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3 The evolution of the judicial tradition of the *penghulus*

> 'A woman may at any time, when dissatisfied with her husband, demand a dissolution of the marriage contract by paying him a sum established by custom.' (Raffles, cited in Jones, G.W. 1994: 202)

> 'Where independent religious courts exist, however, these have the tendency to develop along the line of orthodox doctrine and to purify themselves from all adat flaws. Our interference in the religious administration of justice, which made them collegial and independent from the regents, without doubt had the effect, that these "priest councils" increasingly applied a purified Mohammedan law, which not necessarily leads to satisfactory or beneficial outcomes for the population concerned' (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 943).[1]

3.1 INTRODUCTION

In Chapter 2 we have seen how the jurisdiction of the Islamic courts in Indonesia is rooted in the pre-colonial *jaksa* and *surambi* courts on Java, which after they in 1882 were incorporated into the colonial state as so-called priest councils (*priesterraden*) and, in 1931, as *penghulu* courts (*penghoeloegerechten*), became subject to government regulations and case law of colonial courts. In this chapter we turn from the jurisdictional development of the Islamic courts to the substantive family law norms that the *penghulus* applied during the colonial era.

In this chapter I depict the continuities and changes regarding the application of substantive family law norms by the *penghulu* courts, and sketch the political debates regarding this issue as they took place in the Netherlands Indies. I do not treat the Japanese era (1942-1945) here because of a lack of literature about the influence of the Japanese government on substantive Muslim family law.

In this book I approach the development of substantive Islamic law in Indonesia as part of the development of a distinctive judicial tradition which the Indonesian Islamic courts inherited from the *jaksa, surambi* and *penghulu* courts (see 1.2.1). Through the analysis of the *penghulus'* interpretations of three

1 My own translation.

key legal concepts, namely *taklik al-talak*, *syiqaq* and *harta bersama*, I will show that the *penghulu* courts in their adjudication applied those norms in a lenient way – not necessarily in accordance with the traditional Islamic doctrine of the *syafi'ite maddhab*.

3.2 The development of substantive law in the *penghulu* courts on Java in the pre-colonial period

3.2.1 Family law in the Javanese Islamic courts prior to colonial interference

Before Islam made headway into Indonesia, the Indonesian archipelago saw the rise of two great Hindu-Buddhist Kingdoms, Sriwijaya (7th-13th century) and Majapahit (1292-1500). Their cultural and normative influences have been especially strong on the islands of Java and Bali. From the eleventh century onwards, a *sufi* form of Islam spread to Indonesia via the Indian traders of Gujarat, introducing *syafi'ite fiqh* first to what now is Aceh and later in the 15th century also to the Hindu-Buddhist centers in West and Central Java (Ricklefs 1991).

Under Sultan Agung of Mataram (1613-1645), who ruled over most of Java at the time the Dutch first arrived there, the *penghulus* were part of the ruling elite (*priyayi*) *as* chiefs of Islamic affairs in the districts of the Sultanates. One of the tasks of a *penghulu* was that of judge in Islamic law matters in the *surambi* courts (see 2.2.1). Hardly anything is known about the religious training of the pre-colonial *penghulus*. Before the eighteenth century, systematic religious education through *madrasah* and *pesantren* had not yet developed and the level of education of *penghulus* must have differed from place to place (Bruinessen 1994). However, we do know that during that time, the number of *fiqh* books a *penghulu* on Java would consult probably numbered only five or six *syafi'ite fiqh* books of the hundreds out of *fiqh* works of the *syafi'ite maddhab* (Hisyam 2001: 27-28).

The *penghulus* did not solely draw on *syafi'ite fiqh* books; Muslim family law in the administration of justice by the pre-colonial *penghulus* was a blend of written sultanic ordinances, *syafi'ite fiqh* and *adat* law (Hooker, M.B. 1984; Nakamura 2006). The *penghulus'* acceptance of certain *adat* norms certainly related to the religious practices of Javanese society at that time. Large parts of Javanese society practiced a syncretic form of Islam, a blend of Islamic norms and rituals with old Javanese and Hindu customs and beliefs (Geertz 1976). *Adat* is the unwritten custom of a given community, presumably governing all aspects of personal and public life from birth to death and beyond. Since sharia is also supposed to regulate private and public life, there inevitably is a substantial overlap between *adat* and sharia.

Additionally, sultanic ordinances regulated certain aspects of life on Java. As the *penghulus* were not only judges in the sultanate courts but also high-

ranking government officials, the position of the *penghulus* on Java depended considerably on their relation with the sultan. The sultans on Java had the power to promulgate ordinances – a practice which in the Muslim world had long been accepted as long as the ruler reserved an important place for divine law (An Na'im 2002). On Java the commonness of conditional divorce (*taklik al-talak*), which was stipulated in an ordinance of Sultan Agung, seems to be proof of a strong influence of sultanic ordinances in family law matters (Nakamura 2006). In contrast, until the second half of the eighteenth century the VOC did not interfere in the adjudication by the *penghulus.* As a result, Javanese Muslim family law would largely remain the traditional blend of *syafi'ite fiqh* rules contained in the *fiqh* books, regulations by the sultan and local *adat* practices (Berg 1892; Juynboll 1903; Vollenhoven 1928). In the sections below I will describe the components of this blend, starting with *syafi'ite fiqh.*

3.2.2 Divorce rights of Muslim women under *syafi'ite fiqh*

In order to be able to describe the special characteristics of Muslim family law norms applied in the administration of justice by the Javanese *penghulu*, I first have to provide a short summary of divorce rights according to the *syafi'ite fiqh*. *Syafi'ite fiqh* is the doctrine within the *syafi'i maddhab* and consists of the various opinions of the authoritative *ulamas*. *Fiqh* is equivocal in nature as authoritative opinions can differ substantially from one another. In this section I will not provide a comprehensive discussion of the different opinions of the authoritative *ulamas* concerning family law issues, I will suffice with a short selection of *syafi'ite fiqh* concerning divorce law, based on Indonesian handbooks concerning *fiqh* in family law matters (Syarifuddin 2006; As-Subki 2010). The selection of authoritative norms concerning divorce and post-divorce rights that I present in this section are those derived from the authoritative *kitab kuning*, the Javanese traditional canon of religious textbooks, including *fiqh* books on family law issues. Van Bruinessen has found that in the late sixteenth century a limited number of *syafi'ite fiqh* books were studied in Java, including those concerning family law (Bruinessen 1994: 13). Therefore, while admitting that not much is known about what law was applied in practice by the Islamic judges of that time, it seems likely that those *fiqh* family law norms were important sources for the pre-colonial *penghulus*.

