share bequeathed to *zaw al-furūḍ*, if any. David S. Powers, "The Formation of The Islamic Law of Inheritance" (Ph.D. diss., Princetone University, 1979), 12-3. *'Aṣaba* itself is divided into three types which all taken from male side: *'Aṣaba bi al-nafs, 'Aṣaba bi al-ghayr, 'Aṣaba ma'a al-ghayr*. The first is automatic agnatic heirs, including sons, grandsons from sons, brothers or uncle. The second is agnatic heirs caused by other agnatic heirs. For example, daughters can become agnatic heirs if there are sons, and granddaughters can be agnatic if there are grandsons. Finally, agnatic heirs go together with other agnatic heirs; for example, sisters' fathers become agnatic heirs together with daughters. See Al-Ṣābūnī, *al-Mawārīth fī al-Sharī'a*, 63-87. Hazairin, *Hendak Kemana Hukum Islam*, 14. An interesting subclass of agnates is that of the sons. The sons are not strictly Qur'ānic heirs, but they are a special agnate that cannot be excluded by other heirs of any class. Rather, sons exclude agnates or other excludable heirs. Ḥammūda 'Abd al 'Aṭī, *The Family Structure in Islam* (Lagos: Islamic Publications Bureau,1982), 261.

[5] *Zaw al-arḥām* are relatives not included in *zaw al furūḍ* and *'aṣaba*, in English rendered as "uterine heirs or distant kindred." The existence of this class of heirs still disputed. Some *'ulamā'* refuse their entitlement to inheritance. N. J. Coulson, *Succession in the Muslim Family* (Cambridge: Cambridge University Press, 1971), 30-1; Basyir, *Hukum Waris Islam*, 51-2.

division on the other hand consists of *zaw al-furūḍ*,[6] *zaw al-qarabāt*[7] and *mawālī*[8] (substitute heirs).[9] By contrast, Shi'ī law recognizes only two divisions: *zaw al-furūḍ* and *zaw al-qarabāt*. Hazairin argued that the Shi'ī inheritance system is closer to the original bilateral inheritance system intended by the Qur'ān than the Sunni version.[10]

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[6] The heirs of *zaw al-furūḍ*, according to Hazairin, are direct heirs whose shares are divide according to the Qur'ān and unchanged. They are five only -- daughter alone, father, mother, brother and sister. This division is based on the Qur'ān IV: 11, 12 and 176. Other heirs mentioned in the Qur'ān are not included in the *zaw al-furūḍ* since their shares, Hazairin affirms, still change in certain circumstances. Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith* (Jakarta: Tintamas, 1982), 37-9. See also Damrah Khair, *Hukum Kewarisan Islam di Indonesia: Suatu Kajian Pemikiran Hazairin* (Bandar Lampung: BPPM IAIN Raden Intan, 1995), 30-1.

[7] *Zaw al-qarabāt* are direct heirs, whose share or the proportion of the share is changeable. Referring to the Qur'ān IV: 11, 12, 33, and 176, Hazairin mentions that they are sons, daughters together with sons, father (not in *kalāla* case), brothers and sisters with their children, grandfather and grandmother. They will receive their share after the *zaw al-furūḍ* allocation, if there is still any property remaining. Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 26-9 and 35-6.

[8] *Mawālī* are substitute heirs, who "fill the shoes" that form links to the deceased, for example, orphaned children whose father or mother died before the deceased. Based on his own interpretation of the Qur'ān IV: 11, 33 and 176, Hazairin divided this category into three -- orphaned children (sons, daughters or both), brother and sister, and grandfather and grandmother. Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 31-3.

[9] Hazairin's division is influenced by the Indonesian social system, as he affirms that "this division begins from the question whether or not the Qur'ān recognizes the bilateral system, which accords with Indonesia." Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 18.

[10] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 17-8. Anwar Harjono, "Hukum Kewarisan Bilateral Menurut al-Qur'an: Komentar Singkat Atas Teori Prof. Hazairin," in *Pembaharuan Hukum Islam di Indonesia* (Jakarta: Universitas Indonesia, 1982), 63. Some other scholars appear to agree with this point, For example Powers has made a determined assault on the superimposition theory. Although he is not concerned with Shi'ī law, he argues that the Qur'ānic legislation on inheritance can be interpreted as a more or less complete system by itself. David S Power, *Studies and in Qur'ān and Ḥadith: the Formation of the Islamic Law of Inheritance* (Berkeley and Los Angeles: 1986), 88, 106, 212. Meanwhile, Coulson remarks that predictably of course, the Shi'ī s have claimed that their law is closer to the Qur'ān, and a more faithful reflection of its essential spirit than the Sunni. N. J. Coulson, *Succession in the Muslim Family*, 134.

a. *'Aṣaba*

In Sunni Islamic law, after certain shares have been allotted to the *zaw al-furūḍ*, the remainder of the estate is bequeathed to the agnatic relatives through the males or *'aṣaba*, who take priority over uterine relatives of the female side.[11]

There is the issue nevertheless of whether or not the *'aṣaba* is a Qur'ānic rule. It would seem that Hazairin rejected the concept of *'aṣaba* as the classical *'ulamā'* had conceived it. According to him the concept of *'aṣaba* is not Qur'ānic; it evolved from the tradition of the *'uṣba* (group, clan) in Arab society, which applied to the male line. The *'uṣba* was similar to the "clan" or *marga* of the Batak, who restricted inheritance to the male line, or the "clan" or *suku* (tribe) of the Minangkabau, who privileged the female side. That is to say, the *'aṣaba* provides for the distribution of property through one side of the lineage: in the case of the patrilineal system, on the male side only, and in the case of the matrilineal system, on the female side only.

Hazairin maintains that these systems work against the spirit of the Qur'ān, since the Qur'ān itself does not employ *'uṣba* in the manner formulated by *fiqh* or Islamic law. Even though the word *'uṣba* or *'aṣaba* is mentioned in the Qur'ān several times,[12] neither word is used in the context of a family or inheritance system. Hence, according

[11] Nevertheless, Hazairin also noticed the fact that Shi'i Islamic law does not favor agnatic over uterine relatives. According to him, both, Sunnis and Shi'is are correct, for their approach fits with their respective society's needs. Hazairin, *Hukum Baru di Indonesia* (Djakarta: Bulan Bintang, 1951), 13-5.

