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CONDITIONAL
DIVORCE IN INDONESIA

BY

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Preface

This booklet presents a case study of a fascinating legal development in modern Indonesia, which was introduced to Islam through traders in the thirteenth century. Indonesia's embrace of Islam—perhaps because of the distance from the Islamic “homeland” of the Arabian Peninsula and the multi-ethnic and multi-cultural nature of its society and culture—led to Islamic thought and practices in Indonesia that amply demonstrate the inherent flexibility of Islamic law. This flexibility is nowhere more visible than in the case at hand, which Prof. Hisako Nakamura developed and explained to us during her sabbatical year at ILSP in 2004–2005.

Hisako Nakamura is Professor of Anthropology in the Faculty of International Studies at Bunkyo University, Japan. She began her studies of Indonesia in the early 1970s when as a young mother she accompanied her husband to Yogyakarta for his doctoral research. She is currently concentrating her studies on the development of the semi-governmental BP-4, a body that

provides marriage-, conflict-, and divorce-counseling. As is clear from this paper, her work should be followed by all interested in current developments of Islamic law in Indonesia.

It was indeed a pleasure and a privilege to have Prof. Nakamura with us for a year.

Frank E. Vogel
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Conditional Divorce in Indonesia¹

Hisako Nakamura²

Introduction

In October 1970, when I started my anthropological research in Kotagede, Yogyakarta, in Central Java, the residents of this small town were ethnically almost one hundred percent Javanese and religiously almost entirely Muslim. At the time of my arrival, there was little scholarly interest in Islam in Java. Mainstream Western scholarship had long regarded Islam as quite peripheral to Javanese society. Most of the ethnological literature, from Raffles' classical work to that of Geertz, thought that Islam did not penetrate very deep into the Javanese mind but only covered the surface of Javanese culture.³ In addition, during the 1960s and 1970s, methodologically and theoretically, the idea of separating "great traditions" and "little traditions," as coined by Robert Redfield, was still very influential in the field of anthropology.⁴ In the study of complex societies with great civilizations such as Islamic societies, anthropologists were not required

to deal with “great traditions” but to concentrate on “little traditions.” It was assumed that the subject of our research was common people at the grass-roots level who had little knowledge of and concern for the “great traditions” represented by religious texts. The textual study of “great traditions” was a work for scholars in other disciplines, such as historians of religion or students of comparative religion. Anthropologists were even advised to stay away from the study of religious texts so as not to be “contaminated” by textual biases. Knowledge of religious texts was considered to potentially “distort” our understanding of the religious practice of ordinary people, and we were supposed to be concentrating on and contenting ourselves with the study of contexts rather than texts.

This was especially true for the anthropological study of Muslim societies in non-Arab countries, including Indonesia. Even an elementary knowledge of Islam was not included in standard ethnological courses on Indonesian societies taught at U.S. universities at that time. A typical case is the famous *The Religion of Java*, written by Clifford Geertz. In this “neo-classical work” in Javanese ethnography, the Qur’an is barely mentioned and is not quoted even once although Islamic

elements are identified as one of the three variants of a Javanese religious outlook.⁵

There was another intellectual obstacle that made it difficult at the time to take Indonesian Islam seriously. This was the idea of seeing cultures or civilizations in terms of “center” and “periphery.” This idea was partly based upon the theory of “cultural diffusion,” which was that a culture would necessarily be diluted and become less pure when it spread from a center to remote peripheral areas. In the case of Islam, Indonesia was very far from Mecca, the center of Islamic civilization. Hence Indonesian Islam was supposedly very far from authentic and less pure, mixed with non-Islamic local elements. On this assumption, it was often said that the Javanese Muslims were “nominal” Muslims, “syncretic” Muslims or “statistic” Muslims, and they conducted themselves according to Javanese customs which had no relation to Islam. It was also assumed that Islamic scholarship embodied by Javanese Islamic scholars (*‘ulama’*) was secondary and insignificant, deserving no serious inquiry.

In this academic atmosphere, Islam and Islamic law were quite remote from the concerns of anthropolo-

gists. After the independence of Indonesia, an increasing number of American anthropologists conducted fieldwork in Java. Most of them, however, paid little attention to the role of Islamic law in Javanese society even when they were studying kinship and marriage, the field in which Islamic personal status law was still in operation. Many anthropologists, therefore, explained Javanese local behavior in this field solely in terms of Javanese culture, and produced ethnographies accordingly. Among them, the most representative example was *The Javanese Family* written by Hildred Geertz.⁶

With such a background in anthropology and no training at all in Islamic studies, I started to engage in my own research project on divorce among Javanese Muslims in the field. It can be imagined that the more I observed local people's marital activities, the more I was confused. I was unable to digest my field data. Gradually, I became skeptical about the idea of separating "great" and "little" traditions and about the approach of ignoring Islamic norms contained in religious texts in doing Muslim ethnography. My data required an understanding of the application of Islamic law in social reality. I was compelled to study relevant Islamic texts, the Qur'an to start with, in order

to analyze and appreciate my own field data. Finally, I delved into the study of relevant sources in Islamic law through the books written and published in English and Bahasa Indonesia because of my ignorance of Arabic. My conclusion was that Javanese customs of marriage and divorce were in full conformity with Islamic law and had been implemented among the local people for many centuries.⁷

In this paper, I take an example of “conditional divorce” or *ta’liq al-talaq*,⁸ to show how Javanese, and now more generally Indonesian, Muslims have implemented and institutionalized Islamic law in the local context in history as well as in contemporary situations. On the basis of the examination of this example, I discuss its implications for the dichotomies of “great vs. little traditions” and “center vs. periphery” in civilization. In addition, I mention the problems of *adat*, that is, “customary law,” vs. Islamic law, and *fiqh*⁹ vs. *siyasa*,¹⁰ or Islamic jurisprudence vs. “policy, governance, administration.”