In traditional *syafi'ite fiqh*, as in the other *maddhab*, men's and women's rights to divorce are not equal. A man has the absolute right to repudiate his wife through the pronunciation of the *talak*, without the obligation to provide grounds for the divorce. After the wife's three-months waiting period (*iddah*) has passed, the divorce will be irreversible (*ba'in*). When the husband has uttered the *talak* divorce for the first or second time during the marriage, he still has to provide maintenance (*nafkah*) and shelter for his wife during the

iddah in which she may not marry anyone else. During the *iddah* period the husband can take his wife back (*rujuk*), even if she does not agree.

If a husband pronounces the *talak* for the third time during the same marriage, the divorce immediately becomes final,[2] which means that he loses his right to continue the marriage (*rujuk*) during the *iddah* period that his former wife still has to observe in order to establish whether she is pregnant or not. As a consequence of the third *talak*'s finality, and provided his former wife is not pregnant of his child, the husband has no duty to provide maintenance for his wife during the *iddah* period. However, in all *talak* divorces the husband has to provide a consolation gift or *mut'ah.* Alternatively, the husband can divorce by *li'an*, a pledge before the judge in which the husband swears that his accusation of the adulterous behavior of his wife has been true. A *li'an* divorce is always final and does not require a *mut'ah* consolation gift.

Women have no right to repudiate under *syafi'ite fiqh*, but this does not mean that there are no divorce procedures available to them. In fact, under the *syafi'ite maddhab* women have relatively broad grounds to divorce compared to the *hanafi maddhab* (Mir-Hosseini 1996: 123). First, a judge can annul the marriage through a procedure called *fasakh*, based on witness evidence. Grounds for annulment of the marriage include impotence, or another incurable illness of the husband; the husband's adulterous behaviour (*zina*) or other forms of reprehensible behavior (*maksiat*); severe cruelty of the husband; or the husband's failure to provide maintenance in accordance with the standards of his wife's social status. Besides a *fasakh* divorce, a wife can negotiate a divorce with her husband through a procedure called *khul* or *khuluk.* In this procedure the wife offers her husband a part of her dower (*mahr*) in exchange for his pronunciation of the *talak*. Both *fasakh* and *khul* divorce are final, which means that the husband has no duty to provide maintenance during the wife's *iddah* period.

The post-divorce rights of a wife, besides those already described with regard to the *iddah* period, are as follows. After a divorce, the dower remains property of the wife except where the marriage has not been consummated. In that case, the wife must return half of the dower to her husband. All property brought into the marriage by the wife, including inheritances, remains hers upon divorce. Marriage does not generate communal property of husband and wife. Moreover, after a divorce the ex-father must provide child support for his children who reside with his ex-wife until they are independent (*balligh*). Opinions within *syafi'ite fiqh* differ regarding *balligh*, and applicable ages range from 5 to 12 years old. Only in the exceptional case of a child born after a *li'an* divorce would the ex-husband not be held responsible, as he has cut his bond with the child who is considered to have been born out of wedlock.

2 In Islamic legal terms a final divorce is referred to as *talak ba'in*, and a non-final divorce as *talak raj'i*.

3.2.3 Influences of sultanic ordinances on pre-colonial *penghulu* justice

According to Prins, Sultan Agung of Mataram (1613-1645) had institutionalized an ordinance providing a *third* procedure to facilitate women's divorce in pre-colonial Java, in addition to *fasakh* and *khuluk*: the *taklik al-talak* or conditional divorce (Prins 1951: 292; see also Nakamura 1983: 36-37, 2006: 13). *Taklik al-talak* refers to a set of provisions in the marriage contract which delegate the husband's power in *talak* to the wife. Van den Berg mentions abandonment of the wife for six months without a valid reason or a lack of maintenance as the conditions under which the wife could make use of this delegation of power. The husband had to pronounce the *taklik al-talak* during the marriage ceremony just after the marriage had been concluded. If the wife felt she had the right to and wished to divorce her husband, she could bring the case to the *penghulu*, who on the basis of witness testimonies would have to decide whether one of the stated conditions had been met, and, consequently, the *talak* had come into effect (Berg 1892: 485-486).

Indeed the *taklik al-talak* has been known and discussed by *ulamas* of all Islamic schools, including the *syafi'ite maddhab,* regarding the question of whether the husband may delegate his divorce right to his wife (*tawfid*) and what matters may be regulated in a marriage contract (Hak et al. 2012: 288). The general *syafi'ite* opinion is that a marriage contract may regulate all matters as long as it does not forbid things that are allowed (*halal*) nor stipulate things that are forbidden (*haram*) according to sharia (As-Subki 2010: 106). The reason I discuss *taklik al-talak* as part of the sultanic law is that on Java, unlike most Muslim areas in the world, it is likely to have became standard practice via a regulation by Sultan Agung, instructing *penghulus* to generally apply it in marriage ceremonies:

> [T]a'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. (Nakamura 2006: 13)

In fact, the conditions were restatements of some of the divorce grounds that already applied in *fasakh* divorce, and therefore *taklik al-talak* had a solid base in *fiqh.* I did not come across reliable sources that confirmed the common application of *taklik al-talak* in seventeenth century Java, but it seems likely that Sultan Agung's ordinance contributed to the prevalence of the practice in many parts of Java some two centuries later, as Van den Bergh observed (1892). The institutionalization of *taklik al-talak* on Java, and its practice elsewhere in Indonesia, meant that the husband uttered the conditions of the *taklik al-talak* (which were similar to the *fasakh* divorce grounds for women) in each

formal marriage ceremony concluded by a religious official under the *penghulu.* This must have significantly increased women's legal awareness about their divorce rights under *syafi'ite fiqh*.

3.2.4 Influences of *adat* on pre-colonial *penghulu* justice

In addition to *syafi'ite fiqh* and sultanic ordinances such as the *taklik al-talak*, *adat* was the third component of Muslim family law on Java. The most notable example of an *adat* norm recognized by the Javanese *penghulus* was the custom that property obtained during the marriage was joint property of both spouses (*harta gono-gini* or *harta bersama*). The standard recognition of joint marital property is unknown in *syafi'ite fiqh,* but was customary in nineteenth century Java. The custom is believed to be part of Javanese *adat* and was also adopted in ordinances of the pre-Islamic Javanese kingdoms (Berg 1892: 476-477; Vollenhoven 1928). The custom remained wide-spread on Java after the Islamization of the former Hindu Javanese kingdoms, since the Javanese *penghulus* sustained it in their judgments.

Thus, according to Javanese *adat* both spouses hold rights over the joint marital property. Upon divorce this property is divided among the spouses. The *penghulus* would divide the joint marital property either equally among the spouses or give the husband twice the share of his wife, depending on region or preference. Joint property rights thus did not automatically mean an equal division of joint marital property.