[12] The words *'uṣba* or *'aṣaba* occur four times in the Qur'ān; once in Q. XII:8-9 and Q. XII:14 (Yusuf's story). Here *'uṣba* means "relatives." In Q. XXIV: 11, the other hand, *'uṣba* means "group," while again in Q. XXVIII: 76 it means "a group of people."

to Hazairin, the Qur'ān does not contain the concept *'aṣaba* as defined in classical inheritance law.[13]

The entitlement of the *'aṣaba* in Sunni inheritance law is derived, therefore, not from the Qur'ān but from the Sunna.[14] The Qur'ān does not explicitly define the inheritance right of the *'aṣaba*. This class was included in inheritance law on the basis of the doctrine of consensus.[15]

The *'aṣaba* includes all relatives who are related to the deceased exclusively through links with the male line. Their shares are not apportioned as set fractions.[16] Powers notes that this class of heirs falls into five categories: the sons and his descendants downwards; the father and his ascendants upwards; the descendants of the father (the brothers of the deceased and their issue); the descendants of the paternal grandfather (the deceased's uncles, and cousins and their issue); and the line of the descendants of the great paternal grandfather and higher grandfathers in ascending order (the deceased's great uncles and their issue).[17]

The *ḥadīth*s that form the basis of this doctrine for classical *'ulamā'* include those of Ibn 'Abbās and Jabīr in particular. The former is recorded as having said "*al-ḥaqqu al-farā'iḍa biahlihā famā baqiya fahuwa liawlā rajulin dhakarin*" (the shares are for the

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[13] Sajuti Thalib, *Hukum Kewarisan Islam di Indonesia* (Jakarta: Bina Aksara, 1984), 59-63.

[14] Richard Kimber, "The Qur'ānic Law of Inheritance," *Islamic Law and Society* 5/3 (1998): 291.

[15] Powers, "The Formation of The Islamic Law of Inheritance," 12.

[16] For example, sons do not have a predetermined fraction of the inheritance.

[17] Powers, "The Formation of the Islamic Law of Inheritance," 12-3.

heirs, and the rest are preferred for men).[18] Jabīr on the other hand reports on the Prophet's decision regarding Sa'd's case thus:

> The wife of Sa'ad b. al-Rabī' came to the prophet with her two daughters and said: "O Prophet, these are the daughters of Sa'd b. al-Rabī'. Their father died a martyr's death beside you in battle. But their uncle has taken Sa'd's estate and they cannot marry unless they have property." After this the verse of inheritance was revealed and the Prophet sent to the uncle and said to him: "give the two daughters of Sa'd two-thirds of the estate, give their mother one-eighth and keep the remainder yourself."[19]

These two *ḥadīths* were taken as the foundation for the doctrine of *'aṣaba* by Sunni *mujtahids*. Hazairin was convinced, however that they reflected the influence of the patrilineal system.

Hazairin asserts that the Qur'ānic inheritance verses, especially verses IV: 11, 12, and 176, do not recognize the concept of *'aṣaba*. In verse IV: 11, for example, while the identification of sons as heirs is clearly made, there is nothing said of their position as *'aṣaba* as defined by classical *'ulamā'*. This allows Hazairin to detect a bilateral tendency in the Qur'ān.

In brief, Hazairin concedes that the conditions which persuaded classical Sunni *mujtahids* to agree by consensus on the *'aṣaba* were time bound and reflected a situation where portions were changeable and uncertain. Thus the portion allotted to sons, which is not clearly spelled out in the Qur'ān, was comprehended on the basis of *ḥadīths*. The *ḥadīths* were in turn interpreted according to the social and family system of Arab

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[18] This version of the *ḥadīth* is found in Muḥammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol. 2 (Delhi: 'Aṣaḥḥ al-Maṭābī, 1938), 997.

[19] This version of the Prophet's decision appears in Muḥammad ibn Sūra al-Tirmidhī, *Sunan al-Tirmidhī* (Beirut: Dār al- Fikr, 1983), 285.

society, the patrilineal nature of which determined this interpretation. Rather, Hazairin classified the heirs whose shares were so uncertain as the *zaw al-arḥām*. This meant that the heirs do not consume the remainder of the estate, but must divide it with other heirs that are still eligible. Nor would this category block other heirs, because they are not immediate heirs, like the *zaw al-furūḍ*. This reflected Hazairin's conviction that there is absolutely no concept of *'aṣaba* in the Qur'ān.[20]

It was Hazairin's contention that the institution of *'aṣaba* was inappropriate for Indonesian society. For if it were applied therein it would lead to even greater abuses. For the Batak, the *'aṣaba* would be drawn from the agnatic male line; for the Minangkabau, they would come from the uterine female line; whereas for the Javanese, there could be no *'aṣaba* at all, since the Javanese do not show preference to any single line of descent.

b. Orphaned Children as Substitute Heirs

Another issue that concerned Hazairin was that of orphaned children as heirs. Orphaned children, according to Hazairin, ought to inherit according to the substitute system or "*sistem penggantian*,"[21] even though in traditional Sunni law orphaned children are commonly dismissed as ineligible. The children of predeceased sons are thus excluded from a share of their deceased grandfather's estate by the presence of other sons of the latter still surviving. If the predeceased son left only female (orphaned)

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[20] Sajuti Thalib, *Seminar Hukum Nasional: Azas-azas Tata Hukum Nasional dalam Bidang Hukum Waris* (Jakarta: Panitia Seminar, 1963), 8 and 13.

[21] "Orphaned children" refers to grandchildren with a parental link with the deceased who died previously. In other words, their mother or father died before the grandfather did. According to Hazairin, the orphaned children of both sons and daughters have the right to inherit.

children, they were additionally subject to exclusion by the presence of two or more daughters of the deceased. Furthermore, in some schools of traditional Sunni law, the orphaned children of predeceased daughters were grouped into the *zaw al-arḥām* category and thereby excluded.[22] In Shafiʿī law especially, the orphaned children of daughters are excluded by the presence of sons of predeceased sons.

Hazairin furthermore observed that all social systems basically recognize the "*sistem penggantian*" (substitute system) which may be patrilineal, matrilineal or bilateral. Even though the gender preferences are obvious in a unilateral system (male preference in the patrilineal and female preference in the matrilineal), the transmission in all three systems is drawn in one vertical line, upward or downward. Hence, the children of predeceased sons or daughters filled their parents' shoes in cases of inheritance. Hazairin questioned why Islamic inheritance law does not allow for this. He championed the position of orphaned children as substitute heirs in Islamic inheritance law by claiming that the traditional interpretation of the inheritance verses had been influenced by patrilineal bias. [23]

Reacting to this traditional understanding, and especially the Shāfiʿī rejection of the rights of the orphaned children of daughters, Hazairin concluded that both the orphaned children of sons and of daughters are eligible heirs whenever their parents are predeceased. This is why he named the category "*ahli waris pengganti*" (substitute

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[22] In Maliki law, "distant kindred" are excluded by the state treasury, which figures as an heir in the absence of male agnates and the Qur'ānic blood heirs. In Hanafi law "distant kindred" are excluded by the presence of any *zaw al-furūḍ* or any agnatic heirs (*'aṣaba*). Lucy Carroll, "Orphaned Children in Islamic Law of Succession: Reform and Islamization in Pakistan," *Islamic Law and Society* 5/3 (1998): 410. For more explanation on substitute heirs see for example, Coulson, *Succession in the Muslim Family*, 52-64.

