

REESTABLISHING INDONESIAN *MADHHLAB* *Urf* and the Contribution of Intellectualism¹

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Abstract

The notion of Indonesian madhhab (school of Islamic law) is usually considered to have stopped with Hasbi and Haqairin. On the contrary, The notion of Indonesian madhhab has continued to grow and develop. Even though it has a variety of styles and trends, all of the notions of Indonesian madhhab have the same characteristics that are both contextual and formal. In addition to trying to formulate Islamic law in accordance with the context of Indonesian society, it also seeks to apply the results into statutory regulations with formal applications. With such characteristics, the Indonesian madhhab places 'urf (customs and community context) in a very important position as the main consideration in establishing Islamic law. Methodologically, to produce Islamic law in accordance with the Indonesian context, the Qur'anic text and the Hadith of the Prophet dialogue with Indonesian 'urf. By using a historical approach to Islamic legal thinking, this article discusses the development of the 'urf concept as put forward by the thinkers of Indonesian madhhab, since its emergence until now, and then discusses the influence of the notion of Indonesian madhhab regarding 'urf in the legal products related to Islamic law in Indonesia. Following that scheme, this study found

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that the notion of Indonesian madhhab continues to develop along with the development of scholarly thinking about 'urf from its thinkers.

[Pemikiran tentang mazhab Indonesia biasanya dianggap telah berhenti sampai Hasbi dan Hazairin. Namun sebenarnya, pemikiran mazhab Indonesia tersebut terus mengalami perkembangan sampai dengan sekarang. Walaupun memiliki berbagai macam corak dan kecenderungan, namun semua pemikiran mazhab Indonesia tersebut memiliki karakteristik yang sama, yaitu bersifat kontekstual dan formal. Pemikiran mazhab Indonesia disamping berupaya memformulasikan hukum Islam sesuai dengan konteks masyarakat Indonesia, juga berusaha untuk menjadikan hasil formulasinya tersebut sebagai aturan perundang-undangan yang berlaku secara formal. Dengan karakteristiknya yang semacam itu, mazhab Indonesia menempatkan 'urf (adat dan konteks masyarakat) pada posisi yang sangat penting sebagai dasar pertimbangan utama dalam penetapan hukum Islam. Secara metodologis, untuk menghasilkan hukum Islam yang sesuai dengan konteks Indonesia, dalam pemikiran mazhab Indonesia, teks Qur'an dan Hadis Nabi didialogkan dengan 'urf Indonesia. Dengan menggunakan pendekatan sejarah terhadap pemikiran hukum Islam, artikel ini membahas perkembangan konsep 'urf yang dikemukakan oleh para pemikir mazhab Indonesia, sejak mulai dicetuskannya hingga saat ini, kemudian dibahas juga pengaruh dari pemikiran mazhab Indonesia tentang 'urf tersebut dalam produk aturan perundang-undangan yang terkait dengan hukum Islam di Indonesia. Dengan kajian tersebut, artikel ini menemukan bahwa pemikiran mazhab Indonesia terus berkembang seiring dengan perkembangan pemikiran tentang 'urf dari para tokohnya.]

Keywords: Islamic law, *sharia*, 'urf, Indonesia, *madhhab*

A. Introduction

The notion of Indonesian *madhhab* (school of Islamic law) methodologically positions 'urf parallel to the Qur'anic text and the Hadith of the Prophet. Therefore, Islamic law prevailing in Indonesia, from the perspective of the Indonesian *madhhab*, must not only conform to *sharia*, but also should be in harmony with the socio-cultural context of Indonesia. The notion of Indonesian *madhhab*, commonly also called the Indonesian *fiqh* or the National *madhhab*, was initiated by two legal

thinkers in Indonesia, Hasbi and Hazairin.² Both state that Islamic law (*fiqh*) in Indonesia must be based on the customs and culture of the Indonesian people.³ T.M. Hasbi Ash Shiddieqy (1904-1975), the originator of the idea of ‘Indonesian *fiqh*’, considers that Islamic law implemented in Indonesia must be in accordance with the culture and characteristics of the Indonesian people. *Fiqh* can only be practiced by the people of Indonesia if the norms feel familiar and can solve problems fairly, but, on the contrary, people can leave *fiqh* and look for other more relevant laws.⁴ Thus, according to Hasbi, the idea of *fiqh* based on the ‘urf of Indonesia is very likely to be implemented, because for a long time, Arabic ‘urf has also become a source of *fiqh* that prevails in Arab countries.⁵

When examined, the emergence of the notion of Indonesian *madhhab* does not only bring Islamic law closer to local tradition and culture, but also attempts to reinterpret and reconstruct Islamic legal thinking in Indonesia. Hazairin (1906-1975), who first called his ideas ‘the national *madhhab*’ and later ‘the Indonesian *madhhab*’,⁶ once questioned

² Yudian Wahyudi, “Hasbi’s Theory of Ijtihad in the Context of Indonesian Fiqh”, Master Thesis (Montreal: McGill University, 1993), pp. 32–3; Yudian Wahyudi, *Hasbi’s Theory of Ijtihad in the Context of Indonesian Fiqh* (Yogyakarta: Pesantren Nawesea Press, 2007), pp. 26–7; R. Michael Feener, “Indonesian Movements for the Creation of a ‘National Madhhab’”, *Islamic Law and Society*, vol. 9, no. 1 (2002), pp. 83–115; R. Michael Feener, “Indonesian Movements for the Creation of A ‘National Madhhab’”, in *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007), pp. 54–80.

³ T.M. Hasbi Ash-Shiddieqy, *Sjari’at Islam Mendjawab Tantangan Zaman*, 1st edition (Yogyakarta: IAIN al-Djami’ah al-Islamijah al-Hukumijah, 1961), p. 42; T.M. Hasbi Ash-Shiddieqy, *Fakta Keagungan Syari’at Islam*, 2nd edition (Jakarta: Tintamas, 1982), p. 31.

⁴ Nourouzzaman Shiddiqi, “Prof. T.M. Hasbi Ash-Shiddieqy”, in *Lima Tokoh Pengembangan IAIN Sunan Kalijaga*, ed. by Moh. Damami (Yogyakarta: Pusat Penelitian IAIN Sunan Kalijaga, 1998), p. 156.

⁵ *Ibid.*, pp. 156–7.

⁶ Hazairin replaced the term ‘national *madhhab*’ (*mazhab nasional*) with ‘Indonesian *madhhab*’ (*mazhab Indonesia*). According to him, the term national *madhhab* was not appropriate, since the term ‘National’ mean all the citizens of Indonesia, while what he means is implementation of Islamic law that is suitable within the context of Indonesian Muslim society, not all Indonesian citizens that include citizens of different religions. Therefore, he said that the term of Indonesian *madhhab* is more appropriate for describing his notion. Hazairin, *Hukum Kekeluargaan Nasional*, 2nd edition (Jakarta: Tintamas, 1968), pp. 3–4.

whether Islamic family law formulated by classical Islamic schools of law and based on patrilineal Arabic culture was suitable for Indonesian society considering that the Indonesian people have a family structure that is different from that in the Arab community. In Indonesia, several family structures exist including patrilineal, matrilineal, and some that are bilateral.⁷ The harmonization between Islamic law and *Adat* (customary law) and the contextualization of Islamic law in Indonesia is of primary concern in the notion of Indonesian *madhhab*.

Harmonization between Islamic law and *Adat* law (Indonesian customary law) is an attempt of the notion of Indonesian *madhhab* to deter prolonged conflicts between the two legal traditions. The relation between Islamic law and customary law in the history of Indonesian law has struggled, although in general, the two have experienced more conflict than they have worked together.⁸ In the beginning, Islamic law and local customs of the Indonesian people could go hand in hand and not negate each other. Therefore, L.W.C. van den Berg (1845-1927) proposed the theory of *receptie in complexu* to reinforce the legal practices that existed in Indonesian society. This theory stated that for every legal tradition practiced by a community group, that law would be valid to the community concerned.⁹ Relations that were not harmonious between Islamic law and customary law occurred when the Dutch colonial government imposed the *receptie* theory proposed by Christiaan Snouck Hurgronje (1857-1936).¹⁰ This theory stated that for indigenous groups

⁷ Hazairin, *Hukum Islam dan Masyarakat*, 3rd edition (Jakarta: Bulan Bintang, 1963), pp. 13–4; Hazairin, *Tujuh Serangkai tentang Hukum*, 3rd edition (Jakarta: Bina Aksara, 1981), pp. 151–2.

⁸ Ratno Lukito, “Islamic Law and Adat Encounter: The Experience of Indonesia”, Master Thesis (Montreal: McGill University, 1997), pp. 40–1; Ratno Lukito, *Islamic Law and Adat Encounter: the Experience of Indonesia* (Jakarta: Logos, 2001).

⁹ Van den Berg was in Indonesia from 1870-1887. Before that, in the early colonial era it was recognized that Islamic family law prevails for Islamic society in the Indonesian archipelago. In 1885, the Dutch colonial government enacted *Regeerings Reglement* (RR) formalizing Van den Berg’s theory so that Islamic family law became stronger. Ichtijanto, “Pengembangan Teori: Berlakunya Hukum Islam di Indonesia”, in *Hukum Islam di Indonesia: Perkembangan dan Praktek*, ed. by Juhaya S. Praja (Bandung: Remaja Rosdakarya, 1994), p. 100.