3.2.5 The pre-colonial *penghulus* as women's divorce rights providers

The cases above illustrate that a legal tradition had developed in the Javanese *penghulu* courts simultaneously based on and distinct from *syafi'ite fiqh*. The relatively strong position of Javanese women in *adat* was taken into account by the *penghulus* and Sultans of Java. In this way, *adat* norms and ordinances influenced the adjudication by the *penghulus*, who in the case of *taklik al-talak* stretched the parameters of *syafi'ite fiqh*, and in the case of joint marital property adopted an *adat* norm which was justified by reference made to *fiqh.*

Intentionally or unintentionally, as many *penghulus* were not well-trained in *fiqh* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 963-989), the *penghulus* developed a Muslim family law which was relatively liberal with regard to women's rights. The judgments of the *penghulus* were of great significance for the extent to which women could access their divorce and post-divorce rights. Men could divorce their wives without the interference of a *penghulu.* Women who wanted to divorce through a *khul* divorce still had to obtain the consent of their husband to pronounce the *talak.* If the husband refused they only had the option to divorce under *fasakh* and *taklik al-talak* and had to bring

their case to the *penghulu*. Muslim family law as applied by the pre-colonial *penghulus* was essential to both women's divorce rights and the development of a substantive Muslim family law.

3.3 Policies, debates and views about Muslim family law in the colonial period

3.3.1 Absence of colonial legislation on substantive Muslim family law

As we have seen in the previous chapter, Dutch formal legal interference with the Javanese *penghulus* only started with the issuance of the 1819 Regulation on the Administration of Justice in the Netherlands Indies, which gave *penghulu* courts jurisdiction in marriage, divorce, and inheritance and made the *penghulus* advisers to the *landraad* (see 2.2.3). S 1835/58, which stipulated that parties should submit requests to enforce *penghulu* court judgments to the *landraad*, had institutionalized the interaction between *penghulu* courts and the colonial legal system. The 1882 Priest Councils Regulation unified the *penghulu* courts and placed them under direct colonial administration.

Dutch control over the *penghulu* courts in the end greatly limited their jurisdiction. As appears from case law, the *landraad* and appellate courts primarily used their powers over the *penghulu* courts to settle the relative jurisdiction in their own favor by limiting the penghulu courts' jurisdiction to declaratory judgments only. In the second decade of the twentieth century, through the influence of the successive *adat* law scholars Snouck Hurgronje, Van Vollenhoven and Ter Haar, *adat* law became increasingly central to the Netherlands Indies' Islam policy. The 1931 Penghulu Courts regulation exemplifies this as it formally transferred jurisdiction in all inheritance and property cases (except maintenance) to the *landraad*, which had to apply *adat* law.

Another consequence of Dutch policy was that the *penghulu* courts were made formally independent from local rulers, which according to Van Vollenhoven constituted an unprecedented autonomy resulting in the creation of a completely new institution (1928: 564-565). I would not speak of a completely new institution but rather of new circumstances that were created for the judicial tradition, since the new institution was largely based on the *penghulus'* judicial tradition. The previous paragraph showed that in this tradition, despite that the *syafi'ite fiqh* was 'the primary legal source in marriage and divorce matters' (Prins 1954), the *penghulus* had incorporated *adat* norms and royal ordinances into their adjudication, making it distinct from fiqh. Moreover, in order to avoid conflict with the Muslim community, the colonial government never issued a regulation concerning substantive Muslim family law and thus intentionally continued the judicial tradition of the *penghulus*.

However, the actions and policies of colonial actors did excert some influence on the legal doctrine of the *penghulus*. This colonial influence has been threefold. First, in order to increase legal certainty, in 1754 Governor-General Mossel ordered that a compilation of Muslim family law be drawn up. In the drafting process of the 1760 Freijer Compilation (*Compendium Freijer*), VOC officials relied heavily on the opinions of local chiefs, *penghulus* and *ulamas* concerning Muslim family law. Its participatory drafting process, its substantive norms and its codebook form remarkably foreshadow the 1991 Compilation of Islamic Law. Secondly, colonial experts such as Van den Berg and Van Vollenhoven identified the 'idiosyncracies' within *syafi'ite fiqh* in the *penghulus'* adjudication in Muslim family law, categorizing them as *adat* rather than Muslim family law norms. Finally, the Dutch colonial government attempted to regulate Muslim marriage registration by requiring Javanese Muslims to register marriages and divorces.

3.3.2 The VOC and the compilations of Islamic law (1600-1798)

The *Compendium Freijer* was in fact not the first attempt to create a handbook of indigenous law. The *landraad* established by the VOC in the second half of the eighteenth century had to apply indigenous religious and customary norms in civil law matters concerning the indigenous population. As a consequence, the Dutch needed to compile applicable legal sources. The colonial government issued a number of such compilations, which were mostly based on sultanic ordinances. The *Mogharraer* Code issued in 1750, the Cirebon Code from around the same period, and a compilation of South Sulawesi *adat* law by Van Clootwijk, focused on penal law and contained little family law. Little is known about to what extent those compendia actually were applied in practice (Nurlaelawati 2010: 45). The *Compendium Freijer*, issued in 1760, was exceptional in that it concerned substantive family law and Muslim inheritance law (*faraid*), and in that it had been based on consultations with *penghulus* and *ulamas*. I treat it in some detail here because it can provide insights into the Muslim family law norms that were applied by the *penghulus* of that time.

The *Compendium Freijer* was structured like a legal code, consisting of chapters, articles and paragraphs. A number of these articles concerned the tasks of the *penghulus* (the term 'priest' (*priester*) is used) and are proof that by 1760 the VOC recognized that *penghulus* played an important role in indigenous justice, even if they were not formally recognized as advisers to the *landraad*, nor as full-fledged judges (see 2.2.3). Further proof of mutual influence between the legal system set up by the VOC and the *penghulus* is the fact that the *Compendium Freijer* was translated into Malay and circulated among the *penghulus,* who allegedly used it as legal source (Gobée 1884).

The text provides valuable insights into divorce norms applied by the colonial courts of that time. The articles about family law mostly concerned

divorce procedures, including the *fasakh* procedure[3] and the *khul* divorce. Remarkably, it included a divorce procedure based on continuous discord very similar to the *syiqaq* procedure, a Muslim procedure which according to Lev was introduced in the 1930s (1972: 169-174). Considering that the *Compendium Freijer* had largely been compiled based on information provided by *penghulus* and *ulamas*, its inclusion indicates that the *syiqaq* procedure was already known and applied by *penghulus* on Java before 1760.[4] The procedure resembling *syiqaq* was implicit in Articles 80-84. A wife could ask for a *penghulu*'s intervention on the grounds of continuous discord. The *penghulu* could subsequently order the spouses to live in separation, during which representatives (*hakam*) from both families would try to reconcile the couple.[5] If such attempts failed, the husband or the *penghulu* could divorce the couple.

