

## CHAPTER XIII

# INDONESIA

### I

#### REFORM OF MUSLIM MARRIAGE LAW

The Indonesian Muslims are generally followers of the *Shāfi'ī* school of Islamic law.<sup>1</sup> Before the advent of Islam in the twelfth century no common family law was followed in Indonesia. In each of the islands, people had their own customs and usages. The concept of a uniform law was foreign to them. Their local customs represented "norms of social behaviour of small isolated communities."<sup>2</sup> Islam came as a unifying factor in the social life on the islands. The Indonesians then came to know of Islamic family laws which conflicted with many of their ancient customary practices. The latter were, however, so deeply rooted in the Indonesian society that an overnight switch on to Islamic institutions was not possible. In the course of time Islamic family law, mainly of the *Shāfi'ī* school, replaced customs and usage in various parts of Indonesia. Nevertheless, some customs and usages survived and still continue to have the force of law. These are now described, in contradistinction with Islamic principles, as the '*ādāt*.'<sup>3</sup> Indonesia, thus, came to have an admixture of Islamic legal concepts and local customs. A detailed account of the balance of purely Islamic and customary elements in the Indonesian family law is out of the scope of the present study.<sup>4</sup> Only a brief account of the recent developments in the Muslim family law as applicable in Indonesia will be given here.

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1. Ibrahim, *Islamic Law in Malaya* (Singapore, 1965), 77.

2. Alisjabbana, S. 'Customary Law and Modernisation in Indonesia', in *Family Law and Customary Law in Asia* ed. Buxbam, H. (The Hague, 1968), 11.

3. The belief of some scholars that the '*ādāt*' has modified Islamic law in Indonesia is, it is submitted, erroneous. On the contrary, Islamic law replaced and modified customary practices prevailing at the time Islam spread in Indonesia. Those customs which survived the gradual process of Islamisation are now called the '*ādāt*'. It is an Arabic word meaning usage. See Tahir Mahmood, 'Custom as a Source of Law in Islam', 7 *J.I.L.I.* (1965), 102.

4. Reference may be made for it to Harr, '*Ādat Law in Indonesia*' (New York, 1948.)

At the beginning of the current century, some customary practices opposed to the *Shari'a*, which had survived the unconscious process of Islamisation in the country, were disapproved by Muslim scholars. Ahmed Chatib of Minang Kabau and others made efforts for the replacement of all such customs by the Islamic family law. Some organizations like the *Muhammadiyah* League joined them.<sup>5</sup> Commenting on these efforts, Jan Prins writes :

For more than a generation, there have been numerous animated discussions on the relative value of *'adat* and *Shari'a* (*t*) in the Indonesian world. One can find them in the proceedings of the *Voksraad* before 1942, in many back numbers of newspapers and periodicals, in books and pamphlets, and in judgements and official reports.<sup>6</sup>

The efforts to enforce Islamic principles and procedure relating to marriage and divorce led to gradual reform of Muslim family law in Indonesia.

One of the customary institutions about which the reformers were most unhappy was unilateral divorce. Under the ancient law, a husband's freedom to divorce his wife was wholly arbitrary. The Islamic law of divorce when introduced into Indonesia made little improvement. The precepts of the *Qur'an* and *Sunna* discouraging divorce<sup>7</sup> were wholly neglected by the Indonesian husbands who were used to their customary freedom in the matter. It was, therefore, considered necessary to impose some restrictions on divorce.

The Dutch government of the islands was conscious of the aforesaid efforts and desires for the reform of family law. However, instead of enforcing any Islamic principles, it proposed to enact an entirely novel civil code dealing, *inter alia*, with family law. But the proposal was given up on account of popular resentment in the country.<sup>8</sup>

After the advent of independence, the Indonesian legislature enacted *Law No. 22 of 1946* providing for the appointment of marriage officials in various parts of the country. Its application was extended to almost the entire country in 1954.<sup>9</sup> A Consultation Bureau was established in the Ministry of Religious Affairs and in 1955 Marriage Councils were set up in Bandung and Jakarta. The purpose of all these bodies was to regulate

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5. Berg, 'Indonesia', in *Whither Islam*, 239 f.