¹⁰ Snouck Hurgronje was a counselor of the Dutch colonial government on Islam and Indonesian society. He came to Indonesia in 1898. He was recognized as

or indigenous Indonesians, customary law applies, while other legal traditions, including Islamic law, can apply only if each of these laws has been accepted and recognized as customary law.¹¹ This *receptie* theory then had implications for the practice of Islamic law in an increasingly limited society. Islamic Courts (*Raad Agama*), for example, were only permitted to handle marital cases, while inheritance cases were the authority of colonial courts (*Landraad*). Inheritance cases among Muslims in *Landraad* were decided by using customary law, not by Islamic law, because Islamic inheritance law was considered as not being absorbed into customary law. The enactment of the *receptie* theory has had an effect on the conflict between Islamic law and customary law in Indonesia, even several years after Indonesian independence in 1945.¹²

This conflict between Islamic law and customary law in Indonesia continued until the notion of Indonesian *madhhab* emerged in the 1950s, which tried to combine Islamic law and the Indonesian *urf*, including customary law. However, research as to what extent the notion of Indonesian *madhhab* has been developed by Islamic law thinkers

an inventor of *Adat* law (customary law, *Adatrecht*) in Indonesia, and the *Adat* law was then developed by Van Vollenhoven. Franz von Benda-Beckmann and Keebet von Benda-Beckmann, “Myths and Stereotypes about Adat Law: A Reassessment of Van Vollenhoven in the Light of Current Struggles over Adat Law in Indonesia”, *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia*, vol. 167, nos. 2–3 (2011), pp. 170–1.

¹¹ Ichtijanto, “Pengembangan Teori: Berlakunya Hukum Islam di Indonesia”, pp. 117–8, 122, 125. *Adat* law, as constructed by Cornelis van Vollenhoven (1874–1933), divided the region of Indonesia into nineteen *Adat* law circles. It left no room for Islamic law, except if received into one or another particular *Adat* tradition. William R. Roff, “Customary Law, Islamic Law, and Colonial Authority: Three Contrasting Case Studies and Their Aftermath”, *Islamic Studies*, vol. 49, no. 4 (2010), pp. 455–7.

¹² In the independence era of Indonesia, the dispute happened between not only the Islamic group and the nationalist group, but also legally between the Islamic law group and the customary law group. On the political dispute between the nationalist group and Islamic group, see Nadirsyah Hosen, *Shari’a & Constitutional Reform in Indonesia* (Singapore: Institute of Southeast Asian Studies, 2007), pp. 60–70; Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawai’i Press, 2008), pp. 59–69. On the legal debate between the Islamic law group and the customary law group, see Soetandyo Wignjosoebroto, *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia*, 1st edition (Jakarta: Raja Grafindo Persada, 1994), pp. 239–42.

after Hasbi and Hazairin has never been done. Yudian and Feener, as mentioned, only refer to Hasbi and Hazairin as thinkers of Indonesian *madhhab*.¹³ Similarly, some writers only mentioned one of the two thinkers, such as Nourouzzaman Shiddiqi who only studied Hasbi,¹⁴ and Al Yasa Abu Bakar, Sukiati Sugiono and Mahfudz Junaedi who only studied Hazairin.¹⁵ The last study of Hasbi and Hazairin's thought on Indonesian *madhhab* was researched by Syahbudi in his 2019.¹⁶ By using a historical approach to Islamic legal thought (*tārīkh al-tashrī*),¹⁷ this article seeks to fill the gap so that it can be seen that the notion of Indonesian *madhhab* not only never stopped with Hasbi and Haizirin,¹⁸ but was further developed by Indonesian Islamic law thinkers. Then, given the very important position of *'urf* (customs, local tradition) in the Indonesian *madhhab*, this article focuses on the meaning and position of *'urf* in the Indonesian *madhhab* and its influence on the statutory rules that apply to Indonesian Muslims.

¹³ Yudian and Feener had mentioned Munawir Sjadzali as one of new Muslim intellectuals who promoted the 're-actualization' of Islam in the 1980's, but not as an Indonesian *madhhab* thinker. Wahyudi, "Hasbi's Theory of Ijtihad in the Context of Indonesian Fiqh", pp. 28–9; R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2011), pp. 137–46.

¹⁴ Nourouzzaman Shiddiqi, *Fiqh Indonesia: Penggagas dan Gagasannya* (Yogyakarta: Pustaka Pelajar, 1997).

¹⁵ Al Yasa Abubakar, *Abli Waris Sepertalian Darab: Kajian Perbandingan terhadap Penalaran Hazairin dan Penalaran Fikih Mazhab* (Jakarta: INIS, 1998); Sukiati Sugiono, "Islamic Legal Reform in Twentieth Century Indonesia: A Study of Hazairin's Thought", Master Thesis (Montreal: McGill University, 1999); Mahfudz Junaedi, "Epistemologi Fikih Mazhab Indonesia: Studi atas Pemikiran Hazairin", PhD. Dissertation (Yogyakarta: Sunan Kalijaga State Islamic University, 2017).

¹⁶ Syahbudi, "Kosmopolitanisme Fikih Indonesia: Studi terhadap Pemikiran Hasbi Ash-Shiddieqy dan Hazairin", PhD. Dissertation (Yogyakarta: Sunan Kalijaga State Islamic University, 2019).

¹⁷ One of the discussions in the study of the history of Islamic law (*tārīkh al-tashrī*) is the efforts of scholars in developing Islamic law. Arif Maftuhin, "The Historiography of Islamic Law: The Case of Tārīkh al-Tashrī Literature", *Al-Jāmi'ah: Journal of Islamic Studies*, vol. 54, no. 2 (2016), p. 383.

¹⁸ Feener, "Indonesian Movements for the Creation of A 'National Madhhab'", p. 55; M.B. Hooker, *Indonesian Syariat: Defining a National School of Islamic Law* (Singapore: Institute of Southeast Asian Studies, 2008), p. ix.

B. Hasbi and Hazairin: The Impetus of Indonesian *Madhhab*

The notion of Indonesian *madhhab*, as put forward by Hasbi since 1940¹⁹ and Hazairin since 1951,²⁰ is basically a movement to form a separate school of Islamic law in Indonesia. Thus, the Indonesian *madhhab* is not only understood as seeking to formulate Islamic law that adapts to the social and cultural context of Indonesian society,²¹ but also as a movement that seeks to make Islamic law statutory rules that apply formally in Indonesian law.²² Hasbi and Hazairin stated these two characteristics of the notion of Indonesian *madhhab*, both contextual and formal, from the outset.²³

The Indonesian *madhhab*, according to Hazairin, of course required new *mujtabids* (Islamic law scholars). The *mujtabids* in Indonesia most likely come from Islamic Higher Education, especially from the *Sharia* Faculty whose curriculum combines the legal sciences and Islamic sciences, especially Islamic law. According to him, the kind of *mujtabid* needed is a person who has the expertise of a modern *jurist* and the expertise of a modern Islamic scholar.²⁴ Modern jurists are not enough because their Islamic knowledge is limited, while modern Islamic scholars are also not enough because their knowledge of social science and the

¹⁹ Hasbi's view on Indonesian *madhhab* was further intensified in 1961 when he gave an inaugural speech of his *honoris causa* doctoral title. Shiddiqi, "Prof. T.M. Hasbi Ash-Shiddieqy", p. 156; Wahyudi, "Hasbi's Theory of Ijtihad in the Context of Indonesian Fiqh", p. 1.

²⁰ Samsul Wahidin and Adurrahman, *Perkembangan Ringkas Hukum Islam di Indonesia*, 1st edition (Jakarta: Akademika Pressindo, 1984), pp. 86–7; Sugiono, "Islamic Legal Reform in Twentieth Century Indonesia", p. 96.

²¹ Feener, "Indonesian Movements for the Creation of a 'National Madhhab'", p. 109.

²² Hooker said that the new *fiqh* is found in the positive laws of the state. Hooker, *Indonesian Syaria*, pp. 3, 40..

²³ T.M. Hasbi Ash-Shiddieqy, *Pengantar Hukum Islam*, vol. 2, 6th edition (Jakarta: Bulan Bintang, 1981), p. 284; T.M. Hasbi Ash-Shiddieqy, *Falsafah Hukum Islam*, 4th edition (Jakarta: Bulan Bintang, 1990), pp. 373–5; Hazairin, *Tujuh Serangkai tentang Hukum*, pp. 38, 65; Hazairin, *Hukum Islam dan Masyarakat*, pp. 20–2; Yudian Wahyudi, *Ushul Fikih versus Hermeneutika: Membaca Islam dari Kanada dan Amerika* (Yogyakarta: Pesantren Nawesea Press, 2007), pp. 42–4.

²⁴ Hazairin, *Hukum Islam dan Masyarakat*, pp. 16–9; Hazairin, *Tujuh Serangkai tentang Hukum*, pp. 153–5.

legal science needed to understand Indonesian society are usually also limited.²⁵ According to Hasbi, the *ijtihad* carried out by the *mujtabids* in establishing Islamic law in Indonesia should be done through a process of collective *ijtihad* (*ijtihad jamā'iy*). Additionally, according to him, the group of *mujtabids* should be assembled in a certain organisation such as the *tashrī* institution.²⁶ Therefore, Islamic law contextualisation efforts in Indonesia can only be carried out by Indonesian *mujtabids* and should be carried out by a kind of *fatwa* institution so that the *mujtabids* can perform a collective *ijtihad*.

The results of a contextual *ijtihad*, according to both Hasbi and Hazairin, need to be submitted to the parliament or people's representative institutions to become formal statutory rules that apply to Muslims in Indonesia.²⁷ The results of decisions and legal provisions by the representative institutions can be seen as *ijmā'*, a consensus of the Indonesian people. These results can be revised and replaced by a new consensus if the conditions and situations require a change.²⁸ Thus, the results of Islamic legal provisions that are in accordance with the context of Indonesian society, in the view of the Indonesian *madhhab*, are not enough, but must be processed by the people's representative institutions into formal statutory rules. The statutory rules that apply to Indonesian Muslims are then seen as *ijmā'* or the consensus of the Indonesian people. In the case of *ijmā'*, the Indonesian *madhhab* has a view of the concept of local and temporal *ijmā'*. This is similar to the views of early Islamic *mujtabids* who recognized the validity of local *ijmā'*, such as *ijmā'* of Medina scholars, *ijmā'* of Mecca scholars, *ijmā'* of Basra scholars, and *ijmā'* of Kufa scholars. *Ijmā'* at that time was a consensus that had become the living tradition of a particular society regarding Islamic law.²⁹

The contextual and formal characteristics of the Indonesian

²⁵ Hazairin, *Tujuh Serangkai tentang Hukum*, pp. 155–6.