The *syiqaq* procedure is part of *syafi'ite fiqh* and based on the Qur'an,[6] but authoritative *ulama*s' opinions differ on whether the advice of two *hakam* can be considered an order to the spouses to divorce, let alone stand as legitimate grounds for judicial divorce when the husband does not agree to pronounce the *talak* himself (As-Subki 2010: 328-329). In contrast, the *Compendium Freijer* indicates that the Javanese *ulamas* and *penghulus* of the mid-1750s typically interpreted *syiqaq* to be a procedure that can result in a judicial divorce by the *penghulu*. This is remarkable, given that the Association of *Penghulus* and their Staff (PPDP)[7] made *syiqaq* officially applicable as judicial divorce in the *penghulu* courts only in 1938. In 1972 Lev characterized this as a recent development considerably increasing women's rights in divorce (Lev 1972:170). It now appears likely that *syiqaq* had been applied as a judicial divorce procedure by the Javanese *penghulus* some 178 years before. As a consequence I would rather view the PPDP's step as the unification and standardization of a traditionally lenient interpretation of *syiqaq* by *penghulus*. As we will see, in the nineteenth century Van den Berg also gave an account of such a lenient application of *syiqaq* by the *penghulus*, which supports this view.[8]

Absent from the *Compendium Freijer* are references to the practices of *taklik al-talak* and joint marital property. This is rather surprising, given that the accounts of Van den Berg, Snouck Hurgronje and Van Vollenhoven demonstrate that the Javanese *penghulus* of the nineteenth and twentieth century

3 The term *fasakh* is not used in the text of the *Compendium Freijer*, but the description of the procedure matches *fasakh*.

4 To date, very little is known about the content of the judgments by the *penghulu* courts, neither those in the Javanese Sultanates nor the unified *penghulu* courts under S 1882/152.

5 Article 82 speaks of '*commandanten*' or superiors. The term used in *fiqh* is '*hakam*' most commonly translated as 'mediator.'

6 Surah An-Nisa (4): 35.

7 *Perhimpunan Penghoeloe dan Pegawainya*. See 2.2.7.

8 A possible explanation for the PPDP's step is that from the 1920s onwards, the lenient application of *syiqaq* came under fire by reformist *ulamas*, necessitating a general stance of *penghulus* on the matter. However, I cannot substantiate this hypothesis.

generally applied those legal concepts. Possibly, the *ulamas* who were consulted rejected these concepts as contrary to *syafi'ite fiqh* during the drafting process. Another possibility is that Dutch Islamic law experts rejected the concepts. Van den Berg, for instance, also considered the application of *adat* norms in *penghulus'* judgments to be 'anomalies' to Islamic doctrine, but permissible so long as the Javanese had not fully received Islamic law.

3.3.3 Van den Berg's 'anomalies' (1892) as part of the Javanese *penghulu* courts' tradition

In 1798 the VOC went bankrupt and the Dutch government decided to take over the administration of its territories. As we have seen in Chapter 2, the colonial government set up a legal system for the Netherlands Indies (1819), introducing a proto-constitution (1855) and making the Dutch criminal code applicable to the indigenous population (1873). The chief *penghulus* were made advisers of the *landraad* (1819) and the *penghulu* courts were gradually formally recognized as part of the colonial legal system. This recognition of the *penghulu* courts also meant a limitation of their jurisdiction, including their dependence on the *landraad* to enforce their judgments (1835). The 1882 Priest Councils Regulation unified the *penghulu* courts under the administration of the colonial government. With regard to substantive law, the Dutch did not interfere, but Dutch scholars like Van den Berg, Snouck Hurgronje, and Van Vollenhoven acted as advisers on Islamic matters to the Dutch government and monitored the development of Islamic law in the archipelago.

In the nineteenth century, academics like Van Nes (1850), Keijzer (1853) and Meurenge (1884) published works about Islamic law in Indonesia. The common trait of their works is that they supposed a full applicability of Islamic legal doctrine to the Muslim population of Java. In their conception, which has become known as the *receptio in complexu* theory, a person on Java who considered himself to be Muslim implicitly subjugated himself to this doctrine. They considered practices which were not found in the *syafi'ite fiqh* books as anomalies.

The best-known proponent of the *receptio in complexu* theory was L.W.C. van den Berg, an Islamic law professor who had been appointed by the colonial government as the first Official for the Practice of 'Netherlands Indian' Languages and Adviser for Eastern (*Oostersche*) Languages and Muslim Law (1878-1891) and in this position had been responsible for drafting the 1882 Priest Councils Regulation. In 1892, Van den Berg published the article 'the anomalies within Muhammedan family and inheritance law on Java and Madura' (*De afwijkingen van het Mohammedaansche familie- en erfrecht op Java en Madoera*). Like his predecessors, Van den Berg considered that all Muslims on Java by pronouncing the *shahada* had accepted sharia as the ultimate legal source and therefore he considered *adat* norms to be anomalies. However, if

one reads his work carefully, it seems he held a much more nuanced view of the legal implications of taking *reception in complexu* as a starting point, more so than the well-known criticisms of his argument by Snouck Hurgronje would suggest (e.g. Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-934; see also 3.3.3 below).

Van den Berg's article was based on his own field research in Java in the years 1884-1886 during which he visited Javanese *penghulus, ulamas* and *kyais* and, additionally, built on accounts by Dutch observers of Javanese customs such as C.F. Winter, G.A. Wilken, P.J. Veth and others. Surprisingly for an alleged supporter of the *reception in complexu* theory, he very much recognized the role of *adat* law in Javanese family law matters. In 1882 he had already written that on Java the 'customary law (*adat,* Arab *adat*) in this country has a position which one will not find in other Muslim countries' and that sharia predominates only in family and inheritance law (Berg 1882: 12-13). In his article concerning the anomalies to Islamic law, Van den Berg compared the Dutch accounts of Javanese marriage and divorce practices with his interpretation of *syafi'ite fiqh* norms. Van den Berg distinguished seventeen *fiqh* books that were used as legal sources by *penghulus.* The comparison of the Javanese practices with the *syafi'ite fiqh* revealed the 'anomalies' in these practices. Three main 'anomalies' Van den Berg found concerned the *taklik al-talak*, *syiqaq* and joint marital property.