The Islamic conditional divorce, or ta’liq al-talaq

In any culture the concept of marriage is deeply related to the dissolution of marriage. Islam is no exception.

Lawful marriage in Islam means entering into a marriage contract, which the bridegroom does with the legal guardian (*wali*) of the bride, undertaking to pay the nuptial gift (*mahr*) directly to the bride. The marriage contract (*'aqd al-nikah*) must be concluded in front of two witnesses. Thus, marriage in Islam is a contract made between the husband and the guardian of the wife. Accordingly, the dissolution of marriage takes the form of dissolving the contract, in which the husband must make his intention clear as his own will.

In the matter of entering into a marriage contract as well as dissolving it, Islamic law pays careful attention to whether the husband is a good Muslim husband, according to Qur'anic stipulations: he must be physically available, mentally sane, old enough to be prudent, economically capable of supporting wife and children, sexually satisfactory, etc. The topic of this paper, namely, "conditional divorce," derives directly from this specific feature of Islamic law.

In Islamic law there are several ways to dissolve a marriage, such as *talaq*,¹¹ *khul'*,¹² *shiqaq*,¹³ and *faskh*.¹⁴ *Talaq*, or repudiation, which is the unilateral right of the husband, is the most common way.¹⁵ It is effected by the

husband pronouncing words to the effect that the wife is divorced (*aku talak engkau* or *aku ceraikan engkau*, in Bahasa Indonesia). Any expression in the husband's mother tongue may be used if the husband's intention to divorce his wife is clear. The divorce proclamation is an important legal procedure in actuating a divorce.

Conditional divorce (in Arabic, "the suspension of divorce") is one particular type of *talaq*, which comes into effect under certain conditions. In the case of ordinary *talaq*, divorce is immediately effectuated once the husband has proclaimed it. However, in the case of *ta'liq al-talaq*, divorce comes into effect only at a time when an already specified condition has been fulfilled.

The Pakistani jurist Kazi Nasir-ud-Din Ahmed mentions *ta'liq al-talaq* in his work *The Muslim Law of Divorce*, one of the most comprehensive and detailed works in Islamic law on the matter of divorce written in English, covering all of the four Sunni law schools and Shi'ism.¹⁶ He explains it as follows:

A condition can be attached while pronouncing a divorce so that the divorce takes effect only upon the fulfillment of the condition to which it is sub-

ject. The condition may refer to the occurrence or non-occurrence of a certain specified future event or it may refer to a certain place or time. A conditional divorce remains in suspense and the marriage subsists till the condition, subject to which it was pronounced, is fulfilled. A divorce is effected as soon as the condition is fulfilled. If, however, the condition becomes impossible of fulfillment then the declaration of the husband, that is, the conditional divorce[,] becomes ineffective, and the marriage continues to subsist as before.

If the divorce is made contingent on a default on the part of the husband in the performance of certain condition[s] or conditions agreed upon between the parties, a divorce would be effected on the occurrence of the breach of the condition.¹⁷

Ahmed continues on to mention the kinds of conditions:

The condition subject to which a divorce is pronounced may relate to a specified place and the husband may say that divorce shall take effect only at a certain place. Thus he may say, "You are divorced when you enter Mecca," and in such a case the wife would not be divorced till she actually enters Mecca. Similarly, he may say to his wife,

“If you enter your father’s house or the house of ‘A’ then you are divorced.” A divorce shall take effect in that case only when she enters her father’s house or A’s house but till then the divorce remains in suspense.¹⁸

Joseph Schacht, one of the Western authorities on Islamic law, also states that *ta‘liq al-talaq* was a widely acknowledged form of divorce in classical Islamic law.¹⁹ Supported by jurisprudence in classical Islamic law, *ta‘liq al-talaq* seems to have enhanced the unilateral power of the husband in pronouncing the repudiation of his wife in the historical reality of the Middle East and North African Muslim societies. Nevertheless, it seems to have been “generally pronounced only in anger or excitement not the result of cool deliberation nor, as a general practice, intended to be effected....”²⁰ The impression from Ahmed’s work, especially in consort with the examples he offers of the pronouncements taken from various *fiqh* books, is of a temporarily irrational husband pronouncing an unreasonable condition (or conditions) unilaterally, threatening his wife with a suspended divorce.

As a result of the recent reform efforts on divorce in the Middle East and North African societies, “a formulaic oath to repudiate the wife pronounced merely to express determination in an unrelated matter, or as a threat to repudiate the wife with a view to induce her to perform or abstain from some act with no intention to terminate the union, is no longer valid” in Egypt, Sudan, Jordan, Syria, and Yemen; while “In Morocco, Iraq and Kuwait, conditional divorce is no longer valid under any circumstances.”²¹ Thus, *ta’liq al-talaq*, fully supported by classical law books and once widely practiced in Muslim societies, has disappeared or become illegal in many parts of the Arab Muslim world today, except Saudi Arabia.²²

In contrast, the development of *ta’liq al-talaq* seems to have taken a different course with the spread of Islam to the East. As Schacht wrote:

The conditional pronouncement of the *talaq* may have different objectives: a man may pronounce such a *talaq*, for example, to drive his wife or himself to something or to refrain from something by threatened separation, or to give force to some statement made by him. In India, Malaysia and a large portion of Indonesia, this *ta’liq* of the *talaq*

has become a regular custom at the conclusion of a marriage; it is hardly ever omitted and serves to impose upon the man certain obligations towards his wife as a kind of pre-nuptial agreement, on the non-fulfillment of which the marriage is dissolved by the *talaq*.²³

Ta'liq al-talaq in Indonesia

Ta'liq al-talaq in Indonesia is indeed quite a different story. I shall describe below how it developed and is still developing in Indonesia over a period of four centuries in stages as follows: (1) its initial institutionalization under Sultan Agung in the early 17th century, (2) its development under the Dutch colonial government in the late 19th century and first half of the 20th century, and (3) its further development after the independence of Indonesia in 1945.

