

# インドネシアにおけるイスラーム法の適用： 「条件付き離婚」と「結婚・離婚相談所」

中 村 緋紗子

## Implementation of Islamic Law in Indonesia in Cases of 'Conditional Divorce' and 'Divorce Counseling'<sup>1</sup>

Hisako NAKAMURA

### <要約>

シャリーアと呼ばれるイスラーム法は、ムスリム（イスラーム教徒）にとって神からの啓示を編纂した『クルアーン』と『ハディース』（預言者ムハンマドの言行録）を基にする聖法である。この聖法は、ムスリム（イスラーム学者、政治的支配者、民衆）によるクルアーン・ハディースの解釈学的展開の上に成り立っている。本稿は、インドネシアにおけるイスラーム法の統治者レベルでの適用と草の根レベルでの適用の二つの例をあげて、歴史的に、また現代社会において、聖法としてのイスラーム法がどのように解釈され、運用されてきたかを考察する。

前者の例は「条件付き離婚」(Taklik-Talak)<sup>2</sup>と呼ばれる制度で、インドネシアにおいては婚姻契約時に花婿が立会人たちの下で、離婚宣誓書を読み上げ署名する。婚姻生活中に宣誓書に記された条件が生じた場合、妻がイスラーム宗教裁判所に提訴することによって離婚の宣言が有効となるイスラーム法独特の制度である。本稿ではこの制度の法学的由来とインドネシアにおける歴史的発展を文献調査により明らかにする。後者の例は「結婚・離婚相談所」のカウンセリングのケースであり、その内容分析を中心に、イスラームの宗教的・倫理的教えが実際にどのように当事者たちに理解され、カウンセラーの助言を通して教えられているかをフィールドワークにより考察する。

イスラーム法は、多面的・複合的な分野にわたる研究を必要性とする。第一に歴史的・地域的にムスリムが彼らの聖法をどのように解釈し、適用し法制化してきたかという研究、第二に現実的に法制

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<sup>2</sup> The spelling of Indonesian and Javanese words in this paper follows the current official orthographies. However, exceptions have been made in the case of some personal names and titles of books, which retain their original spelling or follow the practice of the persons concerned. About the transliteration of the words of Arabic origin, I have followed their Indonesian transliteration in the way most presumably standard, and only key terms are shown in footnote in Arabic original and other alternate transliteration.

化されていないが社会的規範として働いている分野での解釈と適用の研究、そして第三にその宗教的・倫理的側面の研究などが必要である。このように現実に適用されているイスラーム法の理解のためには狭い意味でのイスラーム法学をはじめ、法学一般、歴史学、宗教学、文化人類学などの学際的研究が要請される。

## Introduction

My interest in Islam started more than 30 years ago. In October 1970 I arrived in the town of Kotagede, Yogyakarta, Indonesia with my husband, who was about to undertake fieldwork for his Ph.D. dissertation at Cornell University. I was accompanying him as a housewife and a mother of three children but intending to do, if possible, my own fieldwork as a graduate student of anthropology.

The residents of this small local town were ethnically almost one hundred per cent Javanese and religiously also almost entirely Muslims. At the time of our arrival, both my husband and I had little interest in Islam in Java. This was mainly because the mainstream Western scholarship then said that Islam was peripheral to Javanese society. Most of ethnological literature thought that Islam did not penetrate deep into Javanese culture.

In addition, during the 1960' and 1970's, methodologically and theoretically, the idea of separating 'great traditions' and 'little traditions' coined by Robert Redfield was still very influential in the field of anthropology (Redfield 1956). 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 were common people at the grassroots level who had little knowledge of and concern for the 'great tradition' represented by religious texts. Textual study of 'great tradition' was a work for scholars in other disciplines, such as historians of religion or students of comparative religion, but not for anthropologists. Anthropologists were even recommended to stay away from the study of religious texts so as not to be 'contaminated' by textual biases.

This was especially true for the anthropological study of Muslim societies in non-Arab countries, including Indonesia. Even elementary knowledge of Islam was not included in standard ethnological courses on Indonesian societies taught at the US universities. The typical case was the famous book *Religion of Java* written by Clifford Geertz (1960), in which the Qur'an was barely mentioned and not quoted even once.

There was another intellectual obstacle, which made it difficult for us at the time to take Indonesian Islam seriously. That 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'. A culture would be diluted and become less pure when it spread from a center to remote peripheral areas. In case of Islam, Indonesia was far from Mecca, the center of Islamic civilization. Hence, Indonesian Islam was far from authentic and less pure, mixed with non-Islamic local elements. It was also assumed that Islamic scholarship embodied by Javanese *ulama* (Islamic scholars), was secondary and insignificant deserving no serious inquiry.

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

anthropologists. With my 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. As you can imagine, the more I observed local people's marital activities, the more I was confused. Gradually, however, I became skeptical about the idea of separating 'great and little traditions' and about the approach of ignoring Islamic norms contained in religious texts. My data required an understanding of the working of Islamic law in social reality. I was compelled to study relevant Islamic texts, the Qur'an to start with, to analyze and appreciate my own field data. Finally, I decided to study relevant sources in Islamic law through the books written and published in Indonesian language. Despite my ignorance of Arabic, I found that Javanese customs on marriage and divorce were in full conformity with Islamic law and had been implemented among the local people for many centuries. My research results were submitted as an MA thesis to The Australian National University and later published by Gadjah Mada University Press (H. Nakamura 1983).

What I intended to engage with in this book was 'an anthropology of Islamic law'. By this term, I meant a methodological combination of textual and contextual approaches to Islamic law, *shariah*<sup>3</sup>, in the widest sense of the term as 'ethical guidelines'. With this understanding, I have been analyzing and delineating the social processes in which requirements of Islamic law are interpreted and applied in real life situations.