Van den Berg considered the *taklik al-talak* procedure to be *adat* law rather than Islamic doctrine, even if *penghulus* on Java generally recognized it in their judgments. Without denying the lawfulness of the practice, Van den Berg himself did not much value the *taklik al-talak* contract, because of its similarity with the *fasakh* grounds for a marriage annulment in *syafi'ite fiqh*. He found a clear correlation between the number of *fasakh* and *taklik al-talak* divorce suits registered in the Islamic courts: in the areas on Java where *taklik al-talak* was widely practiced it formed the main part of the Islamic courts' case load, whereas in areas where *taklik al-talak* was less common, the main case load of the Islamic courts consisted of *fasakh* divorce cases (Berg 1892: 486-487).

A second 'anomaly' described by Van den Berg was the *syiqaq* divorce procedure, based on continuous discord. According to Van den Berg the *syiqaq* procedure was commonly practiced at that time. He mentioned two varieties of *syiqaq*: first, the case in which the *penghulus* took part in the whole *syiqaq* process, including their efforts to reconcile the couple and in case of failure their subsequent divorce of the couple; second, the case in which reconciliation was left to both families of the spouses, after which if reconciliation failed divorce depended on the willingness of the husband to pronounce the *talak*. As we have seen, the second case represents the most established interpretation of *syafi'ite fiqh.* Nonetheless, the apparent commonness of the first variety of *syiqaq* in nineteenth century Java suggests that the *penghulus* of that time were lenient in interpreting such *fiqh* norms.

Joint marital property is the third 'anomaly' Van den Berg describes. He observed that in most areas on Java, all property acquired by both spouses during their marriage was considered to be jointly owned. In addition to this joint marital property, both spouses continued to individually own the property they brought into the marriage. He explained that on Java a marriage was a partnership or in Arabic a *sharikah*, in which an increase of property was seen to be the reward of the work of both spouses. Van den Berg argued that the Javanese Islamic courts as a rule recognized the *adat* norms concerning marital property. In their judgments the *penghulus* divided marital property of the husband and wife on a 2 : 1 ratio based on the inheritance provisions in the Qur'an (Berg 1892: 475-476).

As mentioned earlier, other than what the concept of *reception in complexu* and the term "anomalies" might suggest, Van den Berg very much recognized the lawfulness of the application of *adat* norms by the *penghulus*. Van den Berg's nuanced view becomes even more evident in his interpretation of Article 75 of the 1854 RR, which stipulated that the Islamic courts' jurisdiction consisted of 'those civil disputes, which according to their religious laws or customs should be decided by their priests.' According to Van den Berg, the *penghulus* did not have to apply doctrinal Islamic law, but:

> 'Muhammedan law, so far as it has penetrated into the legal consciousness of the population, [...].' '[...] therefore the judge should consider the mentioned anomalies, in so far as they indeed are part of customary law, and not the result of individual arbitrariness or ignorance.' (Berg 1892: 454)

Van den Berg's anomalies reveal continuity in the Islamic courts' application of substantive divorce norms in Indonesia. *Taklik al-talak*, joint marital property and *syiqaq* are customary norms that were long applied by Javanese *penghulus*. The Dutch have had some influence on the development of a distinctive substantive Muslim family law within the Islamic court tradition, by subsequently listing the anomalies within Islamic doctrine, describing their general application by the *penghulu* courts, and offering formal legal legitimacy for that application.

3.3.4 Snouck Hurgronje's influence on the *penghulus*

By the end of the nineteenth century, Van den Berg received severe criticism from Christiaan Snouck Hurgronje, the famous Islamic law scholar who formulated the reception theory and is considered the 'founder' of *adat* law scholarship. In 1884, even before he went to the Netherlands Indies, Snouck Hurgronje published the article 'L.W.C. van den Berg's practicing of Islamic law' in which he questioned Van den Berg's knowledge of *syafi'ite fiqh* and Arabic, pointed out flaws in his interpretations, and challenged the *fiqh* books

he had used as legal sources for his handbook on Islamic doctrine (Snouck Hurgronje 1884).[9] After he had succeeded Van den Berg as adviser on Arabic and Islamic law in the Netherlands Indies in 1889, Snouck Hurgronje continued to criticize his predecessor in his *Ambtelijke Adviezen* (official advices). This time, his criticism was not limited to Van den Berg's knowledge of *fiqh*, but also concerned his ideas about the position of the *penghulus* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-934). Snouck Hurgronje listed five flaws in Van den Berg's ideas concerning priest councils.[10]

Although a thorough analysis of Snouck Hurgronje's advices concerning the *penghulu* courts (See Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-1018) is beyond the scope of this research, I do discuss them here as it is likely that they have influenced the *penghulus'* adjudication of that time. In this respect, it is important to note that Snouck Hurgronje could call for disciplinary measures against *penghulus* in cases where someone had filed an official complaint against a *penghulu's* judgment and that he did process such complaints.[11] His opinions could have a real impact on the career of *penghulus*, because he advised the Governor-General and *residenten* in matters pertaining to the *penghulus*' promotion and demotion. As I have done in the case of Van den Berg, I will focus on Snouck Hurgronje's opinions regarding *taklik al-talak*, *syiqaq* and *harta bersama*.

Taklik al-talak is described in Snouck Hurgronje's book *De Atjehers* (1893-1894) as a practice which is very common in many parts of Indonesia. Snouck Hurgronje disagrees with Van den Berg in that he considered the conditions in *taklik al-talak* not to be similar to *fasakh* divorce. Snouck Hurgronje argued that in Islamic doctrine *fasakh* grounds are very limited and apply to exceptional cases only. According to Snouck Hurgronje, the outward similarities between the two procedures on Java were a consequence of the *penghulus*' lenient interpretation of *fasakh* and pertained mainly to cases in which the *taklik al-talak* had not been pronounced during the marriage. According to Snouck

9 It concerned the handbook Berg, L. W. C. van den. 1878. *De beginselen van het Mohammedaansche recht*. Batavia: Ernst & Co. Snouck Hurgronje criticized among others Van den Berg's use of the term 'anomaly' as he argued that all over the Muslim world *adat* is a recognized legal source.

10 First, the term 'priest' was inaccurate since there is no priesthood in Islam. Secondly, priest councils were not responsible for administrating mosques, concluding marriages, or collecting *zakat* taxes, since those tasks were performed by *penghulu* with different specializations. Thirdly, priest councils traditionally were not councils, but consisted of a single *penghulu* judge assisted by a number of other clerks and Islamic scholars, and thus the three-headed judge stipulated in S 1882/152 was neither in accordance with Islamic doctrine nor, and fourthly, would it lead to a more independent administration of justice as Van den Berg had claimed. Finally, S 1882/152 had not improved the workings of the priest councils as they were allegedly still characterized by dependency on informal fees (which led to corruption) and incompetence as regards *syafi'ite fiqh* (which led to legal uncertainty).

11 A number of official opinions concerning such complaints are included in Ambtelijke *Adviezen van C*, Snouck Hurgronje 1889-1936.