heirs). This concept is, according to Khair, a result of Hazairin's original *ijtihād* in analyzing the Qur'ānic verses on inheritance, especially IV: 33.[24] This verse reads, in part, "*wa likullin ja'alnā mawāliya minmā taraka al-wālidāni wa al-aqrabūn wa-alladhīna 'aqadah aimānukum fa'atūhum naṣībahum*" (To [benefit] everyone, we have appointed shares and heirs to property left by parents and relatives to those, also, to whom your right was pledged...). Hazairin interpreted this verse by constructing the word *likullin* as *lifulānin* and *ja'alnā* as *ja'ala Allāh*. The sentence becomes "*wa lifulānin ja'ala Allāhu mawāliya minmā taraka al-wālidāni wa al-aqrabūn wa-alladhīna 'aqadat aimānukum fa'atūhum naṣībahum*" (To someone Allah had appointed successors for the shares that the parents and the close relatives left). Thus, the *fa'il* (heirs) here are the *wālidāni* (parents; father and mother) and *aqrabūn* (close relatives). He then translated the *mawāliya* as blood relatives. Accordingly the *mawāliya* (substitutes or successors) are the children and so on down the lineage, grandfathers and grandmother and so on up the lineage) and brothers or sisters.[25]

Hazairin thus envisioned three kinds of eligible (substitute) heirs, who in traditional Sunni law, are excluded from inheritance under certain circumstances. These three are the orphaned children of daughters (made just as eligible as those of sons), grandparents of mothers (made just as eligible as those of fathers), and brothers or

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[23] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 34.

[24] Khair, *Hukum Kewarisan Islam di Indonesia*, 5.

[25] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 31-3. See also Al-Yasa Abu Bakar, "Ahli Waris Sepertalian Darah: Kajian Perbandingan Terhadap Penalaran Hazairin dan Penalaran *Fiqh* Mazhab" (Ph.D diss., IAIN Sunan Kalijaga, Yogyakarta, 1989), 108-15.

sisters. In sum, Hazairin concluded that the substitute heirs that he proposed are nothing more nor less than the Qur'ān's provision.

c. *Kalāla*

Another indication of Hazairin's contribution may be seen in his treatment of the concept of *kalāla*.[26] In addressing the issue,[27] Hazairin utilized a semantic approach and interpreted the appropriate verses as a unity, avoiding patrilineal bias. Hence he looked at verses IV: 12 and 176 on *kalāla* and connected them with IV: 11 and 33. He interpreted one verse as the complement of the other, so that according to him, the verse IV: 12 introduced *kalāla*, IV: 176 defined it, and IV: 11 and 33 elaborated on the concept.

Hazairin sought to interpret *kalāla* according to the Qur'ān IV: 176. The verse reads: "*Yastaftūnaka qul Allāhu yuftīkum fī al-kalālati in imru'un halaka laiysa lahu walad wa lahu ukhtun falahā niṣfu mā taraka*" (They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or (ascendants) as heirs. If it is a man that dies, leaving a sister but no child she shall have half the inheritance). In approaching the word *walad* in this verse, Hazairin interprets it literally and takes it as denoting a child. The Qur'ān IV: 11 moreover uses the plural form of *walad*, i.e., *awlād* meaning children, which could include sons, daughters or both. Hazairin associates this

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[26] Literally *kalāla* means weariness or tiredness. In relation to inheritance, Muslim scholars defined it as a deceased person who leaves neither *walad* (children) nor *wālid* (father and grandfather). However this definition is not agreed upon it yet, for according to Powers, *kalāla* is a mysterious word. David S. Power, "The Islamic Inheritance system," *Islamic Law and Society* 5 (1998), 285.

[27] The word *kalāla* appears in the Qur'ān twice, once in IV: 12 and again in IV: 176. But the latter has been referred to more than the former.

definition to the meaning of *mawālī* in the Qur'ān IV: 33 and concludes that the meaning of *walad* can be extended to mean more than children and can even include descendants in general. According to Hazairin, in the bilateral system of the Qur'ān, descendant means any child, whether from the male or the female side. Thus the definition of a *kalāla*, according to Hazairin, is a deceased person who leaves no *walad* (descendants) either on the male or female lines.[28]

This definition contradicted the definition arrived at by classical *'ulamā'*. These latter had defined the *kalāla* as the deceased who leaves neither sons nor a father. If he dies without leaving any sons but leaves a father, he is not *kalāla*,[29] since in these circumstances according to Sunni law, the presence of a father blocks other heirs, such as brothers and sisters. Consequently, brothers and sisters will not inherit. Hazairin maintains that actually, according to the verse, the deceased in the state of *kalāla* may still have a father, and that brothers and sisters therefore have a right to the share determined in the verse. Hazairin insists on this definition and considers all brothers, sisters and other heirs to be eligible, even when there is a father. Again, Hazairin concludes that the classical *'ulamā'*s interpretation of the *kalāla* as a deceased person who leaves neither sons nor father was the result of the patrilineal bias of Arab society. Since there was no certain definition of *kalāla*, the social prejudices of the Arabs must have influenced the *'ulamā'*s interpretation.

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[28] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 50.

[29] Powers elucidates the semantic approach of classical *'ulamā'* to defining the word *kalālatan* in both IV: 12 and IV: 176. For more analysis see David S. Powers *The Formation of the Islamic Law of Inheritance*, 96-9.

Syarifuddin echoes Hazairin's opinion and remarks that Hazairin's concept of a bilateral system comes through clearly in this case. Therefore, in the case of *kalāla*, Syarifuddin maintains that a brother or sister has the right to inherit the estate of the deceased even if the deceased has a father or mother still surviving. Besides verses IV: 11, 12 and 176, Syarifuddin relies also on IV: 7; "*li al-rijāli naṣībun min mā taraka al-wālidāni wa al-aqrabūn wa li al-nisā'i naṣībun min mā taraka al-wālidāni*" (From what is left by parents and those nearest related there is a share for men and a share for women).[30]

In support of this notion, Kimber notes that the real problem of *kalāla* lies in verse IV 12: "*wa-inkāna rajulun yūrathu kalālatan aw imra'atun wa la-hū akhun aw ukhtun*" (if the man or woman whose inheritance is in question has left neither descendants or ascendants but has left a brother or a sister). This illustrates the meaning of the syntactical function of *kalālatan*. Kimber then adds that the early exegetes did not know for certain what *kalālatan* meant. They were unsure of whether *kalāla* had different meanings. However, it is clear that behind the linguistic disagreement there was a solid legal consensus that the case referred to is that of a man or woman who dies leaving neither *walad* (descendants) nor *wālid* (ascendants). The problem for the exegetes was how to reconcile their linguistic analysis of *kalālatan* with what they already knew was

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[30] Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung 1984), 18-27.