Today, I would like to present you two examples, showing how Javanese, and now more generally Indonesian, Muslims have implemented and institutionalized Islamic law in the local context. One is the institution of conditional divorce or '*taklik-talak*'<sup>4</sup>, and the other is the institution of Marriage and Divorce Counseling called BP4<sup>5</sup>, which is based on the concept of advice or '*nasihat*'<sup>6</sup>.

There are reasons for focusing on these two topics: Both are integral parts of the implementation of marriage law among Indonesian Muslims today. The first one, *taklik-talak*, will highlight a long historical background of a contemporary institution. In the process of its development, Muslim rulers' authority, *ulama*'s scholarship, and ordinary Muslims' interests interacted and have continued thereby led to its use to this day.

This example is also meant to remedy and supplement a view arising from the recent studies of Islamic law in contemporary Indonesia, which approaches the subject matter almost solely in the narrowest terms of judiciary system (Hooker 1999).

On one hand, this recent scholarly concern should be quite welcome since it certainly fills the long intellectual neglect of Islamic law in Indonesia. Since the appearance of the pioneering work of Daniel Lev, *Islamic Courts in Indonesia* (1972), there has been virtually nothing until the 1990's.

<sup>3</sup> Shariah (var. sp., syariah, sjariah, syari'at, shar', shrī'a; Ar. *للشريعة*, *للشريعة*) = The divine law, the revealed law of Islam, the Way to be followed for Muslims, which is revealed in the Qur'an and contained in the Sunna

<sup>4</sup> Taklik-talak = Conditional divorce. Taklik (var. sp., ta'līk, ta'līq, taklek; Ar. *تعليق*) = Suspension. Talak (var. sp., ṭalāq, ṭalāk, talaq, taleuë (in Aceh); Ar. *طلاق*) = Divorce, repudiation of wife by a husband, a form of divorce, effected by his pronouncing the words *anti ṭaliq* ('I divorce you'); Talak is the most common way to dissolve the marriage in Islamic law.

<sup>5</sup> BP4 = Body for Marriage counseling and Divorce Settlement (*Badan Penasehat Perkawinan dan Penyelesaian Perceraian*) → Currently, Counseling Body for Guidance and Preservation of Marriage (*Badan Penasihat dan Pembinaan dan Pelestarian Perkawinan*)

<sup>6</sup> Nasihat (var. sp., nasehat; Ar. *نصيحة*) = Sincere advice.

On the other hand, however, some problems with this approach have become apparent. For example, this approach has been too much concerned with the politics of legislation, i.e. the process of state law making and the resulting texts of national law (Saikal and Azymardi 2003). The implementation of Islamic law in social context at the grassroots level has been given little attention.

I intend to fill this gap by looking at the working of the Body of Marriage and Divorce Counseling (BP4), which was established to advise ordinary Muslims in the affairs of marriage, divorce and family disputes. The main purpose of BP4 was to provide not 'legal' but religio-ethical advice. Also, BP4 was different from government institutions by virtue of the fact that it was promoted by Islamic social organizations, especially by lay women activists. *Nasihah* was basically moral persuasion among equals.

By taking up the topic of BP4, I intend to argue that the concept of Islamic Law should be treated more widely than as simply legal requirement but rather as ethical and moral norms. I am trying to compile the results of my research on BP4 into a monograph but it has not been completed. What I present you today is some of my initial findings and arguments.

### 'Conditional Divorce' or *Taklik-talak*

In Islamic law, there are several ways to dissolve marriage.<sup>7</sup> Conditional divorce or *taklik-talak* (hereafter I would like to abbreviate it as TT), is one particular type of divorce, which comes into effect under certain conditions. '*Taklik*' in Arabic means 'suspension' and '*talak*' in Islamic legal terms is a way of dissolving a marriage by the husband's proclaiming divorce. Usually, divorce comes into effect immediately after the husband has pronounced the word. However, in the case of TT, divorce comes into effect not on the proclamation of divorce, but at a time when an already specified condition is fulfilled. This type of divorce has been historically well institutionalized in Javanese society and practiced in contemporary Indonesia in general. Let me introduce first what Muslim jurists say about this type of divorce.

The Pakistani jurist, Kazi Nassir-ud-Din Ahmad, mentions this type of divorce in his book, *The Muslim Law of Divorce*. This book seems to be 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 and Shi'i law schools. He explains TT as follows:

*Divorce under the Sunni law may be..... conditional or it may be .....unconditional. 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 subject. The condition may refer to the occurrence or*

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<sup>7</sup> Generally speaking it is believed that 'talak' is only way to dissolve the marriage in Islamic law since dictionaries and encyclopedias translated this term as 'divorce' or 'repudiation of his wife by a husband'. Talak is a way of dissolving a marriage by the husband's proclaiming divorce. However, there are several ways to dissolve the marriage, such as 'talak', 'khuluk', 'syiqaq', and 'fasakh'. Khuluk is a way to dissolving a marriage by payment of compensation. Syqaq literally means 'disunity' or 'dissension' and a way to dissolve a marriage when a dispute arises between husband and wife. The interested parties submit the case to a religious court and the court is to appoint two arbitrators from each side (husband and wife) who are expected to make a right settlement. Fasakh is a way of terminating a marriage by the authority of religious judge.