Hurgronje, the *penghulus*' lenient interpretation constituted an anomalous application of a clear *fiqh* norm, and therefore should not become standard practice in the Netherlands Indies (Snouck Hurgronje, G 1957-1965: 973-974). Rather surprising for the founding father of the *adat* law school, Snouck Hurgronje's opinions concerning application of *fasakh* here were prescriptive rather than descriptive. An interpretation more in line with the reception theory would be that the the *fasakh* procedure had become lenient after its reception into Javanese *adat*.

With regard to syiqaq, Snouck Hurgronje's opinion was also prescriptive. Snouck Hurgronje considered that according to Islamic law the Islamic judge has no power to divorce spouses in a *syiqaq* procedure in case the spouses' representatives had failed to reconcile them. In his opinion, divorce in a *syiqaq* divorce depended fully on the husband's willingness to either pronounce the *talak* or authorize a representative to arrange a *khul* divorce and pronounce the *talak* in his name. Moreover, in Snouck Hurgronje's view the *syiqaq* was no alternative for the *taklik al-talak* because he considered few people in the Netherlands Indies to meet the strict requirements prescribed by the *syafi'ite fiqh* in order to be eligible to become a representative in a *syiqaq* divorce (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 974-975). Again, this shows that according to Snouck Hurgronje the *syiqaq* norms in *syafi'ite fiqh* books held primacy over their traditional application by *penghulus*.

Third, with regard to joint marital property, Snouck Hurgronje observed that the *penghulus* generally recognized the *adat* practice. However in his advice to the Governor-General of 6 October 1900, he argued that after a divorce the division between husband and wife of the property should not necessarily be based on a 2 : 1 ratio or a 1 : 1 ratio, but that divisions based on an estimation of both spouses' contributions to their income were also possible. Moreover, Snouck Hurgronje stressed that *adat* was not fixed but changed over time, and that as the result of processes of Islamization in some areas joint marital property had even ceased to exist (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 1001-1002). Thus, Snouck Hurgronje refused to standardize marital property, even on Java, making it a right not only dependent on the *adat* of a certain locality and time, but also on the private context, thus effectively undermining the predictability of court judgments.[12]

12 Van Vollenhoven, like Van den Berg, considered joint marital property to be a local customary practice and as such part of *adat* rather than *fiqh* since the practice could not be found in the Arabic *fiqh* sources. According to Van Vollenhoven, the Islamic term '*sharikah*' was an invention designed to legitimize the *adat* practice religiously: 'when he [the Javanese *penghulu*] felt the need to reconcile it [the custom of joint marital property] with Muslim laws, than he would presuppose – as likewise in Aceh, Minangkabau or elsewhere – a partnership, *sarikat* or *sirkat*, contracted between the husband and the wife' (Van Vollenhoven 1928: 584). Contrary to Snouck Hurgronje, Van Vollenhoven claimed that *penghulu* courts in Central Java would generally divide the joint marital property on a 1 : 1 ratio, and less frequently on a 2 : 1 ratio, depending on the region or even locality (Van Vollen-

A fundamental and reoccurring inconsistency in Snouck Hurgronje's opinions has become visible. On the one hand, he considered the colonial 'creation' of priest councils a mistake, for which he blamed Van den Berg, and he preferred the *adat* applying *landraad* as the single court for the indigenous population. He complained that the unification of *penghulu* courts on Java had established a distinctly Islamic judicial institution which increasingly distanced itself from *adat* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 943).

On the other hand, his opinions with regard to the content of judgments of *penghulus* reveal a prescriptive and puritan stance on Muslim family law issues. Snouck Hurgronje's official advices challenged the *penghulus'* traditional lenient interpretations of *syiqaq* and *fasakh* and were more in line with the ideas of contemporary *ulamas* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 970-977).[13] Thus, Snouck Hurgronje, the renowned *adat* law scholar, actually promoted Islamic law at the expense of traditional practice, whereas Van den Berg tended to recognize the judicial tradition of the *penghulus*.

Van den Berg's and Snouck Hurgronje's calls to improve the colonial government officials' knowledge of Islam led to a training program for colonial officials which, according to Laffan, 'naturally leant towards the same scripturalist approach of the *Kaum Muda*', the latter term referring to the 'young believers' or Muslim reformists (Laffan 2003: 173-174). In the end the official advices of these antagonists both reflected the development within the judicial tradition of the *penghulu* courts: one that was moving towards a stricter 'scripturalism' in marriage and divorce procedures, whilst respecting *adat* law in other, especially property, matters.

3.3.5 Normative debates on Muslim family law in the early twentieth century

In the first decades of the twentieth century, other members of the so-called *adat* 'law school', such as Van Vollenhoven, Ter Haar and Holleman, even more fiercely defended the reception theory and promoted an *adat*-centered policy for the indigenous population of the Netherlands Indies. This second and third generation of *adat* law scholars lacked Snouck Hurgronje's strong interest in *syafi'ite fiqh* and Muslim family law, and had an anthropological interest in *adat* with a strong focus on land rights. Based on '*adat* mapping' by their Indonesian students, they divided the Netherlands Indies into nineteen *adat* law areas, 'each defined usually by the relative mixture of kinship and territoriality used to create social units – clan, villages, clan-villages, and so forth' (Bowen 2003: 47).

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hoven 1928: 584).

13 Snouck Hurgronje indeed had sympathy for the reformist Muslim movement, as he observed that compared to the *ulama* in Indonesia, those in Turkey, Egypt and Syria had made significant adaptations to modern times (Laffan 2003: 186).

Accordingly, in their works on *adat* law, they treated matters of Islamic justice and Islamic law (which were more universal in character and thus not signifiers of difference) only as a smaller sub-category of *adat*. Furthermore, while Snouck Hurgronje accounted for the flexibility of *adat* in family law matters, which could mean that local instances of Islamization had to be recognized by the *penghulu* courts or *landraad* as a consequence of a reception into *adat*, Van Vollenhoven viewed the stronger penetration of Islam in Indonesian society as an outside threat to *adat* and the interests of the indigenous population of the Netherlands Indies (Vollenhoven 1931: 70).[14]

Concurrently, under the influence of the emergence and growth of reformist Islam in the Muslim world, Muslim organizations such as *Sarekat Islam* (1911), *Muhammadiyah* (1912) and *Persatuan Islam* (1923) were established in Indonesia. The rise of reformist Muslim organizations was countered by 'traditionalist' organization *Nahdlatul Ulama* (1926), which represented the *ulamas* who adhered to *syafi'ite fiqh* doctrines more strictly. The growing influence of a reformist Islamic discourse challenged the authority of *adat* institutions and *adat* norms in marriage and divorce matters, as well as the authority of *adat* leaders in the outer Islands at a time when the *adat* law school had just gained the upper hand in the colonial policies of the Netherlands Indies. With regard to Muslim family law this was reflected in Article 134(2) of the *Indische Staatsregeling*, which made the legal applicability of Islamic law norms formally dependent on their reception into the local *adat*.[15] There was little room for the aspirations of this growing Muslim reformist influence in the ideas of *adat* law scholars, since they continued to focus on the traditional power and kinship relationships in the regions (Prins 1951; Otto 2010: 441).

