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ISLAM, THE STATE AND THE CONSTITUTIONAL COURT IN INDONESIA

Simon Butt[†]

Abstract: Indonesia is home to more Muslims than any other country. Yet it is not an Islamic state and is unlikely to become one, despite the strong and sustained urgings of some Muslim groups. Indonesian Islam is, like Indonesian society itself, dynamic and diverse, accommodating a wide variety of practices and beliefs. One area of contention between conservative Muslims on the one hand, and the state (supported by many more moderate Muslims) on the other, is the extent to which Islamic law should be recognised, applied and enforced by institutions of state. The Indonesian government's response has generally been to limit formal recognition of Islamic law to specified areas of family law and finance, codifying the relevant principles and enforcing them through Islamic courts. This article considers whether the constitutional freedom of religion, introduced in 2000, requires the state to provide mechanisms to apply and enforce the corpus of Islamic law. In particular, it discusses two cases in which Muslims asked the Indonesian Constitutional Court to consider whether freedom of religion required the state to remove restrictions on polygamy, and to allow Indonesia's Religious Courts to apply Islamic law in its entirety, including criminal law.

I. INTRODUCTION

Indonesia has the largest Muslim population of any country in the world. Of its approximately 210 million people, around eighty-eight percent call themselves Muslims.¹ Yet, the proper place for Islam within the Indonesian legal and political systems is an issue of continuing debate and contest. Muslim groups have, since colonial times, regularly and vocally pushed for a greater political and legal role for Islam.² But the state—both colonial and independent—has resisted many of their demands, thereby remaining, for the most part, the primary source of legal and social meanings.³

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¹ ROBERT W. HEFNER, CIVIL ISLAM: MUSLIMS AND DEMOCRATIZATION IN INDONESIA 6 (2000).

² See LUTHFI ASSYAUKANIE, ISLAM AND THE SECULAR STATE IN INDONESIA 35 (2009) (a recent convincing attempt to define models of polity which various Muslim groups have sought).

³ Mark Cammack, Lawrence A. Young & Tim Heaton, *Legislating Social Change in an Islamic Society-Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45, 53 (1996). I use "state" and "government" synonymously to refer to the national-level central (*pusat*) executive and legislature. Although I refer to this entity as though it is homogenous, I am, of course, generalising. Reflecting, at least in part, the diversity of Islamic thought, many state actors—legislative or executive—do not agree with the state's overall handling of Islam, but this article presumes that it is possible to identify broad trends in the state's approach to Islam. I do not refer to the approach to Islam of the various levels of regional government, despite evidence that some of them are passing laws incorporating principles of Islamic law. See Robin

This article identifies a new player in the contest between the state and Islam—the Constitutional Court. Established in 2003, the Court has power to ensure that legislation enacted by Indonesia’s national parliament complies with the Indonesian Constitution.⁴ It is the first Indonesian court to have been granted these powers. It has invalidated several statutes that contradict Indonesia’s constitutional Bill of Rights, inserted in 2000 during the second of four rounds of constitutional amendments made annually from 1999 to 2002.⁵

This article argues that the Court’s function puts it in a critical position as an arbiter between the central government and Islam, because the Constitution contains both *Pancasila*—Indonesia’s state ideology which requires a role for religion within the state—and provisions guaranteeing freedom of religion for citizens. These include:

- 1) Article 28E(1), which gives citizens freedom to “embrace a religion and to worship in accordance with that religion.”
- 2) Article 29(2), which reaffirms Article 28E(1), stating that the “state is to guarantee the independence of every citizen to embrace their respective religion and to worship in accordance with that religion and belief.”
- 3) Article 28I(1), which states that the right to religion, along with several other constitutional rights, “cannot be limited in any way.”

These provisions raise key constitutional questions about the way the legal and political demands of more conservative Islam have been, and should be, handled by the state. For many Muslims, Islam purports to provide a comprehensive set of rules—civil, criminal and public—for life. Does freedom of religion require that Muslims be subject to the corpus of Islamic law? Does delineating the areas of Islamic law that the state will enforce and watering down some aspects of pure classical Islamic law contradict this freedom of religion?