6. Prins J., 'Ādat Law and Muslim Religious Law in Modern Indonesia', 1951 *Die Welt Des Islam. N.S.I.*, 285-86.

7. See Tahir Mahmood, 'Dissuasive Precepts in Muslim Family Law', 2 *Alig. L.J.* (1965), 122-27.

8. Ibrahim, A., *Sources and Development of Muslim Law* (Singapore, 1965), 91.

9. By *Law No. 7 of 1954*.

various liberal institutions of family law with a view to preventing their unreasonable use.

In 1947 and 1955, the Ministry of Religious Affairs enforced a number of *Regulations* dealing with the administration of family law. Under these *Regulations*, the Consultation Bureau and the Marriage Councils were given advisory and supervisory powers in respect of certain family transactions, e.g., marriage, divorce and revocation of divorce.

Unlike the West Asian countries, the substantive family law of Islam was neither reformed nor codified in Indonesia. The Law of 1946 enforced very few substantive provisions. The administrative machinery of the State was given powers and responsibility to restrain misapplication of Islamic family law. As regards the nature and scope of these reforms, the Ministry of Religious Affairs said, in a statement made in the legislature in 1950, that the Government aimed at ameliorating the marriage law according to "what, within the Islamic sphere, time and social justice demanded."<sup>10</sup>

## II

### A SUMMARY OF REFORMS

#### REGISTRATION OF MARRIAGE

The Law of 1946 provides for registration of all marriages taking place in the country. Under this law, it is compulsory for the parties to a marriage to register it with the marriage officials. A detailed procedure for such registration is laid down by the rules framed under this law. The validity of a marriage shall not, however, be affected by the failure to comply with the requirement of compulsory registration.

#### CHILD-MARRIAGE

The *Regulations* issued in 1947 direct the marriage officials to discourage the practice of child-marriage. Under these *Regulations*, it is the liability of these officials to prevent, as far as possible, a child-marriage from taking place and being registered.

#### DIVORCE BY HUSBAND

Under the *Regulations* of 1947, a husband desiring to divorce his wife is required to apply to the local marriage official, and the latter has to make efforts to effect a reconciliation between the spouses. If the official fails

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10. Prins, J., 'Adat Law and Muslim Religious Law in Indonesia', *op. cit.* note 6, at 295.

In his efforts and a divorce takes place, he has to make another attempt to effect a reconciliation before the period of 'idda comes to an end.

Further to the above requirements, the *Regulations* of 1955 provide that a husband desiring to divorce his wife shall make an application either to the local Marriage Council or to the Consultation Bureau. On the receipt of such an application, a period of seven days shall be given to the husband to reconsider the matter. A formal application for a certificate of divorce is to be accepted from him only if he insists on it after the expiry of the said period of respite. A certificate of divorce is to be issued only if all efforts to effect a reconciliation fail and a final and irrevocable divorce takes place in accordance with Islamic law.<sup>11</sup>

Every divorce has to be registered with the marriage officials in accordance with the provisions of the Law of 1946.

#### REVOCAION OF DIVORCE

A first or a second divorce can be revoked, under Islamic law, during the period of 'idda. The Indonesian Law of 1946 provides for compulsory registration of every revocation of divorce. Under the *Regulations* of 1955, when a husband wants to revoke a divorce registered by him earlier, he has to make an application to the local marriage official. On receiving such an application, the official will issue a certificate of revocation of divorce (*surat rudjū*<sup>12</sup>).