the law.[31] Indeed, the meaning of *kalāla* is complicated and unclear as given in the Qur'ān.[32]

The three issues discussed above, according to Hazairin, had been interpreted by the classical '*ulamā'* in the light of a patrilineal bias. In order to do so, however, they had to resort to *nasakh* (abrogation) and *mansūkh* (abrogated) in regard to the inheritance verses especially. Indeed, their belief that the bequest verses (verses on the *waṣiya* or will, II: 180-2 and 240) were abrogated by the inheritance verses (IV: 11-2 and 176) determined their interpretation of the applicable texts. Accordingly, those with the right to receive both inheritance and *waṣiya* are excluded from inheritance whenever they receive the *waṣiya*. For Hazairin this was not correct. Instead, his bilateral system restored the effect of giving it equal status to inheritance. Hazairin's argument is based on a significant departure from the interpretation of the Qur'ān in that he rejects abrogation in this case.[33]

The Qur'ān II: 180 reads, "It is prescribed when death approaches any of you, if he leave any goods, that he makes bequest to parents and next of kin, according to reasonable usage. This is due from the God-fearing," while the Qur'ān II: 240 reads, "Those of you who die and leave widows should bequeath for their widows a year's maintenance and residence; but if they [the widows] leave [the residence], there is no blame on you for what they do with themselves, provided it is reasonable."

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[31] Richard Kimber, "The Qur'anic Law of Inheritance," *Islamic Law and Society* 5/3 (1988), 295-6.

[32] David S. Power, "The Islamic Inheritance System," *Islamic Law and Society* 5/3 (1998), 285. Rather, the word *kalāla* was one of the three terms which Umar wished that the Prophet had defined in his lifetime, the other two being *khilāfa*, and *ribā* (usury). 'Abdullah Yūsuf 'Ali, *The Meaning of the Holy Qur'ān* (Brentwood: Amana Corporation, 1994), 187, note 520.

From these verses Hazairin argued in favor of the right to a bequest on the part of even those entitled to inherit. Thus, he insisted that parents, children, brothers and sisters (referring to the Qur'ān II: 180) and wives (depending on the Qur'ān II: 240) have the right to receive bequests totaling a third of the estate.[34] He explains the phrase *bi al-ma'rūf* in both verses as referring to showing reasonable kindness to survivors. Hazairin furthermore proposed that applying this rule ensured that wives not be neglected either morally or economically, and that parents in their old age and children's health and education be provided for in the future.[35] In sum, Hazairin clearly prefers the parallel operation of inheritance and bequest in property matters.

Kimber agrees with Hazairin that the verses on bequest are not abrogated by the inheritance verses. Nevertheless, he cites a different reason in insisting that the bequest and the inheritance verses are compatible. He points out that there is no reason to believe that the former came into existence before the latter, or indeed that there was any diachronic relationship between them at all. The fact is that the bequest and inheritance verses are not directly concerned with the same thing. The inheritance verses do indeed legislate primarily for inheritance, but the bequest verses do not. The Qur'ān II: 180 mentions the duty of believers to make bequests to their parents and other close relatives, but it does so only as the introduction to a short periscope in the Qur'ān II: 180-2. The Qur'ān II: 240, on the other hand stipulates that widows, especially childless widows, have the right to remain in the marital home for a reasonable period after their

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[33] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith,* 57-8.

[34] Bequest or *waṣiya* in Islamic law can only extend to a third of the estate, at most.

[35] Khair, *Hukum Kewarisan Islam di Indonesia,* 7-8.

loss, or to leave if they wish. This verse, Kimber adds, deals with divorce and occurs near the end of a large body of legislation where the focus is on the residual rights and obligations of both parties to the divorce once it has taken place. This is a somewhat separate issue from inheritance, and the Qur'ān II: 240 could easily be taken as giving the widow an entitlement in addition to her rights of inheritance under the Qur'ān IV: 12. Either way, the two verses, both the verses of bequest and the verses of inheritance, are complementing and are neither in conflict nor abrogated, according to Kimber.[36]

2. Responses

As has already been pointed out, Hazairin did not have a formal Islamic educational background. This being the case, there was criticism of his stance as an Islamic reformist and of certain details of his proposed legal reform. Some of the most vocal critics opposing his idea were Toha Yahya Omar and Mahmud Yunus. They insisted on preserving the traditional tenets and usages of inheritance rules. Their most pointed responses however were directed at the bilateral system and the use of modern science in interpreting the Qur'ān and the *ḥadīth* that Hazairin proposed. Yunus openly criticized Hazairin for deviating from the accepted conventions of Islamic inheritance law. Omar, for his part, expressed doubts about Hazairin's competency and his lack of qualifications fitting him for Islamic reform in view of his educational background.[37]

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[36] Kimber, "the Qur'anic Law of Inheritance," 303-4.

[37] According to Omar, to interpret the Qur'ān and *ḥadīth*, one must be qualified in religious disciplines like *uṣul al-fiqh*, Arabic, *'ilm al-Qur'ān* (*tafsīr*), *'ilm muṣṭalaḥ al-ḥadīth* or *'ulūm al-ḥadīth*. Yunus accused Hazairin of not mastering these disciplines, and thus of having no competence to interpret the Qur'ān as he did. Thalib, *Seminar Hukum*, 2-5.

According to Omar, Hazairin's conclusion was applicable to *adat* law, but not Islamic law.[38]

At a national seminar on inheritance, held in Jakarta in 1963, Omar and Yunus debated Hazairin. Omar maintained that it is true that *'aṣaba* is not based on the Qur'ān but on the *ḥadīth*. Nevertheless, this concept does not contradict the Qur'ān. He adduced as evidence two *ḥadīths*, one from Ibn 'Abbās and the other dealing with the decision of the Prophet regarding Sa'd, as mentioned above. Omar concluded that *'aṣaba* is authentically part of the Islamic inheritance system.[39]

Hazairin maintains that interpreting these *ḥadīths* on the basis of *'aṣaba* is not scientifically valid. The *ḥadīth* of Ibn 'Abbās, which contains the prhase "*aulā rajulin dhakarin*" is not in line with what the Qur'ān intends, thus depriving it of any legal force. As for the decision of the Prophet in Sa'd's case, Hazairin points out that it involves a case which happened at that time only. What was received by Sa'd's brother was only a *tu'ma* (gift) presented at the discretion of the Prophet. He was not entitled to anything from Sa'd's estate, the remainder still belonging to Sa'd's daughters'.[40]

Omar and Yunus also debated Hazairin's interpretation of *mawālī* (substitute heirs) in the Qur'ān IV: 33. According to Omar, the term "*mawālī*" in the verse does not mean substitute heirs in the way Hazairin saw it, but rather *'aṣaba*. This definition was supported by the *ḥadīth* of Abū Huraira: "*anā aulā bi al-mukminīna min anfusihim faman māta wa taraka mālan famāluhu li mawālī al-'aṣabati wa man taraka kallan au*

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[38] Thalib, *Seminar Hukum*, 8.