Challenging the official *adat* policy, Muslim reformists in many areas outside Java established new Islamic courts, arguing that Islamic judges ought to decide on Muslim family law and inheritance matters. New Islamic courts outside Java, however, were not recognized by the colonial government, nor were most of the established ones. Formally this was as that they had not traditionally been part of *adat* (Velde 1928), but more likely the policy arose due to a preference for a non-Islamic administration of justice in the outer islands as also appears from the advices of Snouck Hurgronje. In this administration of justice, minor cases were tried by *adat* courts presided over by local *adat* elites loyal to the colonial government, and other cases by the *landraad.* In order to maintain an *adat*-based indirect rule by loyal traditional elites, the colonial government hoped to prevent the strengthening of Muslim political movements that could challenge (and in Aceh and Minangkabau indeed had challenged) traditional rule.[16]

14 See section 2.2.6.
15 See section 2.2.6.
16 The South Sulawesi case is discussed in Chapter 6.

The attraction of reformist Islamic discourse was its relatively individualistic character as compared to *adat.* Prins has described how young couples in several areas outside Java had been tried before the *adat* court because they had transgressed *adat* prohibitions on in-clan marriage. They unsuccessfully defended themselves using Islamic norms concerning permissible marriages. On the other side of the spectrum, local pro-*adat* counter-movements sprang up in defense of *adat,* which posed the argument that women were better off under the *adat* norms of the community concerned (1954: 73-76).

Lively debates about the position of women in the Netherlands Indies took place among the different ethnic and religious groups: the *priyayi* elites, members of the nobility who ruled on the basis of their traditional position in *adat*, but who also included *penghulus* who were appointed based on their knowledge of *syafi'ite fiqh*; the representatives of the mostly urban-based reformist Muslim organizations, who challenged the legitimacy of *adat*-based rule; representatives of the Javanese and rural based traditionalist *ulamas*; and European and indigenous social-democratic, Protestant and Catholic representatives. One of the pressing issues concerned family law and women's rights in marriage and divorce (Prins 1951; Blackburn & Bessel 1997).

3.3.6 The 1938 women's congress' agenda on Muslim family law reforms

Under the influence of the ethical policy first formulated by the Dutch government in 1901, the discourses of the colonial government, media and the public were increasingly concerned with the fate of the population of the Netherlands Indies (Blackburn 2004: 17). A decade after the ethical turn women's rights organizations appeared as new and important players in the political arena, and women's rights in marriage and divorce became another issue in those debates. In 1912 the first Javanese women's organization was founded. *Putri Mardika* consisted of *priyayi* women and took up issues like forced marriage, child marriage and polygamy. Many women's organizations followed in the years to come. Most were branches of, or affiliated to, the emerging political and religious organizations of that time. The ideological differences often proved irreconcilable among women affiliated to this variety of organizations: Muslim, Christian and the Catholic organizations; the secular nationalist PNI; and the communist PKI, to name a few. For instance, whereas some feminist organizations were in favor of far-reaching family law reforms, the *Muhammadiyah*-affiliated *Aisyiyah* declared that it would only support those reforms that remained within the limits of Islamic law (Blackburn 2004: 17-21; see also Robinson 2008).

In 1937, the colonial government proposed a reform that proved to be highly controversial. If the Bill had been passed, it would have offered the legal option, though not the obligation, for all citizens of the Netherlands Indies, including Muslims, to conclude a civil marriage. Thus, couples from

any religious background would have the option of marrying at the civil registry, thus sidelining registration by the *penghulus* – or registering an existing marriage under the provisions of the Bill. As we will see below some of these provisions were clearly at odds with traditional *syafi'ite fiqh* norms.

According to Van Wichelen (2010: 73), one of the main intentions of the Bill was to protect European women in mixed marriages from certain 'uneuropean' norms. Its provisions were based on the Civil Code,[17] which since 1848 had applied to Europeans in the Netherlands Indies. After registering the marriage at the civil registry, both spouses were considered to have agreed on a monogamous marriage, which could only be ended through a divorce before the *landraad*, based on one of eight divorce grounds: adultery; abandonment; incarceration for two years or more; violence that inflicted severe injury; a mental or physical condition which disabled the execution of marital duties; two months of insufficient maintenance; continuous strife; and finally, polygamy. After divorce the judge could oblige the husband to pay spousal alimony until his ex-wife remarried or died.

As the Bill could also apply to marriages among Indonesian Muslims who voluntarily subjugated themselves to its provisions, all Muslim organizations opposed the Bill. In the end the government of the Netherlands Indies withdrew it. According to Prins the Bill was controversial because Muslim organizations opposed the very idea that the substance of sharia law could be regulated by national legislation (Prins 1951: 293-294). In my view, however, a more plausible explanation for their opposition was that in their eyes the provisions of the Bill challenged traditional Islamic norms. As would become clear in the upcoming years, substantive Muslim family law reforms could be acceptable to the reformist organizations, even the traditionalist *Nahdlatul Ulama*, if they were based on respect for and built upon norms that were part of the Islamic tradition, including the judicial tradition within the *penghulu* courts (see Chapter 4). This marriage Bill was primarily based on *adat* law and Dutch civil law and hence integrated what the *ulamas* perceived to be two major threats to Muslim family law.

The 1937 Bill controversy proved that it was not easy to find common ground in family law matters. Nonetheless, during the Indonesian Women's Congress of 1938, Maria Ulfah Santoso, a nationalist and one of the first Indonesian women lawyers with a degree from a Dutch university, successfully set an agenda for Muslim Marriage law reform that was accepted by all organizations. The agenda made the following recommendations: (1) before a husband could repudiate his wife, the couple had to appear before the *penghulu*, who would attempt to reconcile them; (2) the *penghulu* court could annul a *talak* divorce which was not brought before a *penghulu* for reconciliation; (3) during the marriage ceremony the Muslim marriage registrar had

17 S 1847/23.

to explain the implications of the *taklik al-talak*; and (4) the *taklik al-talak* had to become a comprehensive basis for divorce for women and should include 'insurmountable disagreement between the parties' (Robinson 2008: 45-46). The acceptance of an agenda for Muslim marriage law reform in 1938 by the Muslim women's organization *Aisyiyah*[18] was a first indication that reforms, such as the limitation of the male *talak* right, could be accepted by mainstream Muslim reformist organizations, even if such reforms had no clear base in the Qur'an and Sunna.