Bush, *One Step Forward*, INSIDE INDONESIA, <http://www.insideindonesia.org/content/view/12/29/> (last visited Jan. 31, 2010); see also Arskal Salim, *Muslim Politics in Indonesia's Democratisation: The Religious Majority and the Rights of Minorities in the Post-New Order Era*, in INDONESIA: DEMOCRACY AND THE PROMISE OF GOOD GOVERNANCE 115 (Ross H. McLeod & Andrew J. MacIntyre eds., 2007) [hereinafter Salim, *Muslim Politics*].

⁴ Indonesian Constitution, Articles 24C(1) and 24C(2). The Court was established by Law No. 24 of 2003 on the Constitutional Court.

⁵ See Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 SING. J. INT’L & COMP. L. 244 (2002).

This article discusses two cases in which the Constitutional Court was asked to answer these very questions. In the first, the *Polygamy Case* (2007),⁶ the applicant argued that the 1974 Marriage Law,⁷ which prohibits men from entering into a polygamous marriage without prior approval from a religious court, does not accord with Islamic law and hence intrudes upon his freedom of religion. In the second, the *Religious Courts Law Case* (2008),⁸ the applicant claimed that the state-imposed limitation of the jurisdiction of religious courts to particular civil matters is unconstitutional because it prevented his full observance of Islam. In both cases, Constitutional Court judges unanimously rejected these arguments, thereby supporting the gist of the central government's approach towards Islamic law to date.

Describing the relationship between Islam on the one hand and the Indonesian state on the other as a "contest" requires qualification. Modern Indonesian Islamic thought and practice is radically diverse.⁹ It certainly does not comprise objectively identifiable and agreed-upon norms. At the more conservative end of the spectrum are groups striving for state-supported enforcement of uncodified and unreconstructed classical Islamic law (*Syariah*), as embodied in its traditional sources: the Quran, the sayings and deeds of the Prophet (*Sunnah*) and the rules contained in legal texts written by Islamic scholars (*fiqh*).¹⁰ Significant disagreement exists even amongst this group as to which of these sources should be taken as authoritative and how they should be interpreted and applied in Indonesia today.

This article focuses on the response of the Indonesian state to demands of some of these more conservative groups for a greater role for Islamic law—a role which, according to their various interpretations, *Syariah* requires. It must be emphasized, however, that most Indonesian Muslims accept interpretations of Islamic law that are "read in light of rapidly evolving social, economic and political contexts."¹¹ Many Muslims who accept less conservative interpretations are likely to be content with, or

⁶ See *In re M Insa*, No. 12/PUU-V/2007 (Constitutional Court case reviewing Law No. 1 of 1974 on Marriage), available at <http://www.mahkamahkonstitusi.go.id/> [hereinafter *Polygamy Case*].

⁷ Marriage Law No. 1, 1974 (*Perkawinan*).

⁸ See *In re Suryani*, No. 19/PUU-VI/2008, available at <http://www.mahkamahkonstitusi.go.id/> [hereinafter *Religious Courts Case*] (Constitutional Court decision reviewing Law No. 7 of 1989 on the Religious Courts as amended by Law No. 3 of 2006 on Amendments to Law No. 7 of 1989 on the Religious Courts).

⁹ See R. MICHAEL FEENER, *MUSLIM LEGAL THOUGHT IN MODERN INDONESIA* xvii (2007).

¹⁰ Other commonly used spellings in the Indonesian context include *Syariat*, *Syaria*, *Qu'ran* and *Koran*.

¹¹ FEENER, *supra* note 9, at xx.

may even actively encourage, the state's treatment of Islam discussed in this article. Rather than being considered secularist or anti-Islamic, it might be more accurate to claim that the state's approach to Islam resembles some of these more progressive interpretations.