I. The initial institutionalization of *ta'liq al-talaq* under Sultan Agung

Ta'liq al-talaq seems to have been well known in Java since the early days of its Islamization. Zaini Ahmad Noeh,²⁴ a retired civil servant in the Department of Religion, argues in an article that it goes back to the early 17th century.²⁵ Quoting *Tatacara Islam* ("Manners of Islam," 1926), a work written in Javanese by Professor R.

K. H. Mohammad Adnan, the first head of the Islamic High Court of the Indonesian Republic, Noeh states that it was institutionalized by Sultan Agung (“Great Sultan,” r. 1613-46), the third ruler of the Islamized Javanese kingdom of Mataram, in 1631.²⁶ According to Adnan (quoted by Noeh), the pronouncement of the *ta’liq al-talaq* in this early Javanese version was formalized simply as follows (in my translation from the Bahasa Indonesia version by Noeh):

(The bridegroom is read out a promise by a religious official:)

Listen, bridegroom. Do you accept the royal promise (*janji dalem*) of *taklik*? In the event you leave your wife so-and-so for seven months by land or for two years by sea, except if you are on military duty, and in the event your wife does not want to be quiet and brings the case to the religious court (*rapak*), then one *talak* will fall after the court investigation proves the case to be true.

(The bridegroom answers:)

Yes, I do.²⁷

This earliest Javanese usage of *ta’liq al-talaq* has a number of interesting features:

The first is that, according to Noeh, *ta'liq al-talaq* was institutionalized as a product of *siyasa* (policy, administrative decision) by the ruler. In this format, the husband did not pronounce it by himself, but was guided by a deputy of the religious judge (*penghulu naib*) representing the sultan. The husband only gave his agreement to the latter's statement. It fell therefore in the category of *janji dalem* (royal promise), a contract between the ruler and the subject. This aspect seems to have been connected with the military duty (*wajib militer*) in the Mataram Sultanate.²⁸

Sultan Agung was well known in Javanese history as a pious warrior king. He was the first king of inland Java to receive the title of sultan, he conquered older Muslim principalities on the north coasts of Java, and expanded the territory of Mataram almost all over Java. His reign of thirty-three years was full of wars.²⁹ During his rule, Islam penetrated deeper among the general population of Java. Adnan does not provide contemporaneous evidence to support his assertion as to the role of Sultan Agung as the initiator of *ta'liq al-talaq*. However, in light of popular legends referring to it as a "royal promise," it would seem almost certain that this ruler did indeed initiate it in Java. In

other words, political leaders initiated *ta'liq al-talaq*, not religious legal scholars.

The second interesting feature is the fact that a major change to the premise of *ta'liq al-talaq*, in contrast to classical *fiqh*, seems to have been made by Sultan Agung. As noted above, the examples of *ta'liq al-talaq* in the classical books of jurisprudence mostly consisted of statements like “You are divorced if (or when) you do such-and-such,” the “you” here always referring to the wife.³⁰ This meant that the matter was the prerogative of a husband to threaten a suspended divorce and demand from his wife obedience.

The royal promise of *ta'liq al-talaq* in Java took the form, however, of a husband's future actions (or non-actions) being specified as grounds for a wife's demand for divorce. This meant that it was considered a method to protect wives and remind husbands to fulfill their Islamic duties in married life. In other words, with the approval of state authorities, the Javanese wife was able to threaten her husband with a lawful divorce if he did not behave.

In addition, Javanese circumstances for the pronounce-

ment of *ta'liq al-talaq* differ from those mentioned in classical law books. Contrary to the non-solemn and irrational nature of the pronouncement suggested by Ahmed, the *ta'liq al-talaq* introduced by Sultan Agung was conducted in serious circumstances: at a wedding ceremony, during which the bridegroom was neither in a state of anger nor (irrational) excitement. It followed the solemn occasion of entering into a marriage contract (*aqad nikah*).

A fourth feature that distinguishes the Javanese *ta'liq al-talaq* was that Sultan Agung's intention to establish the institution of conditional divorce seems to have been educational. Reportedly, he was the first to introduce a number of other Islamic institutions as well, including the Islamic calendar and the Islamic judiciary, into the Mataram kingdom. As we read in Noeh, he wanted to instil in his subjects by way of the newly established *ta'liq al-talaq* the knowledge of duties that Muslim husbands had in relation to their wives.

Another feature of *ta'liq al-talaq* in Java was that it included realistic conditions for divorce, such as the husband's desertion of his wife by land or by sea for a

certain period of time. Since Islamic law basically gave the right to pronounce divorce only to the husband, a husband's desertion was very difficult for the wife, who had no recourse to maintenance or remarriage when she was deserted, often for many years.³¹ The Javanese *ta'liq al-talaq* circumvented this difficulty and made it possible for the deserted wife to dissolve the marriage.