[39] Thalib, *Seminar Hukum*, 10.

[40] Thalib, *Seminar Hukum*, 10.

*daya'an fa anā waliyuhū fal- 'ud'a lahū"*[41] (I am closer to the believer than any among you. So whoever dies and leaves some estate, the estate is for the heirs of *'aṣaba...*). The word *al-'aṣaba* here, according to Omar, is affected by the general meaning (*mujmal*) of *mawālī,* which might mean master, slave and *'aṣaba.*[42] Therefore this *ḥadīth* shows that *mawālī* in the Qur'ān IV: 33 meant *'aṣaba.* Furthermore, Omar adds, if the semantic approach is used, the *fā'il* (the subject (heirs)) refers to everyone (*kullin*) not just parents (*al-wālidāni wa al-aqrabūn*), as Hazairin himself pointed out.[43]

Like Omar, Yunus rejected Hazairin's interpretation of the Qur'ān IV: 33, especially regarding the term *mawālī.* The term *Mawālī,* according to Yunus, has many meanings such as masters, slaves, neighbors, children, and cousins. However, it is generally agreed that the term *mawālī* means children of the deceased, as *'aṣaba.* Yunus cited various some *mufassirrūn* (exegetes), in support of his interpretation, for example Ibn Kathīr[44] and tha authors of *al-Manār.*[45] Yunus argued that although the *mufassirrūn* differently interpreted "*mawālī,*" they concluded that the word denoted the direct heirs--not substitute heirs, as Hazairin claimed. This definition reinforced by the Qur'ān XIX: 5-6 and IV: 7. Yunus was convinced that *mawālī* refers to the father, mother and nearest heirs as direct heirs, not substitute heirs. Substitute heirs, he argued, do not exist in the

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[41] This version of this *ḥadīth* is found in Muhammad ibn Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī,* 998-9.

[42] Khair, *Hukum Kewarisan Islam,* 40.

[43] Abu Bakar, *Ahli Waris Sepertalian Darah,* 116-7.

[44] Ibn Kathīr al-Dimshīqī, *Tafsīr al-Qur'ān al-'Aẓīm,* vol. 1 (Beirūt: Dār al-Fikr, 1994), 605-7.

[45] Riḍa, for example, says that this verse is determined by the *ḥadīth* that the male's share is twice that of the female. This tends to confirm Yunus' conclusion. Muḥammad Rashīd Riḍa, *Tafsīr al-Manār,* vol. 5 (Cairo: al-Hay'ah al-Miṣriyyah al-'Amma li al-Kitāb, 1973), 52-55.

Qur'ān. However, substitute heirs can receive part of the share of the estate of the deceased, through a testament or will.

Hazairin responded to both Omar's and Yunus' interpretation of "*mawālī*" as *'aṣaba*, questioning their interpretation of the *ḥadīth* of Abū Huraira. Again he maintained that this *ḥadīth* was colored by the patrilineal pattern of Arab society and that it was expressed before the inheritance verses were sent down. He agreed with the opinion of the term *mawālī* as still being general (*mujmal*) and needing more explanation. That explanation, according to Hazairin, can be found in the Qur'ān IV: 33, which explains the term *mawālī*.[46]

Hazairin challenged Yunus' interpretation of the Qur'ān IV: 33 by arguing that it was inapplicable in cases where the direct heirs died before the deceased and yet left some children behind. He was certain that his own interpretation was in keeping with the "bilateral system" which the Qur'ān and the Prophet aimed at establishing. He was convinced furthermore that the use of modern science can fully and responsibly accommodate the message of the Qur'ān because knowledge and science bridge the Prophet's time with subsequent periods.[47] Hazairin insisted that Yunus' idea of extending testamentary bequest to indirect heirs went against the bilateral system intended by the Qur'ān.

On the problem of *kalāla* raised by Hazairin, Omar maintained that the deceased may leave neither *walad* (descendants) nor *wālid* (ascendants) to qualify as such. The former interpretation is based on the *manṭūq* (statement) of the *naṣṣ* (the verse), while

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[46] For more analysis of Hazairin's view on the Qur'ān IV: 33, see Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 23-9.

the latter interpretation is based on the *ma'qūl* (common sense) of the *naṣṣ*. He adds that the latter interpretation is also supported by the Qur'ān IV: 11: "*abā'ukum wa abnā'ukum lā tadrūna ayyuhum aqrabu lakum naf'an*" (your parents and your children are nearest to you in benefit). Omar and Yunus were of the opinion that their views reflected those of most Companions and classical '*ulamā*."[48]

Given the amount of effort that Hazairin expended in trying to present a convincing idea of reform of inheritance laws, it would be surprising if it turned out that he did not meet with at least some success. The debates failed to arrive at any consensus because the two sides had different approaches and paradigms.[49] Nonetheless Hazairin held his own in the debates, believing that his opinion needed to be sustained and continued.[50] Moreover, in no way did his argumentation or knowledge of Islam fall short of these two well-qualified scholars.

It is true that Hazairin's idea of legal reform was then not fully accepted by other reformists at the time he proposed it. It was in fact only later that it had a direct or indirect impact on many individuals and institutions. The following is an illustration of the impact of Hazairin's thought on institutions within the government and individual reformists.

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[47] Hazairin, *Hukum Kewarisan Bilateral Menurut al-Qur'an dan Hadith*, 63-65.

[48] Khair, *Hukum Kewarisan Islam di Indonesia*, 51.

[49] Nur Ahmad Fadhil Lubis, "Islamic Legal Literature and Substantive law in Indonesia," *Studia Islamika*, 4/ 3 (1997), 55.

[50] According to Lev, Hazairin was serious about spreading his ideas giving speeches and participating in debates whenever the opportunity arose. In thi way hazairi had a tremendous impact on Indonesian scholars, and especially, the youth. Daniel S. Lev, interview by author, 13 May 1999, Montreal, tape recording, Quality Hotel, Montreal.

B. Hazairin's Impact and Contribution towards the Indonesian Legal System

Perhaps the most significant impact of Hazairin's reformist vision has been on his students and friends. Many of Hazairin's students became the leading architects of *fiqh* reform in the 1980s and 1990s. These include many of today's older generation of law professors and Supreme Court justices, many of whom draw on Hazairin's arguments in advocating current reforms. For example, Sajuti Thalib, in advocating his *receptio a contrario* theory, has clearly followed Hazairin's tenets. He has sought to preserve and elaborate Hazairin's "*receptie exit* theory" and launched the "*receptio a contrario* theory" as a continuation of his teacher's theory.