II. ISLAM AND THE STATE IN INDONESIA: HISTORICAL CONTEXT AND POLITICAL CONTEST

By way of historical and political background to these cases, this article begins by discussing key "battles" in the contest between Islam and the state in modern Indonesia. From the very first days of Indonesia's independence, declared on August 17, 1945, the Indonesian state has limited the formal position of Islamic law within the national legal system. It has sought to confine and neutralise Islam as a source of legal obligations and legal authority independent of, and perhaps even in competition with, the state.

A. *The Jakarta Charter and Pancasila*

In the lead-up to the declaration of independence, Muslim activists had successfully lobbied for the inclusion of the so-called "Jakarta Charter" (*Piagam Jakarta*) in the final draft of Indonesia's first independent Constitution. This charter required Muslims to follow Islamic law. The charter was, however, quietly dropped from the final version of the Constitution of 1945. It was removed to placate non-Muslim groups—including Christians in Eastern Indonesia—who threatened to break away even before the state was formally established if the charter was retained, and to allay concerns about the wholesale imposition of Islamic law held by Indonesia's more moderate Muslims, which are said to constitute a clear majority.¹² The Charter's rejection, however, was, and is still, seen by some Muslim groups as "the" great betrayal of Islam since independence.

With the dropping of the charter, Indonesia did not, however, become an entirely secular state. *Pancasila*—Indonesia's state philosophy of five principles—was included in the preamble to the 1945 Constitution, partly to appease those who advocated in favour of the Jakarta Charter. *Pancasila* has

¹² See H MUHAMMAD YAMIN, *NASKAH PERSIAPAN UNDANG-UNDANG DASAR 1945* (1959); see also FEENER, *supra* note 9; ARSKAL SALIM, *CHALLENGING THE SECULAR STATE: THE ISLAMIZATION OF LAW IN MODERN INDONESIA* 64-69 (2008).

as its first principle *Ketuhanan Yang Maha Esa* (Belief in a Unitary Deity).¹³ *Pancasila* is the state philosophy and “the source of all sources of law,”¹⁴ and, therefore, requires government and citizens alike to give effect to this principle. The very founding principles of the state, therefore, appear to establish adherence to one’s religious beliefs as both a right and an obligation of Indonesian citizenship. They also appear to compel the government to not only safeguard religious freedom but to utilise the machinery of the state to encourage and promote the exercise of faith, including Islam. Because *Pancasila* mandates such a role for religion in matters of state, the ideological door has remained ajar for some Muslim groups to continue seeking a more prominent place for Islamic principles in government and law. Furthermore, many Indonesian Muslims regard Islamic doctrine as having independent legal potency, regardless of its recognition, or lack thereof, by the state.

Debates over the place of Islam within the Indonesian state, and calls for the reintroduction of the Jakarta Charter, have, therefore, continued since 1945. For example, Indonesia’s Constituent Assembly (*Konstituante*)—established in the mid-1950s to devise a new Indonesian Constitution—was consumed with the issue.¹⁵ More recently, in 1999-2000, when Indonesia’s People’s Consultative Council was deliberating proposed amendments to the 1945 Constitution, some Muslim members pushed, again unsuccessfully, for the entrenchment of provisions resembling the Jakarta Charter.¹⁶

B. *The Administration of Islamic Law: Accommodation and Incorporation*

While the Indonesian government has managed to deflect calls for the introduction of the Jakarta Charter and for an Islamic state, it has, however, allocated some space to Islamic law within the Indonesian legal and administrative systems. The government administers aspects of Islam

¹³ The remaining four principles of *Pancasila* are: *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilised Humanity); *Persatuan Indonesia* (The Unity of Indonesia); *Demokrasi*; and *Keadilan Sosial* (Social Justice).

¹⁴ Lawmaking Law No. 10 2004, art. 2; Sunaryati Hartono, *Sources of Law, in* ASEAN LEGAL SYSTEMS 23 (1995); R DAMAN, *HUKUM TATA NEGARA: SUATU PENGANTAR* 141 (1993).