Finally, a sixth feature was represented by the condition, "in the event your wife does not want to be quiet and brings the case to the religious court (*rapak*)."³² This was an official decree allowing the wife to obtain a dissolution of her marriage via the court, also preventing further conflict between husband and wife.

The above-listed features of such a royal promise indicate that Sultan Agung was an innovative ruler. As mentioned above, there are no contemporary records documenting the reaction of the Javanese religious legal scholars to this *siyasa* act by Sultan Agung. Nevertheless, contemporaneous Dutch observers report that "holy men," presumably the ulema, or legal scholars, were always surrounding him, apparently availing themselves for royal consultation.³² It

is not known which books of Islamic jurisprudence these “holy men” used. However, later Javanese ulema seem to have agreed that the practice of *ta’liq al-talaq* as instituted by Sultan Agung had a *fiqh* base derived from a maxim contained in the sixteenth-century text *al-Tahrir*, written by Zakariyya’ al-Ansari (d. 926/1520). Al-Ansari was a great Egyptian scholar of *fiqh* and Sufism, who said: “Whoever makes his *talaq* dependent upon an action, then the *talaq* occurs with the existence of that action, according to the original pronouncement.” Al-Ansari’s maxim was later quoted by al-Sharqawi (1737-1812), Shaykh al-Islam in Cairo, who had a number of students from Southeast Asia.³³ At present, however, I have not found any more information available to be able to expand on the intellectual relationship between al-Ansari, Sultan Agung, and al-Sharqawi.

II. The development of *ta’liq al-talaq* under the Dutch colonial government

The institution of *ta’liq al-talaq* developed even further under subsequent generations of Javanese Muslim local rulers and religious officials, even after the Dutch colonial authorities established themselves as their overlord from the early 19th century. The Dutch

promoted the native custom: an instruction including mention of *ta'liq al-talaq* was issued by Herman Willem Daendels, Governor-General of the Netherlands East Indies from 1807, to the native regents (*bupati*) of Java in 1808. This was followed by decrees on the duties of the religious judge (*penghulu*) in Stb. (*Staatsblad*) 1835 No. 58³⁴ and on the formation of the religious court (*Raad Agama*) in Stb. 1882 No. 152. Then *ta'liq al-talaq* appeared as part of *Ordonansi Pencatatan Perkawinan* (Ordinance on Marriage Registration) in Stb. 1895 No. 198, Stb. 1929 No. 348, Stb. 1931 No. 348, and Stb. 1933 No. 98 for the Solo and Yogyakarta principalities.³⁵ A certain number of changes were made to the formula during the Dutch colonial time: more conditions were added, including the husband's duty to provide maintenance to his wife, and the pronouncement of *ta'liq al-talaq* was no longer read by a religious judge (or his deputy), but by the husband himself.

Christiaan Snouck Hurgronje, a renowned scholar of Islam and an adviser to the Dutch colonial government on "native" (= Muslim) affairs, recognized the existence of *ta'liq al-talaq* during his study on the "Jawah" colony (Muslims from the Indonesian ar-

chipelago) in Mecca.³⁶ Later, he researched Acehnese society and wrote a detailed ethnography, *The Achenese*, originally published in Dutch in the 1890s. In this book, he examines Acehnese society and culture from the viewpoint of Islamic law.³⁷ He found conditional divorce to be widely practiced in all of the Indonesian archipelago and considered the example of *ta'liq al-talaq* as practiced in Indonesia to be an improvement on the generally unfavorable treatment of women in classical Islamic law. He based this on the “pre-existing social conditions which Islam found established on its first introduction, and which it was unable to exterminate.”³⁸

Noeh makes mention of a guidebook for Islamic judges, written by Sayid Utsman b. Abdullah b. Aqil (often called Habib Utsman Betawi, Habib being a respectful title for a descendant of the Prophet Muhammad), a leading Islamic scholar and religious judge in the region of Batavia in the late 19th century, which commends *ta'liq al-talaq* as an institution “in order to bind a husband to respect the rights of his wife and to associate with her in good manners, considering the benefit to the community (*ber-istihsan-kan*).”³⁹

III. Development of *ta'liq al-talaq* after the independence of the Indonesian Republic

In the post-independence period since 1945, *ta'liq al-talaq* has become effective for the entire Indonesian nation by the decree of the Department of Religion, which made it into a uniform document of agreed-upon conditions.⁴⁰ In this form, the bridegroom agrees to divorce his wife on certain conditions. The most recent official formulation by the Ministry of Religion reads as follows:

Having signed the marriage contract (*akad nikah*), I ... bin ... promise sincerely that I will fulfill my obligations as a husband and I will live amicably with my wife, named ... binti ... according to the teachings of the law of Islam.

Furthermore I hereby pronounce the *ta'liq* formula (*sighat taklik*) with regard to my life as follows:

If I leave my wife for six months consecutively, unless I am performing a state responsibility;

Or, I do not give her obligatory support (*nafkah*) for three months;

Or, I maltreat my wife physically;

Or, I neglect my wife for six months consecutively;

Then, should I violate these promises and my wife refuses to acquiesce and so charges before the Pen-

gadilan Agama (Islamic courts) or a similar court or another agency competent to deal with this accusation are upheld and accepted by the court to other instance [sic], and my wife pays 1,000 rupiah as compensation (*iwad*), my first talak falls upon my wife. To the court and or instance mentioned above which examines and decides upon the accusation of my wife, I give authority to accept the *iwad* money and to contribute it for charitable purposes.⁴¹

These are the standard conditions, and the wife may also add further conditions. According to this agreement, if the wife notices any conduct of her husband which violates the stipulated conditions and if she takes her case to a religious judge with evidence supported by the testimony of two witnesses, then the religious judge pronounces that the proclamation of divorce has come into effect and she is divorced.