Muhammad Daud Ali likewise shows the influence of Hazairin's thought in proposing inheritance rules for Indonesian society. Ali has explained how those responsible for drawing up the Kompilasi Hukum Islam (Compilation of Islamic Law) drew on history and culture in determining the new provision that orphaned grandchildren should inherit the share that their deceased parents would have received. Ali maintains that the primary sources for this position are the Qur'ān and Sunna, but that in practice this position was applied flexibly because neither the Qur'ān nor the *ḥadīth* is, properly speaking, a law book. Both are "mother books" containing fundamental messages for people everywhere and for all time.

Ali adds that what is already fixed in the text of the Qur'ān or *ḥadīth* text (*qaṭ'i al-ḍalāla*), such as the 2:1 ratio of shares apportioned to sons and daughters set out in the Qur'ān IV: 11, should not be changed. But if a given case is not fixed in the Qur'ān and *ḥadīth* (*ẓanni al-ḍalāla*) and there is felt to be a pressing need to interpret it in

accordance with a society's best interests, such as the right of a child to replace a predeceased parent as heir to an estate or property, this should be done.

This decision also recognizes the maxim *al-'ada al-muḥakkama* (*adat* can be a (Islamic) law), allowing for example, for an inheritance system which has no basis in the Qur'ān or *ḥadīth* but in the *adat* of Muslim Indonesians. Moreover, because *adat* is part of the legal consciousness of Muslim society, it can bring clear social benefits.[51]

In a series of speeches delivered in the 1980s, Munawir Sjadzali[52] appeared to echo Hazairin's ideas on the bilateral system. He encouraged jurists to alter Indonesian inheritance *fiqh* from the 2:1 ratio stipulated in the Qur'ān to a 1:1 ratio, reflecting an equal division of wealth among male and female children, an arrangement more attuned to Indonesian society. His argument was similar to Hazairin's in that it emphasized the Arab culture within which the Qur'ān was revealed and the need to adapt *fiqh* to other cultures and times. This argument was also aimed at the hypocrisy of Indonesian scholars (*'ulamā*'s) who, in private, acknowledged the unequal ratio to be unjust but who publicly advocated observance of the Qur'ānic rule.[53] Basing himself on such fundamental concepts as justice (*keadilan*) and propriety (*peradaban*), Sjadzali stressed that not all the commands of the Qur'ān need to be enforced.[54]

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[51] Muhammad Daud Ali, "Asas-asas Hukum Kewarisan dalam Kompilasi Hukum Islam," *Mimbar Hukum* 9 (1993): 1-17, as cited in Bowen, "Qur'an, Justice and Gender," 72-3.

[52] He was Minister of Religious Affairs from 1983-1993. He was more a politician and a diplomat than an Islamic jurist.

[53] Bowen, *Qur'ān,* "Justice and Gender," 73-4.

[54] Munawir Sjadzali, *Islam: Realitas Baru dan Orientasi Masa Depan Bangsa* (Jakarta: Universitas Indonesia, 1993), 4.

Many scholars have challenged Sjadzali's ideas. Basyir, for example, claimed that this solution to the inheritance problem in Indonesia deviated from Qur'ānic teaching. He maintained that a sociological approach is not relevant, for Islam is not a mere social construct but a command that comes from Allah (*khiṭāb Allāh*). Islam should not be fitted to social requirements but on the contrary, must mold society.[55] With this point of view, Basyir opposed equally Munawir's and Hazairin's respective sociological (socio-anthropological) approaches to inheritance when interpreting the Qur'ān and *ḥadīth*.

Bowen compares Hazairin's argument regarding cultural differences with Madjid's later argument about historical differences.[56] He says that both are similar to Rahman's claim of eternal versus specific rules in the Qur'ān. Although Madjid's scholarship was clearly influenced by that of Rahman, according to Bowen, it may have been shaped by Hazairin's writings as well. An interesting feature of the latter's writing is the concurrence of religious historical scholarship, largely following in Hazairin's footsteps. The proponents of each are not entirely aware of the convergence; Madjid views the jurist as somewhat too concerned with Islamic law, while jurists see Madjid as too little concerned with the legal status of the scriptures. Hazairin may be credited with laying the legal framework onto which the later historical arguments developed by way of Rahman's ideas were to be fitted.

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[55] Ahmad Azhar Basyir, "Reaktualisasi, Pendekatan Sosiologis Tidak Selalu Relevan," in *Polemik Reaktualisasi Ajaran Islam* (Jakarta: Pustaka Panjimas, 1988), 116.

[56] In his scholarship, Nurcholish Madjid has examined many of Rahman's ideas, especially on contextualization. Nurcholish Madjid, "Sejarah Awal Penyusunan dan Pembakuan Hukum Islam," in Budhy Munawwar-Rahman ed., *Kontekstualisasi Doktrin Islam dalam Sejarah* (Jakarta: Paramadina, 1994), 237-250.

In proposing the idea of creating a national *madhhab*, Hazairin distinctively paved the way for the Hasbi's "Indonesian *fiqh*," which later became a major phenomenon.[57] Both attempted to place their respective works within a social and historical context. In terms of the textual backgroumd, however, Hasbi's approach was quite different, in that he emphasized the role of *ḥadīth*, while Hazairin's approach relied much more on the Qur'ān. Hazairin moreover is believed to have been the first to call for the establishment a *madhhab* with an Indonesian character, although some would dispute this. His proposal was clearly set out in a speech given in Jakarta in 1951:

> The new *madhhab* that I have named a "*madzhab nasional*" (National *madhhab*) is not exactly proper, because the term "national" applies to all citizens of Indonesia, while Indonesian Muslims are only part of them." The name – *madzhab Indonesia* (Indonesian *madhhab*) offered recently by M. Hasbi Ash-Shiddiqy, is more appropriate. [58]

Although some scholars regard Hasbi as the initiator of the *madzhab Indonesia*, from the statement above it is clear that Hazairin's proposal preceded Hasbi's.[59] Moreover, Hazairin's ideas on the framework of Indonesian *fiqh* or a national *madhhab* seem to have been more systematic than those of Hasbi.[60] Hazairin had discovered some of the real problems faced by Indonesian Muslims in applying Islamic family law. He

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[57] For more information on Hasbi's Indonesian *fiqh* see for example Yudian W. Asmin, "Hasbi's Theory of *Ijtihād* in the Context of Indonesian *Fiqh*" (M.A. thesis, Institute of Islamic Studies, McGill University, Montreal, 1993). See also Nurouzzaman ash-Shiddiqiey, *Fiqh Indonesia: Penggagas dan Gagasannya* (Yogyakarta: Pustaka Pelajar, 1997).

[58] Hazairin, *Hukum Kekeluargaan Nasional* (Jakarta: Tintamas, 1982), 5-6.

[59] Yudian Wahyudi, "Hasbi's Theory of *Ijtihād*," 1.