¹⁵ DANIEL S. LEV, *THE TRANSITION TO GUIDED DEMOCRACY: INDONESIA POLITICS, 1957-1959* 257-77 (1966); ADNAN BUYUNG NASUTION, *THE ASPIRATION FOR CONSTITUTIONAL GOVERNMENT IN INDONESIA: A SOCIO-LEGAL STUDY OF THE INDONESIA KONSTITUANTE 1956-1959* (1992). Then-President Soekarno unilaterally dissolved the *Konstituante*, along with the national parliament, before the debate could be concluded, thereby ushering in his period of “Guided Democracy,” under which Indonesia returned to the 1945 Constitution.

¹⁶ See NADIRSYAH HOSEN, *SHARI’A & CONSTITUTIONAL REFORM IN INDONESIA* 59 (2007); see also SALIM, *supra* note 12, at 87-111.

through the Ministry of Religious Affairs.¹⁷ The national legislature and executive have also enacted laws, applicable only to Muslims, which explicitly purport to incorporate Islamic legal norms into national law. They have also passed laws which, while not making direct reference to Islam, appear to adopt concepts or principles widely associated with more conservative varieties of Islam.

The substance of the former category of laws is primarily matters over which Indonesia's religious courts (*peradilan agama*) have jurisdiction, including family, inheritance, and Islamic finance.¹⁸ These laws include the Compilation of Islamic Law (Presidential Decision No. 1 of 1999, herein referred to as the *Kompilasi*) and recently-enacted statutes on Islamic finance, including Law No. 21 of 2008 on *Syariah* Banking and Law No. 19 of 2008 on *Syariah* Securities. The limitation of the religious courts' jurisdiction to several fields of Islamic law was disputed in a Constitutional Court case, discussed below.

As to the latter category of laws, which appear to adopt, albeit not explicitly, Islamic norms, the most controversial has been the Anti-Pornography Law (Law No. 44 of 2008), enacted in November 2008, which is said to reflect, albeit not explicitly, Islamic concepts of morality.¹⁹ Other examples include laws enacted by some of Indonesia's local governments.²⁰

¹⁷ See Ministry of Religious Affairs website, <http://www.depag.go.id/> (last visited Jan. 31, 2010). The Ministry administers other religions, but the bulk of its work relates to the administration of Islam.

¹⁸ Despite being called "religious courts," the *peradilan agama* are, in fact, more properly called Islamic courts because they hear only disputes between Muslims, applying laws purported to be based on Islam.

¹⁹ See Jason Tedjasukmana, *Indonesia's New Anti-Porn Agenda*, TIME, Nov. 6, 2008, available at <http://www.time.com/time/world/article/0,8599,1857090,00.html>; see also Geoff Thompson, *Indonesia Passes Tough New Anti-Porn Laws*, AUSTL. BROAD. CORP., Oct. 31, 2008, <http://www.abc.net.au/news/stories/2008/10/31/2406371.htm> (last visited Mar. 28, 2010); see also Bush, *supra* note 3.

²⁰ For reasons of space, this article does not consider these co-called "Syariah by-laws," which have been discussed elsewhere. See Jane Perlez, *Spread of Islamic Law in Indonesia Takes Toll on Women*, N.Y. TIMES, <http://www.nytimes.com/2006/06/27/world/asia/27iht-web.0627islam.2061807.html> (last visited Jan. 31, 2010); see also Bush, *supra* note 3; see also Salim, *Muslim Politics*, *supra* note 3. Other national-level laws appear to be pro-Islam, but cannot necessarily be said to incorporate aspects of Islamic law. In 2003, a new National Education Law was enacted which requires students of primary and secondary schools to "receive education in accordance with their religion, taught by someone of that religion." Simon Butt, *Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts*, in *INDONESIA: LAW AND SOCIETY* 283 (Tim Lindsey ed., 2d ed. 2008). This might not appear particularly controversial until one considers that very few non-Muslims attend Muslims schools, but many Muslims attend non-Muslim schools. Christian schools might, therefore, be required to teach Islam, to hire Muslim teachers and perhaps even to provide a prayer room for their students. *Id.* at 283. In June 2008, the Religious Affairs and Internal Affairs Ministers and the Attorney General issued a Joint Decree "freezing" the activities of Ahmadiyah, a sect which aligns itself with Islam. Ahmadiyah is denounced by many Muslims largely because the sect teaches that the Prophet Mohammad was not the last Prophet. The Decree, however, seems to contradict the constitutional religious freedom provisions, set out below. This