*non-occurrence of a certain specified future event or it may refer to a certain place or time. ... 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. (Ahmad 1978: 79-80)<sup>8</sup>*

Ahmad says: "*Conditional divorce is generally pronounced only in anger or excitement ..... It is obvious that his pronouncement is not the result of cool deliberation nor, as a general practice, intended to be effected ...*" (Ahmad: 81). Impression arising from Ahmad's work, especially a number of examples of the pronouncements taken from various *fikh*<sup>9</sup>, Islamic jurisprudence, books, is a temporarily irrational husband pronouncing an unreasonable condition (or conditions) unilaterally, threatening his wife by a suspended divorce.

In contrast, the development of TT seems to have taken in a different course with the spread of Islam to the East. Schacht, a renowned Western authority in Islamic law, states in *The Encyclopaedia of Islam*;

*The conditional pronouncement (ta'lik) of the ṭalāk may have different objectives: a man may pronounce such a ṭalāk, 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'lik of the ṭalāk 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 ṭalāk.<sup>10</sup>*

A. Layish, another Western specialist of Islamic law, notes in *The Encyclopaedia of Islam* that as a result of more recent reform efforts on divorce in the Middle East and North African societies, TT has been abolished in many of those societies altogether:

*In Egypt (1929), the Sudan (1936, 1991), Jordan, Syria and Yemen, 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 Morocco, Irak and Kuwait, conditional divorce is no longer valid under any circumstances.<sup>11</sup>*

8 "There is no conditional divorce under the Shi'i law." (Ahmad 1978: 82)

9 Fikh (var. sp., fik, h, fiqh; Ar. فقه) = Understanding or comprehension; the science of the divine law, jurisprudence in Islam, the sum of man's knowledge of the shari'a, Islamic law or jurisprudence.

10 Schacht on "ṭalāq" in *The Encyclopaedia of Islam*, New Edition, vol. X, p.154, right column, l. 46-70.

11 A. Layish, op. cit., p.155, left column l. 8-16.

Thus, TT is disappearing or becoming ineffective in many parts of the Muslim world today<sup>12</sup>.

As suggested above, however, TT in Indonesia has quite a different story. To start with, TT seems to have been known well in Java since the early days of its Islamization. On this matter, Zaini Ahmad Noeh,<sup>13</sup> a retired high official of the Department of Religion, Government of Indonesia, argues in his article that this practice has a long history going back to the early 17<sup>th</sup> century. (Noeh 2003) Quoting *Manners of Islam (Tatacara Islam, 1926)*, a work written in Javanese by Mohammad Adnan, the first head of Islamic High Court of Indonesian Republic, Noeh states that TT was institutionalized in 1631 by Sultan Agung ('Great Sultan', r. 1613-1646), the third ruler of the Islamized Javanese kingdom of Mataram<sup>14</sup>. According to Adnan, the pronouncement of the TT in this early Javanese version was formalized simply as follows:

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

*Listen, the bridegroom. Do you accept the royal promise (janji dalem) of taklik? In case, you leave your wife so-and-so for seven months by land or for two years by sea, except you are on military duty, and in case 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.*

(Then, the bridegroom answers:)

*Yes, I do.*

(Noeh 2003: 97) [Original in Javanese with Indonesian translation. English translation is mine - HN]

There are a number of interesting features of this early formula of TT as follows.

1. TT was a product of policy or administrative decision (*siyasa*) by the ruler. Therefore, it was called "conditional divorce promised by the Sultan" or "TT Janji Dalem" — a contract between the ruler and the subject. This aspect seems to have been connected with the military duty (*wajib militer*) of Mataram Sultanate.

Noeh explains as follows:

*"This royal contract of TT was related to military service. All grown-up male members of the country were then soldiers who were obligated to do military service time-to-time. .... To become a soldier in this way was an honor, and the contract of TT given to him was also a mat-*

<sup>12</sup> Seems to continue to be effective in Saudi Arabia. Cf. Frank Vogel's "The Complementary of Iftā' and Qaḍā': Three Saudi Fatwas on divorce", in *Islamic Legal Interpretation: Muftis and their Fatwas*, edited by Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, 1996:262-269.

<sup>13</sup> Zaini Ahmad Noeh was formerly the Acting Director of the Office of Religious Court of the Department of Religion, Republic of Indonesia, and a member of the Syuriah 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 *Islamic Courts in Indonesia* (1970) and my *Divorce in Java* (1983).

<sup>14</sup> In the same author's another article, the year of the introduction of TT is mentioned as 'the Javanese year of Alip 1554 or 1630 Masehi. (Noeh 1997: 64)

*ter of pride.*" (*Ibid*, p.97)

Sultan Agung was a pious warrior king well known in Javanese history. He was always surrounded by 'holy men', presumably *ulama* (Islamic scholars), and during his rule Islam penetrated deeper among the general population of Java.<sup>15</sup>

2. The stance of the promise obligating husband:

Another feature perhaps brought in by Sultan Agung in contrast to the classical Islamic jurisprudence (*fiqh*) is the stance of TT. As mentioned above, the examples of TT in classical *fiqh* books were mostly statements like "You are divorced if you do so and so," and 'you' here always meant 'wife'. The matter was treated with the stance in which a husband was threatening and demanding his wife to obey him by suspended divorce. On the contrary, the royal contract of TT in Java took the form in which husband's future actions (or non-actions) were specified as grounds for the wife's demand for divorce. It meant that the matter was treated with a stance protecting wives and reminding husbands to fulfill their duties in married life.

3. Educational — teaching the husband obligations toward his wife:

Noeh further points out that Sultan Agung's intention to establish TT institution was educational. Reportedly, he introduced a number of Islamic institutions including Islamic calendar and Islamic judiciary system into his kingdom. Through the newly established TT, thus, he attempted to teach his subjects duties of Muslim husbands towards their wives. Noeh says, through TT, "they knew how they should behave to their wives when the soldiers came home after their duty." (*ibid.*).