The 1938 Women's Congress' reform agenda tested the limits of traditional Muslim marriage law, especially the provision that sought to limit the absolute *talak* rights of the husband under *syafi'ite fiqh*. The proposed obligatory reconciliation effort would effectively turn the male right of *talak* into a *syiqaq*-like procedure. Proposing standard inclusion of continuous discord as one of the conditions in the *taklik al-talak* proves that the women's organizations considered the current divorce rights under *taklik al-talak* and *syiqaq* not comprehensive enough for women to escape unhappy marriages.

In the late 1930s, the political atmosphere proved to be conducive to progressive reforms. In 1938, the congress of the Association of *Penghulus* and their Staff (PPDP; see section 2.2.6) had reaffirmed the applicability of the lenient interpretation of *syiqaq* in the *penghulu* courts, meaning that continuous strife could be grounds for a judicial divorce by the *penghulu* courts. In a decision of 1938 the newly established Islamic High Court (in 1937; see section 2.2.6) followed and recognized *syiqaq* divorce based on irreconcilable differences.[19] This meant a return to the *penghulus'* traditionally lenient application of the *syiqaq* procedure adopted in *Compendium Freijer* of 1760, and had been described by Van den Berg in the 1880s.

With regard to *taklik al-talak*, however, the Islamic high court issued rather conservative decisions. For example, in two cases it judged that *taklik al-talak* divorce should not be granted when the wife had been disobedient (*nusyuz*) by leaving the husband's house, even if a condition in the *taklik al-talak* had been met.[20] Possibly, the urgency of the inclusion of continuous marital strife

18 *Aisyiyah* was affiliated to the reformist Muslim organization *Muhammadiyah* and generally followed the opinions of its male leadership. Since the *taklik al-talak* and *syiqaq* provisions were controversial from a *syafi'ite fiqh* point of view, they initially were less acceptable to traditionalist *ulamas* of the *Nahdlatul Ullama.*

19 In a judgment the Islamic high court gave a husband the opportunity to divorce his wife. If he refused, the court would declare the divorce itself. A year later the same court divorced the couple. Decisions of the Islamic high court of 24 October 1938b and 12 January 1939. Source: Tan (1976).

20 Decisions of the Islamic high court of 24 October 1938a and 30 March 1939. The Islamic high court decided that since the *taklik al-talak* did not include a statement that the conditions would also apply in case the wife had been disobedient (*nusyuz*), the divorce request could not be sustained. On the other hand it ruled in a case of 20 April 1939 that a wife was not *nusyuz* if she refused to live in one house with her mother-in-law. Source: Tan (1976).

as a condition in the *taklik al-talak* was due to this and similar judgments of the *penghulu* courts.

3.4 Conclusion

In this chapter I have sketched the characteristics of the substantive norms that the *penghulu* courts applied in their adjudication, the debates surrounding those Muslim family law norms, and the political landscape in which those debates took place. I have made three major observations.

First, the perspective of a *penghulu* judicial tradition proved to be a useful analytical tool to place the legal changes and continuities regarding substantive Muslim family law in their right historical and political context. I have demonstrated that in the pre-colonial Sultanates the Javanese *penghulus* applied a blend of *fiqh* norms, norms derived from *adat* and sultanic ordinances. My main argument is that this traditional adjudication in family law matters developed into a distinctive judicial tradition, which, much more than changes in the methods and substance of *fiqh* interpretations by the Indonesian *ulama*, facilitated substantive legal changes in Muslim family law. If one compares present-day divorce rights of women with the traditionally lenient interpretations of *taklik al-talak, syiqaq*, *khul* and *fasakh* and the *penghulu*'s application of state law and *adat* norms in Van den Berg's nineteenth (and probably even Freijer's eighteenth) century, one is struck by how many of those traditional norms are still applied by the Islamic judges today.

Secondly, I have shown how the Women's Congress of 1938 developed an abstract model for Muslim family law reform in Indonesia. In this model, practices that are based in the 'traditional' judicial practice of the Javanese *penghulu* courts rather than in *syafi'ite fiqh,* such as a lenient interpretation of *syiqaq* and *taklik al-talak*, are restated and standardized. Moreover, Islamic norms, such as the *talak*, can be reformed by first adopting them and subsequently adjusting their meaning by making them conditional to other legal provisions. An example of such technique in the Women's Congress agenda was the provision which made the *talak* conditional to a compulsary reconciliation attempt. As we will see in the next chapter, the New Order regime ultimately would resort to ta similar model in an attempt to generate sufficient support from Muslim organizations for its agenda to establish a national and Indonesian Muslim family law.

Thirdly, this chapter has shown continuity in the judicial practice within the *penghulu* courts, in spite of the changes in government policies and discourses. In the colonial period, a major discourse shift took place in the political debates about Muslim family law. The old paradigm centered on the opposition between a lenient application and a strict doctrinal application of Muslim family law norms. This paradigm dominated the debates about family law before the time of Snouck Hurgronje, which was characterized by the increas-

ing influence of reformist Islam and the newly (in 1910s-1920s) established Muslim organizations *Sarekat Islam, Muhammadiyah* and NU. In this paradigm, lenient administration of justice by *penghulus* was the subject of criticism by the traditionalist NU and the reformist *Muhammadiyah*, which both preferred a more strict application (of their concept) of Islamic law.

By the early 1930s, under influence of the *adat* law scholars Van Vollenhoven and Ter Haar, the paradigm was replaced by an *adat*-Islam opposition. The 1931 *Penghulu* Courts Regulation, of which Ter Haar had been one of the drafters, limited the jurisdiction of the *penghulu* courts and brought inheritance and property issues, formally under the authority of the *landraad* and under the legal regime of *adat.* As reflected in the debates surrounding the 1937 Civil Marriage Bill, the debates about family law reforms between the colonial government officials, secular-minded *priyayi,* socialists, women's organizations and Muslim organizations, developed into a new discourse shift, centering around the secular family law versus Muslim family law opposition. As this new discourse posed a real threat to Muslim family law, it created a stalemate, rendering any reforms impossible until the year 1974 when the Marriage Law would be adopted.

The two discourse shifts finally united the *ulamas* and *penghulus,* who increasingly stood side-by-side to defend the judicial tradition of the *penghulus* against the threats of an *adat* and civil law-based family law. As I will show in the next chapter this support from Muslim organizations and *ulamas* would finally result in the adoption of the 1991 Compilation of Islamic Law, which was presented as the consensus (*ijma*) of the Indonesian *ulamas* and an innovative Indonesian *fiqh*, but which in fact reflected the *ulamas'* acceptance of the continuation of the judicial tradition of the Indonesian Islamic courts.