²⁶ T.M. Hasbi Ash-Shiddieqy, *Pengantar Hukum Islam*, 2: p. 284; Ash-Shiddieqy, *Pengantar Hukum Islam*, 1: pp. 279–80.

²⁷ Ash-Shiddieqy, *Falsafah Hukum Islam*, pp. 373–5; Hazairin, *Hukum Islam dan Masyarakat*, pp. 20–2; Hazairin, *Tujuh Serangkai tentang Hukum*, pp. 41, 157–9.

²⁸ Ash-Shiddieqy, *Falsafah Hukum Islam*, pp. 373–5.

²⁹ Sha'bān Muḥammad Ismā'īl, *Dirasat ḥawla al-Ijma' wa'l-Qiyas Dirāsāt ḥawla al-Ijma' wa al-Qiyās* (Cairo: Maktabah al-Nahḍah al-Miṣriyyah, 1993), pp. 131–3, 138; Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 1979), p. 78.

madhhab are different from the two other Islamic legal thought groups in Indonesia, namely a group that has a textual-formalistic approach and a group that has a substantial-cultural approach. The first group views that Islamic law that is interpreted textually must be implemented for all Muslims, including Indonesian Muslims. Therefore, for them, the political process in a country is a tool to formally enforce Islamic law in statutory regulations.³⁰ Meanwhile, the second group views that the most important thing is the absorption of Islamic legal values in the behaviour of Muslim communities. This means that the universal values of Islamic law such as justice, honesty, freedom, equality before the law, and religious tolerance must be cultivated, instilled, and enforced in the social life of the Indonesian people. The process of implementing Islamic legal values is carried out culturally through public awareness, not by formal-structural means using statutory regulations.³¹

The classification of Islamic legal thinking that developed in Indonesia reflects two things, namely the tendency for Islamic legal thinking and the efforts to formally implement it in statutory rules. This classification differs from Hooker's classification based on philosophical tendencies of Islamic legal thinking in Indonesia. Hooker divides Islamic legal thinking in Indonesia into three groups. The first group states that *sharia* (Islamic teachings in the Qur'an and Hadith) as understood textually are considered sufficient and need to be implemented directly in Indonesia. The second group states that *sharia*, except the issues of ritual worship, must be adapted according to the local context of Indonesia. The last group perceives that *sharia* must be interpreted rationally through *maqāṣid al-sharī'ah* (the main goal of *sharia*) so that Islamic law can embrace

³⁰ Some groups that had struggled to implement Islamic law formally in Indonesia are Majelis Mujahidin Indonesia (MMI), Hizbut Tahrir Indonesia (HTI, which was officially dissolved by the state in 2017), and Front Pembela Islam (FPI). S. Yunanto, et al, *Gerakan Militan Islam di Indonesia dan di Asia Tenggara*, 2nd edition (Jakarta: Friedrich-Ebert-Stiftung & the RIDEP Institute, 2003), pp. 61–3.

³¹ Ahmad Qodri Azizy, *Hukum Nasional: Eklektisisme Hukum Islam dan Hukum Umum*, 1st edition (Jakarta: Teraju, 2004), pp. 230–3. A group, which had refused the formalization of Islamic law in Indonesia and proposed substantial Islam approach, is Jaringan Islam Liberal (JIL). Saiful Mujani, "Syari'at Islam dalam Perdebatan", in *Syariat Islam: Pandangan Muslim Liberal*, ed. by Burhanuddin (Jakarta: Jaringan Islam Liberal & The Asia Foundation, 2003), pp. 24–8.

contemporary issues such as human rights, gender equality, social welfare, strengthening civil society, and implementing good governance.³²

Apart from differences of opinion about the implementation of Islamic law noted above, Islamic law has actually been recognized as one of the sources for the formation and development of Indonesian national law, together with other legal traditions such as Dutch colonial law and customary law.³³ Therefore, the effort that should be made by Indonesian Muslims is how to prepare the formulation of Islamic law that can be used as material for the formation of national law.³⁴ In other words, what is needed is the formulation of Islamic law in accordance with the Indonesian context that can be proposed as material for the formation and development of national law. Here the relevance of the notion of Indonesian *madhhab*, which from the very beginning tried to contextualize Islamic law with the culture and customs of Indonesian people, is clear for trying to implement and formalize a rule of positive law that would apply in Indonesia. This notion of Indonesian *madhhab* is basically a moderate group among textual-formalist groups and substantial-cultural groups as mentioned above. This notion of Indonesian *madhhab* can be referred to as a contextual-formalist group. Besides internal moderation, the notion of Indonesian *madhhab* is also externally moderate because it seeks to combine and dialogue between Islamic law and customary law that have been in constant confrontation from the Dutch colonial period to several years beyond Indonesian independence.³⁵

³² Hooker, *Indonesian Syariah*, pp. 43–65.

³³ Mudzakkir, “Integrasi Hukum Islam dalam Hukum Nasional: Upaya Restrukturisasi Perundang-Undangan Nasional”, *Jurnal Mazhabuna*, vol. 2, no. 2 (2003), p. 23.

³⁴ It is very relevant to prepare Islamic law as a source of national law because Indonesia has still arranged its national law. The laws prevailing now, according to Bustanul Arifin, are mostly ‘laws in Indonesia’, not ‘Indonesian laws’. Busthanul Arifin, “Kata Pengantar”, in *Ijtihad Kemanusiaan* (Jakarta: Paramadina, 1997), p. xxii.

³⁵ It could be seen from some theories concerning prevailing of Islamic law in Indonesia proposed and implemented since the Dutch colonial era until the independent era of Indonesia. On the theories, see. Ichtijanto, “Pengembangan Teori: Berlakunya Hukum Islam di Indonesia”, pp. 117–38; Achmad Gunaryo, *Pergumulan Politik & Hukum Islam: Reposisi Peradilan Agama dari Peradilan ‘Pupuk Bawang’ menuju Peradilan yang Sesungguhnya*, ed. by Mu’ammam Ramadhan (Yogyakarta: Pustaka Pelajar & Pascasarjana IAIN Walisongo, Semarang, 2006), pp. 64–123.

Based on the description above, there are two characteristics of the Indonesian *madhhab*, namely contextual and formal. ‘Contextual’ means formulating Islamic law in accordance with the context of Indonesian society and ‘formal’ means making the contextual formulation of Islamic law as a state law that applies in Indonesia. In its development, the notion of post-Hasbi and Hazairin Indonesian *madhhab* was continued by several Islamic law thinkers who had the same kind of thinking as the two predecessors. These include Munawir Sjadzali (1925-2004) who had the idea of ‘contextualizing Islamic law in Indonesia’ that was put forward in 1988,³⁶ Busthanul Arifin (1929-2015) who is associated with the ‘institutionalization of Islamic law in Indonesia’ in 1989,³⁷ A. Qodri Azizy (1955-2008) with the ‘formalization of Islamic law in Indonesia’ in 2002,³⁸ and Yudian Wahyudi (b. 1960) for the ‘reorientation of Indonesian *fiqh*’ in 1994.³⁹ The terms proposed by Indonesian Islamic law scholars above are different, but have the same characteristics so that in this article, the terms are equated with meaning and purpose. However, this article uses the term ‘Indonesian *madhhab*’ from Hazairin because the term is closest to describing the characteristics of this thinking, namely as a movement to implement Islamic law in Indonesia contextually and formally at the same time.

C. The Development of Indonesian *Madhhab* and the Opinion toward Custom (*Urf*)

As stated above, this article argues that the notion of Indonesian

³⁶ Munawir. Sjadzali, *Ijtihad Kemanusiaan* (Jakarta: Paramadina, 1997), pp. 58–75; Munawir. Sjadzali, “Reaktualisasi Ajaran Islam”, in *Polemik Reaktualisasi Ajaran Islam*, ed. by Iqbal Abdurrauf Saimima (Jakarta: Pustaka Panjimas, 1988), pp. 6–8.

³⁷ Busthanul Arifin, *Pelembagaan Hukum Islam di Indonesia: Akar Sejarah, Hambatan, dan Prospeknya* (Jakarta: Gema Insani Press, 1996), pp. 56–7.

³⁸ Azizy, *Hukum Nasional*, pp. 291–8.

³⁹ Yudian’s idea of Indonesian *madhhab* is basically put forward earlier than that of Qodri. In this article, Yudian’s thought is placed last because he is still alive so his thought is still possible to develop. Yudian Wahyudi, “Reorientasi Fiqh Indonesia”, in *Islam Berbagai Perspektif: Didedikasikan untuk 70 Tahun Prof. Dr. H. Munawir Sjadzali, MA*, ed. by Sudarnoto Abdul Hakim, Hasan Asari, and Yudian Wahyudi (Yogyakarta: Lembaga Penterjemah & Penulis Muslim Indonesia, 1995), pp. 223–32; Wahyudi, *Ushul Fikih versus Hermeneutika*, pp. 35–44.

madhhab, as pioneered by Hasbi and Hazairin, has continually evolved in Indonesia through the contributions of various Islamic law thinkers.⁴⁰ This section seeks to trace the continuity of the notion of Indonesian *madhhab* through the views of its thinkers regarding the concept of *'urf*. *'Urf*, in the view of Indonesian *madhhab*, is a major consideration in the effort to contextualize Islamic law in order to suit the conditions of Indonesian society. Regarding their views on *'urf*, this section finds that the thoughts of the six Indonesian *madhhab* thinkers mentioned above can be classified into two trends. The first trend emphasizes *'urf* as a source of Islamic law in Indonesia and the second tendency extends the meaning of *'urf* not only to the customs and habits of the Indonesian people, but also the social and political context of Indonesian society, in general. The following section explains these two trends.