#### DELEGATED DIVORCE

Under Islamic law, a husband can delegate his right to pronounce a divorce to his wife herself. At the time of marriage, the spouses are free to stipulate any lawful conditions in the marriage-contract, the violation of which will give to the wife a right to pronounce a delegated divorce (*talāq al-tawfid*). The Indonesian *Regulations* of 1955 provide that every marriage-certificate issued by an official must incorporate a stipulation relating to delegated divorce; the grounds on which the wife shall have a right to pronounce such a divorce are to be settled by the parties to an intended marriage.

The above provision furnishes to the Indonesian wife a method to curtail the freedom of her husband in general and, particularly, empowers her to free herself from the marital bond in the event of a bigamous marriage contracted by the husband.

11. A famous Tradition: "The most detestable thing in the sight of God is divorce" appears on the top of the application-blanks to be used for obtaining a certificate of divorce. The purpose of this is to dissuade the husband from effecting a divorce unless it is really unavoidable. For the impact of this Tradition on Islamic divorce law, see Tahir Mahmood, *op. cit.* note 7, at 125.

12. See the Glossary at the end of this book.

APPENDIX TO Chapter XIII

MARRIAGE AND DIVORCE REGULATIONS IN INDONESIA\*

(i) REGULATIONS ISSUED IN 1947\*\*

1. Where a bigamous marriage is desired by a person, the marriage official, when called upon to register it, shall clarify and explain to such person, the position of a bigamous marriage under Islamic law, the legal conditions attached therewith, and his obligations relating thereto.

2. Where a divorce is desired by the husband, the official shall give audience to both the spouses and shall try, by all possible means, to persuade the husband to change his mind. If the husband insists on a divorce, the official shall allow it but shall warn him about his obligations, under Islamic law, towards the divorced wife during the period of 'idda. When the period of 'idda draws to a close, the official shall once again try to persuade the husband to revoke the divorce. If the efforts fail and the 'idda period expires, the divorce shall become effective and shall be registered.

3. Where a guardian or any other person contracts a girl into marriage, the marriage official shall see that all the conditions for the validity of marriage under Islamic law have been complied with.

4. As far as possible, the officials shall not allow a child-marriage to be solemnised and registered.

(ii) REGULATIONS ISSUED IN 1955

1. The parties to an intended marriage shall supply to the marriage registrar, in the prescribed form, all the details relating to the status and identity of the parties and the particulars of the marital contract; they shall obtain from him a marriage-certificate (*sūrat-nikāh*).

2. A proforma for the declaration of delegated divorce (*taālik*) shall be printed on the marriage certificate (*sūrat-nikāh*) and the husband shall have to sign it. According to such declaration, the wife shall have a right to be divorced on the grounds to be specified in the proforma by the parties at the time of marriage.

3. Where the husband desires to divorce his wife, he shall apply to the Consultation Bureau in the Ministry of Religious Affairs or to the Marriage Councils where these are functioning. The parties shall, then, be summoned and a reconciliation attempted. If the attempt fails, the matter shall be postponed for seven days and the parties shall be asked to reconsider the matter within that period.

If, after the expiry of the said period, the husband still insists to divorce his wife, he shall be asked to fill the form of application for a divorce certificate (*sūrat-talāk*).

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\* This paraphrase of the *Regulations* has been prepared by the author of the present study, on the basis of the references to their provisions found in the various works cited in the chapter, with a view to maintaining the uniform pattern followed in other chapters of the present work.

\*\*For the Malay words appearing in this paraphrase, see the Glossary at the end of the book.

He shall state therein the nature of the intended divorce under Islamic law, *i.e.*, whether it is the first, second or a third divorce, and whether revocable or irrevocable (in case it is the first or the second one). The officials shall proceed to act in accordance with the entries. If, eventually a final and irrevocable divorce takes place in accordance with Islamic law, they shall issue the certificate of divorce.

4. Where a husband revokes the divorce which he had earlier pronounced, he shall obtain from the officials, a certificate of revocation (*surat-rudjū*).