Thus at present, there are three requirements that must be fulfilled in order for the *ta'liq al-talaq* in Indonesia to be finalized: the occurrence of any one or more of the four conditions of the standardized agreement or of any additional conditions added to it; the wife's disapproval of her husband's conduct; and her bringing

the case to a religious judge with sufficient evidence of the violation by her husband of the agreed-upon conditions. In addition, the wife must pay a nominal amount of compensation.⁴² This payment of *'iwad*,⁴³ which is handed over to the authorities for charitable purposes, is now a standard statement added by the husband to the *ta'liq al-talaq* agreement. This statement makes the husband's side ineligible to request reconciliation (*rujuk*) after the decision of *talaq* is handed down by the court.⁴⁴

The National Marriage Law (Undang-Undang Perkawinan) of 1974, which stipulates that Indonesian citizens must follow their respective religious laws in marriage (Article 2), has confirmed the application of Islamic law in Muslim marriage. The law also mentions certain situations that can be regarded as sufficient reasons for the wife to request the dissolution of marriage,⁴⁵ some of which overlap with the standard conditions in the *ta'liq al-talaq* agreement. In addition, the Compilation of Islamic Laws, issued as the Presidential Instruction of Number 1, 1991 after lengthy consultations with ulema throughout Indonesia, explicitly mentions conditional divorce as a legitimate practice.⁴⁶ It is now a consensus among Indonesian ulema that conditional

divorce is permissible (*ja'iz*) in terms of *fiqh*, i.e., neither obligatory nor prohibited, allowing the marrying parties to establish an agreement in the form of *ta'liq al-talaq*.⁴⁷ The overwhelming majority of marrying Muslims seems to use this choice in reality.

It has been widely recognized by administrators as well as academics that the continuous enhancement of *ta'liq al-talaq* has brought about positive social results. It still has a strong educational effect, which was one of its features from its beginnings with Sultan Agung four centuries ago. From the wife's perspective, it has given her a stronger position in marriage and a strong legal means to dissolve her marriage. Statistically, there seems to be undeniable evidence that *ta'liq al-talaq* has provided an effective measure for women to get out of unbearable marriages.⁴⁸ It is now a standard practice throughout Indonesia that, after the contract of marriage has been concluded, the bridegroom reads out the printed formula of *ta'liq al-talaq* in front of a religious official and in the presence of the bride and her guardian with two witnesses, and signs it.⁴⁹

In the early 1990s, some voices appear to have requested the abolishment of *ta'liq al-talaq*.⁵⁰ The reasons were

various: some, mostly secular intellectuals, considered it “improper” since it brought up the matter of divorce on the happy and solemn occasion of a wedding. Others, including some ulema, insisted that it was no longer necessary since the newlyweds were well aware of their rights and obligations through religious education.⁵¹ The above-cited 1997 article by Noeh was written as a counter-argument against these recent criticisms of *ta’liq al-talaq*, in defense of the educational and practical usefulness of conditional divorce. As I note below, my very recent field observation indicates that it is evident that the criticism of conditional divorce has for the moment subsided and it still remains intact and effective to this very day.

In 2004 my husband and I were invited by the office head at an Office of Religious Affairs in Yogyakarta⁵² to participate in a wedding ceremony, which happened to be taking place in his office. There we witnessed the standard procedure of concluding a marriage contract as practiced at present. The *fiqh* requirements were fulfilled as follows: present at the ceremony, which was officiated by the head of the office, were a guardian (*wali*) from the bride’s side (her father), the bridegroom, and two witnesses; they all signed the printed marriage contract

form; and the bridegroom presented the bride price (*mahr*, here in the form of a volume of the Qur'an) to the bride's side. In addition to these *fiqh* requirements, the bride herself was also present at the ceremony and signed the marriage certificate (*surat nikah*). The printed form had a space for the bride's signature. The bride price was handed by the bridegroom to the bride herself, not to her guardian. Thereupon, the office head asked the bridegroom if he were prepared to recite the *ta'liq al-talaq*. He answered in the affirmative, and read out the standard pronouncement that was printed on the opposite side of the marriage contract. He then signed it in front of the bride and the rest of the party. The witnesses also signed the document, and it was then handed to the bride.

Discussion

As I mentioned in the introduction, there are at least two problematic anthropological approaches regarding the application of Islamic law in social reality. They are the dichotomies of "great" vs. "little" traditions and "center" vs. "periphery." Moreover, from my research on *ta'liq al-talaq* in Indonesia, I have become aware of two additional problems, viz. the dichotomy of *adat* vs. Islam, and the relationship between *fiqh* and *siyasa*. Let me discuss these problems below.

“Great traditions” vs. “little traditions”: The anthropological approaches of civilization devised by Robert Redfield to separate “great traditions” and “little traditions” may have been useful to understand a great cultural gap between alien colonizers and the indigenous colonized like those in the Christianized New World. However, in the case of Islam, especially in Southeast Asia where it penetrated peacefully, separating these two traditions as antinomies does not seem advisable. As our survey of *ta’liq al-talaq* in Indonesia indicates, conditional divorce has been extensively practiced as a custom by ordinary Indonesian Muslims at the grass-roots level for many centuries. Alongside the practice, it has a long history of review by ulema whose point of reference is to *fiqh* and of a series of decisions by rulers, both of whom are supposedly agents of the “great traditions.” In order to understand and to appreciate the importance of such a well-established “little tradition” as *ta’liq al-talaq* in Indonesia, researchers need a good command of the knowledge of “great traditions” as well.