1. Indonesian *'Urf* as a Source of Islamic Law

As Arab, Egyptian, and Indian customs can be sources of Islamic law (*fiqh*) in those regions, in the notion of Indonesian *madhhab*, Indonesian local customs (*'urf*) can also be a source of Islamic law as practiced in Indonesia.⁴¹ In other words, *'urf* of Indonesia can be a source in the *ijtihad* process to determine the formulation of Islamic law in Indonesia. Regarding the importance of this *'urf*, Hasbi cites an Islamic legal maxim that states that the law stipulated by *'urf* has the same position as the law stipulated by the *sharia* text (*al-thābit bi al-'urf ka al-thābit bi al-naṣṣ*).⁴² In addition to *'urf*, according to Hasbi, benefit (*maṣlaḥah*; public interest) is also an important consideration in the process of *ijtihad*, as a legal maxim states that Islamic law is based on human benefit, wherever benefit is

⁴⁰ The development of the notion of Indonesian *madhhab* is very possible. According to Akh. Minhaji, the idea of the need for Islamic law in accordance with the culture of the Indonesian society actually existed long before Indonesia's independence. This could be seen from the contents of the book *Wedhatama* written in the late 1870s during the era of Mangkunagara IV (1857-1881) in Surakarta. Akh. Minhaji, "The Wedhatama and Its Impact on Islamic Legal Thought in Indonesia", *Al-Jāmi'ab: Journal of Islamic Studies*, vol. 40, no. 2 (2002), pp. 259–60, 277.

⁴¹ Ash-Shiddieqy, *Syari'at Islam Mendjawab Tantangan Zaman*, p. 42; Ash-Shiddieqy, *Fakta Keagungan Syari'at Islam*, p. 31.

⁴² T.M. Hasbi Ash-Shiddieqy, *Pengantar Ilmu Fiqh* (Jakarta: Bulan Bintang, 1978), pp. 213–4.

there, there is God's law (*al-ḥukm tadūru ma'a maṣāliḥ al-'ibād fa ḥaiṭhu ma wujidat al-maṣlahah fa thamma ḥukm Allāh*).⁴³ Therefore, there is a rule that states that Islamic law and the results of *ijtihad* can change according to changes in social conditions (*taghayyur al-ḥukm wa'l-ijtihad bi taghayyur al-ahwāl*). However, the stipulation of the law by considering '*urf*, benefits and amendment to this law only apply to social matters (*mu'āmalah*) and do not apply to matters of ritual worship (*'ibādah*).⁴⁴

The law based on Indonesian '*urf*, according to Hazairin, needs to be a separate school of law, namely the Indonesian *madhhab*, which is different from the classical schools of Islamic law. The formation of the classical schools is generally based on the customs and conditions of the Arab community, while the Indonesian people have their own customs and culture.⁴⁵ In Indonesia, since the arrival of the classical *fiqh*, there have often been conflicts with customary law in Indonesia. This shows that Arabic *fiqh* is difficult to implement in Indonesian society.⁴⁶ Therefore, in Indonesia there needs to be a new school of Islamic law, namely the Indonesian *madhhab*; an Indonesian school of Islamic law based on the '*urf* of Indonesia. The school, as stated, is only related to the social field and does not concern the issue of ritual worship.⁴⁷

Sociologically, Arab society has characteristics and structures that are different from those of Indonesian society. Take the issue of adult women and marriage guardians, for example. According to Hazairin, Indonesian society generally accepts the opinion of the Shāfi'ite school of law which states that every woman must use a male guardian when she is about to get married, without further questioning why, or whether it is

⁴³ Ash-Shiddieqy, *Fakta Keagungan Syari'at Islam*, pp. 37–8; Ash-Shiddieqy, *Syari'at Islam Mendjawab Tantangan Zaman*, p. 33.

⁴⁴ Ash-Shiddieqy, *Syari'at Islam Mendjawab Tantangan Zaman*, p. 34; T.M. Hasbi Ash-Shiddieqy, *Dinamika dan Elastisitas Hukum Islam* (Jakarta: Tintamas, 1975), p. 41; Ash-Shiddieqy, *Fakta Keagungan Syari'at Islam*, p. 30.

⁴⁵ Hazairin, *Hukum Islam dan Masyarakat*, p. 15; Hazairin, *Tujuh Serangkai tentang Hukum*, p. 153.

⁴⁶ Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith*, 6th edition (Jakarta: Tintamas, 1982), pp. 1–2.

⁴⁷ Hazairin, *Hukum Islam dan Masyarakat*, p. 15; Hazairin, *Tujuh Serangkai tentang Hukum*, p. 153; Wahidin and Adurrahman, *Perkembangan Ringkas Hukum Islam di Indonesia*, p. 87.

the only way for women to get married consistent with Islamic teachings. Hazairin reminds us that the Ḥanafite and Shīʿite schools of law did not require the existence of a marriage guardian for adult women. The need for a marriage guardian is only for minors, either male or female. The two schools of law did prioritize male guardians over female guardians for marriage⁴⁸ and even the Shafīʿite school of law did not allow women to become guardians of marriage. Anthropologically, the provision is in accordance with the conditions of Arab society because of their patrilineal kinship system. Therefore, Hazairin questioned whether this provision was also suitable for the people of Indonesia, because in Indonesia there were several kinship systems including matrilineal, bilateral, and also patrilineal. If Islamic law in Indonesia related to marriage guardians, for example, is different from the provisions and views of the classical schools of law, is it not seen as Islamic teaching? When the Qurʾān as the main source of Islamic law does not clearly specify the marriage guardian, then it must be a man.⁴⁹

For Munawir Sjadzali, contextualization of Islamic law in Indonesia is a necessity. The Indonesian Muslim community requires the formulation of Islamic law in accordance with the social, cultural, and customary conditions (*urf*) of Indonesia. According to Munawir, formulating Islamic law in accordance with the Indonesian context is very possible. Islamic law is a dynamic and flexible law as practiced by both classical and modern Islamic jurists such as ʿUmar Ibn al-Khaṭṭāb (d. 644), ʿUmar Ibn ʿAbd al-ʿAzīz (d. 720), Abū Yūsuf (d. 798), ʿIzzuddīn Ibn ʿAbd al-Salām (d. 1262), Najmuddīn al-Ṭūfī (d. 1316), and Muḥammad ʿAbduh (d. 1905).⁵⁰ Munawir, for example, proposed the view that for the context of Indonesian society, males and females must receive equal

⁴⁸ Abū Ḥanīfah, the founder of Ḥanafite *madhhab*, allows woman as the marriage guardian. Muḥammad Ibn Ismāʿīl al-Ṣanʿānī, *Subul al-Salām Sharḥ Bulūgh al-Marām min Adillah al-Aḥkām*, vol. 3 (Beirut: Dār al-Fikr), p. 120.

⁴⁹ Hazairin, *Hukum Islam dan Masyarakat*, pp. 13–4; Hazairin, *Tujub Serangkai tentang Hukum*, pp. 151–2.

⁵⁰ Munawir Sjadzali, *Islam, Realitas Baru dan Orientasi Masa Depan Bangsa* (Jakarta: UI Press, 1993), pp. 1, 8, 16, 52–9; Munawir Sjadzali, “Dari Lembah Kemiskinan”, in *Kontekstualisasi Ajaran Islam: 70 Tahun Prof. Dr. H. Munawir Sjadzali*, ed. by Muhammad Wahyuni Nafis (Jakarta: Ikatan Persaudaraan Haji Indonesia-Paramadina, 1995), pp. 90, 92–3; Sjadzali, *Ijtihad Kemannisiaan*, pp. 37–46.

inheritances. This view is different from what is found textually in the Qur`an, 4: 11 that male children receive a share of inheritance twice that of the female children. This verse, according to Munawir, must be interpreted contextually, not textually.⁵¹

Equal inheritance for boys and girls, according to Munawir, is a provision that is in accordance with the current context of Indonesian society. He concluded it from his visit to several regions and from the information he got from the judges of religious courts when he was the Minister of Religion. Many Muslims preferred to submit their inheritance cases to public courts rather than to religious courts because the decisions between boys and girls were seen as more suitable. In reality, many Muslim families carry out pre-emptive actions, that is, before they die, they share most of their wealth as gifts (*hibab*; grants) to their children, each getting the same part regardless of gender differences. Thus, when they die, their wealth that must be divided through inheritance is only a little or nothing at all. Although such actions are essentially not contrary to the provisions of the Qur`an, they are a form of *hīlah* (excuse, trick) to avoid the Islamic inheritance law (*farā`id*).⁵²

Such changes in the interpretation of Islamic law, according to Munawir, are caused by the dynamics of the current social, cultural, and customary context (*'urf*) of Indonesian people so that the implementation of textual Islamic law is not seen to reflect a sense of justice. Therefore, according to Munawir, there needs to be modification and contextualization of Islamic law by reinterpreting even the legal matters stated textually in the Qur`an. However, the contextual reinterpretation only relates to social problems (*mu`āmalah*) and not problems related to pure ritual worship (*'ibādah maḥḍah*).⁵³ Munawir thus defines the concept of *'urf* (custom) as the dynamics and changes of contemporary Indonesian society. The dynamic of *'urf* must be a primary consideration in making

⁵¹ Munawir. Sjadzali, “Pengantar Penerbit”, in *Polemik Reaktualisasi Ajaran Islam*, ed. by Iqbal Abdurrauf Saimima (Jakarta: Pustaka Panjimas, 1988), p. v; Sjadzali, *Ijtihad Kemanusiaan*, pp. 7–8, 70–1.

⁵² The ambiguity that caused the gap between formal belief and daily behavior, according to Munawir, is caused by the stagnation of rational religious thinking. Sjadzali, “Dari Lembah Kemiskinan”, pp. 87–90; Sjadzali, *Islam, Realitas Baru dan Orientasi Masa Depan Bangsa*, pp. 17–20, 79.