[60] This may have had something to do with the educational level that each had attained. Hazairin for instance had obtained a doctorate, whereas Hasbi graduated only from the *pesantren*, equivalent to senior High School level. Another reason is that Hazairin was an anthropologist, and had distinctive skills, both methodological and theoretical, to bring to the

offered a way out through the bilateral system, in view of the diversity of the social systems in the country. Finally, he offered some clear interpretations of the problem in the interests of reform. Lubis notes by the way that it was Hasbi who, in 1961, revived the idea without mentioning Hazairin's earlier views on creating a national *madhhab*.[61]

From the government itself came a call for reforming Islamic law (*fiqh*). The government emphasized the importance of creating a unified legal system, in large part to ensure greater ideological and political control over social and political institutions.[62] But it was also responding to those Muslim reformers, including Hazairin, who called for stricter application of Islamic law in the broader framework of a national *madhhab*.

Implementation of the national *madhhab* suggested by Hazairin has brought about significant constitutional amendments. His contribution to the application of Islamic law at the state level may clearly be seen in the Marriage Law No. 1/1974, the Islamic Court Law of 1989, the Compilation of Islamic Law of 1991 and the foundation of BAZIS or Badan Amil Zakat, Infaq dan Shadaqah (Supervisory Body of *Zakā*, *Infaq* and *Ṣadaqa*).

The Marriage Law, decreed in 1974, shows how Hazairin's idea of a bilateral system was incorporated into statute. Article 41, for example, reads: "the consequences of dissolution of a marriage on account of divorce are as follows: the mother as well as the father shall continue to have the responsibility of maintaining and educating their

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study of legal institutions. Rene R. Gadacz, "Foreword," in *Towards An Anthropology of Law in Complex Society* (Calgary: Western Publishers, 1982).

[61] Lubis, "Islamic Legal Literature," 54.

[62] John R. Bowen, "Qur'ān, Justice Gender," 56.

children...The father shall be accountable for all expenses relating to the maintenance and the education needed by the children; in the case of the father being in fact unable to discharge his responsibility a court of law may decide that the mother share the burden of expenses referred to."[63] According to Hazairin, the article stipulates bilateral responsibility and changes the function of husband and wife. It had the effect, for instance, of altering the patrilineal system among the Batak, just as it did the matrilineal bias that prevailed among the Minangkabau, for whom husbands were only a complement of the family.[64] The marriage law therefore sought to benefit both husband and wife.

In 1973, a year before the marriage law was implemented, Hazairin published a commentary on it.[65] Suggesting very few changes, he supported the bill. The implementation of this bill caused him to be optimistic regarding the development of the legal system. According to him, the bill guaranteed marriage and inheritance laws and maintained the function of the Islamic courts.[66] It radically changed, moreover, social conditions by instituting a bilateral system. The *'uṣba* tradition or single reference line of descent in marriage and inheritance law was automatically transformed into a

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[63] See, Marriage Counseling Bearau, *the Indonesian Marriage Law* (Jakarta: Department of Religion Affairs, 1988), 22.

[64] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan Nomor 1-1974* (Jakarta: Tintamas, 1986), 18-9.

[65] See Sajuti Thalib, *Hukum Kekeluargaan Indonesia* (Jakarta: Universitas Indonesia, 1986), 163-7, as he quoted from Harian KAMI (KAMI daily), September 18, 1973.

[66] Thalib, *Hukum Kekeluargaan Indonesia*, 163.

bilateral system. Hazairin's goal was to institutionalize the bilateral (parental) system in family law in order to achieve a homogenous law for Indonesian Muslim.[67]

Hazairin furthermore argued that the Marriage Law No. 1/1974 was a clear example of *neo-ijtihād* or *authentic* interpretation (*tafsir yang otentik*).[68] What he meant by this was that the marriage law in Indonesia had moved from being based officially on *adat* law to allowing for Islamic provisions.[69] This new law terminated *adat* marriage rules, except their ceremonial components. The Marriage Law also provided a new national law, applicable to Indonesian citizens as a whole.[70] Those who followed Islam and other religions were to be allowed their own laws of marriage.[71]

Hazairin's tireless attempts to lay the groundwork for his idea of a bilateral social system through reform of inheritance law led to significant improvement in the family and property law of Indonesian society. Although some of his ideas had been anticipated in the Madjelis Permusjaratan Rakjat Sementara decree of December 3, 1960, many of Hazairin's suggestions regarding a bilateral system were clearly reflected in the Compilation of Islamic Law enacted in 1991. The Compilation of Islamic Law contains three books. Book I constitutes the Marriage Law, Book II the Inheritance Law, and Book III the *Waqf* (endowment) Law. Of course Hazairin's intention was to institutionalize Islamic law, especially in marriage and inheritance, and this was

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[67] Hazairin, *Hukum Kekelurgaan,* 3.

[68] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 9.

[69] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 5.

[70] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 1.

[71] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan,* 3.

accomplished in this compilation. Some elements of his thought were incorporated into the compilation, for example, in the case of orphaned children and their right to inheritance, as Muhammad Daud Ali explained. Article 185 reads, "whenever an heir dies before the deceased, his place is taken by his children. Their share may not exceed the share of those for whom they substitute."[72]

The implementation of the Marriage Law and the Compilation of Islamic Law has had a further impact in that it has met the demands of women's groups and jurists that legal steps be taken to give women equal rights to divorce and legal resources.[73] Similarly, through these statutes women have achieved greater property rights both in divorce and inheritance.

In 1989 the government attempted to expand the jurisdiction and augment the enforcement powers of the Islamic courts, even as this and other laws rendered the Indonesian system more integrated and subject to state supervision. Islamic courts now exist alongside general courts; and the decisions of judges are subject to Indonesian Supreme Court review. While Article 10 of the Constitution of Judicial Affairs (or Undang-undang Pokok Kekuasaan Kehakiman No. 14/ 1970) had led to the establishment and development of Islamic courts in Indonesia,[74] Hazairin's contribution was in unifying the Islamic court's competence in Java, Madura and Kalimantan where previously it had taken a back seat to differences.

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[72] Departemen Agama R. I., *Kompilasi Hukum Islam* (Jakarta: Departemen Agama RI, 1991/1992), 95.

[73] Bowen, "Qur'ān, Justice Gender," 56.

[74] Sajuti Thalib, *Hukum Kekeluargaan di Indonesia Berlaku Bagi Umat Islam* (Jakarta: Yayasan Penerbit Universitas Indonesia, 1974), 163.

In 1991 the government focused its attention on the *zakā* (alms) system. An institution was formed to organize its collection and that of other alms as well. Decrees of the Minister of Religious Affairs and Internal Affairs Nos. 29 and 47/1991 led to the foundation of BAZIS or Badan Amil Zakat, Infaq dan Shadaqah (Supervisory Body of *Zakā, Infāq* and *Ṣadaqa*) under state management.[75] The function of this body is to govern the collection and redistribution of *zakā* proceeds according to the needs of Indonesian Muslims from the district to the central level. The establishment of BAZIS represented an attempt on the part of the government to redress the economic problems faced by Indonesian Muslims. Hazairin's responsibility in its foundation may have been minor, but it is no coincidence that it answered many of the concerns that he had expressed regarding the need to institutionalize the economic infrastructure of the Muslim community.