“Center” vs. “periphery”: The idea of seeing cultures or civilizations in terms of “center” and “periphery” was partly based upon the theory of “cultural diffusion,” whereby a culture that moves away from its

center becomes diluted. However, in the case of Islam, geographical distance from Mecca does not necessarily mean diminishing knowledge or a distorted understanding of Islam. Certainly, Mecca represents the center, towards which direction Muslims all over the world pray daily. It is also the holy place, with Medina, to where hundreds of thousands of Muslims make pilgrimage (*hajj*) annually. But the history of Islam shows that the center of Islamic civilization often moved from one place to another and even multiplied simultaneously. More important than a geographic center are global networks of ulema covering many “centers” of Islamic scholarship in the world that have developed over centuries. Authenticity in Islamic scholarship ignores geographic limitations. *Ta’liq al-talaq* in Indonesia seems to have developed on the initiative of local rulers with the scholarly sanction of local ulema seeking authenticity in the classical texts.

Adat vs. Islamic law: One of the reasons why Indonesian Islam has not been taken seriously by the western academic world may go back to a political bias of the makers of the “Adat Law School” in and around the Dutch colonial government since the beginning of the 20th century. They attempted to elevate *adat* over

Islamic law in order to enhance the hegemony of presumably non- or anti-Islamic *adat* chiefs over Muslim rulers and ulema who were fundamentally anti-Dutch. Snouck Hurgronje is said to have contributed to the establishment of this school, yet, according to my assessment of his work, he does not deserve any blame in particular reference to his comments on *ta'liq al-talaq*. As we have seen, he acquired first-hand information on *ta'liq al-talaq* from the Indonesian Muslims he met in Mecca. He used the term “adat” for *ta'liq al-talaq*, but what he meant was that the institution of *ta'liq al-talaq* had been established as a local custom in accordance with Islamic law.

Dutch officials and scholars promoting *adat* law seem to have lacked a comparable knowledge of Islamic law. Snouck Hurgronje intensely criticized L. W. C. van den Berg in *The Achenese* for his neglect of *ta'liq al-talaq* as an important custom and for his lack of appreciation of it in terms of Islamic law.⁵³ Like Van den Berg, later generations of *adat* law scholars encountered *ta'liq al-talaq* in many parts of the Dutch East Indies and also did not consider it an integral part of Islamic law in practice. They treated it as if it were non-Islamic or sometimes anti-Islamic without

examining *fiqh* sources, and categorized it as *adat* law in contradistinction to Islamic law. It was then simply classified as a “peculiar” custom in the Indonesian archipelago. After independence, a number of Western social scientists, mostly American, conducted fieldwork in Indonesia, but since they were also not equipped with a proper knowledge of Islamic law, they simply repeated the Dutch *adat* scholars’ categorization. This led to a continuation of “curious cultural reductionism” in the study of Islamic law in Indonesia until recently.

Fiqh vs. *siyasa*: Historical as well as contemporary evidence indicates that *ta’liq al-talaq* in Indonesia was institutionalized and developed by rulers availing themselves of their *siyasa* privileges and that it received varying degrees of approval by ulema who sought authority in *fiqh*. *Fiqh* contains many ways to actualize Islamic law in accordance with a change in societal preferences, and Islamic scholars as well as administrators look for ways to adapt. Therefore, a study of *fiqh* must always refer to *siyasa* and vice versa.

Conclusion

As I pointed out at the beginning of this paper, anthropology has tended to depend solely on field observation, or contextual study, without paying appropriate attention to textual sources and the historical background of social institutions—even when studying Muslim societies, including Indonesia. One consequence is a too simplistic picture explaining everything in terms of *adat* or local culture, an example of which is the ethnography *The Javanese Family* by Hildred Geertz. There Javanese Muslim women are depicted as securing divorce by resisting or deviating from Islamic law.⁵⁴ Hopefully, this paper has succeeded in showing that her picture is far from the truth.

Methodologically, this paper suggests that at least five approaches should be employed in order to grasp the reality of implementation of Islamic law in actual social contexts: (1) anthropological field observation of the actors, (2) an understanding of the historical background of social institutions under study, (3) the study of relevant textual sources including *fiqh* books, (4) information on the ulema's discussion of the subject under study, and (5) a study of the aspect of *siyasa* (political and administrative decisions) in the

matter. In other words, an anthropology of Islamic law must be truly interdisciplinary in order to grasp the social reality under study as a complex yet dynamic process.

Endnotes

- ¹ An earlier version of this paper was presented at the Islamic Legal Studies Program, Harvard Law School, on February 10, 2005. I would like to acknowledge the assistance of Peri Bearman, Samantha Knights, and Mitsuo Nakamura in the editorial improvement of the paper. I would also like to thank Bunkyo University for giving me a chance to engage in research at Harvard Law School for the full Japanese academic year of 2004. All diacritics for the proper transliteration of Arabic have been omitted here.
- ² Visiting Researcher, Islamic Legal Studies Program, Harvard Law School, 2004–2005, and Professor in the Faculty of International Studies, Bunkyo University, Japan.
- ³ Cf. Thomas Stamford Raffles, *The History of Java* (2 vols.), Kuala Lumpur: Oxford University Press, 1978 [1817] and Clifford Geertz, *The Religion of Java*, New York: Free Press of Glencoe, 1960.
- ⁴ Robert Redfield, *Peasant Society and Culture: An Anthropological Approach to Civilization*, Chicago: University of Chicago Press, 1956.
- ⁵ G.W.J. Drewes, a Dutch Orientalist, criticized Geertz's work by pointing out that the Javanese appeared almost illiterate in his book. Cf. Mitsuo Nakamura, *The Crescent Arises Over the Banyan Tree*, Yogyakarta: Gadjah Mada University Press, 1983, p. 173n.
- ⁶ Hildred Geertz, *The Javanese Family: A Study of Kinship and Socialization*, New York: The Free Press, 1961.
- ⁷ Hisako Nakamura, *Divorce in Java*, Yogyakarta: Gadjah Mada University Press, 1983.
- ⁸ There are various spellings in Indonesia: *taklik-talak*, *ta'lik-talak*, *taklek-talak*, *ta'liq-talaq*.
- ⁹ There are various spellings in Indonesia: *fikh*, *fiqh*.
- ¹⁰ There are various spellings in Indonesia; *siyasa*, *sijasa*.
- ¹¹ There are various spellings in Indonesia: *talaq*, *talak*, *talaaq*, *taleu'* (in Aceh).