⁵³ Sjadzali, *Ijtihad Kemanusiaan*, pp. 37–46.

interpretations of the Qur`an so as to produce contextual interpretations, not textual interpretations.

2. Broadening the Meaning of Indonesian *Urf*

Unlike the previous three Indonesian *madhhab* thinkers, three other thinkers tried to expand the meaning of *urf*. Busthanul Arifin stated that the Indonesian *madhhab* cannot be separated from the laws that operate in Indonesian society, both unwritten laws such as customary law and positive law, including laws that currently apply as inherited from the Dutch colonial government. Therefore, in an effort to institutionalize Islamic law, it is necessary to examine the comparison of laws, especially the positive laws that apply in Indonesia.⁵⁴ With such a comparative study of law, it can be known which law is in accordance with *sharia* and which law is not appropriate. Even though the majority of positive laws are inherited from the Dutch colonial period, according to Busthanul, many positive laws in Indonesia are in accordance with *sharia* values so that these laws can be called products of the Indonesian *madhhab*.⁵⁵ *Ijtihad* to establish Indonesian Islamic law is not possible without first studying the laws that apply and develop in the community. According to Busthanul, this study of law and social conditions that developed in the community, *urf* and *‘adab* (customs and habits), had been carried out by classical scholars.⁵⁶ Based on the explanation above, in Busthanul’s view, *urf* can be in the form of other laws that are in force in Indonesia, namely customary law and positive law inherited from the Dutch colonial period. To formulate the Indonesian *madhhab*, Islamic law must dialogue with laws that are being applied in that society.

In line with Busthanul, Qodri Azizy stated that in its history, the formulation of Islamic law, with various opinions among its schools, was strongly influenced by local cultural factors that are generally referred

⁵⁴ Arifin, *Pelebagaan Hukum Islam di Indonesia*, pp. 12–4, 164.

⁵⁵ According to Busthanul, this is a real enforcement of Islamic law, which is different from Islamic law enforcement as political commodity that falls on an apology without accosting other laws existing in Indonesia. Arifin, “Kata Pengantar”, pp. xii–xiii.

⁵⁶ *Ibid.*

to as *'urf* or *'ādah*.⁵⁷ Therefore, in Indonesia, according to him, there is a need for an Indonesian *madhhab* that formulates Islamic law in accordance with the socio-cultural context of Indonesian society. The existence of the Indonesian *madhhab* is important because the Indonesian social and cultural context is generally different from the social and cultural context of Arab society, moreover with the social context of classical Arab society. According to Qodri, the existence of the Indonesian *madhhab* needs to be accompanied by the formulation of an Islamic legal methodology that becomes the basis of this Indonesian *madhhab*.⁵⁸

Law, in Qodri's view, must be understood dynamically, including legal traditions that exist in Indonesia such as Islamic law, customary law, and Dutch colonial law. Therefore, Islamic law applied in Indonesia should also be dynamic, specifically to respond to social changes so that Indonesian Muslims would not have to refer constantly to the views of classical *fiqh*. Customary law should also not be understood as a law established by the Dutch colonial government, but must be interpreted as a living law in the community. Likewise, the laws of Dutch colonial heritage must be understood dynamically as laws from Western countries, especially from modern countries that have an international influence.⁵⁹ In an effort to formalize Islamic law in Indonesia, Islamic law must dialogue with living traditions in the community, including the traditions of customary law and the laws from Western countries.⁶⁰

Reaching beyond that, Yudian Wahyudi stated that the Indonesian *madhhab* aims to formulate typical Indonesian Islamic law by making the *'urf* of the Indonesian people as a source. In other words, the Indonesian *madhhab* is an effort to liberate Indonesian culture from the dominance of Arab culture, which has had a strong influence in the tradition of classical Islamic law.⁶¹ Thus, the Indonesian *madhhab* is the “Indonesianization”

⁵⁷ Regarding the influence of *'urf* to the differences of *fiqh* in the classical era of Islam, see, for example, Noel James Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), pp. 48–9.

⁵⁸ Azizy, *Hukum Nasional*, pp. 19–20.

⁵⁹ *Ibid.*, pp. 2–3, 138–9.

⁶⁰ *Ibid.*, pp. 50, 208–9.

⁶¹ Wahyudi, *Ushul Fikih versus Hermeneutika*, pp. 32, 37, 42, 44; Yudian Wahyudi, “Peran Hasbi Ash-Shiddieqy dalam Pembaharuan Hukum Islam di Indonesia Abad XX”, in *Ke Arab Fiqh Indonesia: Mengenang Jasa Prof. Dr. T.M. Hasbi Ash Shiddieqy*, ed.

of the concept *'urf* that is found in classical Islamic law by adjusting it to the social, cultural, and political context of Indonesia. Formulating the Indonesian *madhhab*, as Islamic law in general, requires *Ijtihād* that uses methodology and analytical tools, called *uṣūl al-fiqh*. The eternal task of *uṣūl al-fiqh*, in Yudian's view, is the dialogue of limited *sharia* texts in the Qur'an and the Sunnah of the Prophet with *'urf* in the form of civilizations, histories, or customs that develop continuously and unlimitedly.⁶² Thus, in Yudian's view, *'urf*, which is the basis for the formulation of the Indonesian *madhhab*, is custom plus the social, cultural, and political context of Indonesia, even the global civilization that influences Indonesian society.

In the context of the Indonesian *madhhab*, the dialogue is between *sharia* texts and *'urf* of contemporary Indonesian society. According to Yudian, dialogue between *sharia* and *'urf* must be based on *maqāṣid al-sharī'ah*, namely the goals of *sharia* for achieving and maintaining human benefit (*maṣlaḥah*).⁶³ Yudian states that the concept of *maqāṣid al-sharī'ah* is usually understood only as a theoretical doctrine that is almost never applied to analyse and solve issues that develop in society, causing a stagnation of Islamic law. Today's Muslim community often attempts to speak by using language of God, even though God Himself actually speaks to Muslims using human language. Yudian argues that *maqāṣid al-sharī'ah* must be returned as a method for analyzing and solving issues and problems faced by society, and even humans, in general.⁶⁴ More than that, *maqāṣid al-sharī'ah*, or *uṣūl al-fiqh* in general, cannot be applied only to analyze legal issues, but also to other issues that develop in society, including social and political issues.⁶⁵

by Yudian Wahyudi (Yogyakarta: Forum Studi Hukum Islam, Fakultas Syari'ah IAIN Sunan Kalijaga, 1994), pp. 11, 16.

⁶² Yudian Wahyudi, *Maqashid Syari'ah dalam Pergumulan Politik: Berfilsafat Hukum Islam dari Harvard ke Sunan Kalijaga* (Yogyakarta: Pesantren Nawesea Press, 2007), pp. 35, 90.

⁶³ Wahyudi, *Ushul Fikih versus Hermeneutika*, pp. 45–7..

⁶⁴ *Ibid.*, pp. 48, 51; Wahyudi, *Maqashid Syari'ah dalam Pergumulan Politik: Berfilsafat Hukum Islam dari Harvard ke Sunan Kalijaga*, p. 26.

⁶⁵ Wahyudi, *Ushul Fikih versus Hermeneutika*, p. 52; Wahyudi, *Maqashid Syari'ah dalam Pergumulan Politik: Berfilsafat Hukum Islam dari Harvard ke Sunan Kalijaga*, pp. 27, 49. How *maqāṣid al-sharī'ah* is applied to analyse political issues, for example, can be read in

D. The Urgence of *Urf* and Its Methodological Position in Indonesian *Madhhab*

All Indonesian *madhhab* thinkers emphasize the importance of Indonesian *urf* as a consideration for the formulation of Islamic law. For Hasbi, without Indonesian *urf*, Islamic law would feel foreign to the people of Indonesia, and with Indonesian *urf*, according to Hazairin, it is necessary to change the classical *fiqh* that is still valid in Indonesia today and reformulate it to suit the Indonesian context. In Munawir's view, Indonesian *urf* is a very important consideration for interpreting the *sharia* text, and for him, in order to fit the context of Indonesian society, the interpretation must be contextual, not textual. Busthanul goes on to state that the meaning of *urf* is not only the customs of society, but also the legal traditions that develop in a society. Therefore, customary law and inherited laws from the Dutch colonial government that are applicable in society can also be seen as *urf*. Qodri expanded on Busthanul by stating that social traditions and legal traditions could be seen as living traditions in society and this was an important consideration for formulating the Indonesian *madhhab*. Yudian asserted that the *urf* that is a consideration for the formulation of the Indonesian *madhhab* must be interpreted broadly, not only interpreted as the custom of Indonesian society, but also the social and political context of Indonesia, even the contemporary global civilization that affects Indonesian society. The six thinkers in the Indonesian *madhhab* can be classified as the first three emphasizing the importance of Indonesian *urf* in interpreting and defining Islamic law in Indonesia, while the next three thinkers developed and broadened the meaning of *urf* that becomes basis for the Indonesian *madhhab*.

Regarding the position of *urf* in Islamic law, Indonesian *madhhab* thinkers make a distinction between the matters of ritual worship (*ibādah maḥḍah*) and social matters (*mu'āmalah*). According to them, the formulation of the Indonesian *madhhab* is only related to social problems, not matters of ritual worship.⁶⁶ This can be understood because the

Yudian Wahyudi, *Islam dan Nasionalisme: Sebuah Pendekatan Maqashid Syari'ah* (Yogyakarta, 23 Sep 2006); Yudian Wahyudi, *Al-Afghani and Ahmad Khan on Imperialism: A Comparison from the Perspective of Islamic Legal Philosophy* (Yogyakarta: Pesantren Nawesea Press, 2007).

⁶⁶ Hazairin, *Hukum Islam dan Masyarakat*, p. 15; Hazairin, *Tujuh Serangkai tentang Hukum*, p. 153; Sjadzali, "Dari Lembah Kemiskinan", pp. 90, 92–3; Sjadzali, *Islam, Realitas Baru dan Orientasi Masa Depan Bangsa*, pp. 52–9; Sjadzali, *Ijtihad Kemannusiaan*, pp.