4. Also another feature of TT in Java was that it included realistic conditions such as the husband's desertion by land or sea for certain periods of time. Also, the breach of not all of these conditions but only one of them was made sufficient to constitute the ground for demand of divorce by wife.

Unfortunately, there are no contemporary documents indicating the attitude at the time of Javanese *ulama* towards this decision by Sultan Agung, even though reportedly he was constantly surrounded by 'holy men' as mentioned above. However, circumstantial evidence suggests that, they seemed to agree that TT practice had *fiqf* base derived from a maxim contained in the sixteenth-century book *al-Tahrir* written by Zakariyya al-Ansari (d.926/1520). Zakariyya was a great Egyptian scholar of *fiqh* and sufism, who said: "*Whoever makes his talak dependent upon an action, then the talak occurs with the existence of that action, according to the original pronouncement.*" Zakariyya's maxim was then quoted in an eighteenth century *fiqh* book written by al-Sharqawi (1737-1812), Shaykh al-Islam in Cairo, who had a number of students from Southeast Asia. Azyumardi Azra recently delineated these scholarly genealogies in his Columbia PhD. dissertation.<sup>16</sup>

<sup>15</sup> For Sultan Agung, see Ricklefs (1998: xxi) as follows: "The greatest monarch of the [Mataram] dynasty was [its founder] Senopati's grandson Sultan Agung (r.1613-46). He established the hegemony of the Mataram dynasty in Central and East Java in series of bloody campaigns. [He conquered Surabaya in 1625 and threatened remaining Hindus in Bali, and attacked and failed to take back Batavia from the Dutch in 1628-29.]... In Mataram dynastic tradition Sultan Agung was model of the pious warrior king. ... As de Graaf pointed out, VOC [Dutch East Indies Company] records tell of holy men surrounding the Sultan at court, of his regular visits to the mosque and of his insistence that European prisoners of war be converted through circumcision."

<sup>16</sup> For the position of Zakariyya and Sharqawi in the intellectual genealogy and networks of *ulama* extending from the Middle East to Southeast Asia, see Azyumardi 2004 (especially for Zakariyya, pp. 18-19 ff., 129-30 ff and for Sharqawi, p. 121).

The institution of TT was developed further even after the establishment of the Dutch colonial authorities since the early 19<sup>th</sup> century.<sup>17</sup> First, more conditions were added as the husband's duty such as giving of maintenance to his wife. Second, pronouncement of TT was no longer read by a religious judge (or his deputy), but by the husband himself. (Noeh 1997: 65-69).

In the late 19<sup>th</sup> century, according to Noeh, Sayid Utsman bin Abdullah bin Aqil (often called Habib Utsman Betawi), a leading Islamic scholar and religious judge in the region of Batavia (Betawi), wrote a guidebook for Islamic judges<sup>18</sup> in which TT was mentioned as follows: “*TT has been instituted 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).*” (Noeh 1997:69).

In the post-independence period since 1945, the TT 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 conditions.<sup>19</sup> In this form, the bridegroom agrees to divorce his wife if he:

1. leaves her for six months or longer consecutively, or
2. fails to give her proper maintenance (*nafkah*) for three months consecutively, or
3. abuses her physically, or
4. neglects her for six months consecutively. (H.Nakamura 1983:37.).

These are 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 agreed conditions and if she complains to a religious judge with evidence supported by the testimony of two witnesses, then the religious judge pronounces that the proclamation of divorce has now come into effect and she is divorced.

In addition, it is now a standard procedure to add another condition by husband as follows: “*If my wife pays a certain amount of money as compensation (iwad ) to me which will be handed over to the authorities for charitable purposes.*” This statement makes the husband's side ineligible to request reconciliation (*rujuk*) after divorce. (Lev: *ibid.*).

The National Marriage Law (Undang-Undang Perkawinan) of 1974 has confirmed the application of Islamic law in Muslim marriage in terms of national law. In addition, The Compilation of Islamic Laws issued as the Presidential Instruction of Number 1, 1991 has explicitly mentioned TT as legitimate practice (in Chapter VII, Agreement in Marriage, Article 45-46). It is now a consensus (*ijimā'*) of Indonesian *ulama* that TT is not obligatory (*wajib*) but permissible (*halal*) and the marrying parties

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<sup>17</sup> Daendels, Governor General of the Netherlands East Indies, issued an instruction to the bupati (native regents) of Java in 1808 in which TT was included. This was followed by decrees respectively on the duties of penghulus (religious judges) in Stb. (Staatsblaad = Government Decree) 1835 No. 58 and on the formation of Raad Agama (religious court) in Stb. 1882 No.152. Then it came out 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. Noeh regards such ‘cooperation’ of native religious officials and ulama with the Dutch authorities as a kind of subversion: “... without being realized by the Dutch colonial rulers, penghulus were placed as the agent for the ‘perfection of Islamization’ of the people...” (Noeh 1997:69).

<sup>18</sup> According to Noeh (1997:69), Habib Utsman Betawi's guidebook has the following title: *Kitab Qowanin al-Syar'iah li Ahlal-Hukumiyah wal-Iftaiyah* (Batavia, c. 1895).

<sup>19</sup> Department of Religion, Republic of Indonesia, Instruction No.1 of 1955 and Decree No. 15 of 1955. For English translation of this form, see (Lev 1970: 163-4).



have the right to establish an agreement in the form of TT.