- ¹² There are various spellings in Indonesia: *khuluk*, *chul*, *chuluk*. This is a way of dissolving a marriage by way of the wife's forfeiting her right to financial compensations.
- ¹³ There are various spellings in Indonesia: *syiqaaq*, *shiqaaq*, *sjiqaaq*. Lit. "disunity" or "dissension," this is a way to dissolve a marriage when a dispute arises between the husband and the wife. The interested parties submit the case to a religious court and the court appoints two arbitrators from each side (husband and wife), who are expected to make a proper settlement. The settlement of marital dispute in this way is enjoined in the Qur'an (4:35).
- ¹⁴ There are various spellings in Indonesia: *fasakh*, *fasach*, *pasha*. It is a way of terminating a marriage by the authority of a religious judge.
- ¹⁵ Many writings give the erroneous impression that *talaq* is the only way to dissolve a marriage in Islamic law and women do not have the right to dissolve their marriage.
- ¹⁶ Kazi Nasir-ud-Din Ahmed, *The Muslim Law of Divorce*, New Delhi: Kitab Bhavan, 1978.
- ¹⁷ *Ibid.*, p. 79.
- ¹⁸ *Ibid.*, p. 80. On p. 82 is found: "There is no conditional divorce under the Shi'i law."
- ¹⁹ See Schacht, art. Talak, in *The Encyclopaedia of Islam*, 2nd edition, Leiden: Brill, 1950–2004, vol. X, pp. 151–55. He states: "The question of the validity of a conditionally pronounced *talak* ... is also much disputed. The Hanafis and Shafi'is make such a *talak* come into operation on the fulfillment of the condition; the Malikis regard it, according to the nature of the condition, as sometimes at once effective and sometimes void." (p. 154) On the Hanbalis, see Susan A. Spector, *Chapters on Marriage and Divorce: Responses of Ibn Hanbal and Ibn Rahwayh*, Austin: University of Texas Press, 1993, p. 32, where she writes: "In the third category are declarations on the part of a husband that make divorce contingent upon the fulfillment of a condition. Such declarations are treated as unilateral oaths, and divorce occurs when the condition stipulated obtains."

- ²⁰ Ahmed, op. cit., p. 81.
- ²¹ See Aharon Layish, art. Talak, in *The Encyclopaedia of Islam*, 2nd edition, Leiden: Brill, 1950–2004, vol. X, pp. 155–57. The *Encyclopaedia* transcription has been adjusted to more standard norms in this and the following citation.
- ²² Frank E. Vogel mentions the existence of *ta'liq al-talaq* in Saudi Arabia in his paper, “The Complementarity of Ifta’ and Qada’: Three Saudi Fatwas on Divorce,” in *Islamic Legal Interpretation: Muftis and their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, Cambridge: Harvard University Press, 1996, pp. 262–69.
- ²³ Schacht, op. cit., p. 154.
- ²⁴ Zaini Ahmad Noeh was formerly the Acting Director of the Office of the Religious Court of the Department of Religion, Republic of Indonesia, and a member of the Syariah Council of the Nahdlatul Ulama. Other than a number of his own works on the history of Islamic law in Indonesia, he has translated into Bahasa Indonesia, Daniel Lev’s book, *Islamic Courts in Indonesia*, Berkeley: University of California Press, 1972, and my book, Hisako Nakamura, *Divorce in Java: A Study of the Dissolution of Marriage Among Javanese Muslims*, Yogyakarta: Gadjah Mada University Press, 1983.
- ²⁵ Noeh, “Dua Peninggalan Sultan Agung,” *Mimbar Hukum*, No. 61, Thn. XIV (2003), pp. 94–99.
- ²⁶ In another article by the same author, the year of the introduction of *ta'liq al-talaq* is mentioned as “the Javanese year of Alip 1554 or 1630 Masehi.” Noeh, “Pembacaan Sighat Taklik Talak Sesudah Akad Nikah,” *Mimbar Hukum*, No. 30. Thn. VIII (1997), pp. 64–75.
- ²⁷ Noeh, op. cit., p. 97.
- ²⁸ Ibid.: “This royal promise of taklik-talak was related to military service. All grown-up male members of the country were then soldiers who were obligated to do military service [from] time-to-time To become a soldier in this way was an honor, and the contract of taklik-talak given to him was also a matter of pride. Through this, Sultan Agung educated his subjects (husbands) that they had always to fulfill their

obligations to their wives except for the duration of military duty, while they were assured that the wives would not request divorce as long as they were on duty.”