Indonesian *madhhab* only focuses on matters that will become formal rules to apply in the community at large. Rules of formal legislation can be related to ritual worship, but only at the level of management and implementation, not related to legal material.⁶⁷ Ritual services such as prayer, fasting, and pilgrimage that have been explained in the *sharia* text do not require an interpretation associated with Indonesian *'urf*. If there are differences of opinion in the details of the issue of worship, each Muslim group in Indonesia can interpret or follow the opinion according to its tendency. Hazairin, for example, offered that in the matter of ritual worship, the Indonesian people could follow the Shāfi'ite school of law as a school followed by the majority of the Indonesian people.⁶⁸

In addition to that, the Indonesian *madhhab* distinguishes between the terms *sharia* and *fiqh*. *Sharia* is Islamic teaching given by Allah the God to the Prophet Muhammad, while *fiqh* is the result of the interpretation of Islamic jurists regarding *sharia*. In other words, *sharia*, which is contained in the Qur'an and the Sunnah of the Prophet, comes from *shāri'* (*sharia* maker), while *fiqh* is the result of human reasoning and understanding towards the Qur'an and the Sunnah of the Prophet produced through *ijtihad* (concerted effort to deduce Islamic law from its sources). The results of *ijtihad* set by Islamic jurists are not *sharia*, but have become *fiqh*, such as Shāfi'ite *fiqh* and Ḥanafite *fiqh*. *Sharia* is thus complete and applies to all places and times, while *fiqh* can vary and change between one community and another, as well as between one time and another.⁶⁹

From the explanation above, there are three key words related to the position of *'urf* in the notion of Indonesian *madhhab*, namely Indonesian *'urf*, *sharia*, and *fiqh*. The differences between the three terms

37–46; Azizy, *Hukum Nasional*, p. 219; Wahyudi, *Ushul Fikih versus Hermeneutika*, pp. 28–31. Islamic scholars had different opinions about restrictions toward *'urf* as a source of Islamic law. However, they generally insist that *'urf* should conform to the spirit of *sharia*. Mohammad Zain bin Haji Othman and Muḥammad Bakhīt al-Muḥīrī, 'Urf as a Source of Islamic Law', *Islamic Studies*, vol. 20, no. 4 (1981), pp. 343–55.

⁶⁷ Such as the laws on the implementation of Hajj (pilgrimage) No. 17/1999 and the laws on the management of *zakat* (divine tax) No. 38/1999.

⁶⁸ Hazairin, *Hukum Islam dan Masyarakat*, p. 15; Hazairin, *Tujuh Serangkai tentang Hukum*, p. 153.

⁶⁹ Ash-Shiddiqy, *Dinamika dan Elastisitas Hukum Islam*, pp. 9–12; Azizy, *Hukum Nasional*, pp. 68–9; Arifin, *Pelembagaan Hukum Islam di Indonesia*, p. 40, 42–3.

and their interrelatedness can be explained as follows. The local habits of the community (*'urf*) are real, daily practices that occur in Indonesian society. Habits that are consciously practiced continuously for a long time by the collective community will become a habitual norm among them. This habitual norm is a real and empirical norm that applies in society.⁷⁰ However, customary norms in the community do not always conform to the ideal values of *sharia*. If habits as customary norms are based on the reality of behavior that lives in the community, then *sharia* values are ideal norms that need to be implemented in empirical reality in society. *Sharia* values are an idea that becomes a standard reference for the establishment of Islamic law, so that the actions and behavior of individuals or communities are considered legal or illegitimate.⁷¹

Sharia in this context are ideal values contained in the Qur'an and the Hadith of the Prophet, and are not always identical with legal verses or hadiths that are understood textually. Therefore, Al-'Ashmāwi, for example, distinguishes between *al-sharī'ah* (*sharia* ideal values contained in the Qur'an and the Hadith of the Prophet) and *ahkām al-sharī'ah* (practical legal rules that exist in the text of the Qur'an and Hadith).⁷² Thus, *sharia* here is closer to the meaning of *maqāṣid al-sharī'ah* than the legal verse or hadith that is understood textually.⁷³ With such understanding, *Sharia* will be able to answer all problems that arise along with the development of different places and times. Because of this ideal value, *sharia* then must be interpreted and contextualized so that it can be applied in certain societies. *Sharia*, for example, orders to do justice, but the implementation of justice in a society needs to be adjusted to the conditions and situations of the community.

The results of the interpretation and contextualization of *sharia* that are diametrically different with customary norms (*'urf*) are in the forms of contextual and local *fiqh*. *Fiqh*, thus, is formed and formulated

⁷⁰ Satjipto Rahardjo, *Ilmu Hukum*, 5th edition (Bandung: Citra Aditya Bakti, 2000), pp. 14–5.

⁷¹ Abu Ameenah Bilal Philips, *The Evolution of Fiqh: Islamic Law and the Madhhabs* (Kuala Lumpur: A.S. Noordeen, 2002), pp. 1–2.

⁷² Muhammad Sa'id 'Ashmawi, *Jauhar al-Islām* (Beirut: Mu'assasat al-Intishar al-'Arabi, 2004), pp. 33, 45.

⁷³ Yūsuf al-Qaraḍāwi, *Madkhal li Dirāsah al-Sharī'ah al-Islāmiyyah* (Beirut: Mu'assasah al-Risālah, 1994), pp. 53–4.

consciously and intentionally to connect between the ideal values of *sharia*, as *das sollen* (what should be), with the norms of real habits of society, as *das sein* (what is). In other words, *fiqh* is the result of the dialectical process between the ideal *sharia* on the one hand and the reality of the '*urf*' in society on the other hand. Therefore, *fiqh* is closely related not only to the ideal *sharia* worldview, but also to real community customs so that the *fiqh* formulation must be responsible for two aspects, namely the ideal philosophical aspects and empirical sociological aspects. Philosophically, *fiqh* must contain the ideals of *sharia* values, and sociologically, *fiqh* must accommodate the reality of social life.⁷⁴ The position of the *fiqh* is thus among the ideal *sharia* and the '*urf*' of the real community. With these characteristics, *fiqh* must be positive, not normative, to answer and solve real legal problems and issues in the community. This is where the importance of *fiqh* as an Islamic legal norm is revealed so that it can be used as a source for establishing positive law in a country.⁷⁵

If described in a formula, the relation between the ideal *sharia*, the norms of the real custom of society ('*urf*'), and *fiqh* (Islamic law) in the Indonesian context are as follows:

Ideal Values of *Sharia* + Indonesian '*Urf*' = *Fiqh* of Indonesian *Madhhab*

This formula illustrates that Islamic law (*fiqh*) is formed from the results of dialogue between ideal values of *sharia* and community customs ('*urf*').⁷⁶ *Sharia* values are contained in the Qur'an and the Sunnah of the Prophet, while '*urf*' in this context is Indonesian customs and culture. Thus, the *fiqh* of Indonesian *madhhab* is *fiqh* that is the result of dialogue between the *sharia* and Indonesian '*urf*' in the form of Indonesian people's customs, including customary law, existing positive law, Indonesia's socio-political context, and even the global civilization affecting Indonesian society. In other words, the *fiqh* of Indonesian *madhhab* must

⁷⁴ Compare to Rahardjo, *Ilmu Hukum*, pp. 15–7.

⁷⁵ *Fiqh* usually contains strong moral norms so that it is generally only a moral suggestion, not a command that must be obeyed positively in the state and social life.

⁷⁶ It does not mean that '*urf*' can be a source by itself in formulating Islamic law without *sharia*. Because '*urf*' is dynamic, there must be a dialogue between '*urf*' and *sharia* to formulate Islamic law that is suitable to, and yet not follow, the development of society.

philosophically conform to ideal *sharia* values and sociologically must accommodate the socio-cultural conditions of the Indonesian people. *Fiqh* of Indonesian *madhhab*, as stated, is only related to social matters (*mu'āmalah*) and not related to matters of ritual worship (*'ibādah*). In addition, the formula above also shows that in the view of the Indonesian *madhhab*, methodologically *'urf* has an equal position with *sharia*.

E. The Influence and Significance of *'Urf* in Indonesian Islamic Laws

The position of *'urf* that is very important in the Indonesian *madhhab* then influences the laws and regulations of Islamic law in Indonesia. Here are four examples about joint property between husband and wife, obligatory bequest (*wasiat wajibah*) for adopted children and adoptive parents, representation of heirs, and conditions for performing the pilgrimage (*hajj*). These issues have actually been discussed in a number of articles as to give examples of how local values are incorporated into national laws.⁷⁷ Lukito, for an example, puts the incorporation of local norms of joint assets and *wasiat wajibah* as examples of how Islamic *sharia* and *adat* (custom) are dialoged.⁷⁸ Although these examples are indeed quite old examples cited by many scholars, they remain to be relevant to be taken as proofs that local values of these cases still gain great attention and concern, as shall be slightly discussed below. Regarding joint assets, article 35 paragraph (1) of the Marriage Law of 1974 states that joint assets are property acquired during marriage, distinguishing them from what the husband or wife obtained through inheritance or business before the marriage. Thus, anyone who works, either husband and/or wife, contributes to the joint asset of the property acquired during the marriage.⁷⁹ The Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI) of 1991, especially article 96, made it clear that if the marriage terminates because of death, half of the joint assets are the right of the remaining spouse. On the other hand, if there is a divorce, then article 97 of the

⁷⁷ Euis Nurlaelawati, “Managing Familial Issues Unique Features of Legal Reform in Indonesia”, in *Islam in Indonesia: Contrasting Images and Interpretations*, ed. by Jajat Burhanudin and Kees van Dijk (Amsterdam: Amsterdam University Press, 2013), p. 123.

⁷⁸ Lukito, *Islamic Law and Adat Encounter: the Experience of Indonesia*, pp. 102–22.