It is now a standard administrative practice throughout Indonesia that, after the contract of marriage (*aqad nikah*), the bridegroom reads out the printed formula of TT in front of a religious official in the presence of the bride and her father, or male relative from father's side (*wali*) with two witnesses, and signs it.<sup>20</sup> Through this, the newly wed husband and wife are made conscious of their rights and obligations in married life and to achieve serenity (*sakinah*), prosperity (*mawaddah*) and a blessed (*rahmah*) family life.<sup>21</sup> From the wife's perspective, TT elevates her position in marriage. She can remind her husband of his obligations from time to time. When an irresponsible husband violates the promise, TT gives his wife a powerful legal means to obtain divorce from him. Statistically, too, there seems to be undeniable evidence that TT provides an effective measure to enhance the right of wife to demand the dissolution of unbearable marriage from her side.

In the early 1990's, some voices appear to have requested the abolishment of TT (Noeh 1997), but it is evident that TT still remains intact and effective to this day. When I visited an Office of Religious Affairs in Yogyakarta in 2004 with my husband, we were invited by the office head to participate in a wedding ceremony, which happened to be held in his office. After the signing of marriage contract according to *fiqh* requirements, the office head asked the bridegroom if he were prepared to recite and sign the TT formula. He answered yes, and read out the standard TT formula printed on the opposite side of the marriage contract, and signed it right in front of the bride and others. The witnesses also signed the document, and it was handed to the bride.

So, this is an example of living Islamic law (*Shariah*) having been adapted, institutionalized and implemented continuously through the interaction among the ruler, *ulama* and the general population at the level of government administration in the history of Indonesia until now.

## Divorce Counseling

As an example of the implementation of Islamic law in Indonesia at interpersonal level, I want now to talk about marriage and divorce counseling. Such a counseling is called *nasihat* or *nasehat*<sup>22</sup> in Indonesian language, meaning 'advice'.

In addition to wide spread practice of giving informal advice among family and community members, marriage and divorce counseling has been instituted as a semi-governmental organization, *Badan Penasihatian Pembinaan dan Pelestarian Perkawinan* (Counseling Body for Guidance and Preservation of Marriage) known in the abbreviated form of BP4 since 1960's.<sup>23</sup> This organization is attached to the Office of Religious Affairs (KUA=*Kantor Urusan Agama*), the Department of Religion at the sub-district level.

The BP4 was established in 1960 as a national organization. The aim of this organization is to

<sup>20</sup> Presence and signing of marriage certificate by bride on the occasion of *aqad nikah* seems to be a recent development, which was not observed while I was doing fieldwork in the 1970's.

<sup>21</sup> Those key words defining the Muslim ideal of married family life are taken from the Compilation of Islamic Laws, 1991, Chapter II, Article 3.

<sup>22</sup> The etymology of the word 'nasihat' is 'nasiha' in Arabic, which means "sincere advice" (Wher 1994:1137). See footnote 6 above.

<sup>23</sup> I will use this abbreviation all through this paper because the abbreviation has remained the same although the official full name of this organization has changed three times since its formation.

enhance the value of marriage and help people to raise their families according to Islamic teachings revealed, among others, in a Qur’anic verse (30:21 as follows) :

*And among His wonders is this: He creates for you mates out of your own kind, so that you might incline towards them, and He engenders love and tenderness between you: in this, behold there are messages indeed for people who think!* (Translation from Muhammad Asad 1980: 619)

The Statutes and Rules of BP4 (Article 4) include the following as its purposes since 1960’s:

1. To give advice (*nasihat*) and information (*penerangan*) to those who are involved as well as to general public about matters of marriage (*nikah*), divorce (*talak*) and reconciliation (*rujuk*);
2. To try to decrease the numbers of marriage involving minors (*perkawinan di bawah umur*);
3. To prevent the abuse of the right of divorce (*perceraian sewenang-wenang*);
4. To give assistance to those who experience difficulties in marriage and for those seeking divorce to reach a just settlement according to Islamic law (*hukum Islam*);

Each BP4 board at sub-district level has normally a staff consisting of a general chairman and two chairwomen, two secretaries, and two treasurers, and sometimes several assistants. The general chairman is the head of KUA *ex officio*, who plays only a supervisory function. Except for the general chairman, other BP4 board members are all women. The women members are all local religious and social leaders who have volunteered to work for BP4.

The Kotagede BP4, with which I am most familiar, was officially formed on 17 July 1964. At the time of establishment, it consisted of seven members as listed below;

Name	Positions	Age	Education	Occupation
Mr.Hadi Nur	General Chairman	48	Ma’ had Islamy	Head of KUA
Mrs. Hadi Nur	1 <sup>st</sup> Chairwoman	42	Mu’ allimat	Merchant
Mrs. Mardisiswoyo	2 <sup>nd</sup> Chairwoman	50	Mu’ allimat	Teacher
Mrs. Mulyohardjono	Secretary	41	Mu’ allimat	Entrepreneur
Mrs. Chirzin	Secretary	42	Mu’ allimat	Merchant
Mrs. H. Djahid	Treasurer	50	Mu’ allimat	Shop owner
Mrs. H. Rofi ‘i	Treasurer	50	Mu’ allimat	Merchant

Only the general chairman was male. All the others were middle-aged married women, and all were working as market merchants, shop owners, entrepreneurs, or teachers respectively. They were all members of ‘Aisyiyah, a female division of the Islamic organization, Muhammadiyah.<sup>24</sup> They all graduated from Mu’ allimat, Muhammadiyah’s Senior Girls High School for Religious Teachers Training

<sup>24</sup> Muhammadiyah is a reformist Islamic organization dedicated to the promotion of modern education and social welfare for the mostly urban segments of Muslim population of Indonesia since 1912.

in Yogyakarta. Their educational level was very high considering their age. They all also came from economically well-established and religiously devoted families.<sup>25</sup> They were married to the husbands who were active in religious circles and both established good family reputations.