Lev argues that Hazairin's ideas and suggestions regarding social change within Indonesian society were obviously reflected in that some Islamic laws were written in response to the demands of Indonesian Muslims. The evolution of unilateral societies (the Batak and the Minangkabau) which have changed in respect to modernization and urbanization show that Hazairin's prediction that society will change and *adat* law with it was an astute one. This also can be seen especially in the decisions of Islamic Courts where family law is interpreted in ways that reflect Islamic principles at the expense of *adat* customs. Islamic law therefore had an influence caused by social changes. And

[75] Departemen Agama RI., *Pedoman Pembinaan Amil Zakat, Infaq dan Shadaqah* (Departemen Agama RI, 1992), 107-31.

Hazairin affirmed that it is only Islamic law that can give a certainty, for when society changes, the *adat* law also changes.[76]

The government furthermore has tried to introduce other measures. For example, to overcome the problem of inheritance in Minangkabau, the authorities have, in addition to instituting Islamic property law, introduced the concept of *hiba* (gift), which has helped in the Islamization of social processes there. The conflict of the *adat* and Islamic inheritance systems was resolved by the use of *hiba* in that it allows children (sons and daughters) to receive property from their father, which was not the case previously. As Bowen notes, based on his research on contemporary Indonesian jurisprudence deeply rooted local practice restricts the share of inheritance as *hiba* (gift) which is limited to one-third of the property. This suggests that *hiba* is regarded as an impediment to the Islamization of social life in coping with traditional property, for this rule may also be explained as having been motivated by local social norms.[77] The extent of Hazairin's contribution in this area is unclear, but it can be said with confidence that it was his views that facilitated its introduction.

Much has been done in the legal field to redress social disparities in Indonesia. This has led to the introduction of new elements of Islamic law into the national constitution in an effort by Islamic jurists and leaders, together with the government, to

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[76] Lev, interview by author.

[77] John R. Bowen, "You May Not Give it Away: How Social Norms Shape Islamic Law in Contemporary Indonesia Jurisprudence," *Islamic Law and Society* 5/3 (1998), 382. This policy, Bowen adds, appears to take a step backward, because it limits, rather than expands the authority of a Muslim in regard with the wealth. Bowen, "You May not give it Away," 386. Compared to this policy, Hazairin's bilateral system is more advanced because it gives Muslims more authority over property matters.

establish *maṣlaḥa* with an Indonesian character. We cannot deny that Hazairin was a major force behind this trend.[78]

[78] Hazairin, *Tinjauan Mengenai Undang-undang Perkawinan*, 27.

# CONCLUSION

This study has shown that Hazairin's proposal for legal reform stemmed from his belief that Indonesia's legal system was mostly, if not entirely, inherited from the Dutch government, and that this was an anomaly that had to be rectified. This observation led him to give his attention to Islamic law in Indonesia and its interaction with *adat* law, especially in matters of family and inheritance.

Given his heavy socio-anthropological background, Hazairin's understanding of family and inheritance systems had an undeniable influence on his perception of the social reality of Indonesia. Our analysis has shown that he wished to introduce greater compatibility between Islamic law and *adat* law in cases of inheritance, a goal that could be achieved through the assimilation of the latter into Islamic law.

Hazairin's proposals for legal reform depended on the use of *ijtihād* and its more or less systematic application to resolving social problems. Although he was inconsistent in some aspects of his program, his ideas were innovative and radical with respect to the conditions of his day. This discrepancy may be attributed to the fact that Hazairin's attempts at Islamic legal reform were to some extent motivated by political considerations, since he believed that the status of Islamic law was threatened by an *adat* law which was strongly rooted in Indonesian society and which received support from *adat* proponents.

Although his ideas have been criticized on account of his own lack of formal training in the Islamic disciplines, and for deviating from traditional Islamic legal thought, these accusations seem unsupported in reality. As we have seen, Hazairin was very familiar with Islamic legal thought. Moreover, his method of interpreting the

Qur'ān and his approach in using modern science to analyze its text seem reasonable, and are in keeping with the spirit of Islam which acknowledges that the Qur'ān is approachable from any perspective.

Hazairin may thus be credited with having fashioned an Islamic law with Indonesian characteristics. His proposal for a national *madhhab* or an Indonesian *fiqh* recognized the country's social diversity, even though a unified Islamic law for Indonesian Muslims was of the utmost importance to Hazairin's legal reforms. Hazairin likewise sought to institutionalize Islamic law at the national level in order to introduce uniformity in its application.

Hazairin's efforts were aimed at reforming *adat* law and Islamic law at one and the same time. He drew on the principles underlying all Indonesian social systems to urge a new understanding of the Qur'ān, besides criticizing the idea that Islamic doctrine was final and absolute. The reforms that he set in motion led to a more balanced, or as he would have put it, "bilateral" system of domestic relations and gender equality in inheritance matters in particular and in property rights in general.

In attempting this fusion of Islamic and non-Islamic traditions, Hazairin applied a critical method that may be said to have consisted of the following axioms: first, that human intellectual construction in *fiqh* (or classical Islamic law) is the result of interpretation; second, that interpretations are affected by a variety of factors, including social conditions and culture; third, that there is a direct connection between the survival of certain interpretations and their promulgation as fact and the socio-anthropological concerns of those in a position to control authoritative intellectual products; fourth, that every society must therefore reevaluate inherited "knowledge" in

view of changed circumstances, paying particular intention to its own specific character; and last of all, that in the case of Islamic "knowledge" the Qur'ān provides clear guidance in this ongoing evolution in providing a message of social justice based on human equality.

Despite the fact that his ideas were rejected by other reformists, Hazairin's legal thought has had a marked influence on his disciples, followers and supporters. Many leading scholars have agreed with his ideas and several have at least followed his lead in interpreting the Qur'ān. His ideas are leant weight from the fact that he accurately foresaw the changes that Indonesian society has had to face particularly the effects of these changes on the family. This has prompted the government to implement many of his suggestions. Moreover, Hazairin's thought is still discussed in Indonesian legal discourse and his books have also been re-published and discussed anew. His legal thought especially is studied in some depth by students of Sharī'a faculties in the Indonesia's IAIN system, which are now an important part of the legal syllabus, especially regarding the relationship of *adat* law to Islamic law.

Finally, Hazairin's legal reform has had a significant impact on the development of the legal system in Indonesia. This is readily apparent in the emergence of certain Indonesian Islamic institutions for example, the Indonesian Marriage Law, the Compilation of Islamic Law, BAZIS and the Law of Islamic Courts.

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