⁷⁹ See article 35 (1) of The Law of Marriage.

KHI states that both parties have the right to one-half of the joint assets as long as it was not determined otherwise in the marriage agreement.⁸⁰

The provision for this joint property is a product of *fiqh* of the Indonesian *madhhab*, especially the influence of Hasbi and Hazairin's thoughts on the 1974 Marriage Law and the influence of Munawir and Busthanul's on the 1991 KHI. Meanwhile, classical *fiqh* does not clearly discuss the assets of husband and wife obtained during marriage. Classical *fiqh*, based on Arab patrilineal society, generally only states that the property obtained by the husband as a result of his efforts is the property of the husband, only the husband is obliged to provide a living to his wife.⁸¹ When viewed in the terms of *sharia*, the verses of the Qur'an generally suggest that the relationship between husband and wife in the family must be based on good relations,⁸² including in the matter of managing property during the marriage. Meanwhile, in the customs of the people in Indonesia, these common assets are acknowledged, although by different terms. In Java such is known as *gono gini*, in Bali it is called *druwe gabro*, in Minangkabau it is called *harta suarang*, Bugis people called it *cakarra*, in Pasundan and West Java people know it as *campur kaya*, *barang sekaya*, or *kaya reujeung*, and in Borneo it is called *barang perpantangan*.⁸³ On the basis of such *'urf*, later in the legislation in Indonesia, especially in KHI, it is stipulated that the existence of shared assets that are halved is the right of both husband and wife in the event of either divorce or death.⁸⁴

⁸⁰ See articles 96 and 97 of KHI.

⁸¹ Sayyid Sābiq, *Fiqh al-Sunnah*, 2nd edition (Beirut: Dār al-Fikr, 1998), pp. 106, 116.

⁸² Qur'an 4: 92.

⁸³ Dominikus Rato, *Hukum Benda dan Harta Kekayaan Adat* (Yogyakarta: LaksBang PRESSindo, 2016), p. 32. Regarding common property in marriage, see also Ratno Lukito, *Pergumulan antara Hukum Islam dan Adat di Indonesia* (Jakarta: INIS, 1998), pp. 82–5; Lukito, *Islamic Law and Adat Encounter: the Experience of Indonesia*, pp. 109–13.

⁸⁴ In deciding cases, the judges of the religious court in Indonesia consistently apply the rules regarding joint property. Livia Holden and Euis Nurlaelawati (eds.), *Nilai-Nilai Budaya dan Keadilan bagi Perempuan di Pengadilan Agama Indonesia: Praktik Terbaik* (Yogyakarta: Suka Press in Cooperation with PPGHA/PSWA UIN Sunan Kalijaga and GCRF Oxford University, 2019), pp. 3–4, 8–9. Regarding the theory and practice of family law issues in community and religious courts, see Muhammad Isna Wahyudi, *Hukum Keluarga di Indonesia: Dinamika dalam Aturan dan Praktik* (Yogyakarta: Magnum Pustaka Utama, 2020).

The discussion on the issue of joint property has arisen again through judicial review submitted by Ike Farida to the Constitutional Court on May 11, 2015. She felt disadvantaged because after having a husband of a foreign citizen, her right to own immovable property was lost.⁸⁵ As stated, in the Marriage Law No 1 of 1974 it is stated that assets obtained during marriage become joint property (article 35), as long as there is no marriage agreement that agrees to separate assets during the marriage. This marriage agreement can only be done before the marriage contract and the contents of the agreement cannot be changed (article 29). On the one hand, Ike Farida and her husband did not enter into a marriage agreement, then the property is shared property, while on the other hand, according to the Agrarian Law No 5 of 1960 article 21 and 36, foreign citizens cannot have property rights in Indonesia. Therefore, Ike Farida, because her wealth is a shared asset with her husband who is a foreign citizen, she also does not have ownership rights. Judicial review related to article 29 of the Marriage Law concerning marriage agreements is then granted by the Constitutional Court through decision No. 69/PUU-XIII/2015. The Judges of Constitutional Court at the plenary session on October 27, 2016 ruled that article 29 of the Marriage Law must be understood that the marriage agreement can be done before or during the marriage, and its contents can be changed if agreed by both parties and does not harm a third party.⁸⁶ With the ruling of the Constitutional Court, an Indonesian citizen who conducts mixed marriages with foreign citizen, if one wants to have property rights, then she/he must enter into a marriage agreement to separate assets from her/his spouse of foreign citizens.

In addition to shared assets, other *fiqh* products of the Indonesian *madhhab* are a matter of inheritance for adopted children and adoptive parents with mandatory wills (*wasiat wajibah*). Article 209 of the KHI states that adopted children who are excluded from the wills of their adoptive parents have the right to obtain a mandatory portion of the will; as much as one-third of the inheritance left by their adoptive parents. Likewise, adoptive parents also have the right to get a part of the will of their adopted child, as much as one third of the inheritance, if the child

⁸⁵ MKRI, No. 69/PUU-XIII/2015, pp. 1, 8–13.

⁸⁶ *Ibid.*, pp. 156-157.

die first. If traced in the treasures of classical *fiqh*, there is no provision for adopted children or adoptive parents to receive an inheritance in this way. This is because Qur'an, 33: 4-5 states that adopted children have kinship relations only with their biological parents and that they only have a brotherly relationship with foster parents in that they can help and share with each other, but they do not have kinship. Accordingly, adopted children and adoptive parents do not have the right to inherit from each other.

Meanwhile, in the customs of the people in Indonesia, adopted children and adoptive parents are mostly considered to have a family relationship so that it is the same as the relationship between parents and biological children. However, in the Indonesian tradition, there is little difference depending on the family system adopted. In patrilineal and matrilineal societies, adoption results in breaking legal relations with biological parents, so adopted children are only entitled to inherit from their adoptive parents. On the other hand, in parental society, adoption does not break the legal relationship with their biological parents, so adopted children can inherit from both their biological parents and adoptive parents.⁸⁷ Thus, in Indonesian *'urf*, adopted children and adoptive parents have a very close relationship, even the same as the relationship between parents and biological children, so that both can inherit from the other.

Regarding the relationship between parents and adopted children, *sharia* on the one hand does not recognize the existence of kinship, so that they do not inherit from each other, but on the other hand, Indonesian *'urf* views that parents and adopted children legally have the same relationship as the relationship between parents and biological children, so that later they can inherit from each other. On that basis, *fiqh* of the Indonesian *madhhab* stipulates that adoptive parents and adopted children, although they cannot inherit from each other, can receive mutual inheritance by means of a mandatory will in which each receives a third of the inheritance of the deceased party.⁸⁸ Here it is seen how *fiqh* of

⁸⁷ Dewi Sulastri, *Pengantar Hukum Adat* (Bandung: Pustaka Setia, 2015), pp. 128–30.

⁸⁸ Regarding obligatory bequests (*wasiat wajibah*), see also Lukito, *Pergumulan antara Hukum Islam dan Adat di Indonesia*, pp. 88–91; Lukito, *Islamic Law and Adat Encounter:*

the Indonesian *madhhab* strives to dialogue and create a bridge between the *sharia* provisions and ‘urf that develop among Indonesian society.⁸⁹

The concept of the obligatory wills is very relevant to the thinking about the re-establishment of Indonesian *madhhab*, which seeks to dialogue between *sharia* values and the practice of law in society, especially in the effort to resolve inheritance problems. The obligatory will, in the KHI, was introduced to solve the problem of adoption in connection with the distribution of inheritance, as stated above. In addition, the concept of the obligatory wills, although not regulated in the KHI, is widely used by judges in the Religious Courts in solving legal problems that develop in society, for example, judges give part of inheritance to non-Muslim relatives and stepchildren through this mandatory will. The decisions of the religious court have been able to uphold justice for all, by giving a portion of inheritance to non-Muslim heirs through the mandatory wills, which is to provide its non-Muslim relatives with a maximum share of one third of the inheritance. These religious court judges are more likely to use the concept of mandatory wills in cases of inheritance of different religions than to investigate legal reasons (*‘illat*) and then reinterpret *hadiths* of the Prophet that prohibit inheritance of different religions.⁹⁰ The judges are also to give inheritance through mandatory wills to stepchildren, which actually are more closely related to the heir than the adopted child.⁹¹ This shows that the concept of the obligatory wills has become one of the solutions for dialogue between

the Experience of Indonesia, pp. 118–22.

⁸⁹ Because of many cultures in Indonesia, including customary law, there are many studies of legal pluralism in Indonesia. To mention some of them are Franz Von Benda Beckmann, “Changing Legal Pluralism in Indonesia”, *Yuridika*, vol. 7, no. 4 (1992); Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (New York: Routledge, 2013); Arskal Salim, *Contemporary Islamic Law in Indonesia: Sharia and Legal Pluralism* (Edinburgh: Edinburgh University Press, 2015); Kurnia Warman, Saldi Isra, and Hilaire Tegnan, “Enhancing Legal Pluralism: The Role of Adat and Islamic Laws within the Indonesian Legal System”, *Journal of Legal, Ethical and Regulatory Issues*, vol. 21, no. 3 (2018).

⁹⁰ Muhamad Isna Wahyudi, “Penegakan Keadilan dalam Kewarisan Beda Agama”, *Jurnal Yudisial*, vol. 8, no. 3 (2015), pp. 269–88.

⁹¹ Agus Moh Najib, “Bagian Waris bagi Anak Tiri dan Anak Angkat (Anotasi terhadap Putusan Mahkamah Agung No. 489 K/AG/2011)”, *Majalah Peradilan Agama*, no. 10 (2016).

sharia values and *'urf* that developed in Indonesian society. In other words, the concept of the obligatory wills must become a *fiqh* of Indonesian *madhhab* which is used to resolve several cases of inheritance law that develop in society, both through rules that are already in the laws and through judges' decisions in court.