Last year (2004), I had a chance to revisit Kotagede's BP4. Of the six members of its founding committee, four were already deceased. Two ladies of the original members were still on the board, but one of them was non-active because of her husband's sickness. Mrs. Chirzin, who was now the only one active, had been the First Chairwomen. She recruited three women — all retired schoolteachers — as new members of the board. These new ladies were well educated at college level and all had long working experience as teachers at various schools. Mrs. Chirzin told me that she felt very happy to be able to continue her voluntary work for BP4 for more than 40 years. She said that she was not a government official (*pegawai negeri*) but a servant of God (*pegawai Allah*) with no reward in money; but she would hope to receive the prize in the next world (*akhirat*) if God was pleased with her work. In Islam, she said, those who knew better had a religious obligation to teach and advise those who knew less.

To illustrate the kind of counseling given at BP4, let me introduce to you one of eight cases I was allowed to record in 1971 in an office of BP4 in the city of Yogyakarta.<sup>26</sup> I have named this case, 'The Case of Bambang and Yanti'. All personal names and place names in the following record are fictitious to protect privacy of those involved. (H.Nakamura 1983:87-93) Let me explain the clients' situation first:

Husband, Bambang and wife, Yanti fell in love and got married five and a half years ago. Soon they had a baby daughter. After having their baby, they registered their marriage at KUA. Their married life was happy and peaceful.

Bambang works as a farmhand. The rice field he works is large enough to maintain his family's livelihood. Yanti follows Bambang to the rice field where he works and helps him.

They have their own house. Bambang has let a room to his close friend, Haryono, who is working in a factory nearby. Haryono is divorced and has two children who are already independent and living separately.

A year ago Bambang found that Haryono and Yanti were sleeping together. Bambang tried to stop his wife's sexual relationship with Haryono. However, he failed to persuade her. He found that Haryono and his wife were not only having affair but that they loved each other. Haryono wanted to marry Yanti if Bambang divorced her. Bambang made up his mind to divorce Yanti.

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<sup>25</sup> For example, Ibu Hadi Nur, first chairwoman and the wife of Bpk. Hadi Nur, the head of KUA, was a daughter of the former Head of KUA in Kotagede. Ibu Djahid, Treasurer, came from an old, wealthy family known as Bani Mu'min, descending from a rich textile and batik trader prospered in Kotagede during the early decades of 20<sup>th</sup> century. From this family, there came several distinguished scholars and religious leaders of national fame.

<sup>26</sup> As a rule, contents of counseling cases are strictly handled as 'secret matter' (*rahasia*) from the beginning of the establishment of BP4 until now. A friend of mine Mr. Y. Masuko, then a reporter from a leading newspaper in Japan and now a professor at a private university in Japan, and I were given an exceptional permission by the counselors of this office to record their counseling sessions on the condition that the records should be used only for academic purposes and the identities of the counselors and clients should be concealed in publication.

So, Bambang came to the BP4 office with his wife Yanti for consultation. Let me follow the course of the counseling session by focusing on the conversations between the two counselors and Bambang, the petitioner of divorce. The counseling with Yanti will be treated later. To the question of the counselors why he wanted to dissolve the marriage with Yanti, Bambang answered as follows:

*Well, I might say that I do not want to divorce my wife for the reason that she has committed adultery. Already for one year she has been unfaithful! I am no longer strong in my heart. If I could still reform my wife, I would do so. But if I couldn't reform her anymore, what shall I do? Already for one year, my wife has been having sexual relations with my friend. I feel that we will be in trouble soon and I will no longer have a peaceful mind. I shall divorce my wife now because I can't stand it anymore.*

The remarkable fact in the above statement is that Bambang's immediate reason for considering divorce is not his wife's adultery but his own state of mind. Throughout the entire counseling session, Bambang states repeatedly that he is no longer strong in his heart and is afraid of getting in trouble by losing control of his mind in the near future. Bambang also states that he is not happy anymore in the present marriage because he has already been wounded many times in his heart.

Bambang never blames the conduct of his wife, Yanti, or that of his friend, Haryono, who have both caused his unhappiness. The counselors actually suggest to Bambang that they are willing to advise Haryono to give up Yanti and find another woman in her place if Bambang wants this action. To this suggestion Bambang responds as follows:

*Yes, certainly you [the counselors] are right [in suggesting that Haryono should find a wife among other women, not Yanti.] But the reality is that he has already slept with Yanti. He has fallen in love with her. He is having sexual relations only with her. If I hand over Yanti to Haryono, he wants to marry her.*

Bambang emphasizes the fact that Haryono is serious about this affair, and so is Yanti. Bambang makes the following statement on this point.