- ²⁹ For Sultan Agung, see M. C. Ricklefs, *The Seen and Unseen Worlds in Java 1726–1749: History, Literature and Islam in the Court of Pakubuwana II*, Honolulu: Allen & Unwin and University of Hawai’i Press, 1998, p. xxi.
- ³⁰ See Ahmed, op. cit., p. 80. Also see Charles Hamilton, *The Hedaya or a Commentary on the Mussulman Laws*, Lahore: Oremier Book House, 1975, pp. 78–80.
- ³¹ Even though the Shafi’i school, which was the main school of law in Indonesia, had one of the favorable provisions for the wife in this circumstance, a wife could only sue for divorce after four years, four months, and ten days of being deserted. This was similar to the Maliki and Hanbali pronouncements. Cf. the Hanafi opinion (when people of the husband’s generation have all died, estimated at the husband’s age of either 90 or 120).
- ³² Cf. Ricklefs, loc. cit.
- ³³ For the position of al-Ansari and al-Sharqawi in the intellectual genealogy and networks of ulema extending from the Middle East to Southeast Asia, see Azyumardi Azra, *The Origins of Islamic Reformism in Southeast Asia: Networks of Malay-Indonesian and Middle Eastern ‘Ulama’ in the Seventeenth and Eighteenth Centuries*, Honolulu: Allen & Unwin and University of Hawai’i Press, 2004 (for al-Ansari, pp. 18–19ff., 129–30ff., and for al-Sharqawi, p. 121).
- ³⁴ The year of issuance appears after *Stb*.
- ³⁵ Noeh, “Pembacaan Sighat Taklik Talak Sesudah Akad Nikah,” *Mimbar Hukum*, No. 30. Thn. VIII (1997), p. 65.
- ³⁶ Christiaan Snouck Hurgronje, *Mekka in the Latter Part of the 19th Century; Life, Custom, and Learning [of] Moslims of the East-Indian-Archipelago*, transl. J. H. Monahan, Leiden: E. J. Brill, 1970.
- ³⁷ C. Snouck Hurgronje, *The Achenese*, transl. A. W. S. O’Sullivan, Leiden: E. J. Brill, 1906, vol. I, pp. 348–56.
- ³⁸ *Ibid.*, p. 349.

- ³⁹ According to Noeh, the guidebook was entitled *Kitab Qowanin al-Syar'iah li Ahlal-Hukumiyah wal-Iftaiyah* (Batavia, c. 1895). Noeh, op. cit., p. 69.
- ⁴⁰ Department of Religion, Republic of Indonesia, Instruction No. 1 of 1955 and Decree No. 15 of 1955.
- ⁴¹ *Peraturan Menteri Agama No. 2, Tahun 1990*. The English translation of this form is adapted from Arskal Salim and Azyumardi Azra, in *Shari'a and Politics in Modern Indonesia*, Singapore: Institute of Southeast Asian Studies, 2003, pp. 92–93.
- ⁴² Mahmud Junus gives in his book *Hukum perkawinan dalam Islam: Disusun setjara buku undang-undang Barat menurut Mazhab Sjafi'i*, 1964, an example of paying Rp.1—a very nominal amount. (p. 130) Since this book was used as a textbook in the National Institutes of Islamic Studies (IAIN) all over the country, the payment of a nominal compensation was ordered in religious courts in Indonesia on a wide scale; as seen above, 1,000 rupiah is now written in the official form.
- ⁴³ There are various spellings in Indonesia: *iwadl*, *iwad*.
- ⁴⁴ Lev, op. cit.
- ⁴⁵ The standard way for a woman to be able to dissolve her marriage is called *khul'*, in which she gives up her financial rights to maintenance and the delayed portion of her bridal gift.
- ⁴⁶ See Chapter VII, Agreement in Marriage, Article 45–46.
- ⁴⁷ Noeh 1997, p. 68.
- ⁴⁸ National statistics on marriage and divorce indicate that the number of cases in the category of *ta'liq al-talaq* has increased significantly since 1974. Here, however, I will not go into the examination of divorce statistics in Indonesia, which is a huge academic exercise by itself because of its complexity. See Mark Cammack, Helen Donovan, and Tim B. Heaton, in *Islamic Law in Modern Indonesia: Ideas and Institutions*, ed. R. Michael Feener and Mark E. Cammack, Cambridge: Harvard University Press, forthcoming Spring 2007.

⁴⁹ The presence and signing of the marriage certificate by the bride on the occasion of the contracting of the marriage contract seems to be a recent development; I did not observe it while I was doing fieldwork in the 1970s.

⁵⁰ Noeh 1997, pp. 71–72.

⁵¹ Noeh cites interesting statistics in his article showing that in certain counties (*kabupaten*) of East Java, where the influence of ulema is very strong and the level of religious education among the residents is generally high, the practice of pronouncing *ta'liq al-talaq* and resultant invalid (*fasaq*) cases are significantly less frequent compared to other areas. Noeh argues that *ta'liq al-talaq* is all the more necessary in those areas where it still has an educational value. See Noeh 1997, p. 71.

⁵² He is a contemporary “descendant” of *penghulu naib*, deputy of a religious judge.

⁵³ Snouck Hurgronje, *The Achenese*, p. 350, n.1: “In Van den Berg’s *Beginselen* not only do we not find a single word about this most important adat, but even the possibility of a ‘conditional talaq’ is only barely alluded to (p.157). In 1888, when I verbally informed Mr. Van den Berg that I had been told of the existence of this adat by many Javanese at Mecca, he denied that any such special custom existed” (transl. corrected from original, HN)

⁵⁴ H. Geertz, op. cit., p. 72.