The dialogue between ideal values of *sharia* and Indonesian *'urf* is also seen in the case of representation of heirs. Article 185 of the KHI states that the heirs who die earlier before the heir, then his position can be represented by his child. However, the portion of child must not exceed the portion of other heirs who are equal to those represented. The article tries to solve the problem of orphaned grandchildren, whose parents predeceased their own parents. In the classical *fiqh*, it was agreed that orphaned grandchildren are excluded from shares in their grandparents' estates when there are other children (sons), although they can still share an inheritance with daughters (children).⁹² In Indonesian custom, there is also no concept of such representation of heirs.⁹³

The representation of heirs is already known by the people of Indonesia through the concept of *plaatsvervulling* which comes from the Dutch colonial inheritance law. This concept has been applied for a long time in Indonesian society through articles 841-848 of the Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata, KUHPerdata*).⁹⁴ As stated, according to Busthanul and Qodri, *'urf* is not only interpreted as customs of the indigenous people of Indonesia, but also foreign laws that were well-known to the people of Indonesia, including laws originating from the Dutch colonial heritage. Meanwhile, if examined, Qur'an, 4: 9 states that it is not permissible to leave offspring in a weak condition, including economically. Therefore, based on *'urf* in the form of Dutch colonial inheritance law on the one hand, and there are *sharia* values that protect orphans from economic weakness on the other hand, the KHI stipulates that orphan grandchildren can represent the position of their

⁹² Nurlaelawati, "Managing Familial Issues Unique Features of Legal Reform in Indonesia", p. 127; Sajuti Thalib, *Hukum Kewarisan Islam di Indonesia* (Jakarta: Sinar Grafika, 2008), pp. 150–3.

⁹³ Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith*, pp. 19–21.

⁹⁴ As it is known, this Indonesian Civil Code comes from the Dutch colonial inheritance law: *Burgerlijk Wetboek (BW)*. Z. Ansori Ahmad, *Sejarah dan Kedudukan BW di Indonesia*, 1st edition (Jakarta: Rajawali, 1986), pp. 37–43.

parents who have died before his grandfather or grandmother.⁹⁵ The KHI's stipulation is also based on Hazairin's view which interprets the word '*mawālī*' in Qur'an 4: 33 with offspring representing his deceased parents as heirs.⁹⁶

Another example of fiqh of Indonesian madhhab is Law No. 8 of 2019 concerning the implementation of *Hajj* and *Umrah*. Articles 31-42 of the Law states that people going to performing *Hajj* must fulfill all requirements so as to get the services needed, such as *Hajj* travel documents, health services, transportation, accommodation, consumption and protection. Qur'an 3: 97 states that Muslims who already have the *istiṭā'ah* (ability) to go to the Baitullāh in Mecca are required to perform the pilgrimage. The verse does not specify what conditions are required for those who have the ability (*istiṭā'ah*). However, '*urf*' in a broad sense, namely the habits and agreements of both national and international that bind Indonesian people, as stated by Yudian Wahyudi, has detailed the conditions for a person to be able to go to Saudi Arabia, especially Mecca, to perform the pilgrimage. These conditions include the existence of travel documents such as the *Hajj* visa from the Saudi Arabian government, transportation, health information, availability of accommodation and consumption, and other necessary conditions. In other words, the articles of the Law on *Hajj* and *Umrah*, which are the products of fiqh of Indonesian madhhab are methodologically the result of dialogue between sharia values and '*urf*' that develops in society.

The inclusion of legal products resulting from the dialogue between *sharia* and '*urf*' in Indonesia mainly occurred when Munawir Sjadzali became the Minister of Religion. In fact, he had convincingly played an important role in bridging the culturally conceptual gap between Islamic law and state law.⁹⁷ The birth of Law No. 7 in 1989 concerning

⁹⁵ On this case see Ratno Lukito, "Sacred and Profane Law in the Indonesian Context: The Case of the Bequest Verse", in *Approaches to the Qur'an in Contemporary Indonesia*, ed. by Abdullah Saeed (Oxford: Oxford University Press, 2005), pp. 135–60.

⁹⁶ The verse '*wa li kullin ja'alnā mawāliya min mā taraka al-wālidāni wa al-aqrabūn*' is interpreted by Hazairin with 'for each heirs, we make offspring that represent him from the property left by both parents and close relatives'. Hazairin, *Hukum Kewarisan Bilateral Menurut Qur'an dan Hadith*, pp. 27–32.

⁹⁷ Cipto Sembodo, "The Re-actualization of Islamic Law: Munawir Sjadzali and the Politics of Islamic Legal Interpretation under the New Order Indonesia",

the Religious Courts⁹⁸ and Presidential Instruction of 1991 concerning the Compilation of Islamic Law (KHI) was thanks to none other than Munawir's role as Minister of Religion at that time. Likewise with Busthanul Arifin. He, who was then Chair of the Religious Courts Affairs in the Supreme Court of Indonesia, became the chair of the drafting committee of the Compilation of Islamic Law.⁹⁹ Thus, it can be said that Munawir and Busthanul were figures who actually implemented the great idea of the Indonesian *madhhab* pioneered by Hasbi and Hazairin.

Busthanul, as stated, expanded the meaning of *'urf* and argued that the rules of the Dutch colonial period could also be seen as *'urf* if the rules had been accepted, applied, and practiced in the Indonesian community. Therefore, the laws and regulations of Dutch colonial products needed to be taken into consideration in formulating *fiqh* of the Indonesian *madhhab*, as the case of the representation of the heirs above.¹⁰⁰ Departing from the idea of Busthanul, Qodri stated that the laws and regulations of Islamic law in Indonesia are Islamic laws that have been contextualized with the *'urf* of Indonesia. These regulations include Law No. 17 of 1999 concerning the Implementation of *Hajj* (pilgrimage),¹⁰¹ Law No. 38 of 1999 concerning Management of *Zakat* (divine tax),¹⁰² and Law No. 41 of 2004 concerning *Waqf* (endowments).¹⁰³ Meanwhile, Yudian asserted that all laws and regulations in Indonesia that are the results of the dialectic between *sharia* and *'urf* and in line with *maqāṣid al-sharī'ah*, including those mentioned above, are manifestations of *fiqh* of the Indonesian *madhhab*.¹⁰⁴ In fact, according to him, the 1945 Constitution and Law No. 14 of 1992 concerning Road Traffic

Al-Jami'ah: Journal of Islamic Studies, vol. 43, no. 1 (2005), p. 122.

⁹⁸ The latest law on religious court is Law No. 50 of 2009.

⁹⁹ 'Abdurrahmān, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 2007), pp. 39–41.

¹⁰⁰ Arifin, "Kata Pengantar", pp. xii–xiii.

¹⁰¹ The latest *Hajj* and *Umrab* Implementation Law is Law No. 8 of 2019.

¹⁰² The latest law on *Zakat* (divine tax) is Law No. 23 of 2011.

¹⁰³ Azizy, *Hukum Nasional*, pp. 75, 225, 160.

¹⁰⁴ Yudian Wahyudi, *The Position of Islamic Law in the Indonesian Legal System (1900-2003)* (Yogyakarta: Pesantren Nawesea Press, 2015), pp. 53–4.

and Transportation¹⁰⁵ are also included in the products of *fiqh* of the Indonesian *madhhab* because they are typical Indonesian and in harmony with the *maqāṣid al-sharī'ah*. The *fiqh* of the Indonesian *madhhab* that is the rule of law, according to Yudian, becomes *Ijmā'* (consensus) which binds all citizens, including Indonesian Muslims.¹⁰⁶

F. Concluding Remarks

The notion of Indonesian *madhhab* didn't only stop at Hasbi and Hazairin, but continued and was developed by later thinkers on Islamic law. The central idea of the Indonesian *madhhab* is to make the *'urf* of Indonesia an important consideration for establishing Islamic law. The meaning of *'urf* in the notion of Indonesian *madhhab* continues to grow from the habits of Indonesian people which are dynamically understood, the laws that apply in the middle of society such as customary law and positive law, to the Indonesian socio-political context and contemporary civilization that affect Indonesian society. In the development of the Indonesian *madhhab*, *'urf* is thus interpreted broadly, namely the social and cultural context of Indonesian society in general.

The *'urf* with that general meaning, in the framework of Islamic legal methodology, is a real and empirical aspect that becomes a consideration for the formation of the Indonesian *madhhab*, coupled with ideal *sharia* values. The *'urf* thus becomes an aspect that is as important as *sharia* in the process of forming the Indonesian *madhhab*, because without *'urf*, *sharia* remains an ideal and abstract aspect that is not related to the issues and problems faced by Indonesian society. In other words, the Indonesian *madhhab* can only be formed through dialogue between ideal *sharia* values and the real customs of Indonesian society. In the Indonesian *madhhab*, the results from the dialogue between *sharia* and *'urf* are then presented to become positive legal rules that formally apply to the community, such as the existence of shared assets owned by husband and wife during a marriage or the existence of mandatory wills for adopted children and adoptive parents. Thus, *fiqh* of the Indonesian *madhhab* is not only in the form of theoretical legal thinking, but offers real law that is applied in a binding manner for Muslim citizens in Indonesia.

¹⁰⁵ The latest law on road traffic and transportation is Law No. 22 of 2009.

¹⁰⁶ Wahyudi, *Ushul Fikih versus Hermeneutika*, pp. 43–4.

The ideas of *fiqh* of the Indonesian *madhhab* pioneered by Hasbi and Hazairin were implemented into formal regulations, especially during the Munawir and Busthanul periods when one became Minister of Religion and the other the chair of the drafting committee of the Compilation of Islamic Law. After that, increasingly more legislative products emerged that originated from Islamic law that had been contextualized with Indonesian *urf*. According to Qodri, this is reasonable because Islamic law has been recognized as one of the sources for fostering Indonesian national law. In fact, according to Yudian, legislative products that, from the beginning, did not originate from Islamic law can also be seen as *fiqh* of the Indonesian *madhhab* as long as the legal materials are in harmony with *maqāṣid al-shari'ah*.

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