*If one of the parties [Yanti or Haryono] was not happy to have such an affair, it could not happen. With me, Haryono has long been a good friend of mine, Ma'am. If I quarrel with him and divorce my wife accordingly, I will never be happy.*

The friendship between Bambang and Haryono seems so firm that Bambang sincerely believes that Haryono's affair with Yanti is genuine. He states:

*What I can do now is to divorce Yanti. I am already willing to do so because she is going to marry Haryono if I divorce her. I feel already thankful to my friend Haryono for marrying her.*

Thus Bambang states that he is even thankful for Haryono who is marrying Yanti. He seems to wish sincerely for Yanti's happiness and to believe positively in her future happiness with Haryono. However, having heard this statement the counselors show their anxiety about Yanti's future marriage, for Haryono has already divorced his wife before and divorce might become his habit. If so, Yanti may be divorced again by Haryono. Thus, the dissolution of the present marriage may not bring Yanti happiness in spite of Bambang's wish. On this point, Bambang states that he has made careful arrangements to deal with that possibility:

*I have already made Haryono promise not to repeat divorce. I made him promise in front of the neighborhood association head as witness. Therefore, if something wrong happens, I can send Haryono to him. They will discuss first what is wrong [before Haryono does any harm to Yanti].*

In addition to this practical precaution, Bambang says that he is praying to God as follows:

*Also I pray day and night so that Haryono and Yanti can continue to live together until they become grandparents. I pray so that they don't repeat breaking up and marrying. For it is not good. I pray to God that Yanti will be in a good situation forever and that, if it is possible, she is happier with her new husband Haryono who is my brother.<sup>27</sup>*

Thus Bambang pays a great deal of attention to Yanti's present and future happiness, spiritually as well as practically. Bambang states as follows:

*I am ready to divorce my wife sincerely (sudah saya ikhlaskan, literally 'already I am sincere'). Then, if possible after I have divorced my wife, may I hope that I am also given a better marriage partner [by God] than one I have now.*

Bambang's attitude and conduct can be better understood if we take into account the concept of the marriage in Islamic law. According to the Qur'an, the purposes of marriage are to establish a harmonious and orderly household to produce legitimate children.<sup>28</sup> Marriage should be based on happiness, and people, men and women equally, have a right to seek their own happiness in marriage. In other words, it is not worth continuing a marriage if there is no happiness between the husband and wife – only then divorce is permitted.<sup>29</sup> However, before dissolving the marriage, efforts to restore happiness have to have been made<sup>30</sup>, and only when there is no possibility of restoring happiness with-

<sup>27</sup> In the original the word 'dik' is used for this expression. 'Dik', short for 'adik', is an address to be a younger sibling, or a younger friend of ego.

<sup>28</sup> "And God has given you mates of your own kind and has given you, through your mates, children and children's children, and has provided for you sustenance out of the good things." (Qur'an 16:72)

<sup>29</sup> "With Allah, the most detestable of all things permitted is divorce." (Abu Dawud 13:3, quoted in Ali 1944:284), "Of all the permitted things divorce is the most abominable with God." (Ahmad1978:3, in footnote 2)

<sup>30</sup> "And if you have reason to fear that a breach might occur between a [married couple], appoint an arbiter from among his people and an arbiter from among her people. If they both want to set things aright, God may bring about their reconciliation. Behold, God is indeed all-knowing, aware." (Qur'an 4:35)

in the present marriage, the husband is obliged to divorce his wife reputably.<sup>31</sup>

When the husband is going to be happy in marrying a new partner, he must consider his divorced wife, giving her something to cheer her up (*mut'ah*) and encouraging her to find another man as soon as possible to enter a happy marriage life again. When the wife is going to be happy in marrying a new partner, the husband must not disturb her happiness. He must not resent her new marriage. These are religious obligations required of the husband at divorce.<sup>32</sup>

The husband must fulfill these obligations and his conduct in this process seems to constitute evidence of the fact that he is sincere to God. Sincerity in this context means two things: firstly, to obey God's command absolutely (religious dimension), and secondly to be sincere in wishing the happiness of the divorced partner (ethical dimension). When the husband has such sincerity, religious and ethical, God rewards him by a good marriage partner who comforts him and with whom he is happy.

To sum up, Bambang believes that he is following the requirements of Islamic teaching: he is going to divorce his wife reputably and shows no sign of resenting his wife's new marriage. He not only fulfills these religious obligations but also considers his wife's future happiness and has taken practical precautions to prevent her from ending up in a divorce situation again. However, as we will see below, he is given an admonition by the counselors again.

Yanti, in contrast to Bambang, has kept quiet all through the counseling session although she has been sitting there next to him all the time. When the major part of the conversation with Bambang is over, the counselors turn to Yanti and asked her three questions as follows:

- (1) At the time of marriage, was she really happy with Bambang?
- (2) Does she truly want to marry Haryono? And
- (3) Is she sure that Haryono will marry her?

To each of these questions she answered 'Yes'.

It should be noticed that the counselors do not ask Yanti why she has committed adultery or blame her conduct. Instead, the counselors are concerned about her future marriage. They warn Yanti that, if she did not have a firm promise and if she couldn't marry Haryono, she might be disappointed in future.

Apparently because of Yanti's firm determination to marry Haryono, the counselors recognize that the present marriage has no chance of continuing and that it is better for both partners to dissolve it. One of the counselors states thus:

*We hear enough now to understand your situation, my children.*<sup>33</sup> *It seems to be like this: the*

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<sup>31</sup> "And so, when you divorce women and they are about to reach the end of their waiting -term, then either retain them in a fair manner or let them go in a fair manner. But do not retain them against their will in order to hurt them...." (Qur'an 2:231)

<sup>32</sup> And when you divorce women, and they have come to the end of their waiting-term, hinder them not from marrying other men if they have agreed with each other in a fair manner. This is an admonition unto every one of you who believes in God and the Last Day. (Qur'an 2:232)

<sup>33</sup> In the original, the word 'nak' is used for this. 'Nak', shortened form of 'anak', means 'child' or 'children'. 'Nak' is also a term of address to a person of the generation of ego's children. In this context the term 'nak' is, of course, used in the latter meaning - an equivalent of 'my son' or 'my daughter'.

*main point is, if you, Bambang, could reform your wife you would do so. However, you seem definitely not to be able to persuade your wife and change her mind, just like you cannot change time. Now we also consider that your marriage must be dissolved. There is nothing we can do now for what has happened in the past. Truly, divorce is not permitted by God unless there are some definite reasons for doing so. But, it is understandable to dissolve marriage if one's wife commits adultery. Therefore, your divorce is to be regarded as a reasonable conduct.*

The counselors agree there is no way to restore this marriage and only way to secure happiness for both is to dissolve it. They finally give their advice to each of the clients:

[To Bambang]

*This marriage can be dissolved, but you must be cautious. Because there is something wrong with you. For, why has it come to the point where a man has been left by the adultery of his wife? It means that he has not been cautious and there must be some causes [for your wife's adultery]. It is best that he creates his own happiness (membuat kesenangan). He should not endure it until his emotion is so much disturbed. But very often he does not feel the true cause. If I were the wife, it would be impossible for me to be happy with another man when a good and wise household head influenced me and treated me with right conduct. If I am wrong, please forgive me. What I want to say is that there is a woman whose behavior is ugly and there also is a man who is not cautious enough. Therefore, even if you consider that you have acted wisely, it is better now to think that you have acted stupidly. You can improve yourself so that you as a household leader can be happy in this world and hereafter.*

[To Yanti]

*You, Yanti. You are now going to get divorced because you have been having an affair with your husband's friend already for one year. How has it come to this kind of situation? What were the causes, which made you unhappy with Bambang? I am not satisfied with your saying that you like Haryono. What else? If there is anything, say it, even if you think it is unimportant. What was it that Bambang said which made you unhappy? When Bambang invited you to go out with him, you didn't want to go out? There must have been some causes, which made you unhappy with Bambang. Think.*

The main concern for Bambang as referred to in the above statement is that his own happiness is most important. If he had been happy himself, treated his wife rightly and made her happy accordingly, then Yanti would never have committed adultery nor would she have been happy with Haryono. He is advised to reflect upon his own conduct to improve himself so that he will be happy in this world and in the world hereafter.

Yanti is asked to think over her married life with Bambang to find out what was the fundamental cause of her unhappiness. The counselors are anxious lest she may be trapped in the same kind of situation with her new husband if she gets married again. The counselors advise Yanti as to her future

marriage as follows;

*When you get married with your new husband, your understanding of marriage must be altered. You must not behave yourself as you did before. Your conduct has not been good at all. To leave a husband to marry another man is very dangerous. Therefore, when you are married to your new husband, you must be cautious and faithful.*

Thus through the whole counseling session the main criterion to evaluate individual's conduct has been 'happiness': happiness of the husband and of the wife, happiness in the present marriage as well as in future marriage, and happiness in this world as well as in the world hereafter.

The counselors search for the appropriate conduct for the clients through consultation with them. Key values such as happiness in married life, happiness in family life, and sincerity in pursuing one's happiness, are all rooted in the Qur'an and Hadith, but the counselors do not make any explicit reference to these sources. Elderly women of experience and knowledge provide them as words of wisdom to their junior fellow Muslims.

Let me conclude my talk now with a quotation from a book written by Professor Frank Vogel on the breath of the notion of Islamic law as follows;

*..... [W]e would have to treat not only court decisions but also phenomena which are vital to law's application but which we do not call "law," or even "lawlike" — such as ones that are either informal, particular, subjective, private, unique, occasionalistic, voluntary, or individual in various ways. For example, it is not to us "law," "law-finding," or even "law-enforcement," when an individual evaluates the legality of his own action and amends his behavior or not accordingly, gives advice to another on how to comply with the law, .....* (Vogel 2000:30)

In the beginning of my research, I was not sure whether my concern with marriage counseling at BP4 was academically worthwhile as an exercise of anthropology of Islamic law. But, I have found myself assured that I am tracking a 'straight path' when I have come across the above quoted statement. Here I would like to end my talk by expressing my sincere gratitude to Professor Vogel and Islamic Legal Studies Program at Harvard Law School for giving me an opportunity to deepen my understanding of Islamic law.



### <Glossary: Indonesian Terms for Arabic Words>

- **Fikh** (var. sp., fiḥ, fiqh; Ar. **فقه**) = Understanding or comprehension; the science of the divine law, jurisprudence in Islam, the sum of man's knowledge of the Shariah, Islamic law or jurisprudence.
- **Nasihah** (var. sp., nasehat; Ar. **نصيحة**) = Sincere advice.
- **Shariah** (var. sp., syariah, sjariah, syari'at, shar', shrī'a; Ar. **الشريعة , للشرعة**) = The divine law, the revealed law of Islam, the Way to be followed for Muslims, which is revealed in the Qur'an and contained in the Hadith - records of the sayings and the conducts of the Prophet Muhammad.
- **Talak** (var. sp., ṭalāq, ṭalāḳ, talaq, talaq, taleuë' (in Aceh); Ar. **طلاق**) = Divorce, repudiation of wife by husband, a form of divorce, effected by his pronouncing the words *anti ṭāliq* ('I divorce you'); Talak is the most common way to dissolve the marriage in Islamic law.
- **Taklik** (var. sp., ta'liq, taklek; Ar. **تعليق**) = Suspension.
- **Taklik-talak** (var. sp., ta'lik-talak, taklek-talak) = Divorce in suspension, Conditional divorce.

### <Abbreviations>

- **BP4** = Body for Marriage counseling and Divorce Settlement (Badan Penasehat Perkawinan dan Penyelesaian Perceraian)→Currently, Counseling Body for Guidance and Preservation of Marriage (Badan Penasihatan Pembinaan dan Pelestarian Perkawinan)
- **KUA** = Office of Religious Affairs (Kantor Urusan Agama)

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