These administrative and legal accommodations offer far less to Islam than might be immediately apparent, for several reasons, some of which this article explores. First, the Indonesian government has confined the operation of Islamic law to certain narrow fields which exclude public and criminal law. Second, the state has ensured that those laws which purport to give effect to Islamic norms adopt less conservative interpretations of Islamic law. In marriage law, for example, as discussed below, under the *Kompilasi*, polygamy is permissible only in very limited circumstances and even then only with the prior approval of a religious court. Third, by taking control over the recruitment, training and employment of those bureaucrats and judges responsible for enforcing Islamic law, the state has been able to ensure that these actors give predominance to state law in their policy and decision-making, rather than giving effect to their own understandings of Islamic doctrine. Fourth, and most significantly, the state has denied *Syariah* direct and independent authority as a source of law by passing laws that purport to comprehensively encapsulate and codify *Syariah* for the Indonesian context. By so doing, the state has replaced *Syariah*'s divine authority with statutory authority, over which, of course, the state's control is absolute.

C. A "New" Reception Theory?

The Indonesian state's attempts to restrict state recognition of Islamic law to limited areas of law and to deny Islam independent legal authority resembles the so-called "reception theory" introduced by the Dutch during their colonisation of Indonesia.²¹ Indeed, Azra and Salim refer to the national government's approach as the "new reception theory."²² Until the late nineteenth century, Dutch colonists had presumed that Indonesian law was largely Islamic; that is, that most parts of Indonesia had adopted Islamic law in its entirety, thereby displacing pre-existing customary law (*adat*),²³ under which Indonesians had governed themselves before the coming of Islam. This view was, however, displaced around the turn of the twentieth

Decree is widely considered to have been pushed by most conservative Islamic groups. INTERNATIONAL CRISIS GROUP, INDONESIA: IMPLICATIONS OF THE AHMADIYAH DECREE (2008), <http://www.crisisgroup.org/home/index.cfm?id=5556> (last visited Jan. 31, 2010).

²¹ M.B. Hooker, *Introduction: Islamic Law in South-East Asia*, 4 AUSTL. J. ASIAN L. 213, 218 (2002).

²² Arskal Salim & Azyumardi Azra, *Introduction: The State and Shari'a in the Perspective of Indonesian Legal Politics*, in SHARI'A AND POLITICS IN MODERN INDONESIA 1, 13 (Arskal Salim & Azyumardi Azra eds., 2003).

²³ DANIEL S. LEV, ISLAMIC COURTS IN INDONESIA: A STUDY IN THE POLITICAL BASES OF LEGAL INSTITUTIONS 9 (1973).

century. Christiaan Snouck Hurgronje, a Dutch expert on Islam and Aceh, and an adviser to the colonial government, observed that “natives” did not use pure Islamic law to govern their lives, even in matters of marriage, divorce, and inheritance; rather, they primarily used *adat*.²⁴ Islamic law, he contended, was practiced only to the extent that it had been absorbed into *adat*, and even then, *adat* had “moderated” Islamic law, syncretising it with pre-existing practices.²⁵ Accepting this advice, the Dutch administration recognised and enforced principles of Islamic law, largely through a body of Islamic courts, only to the extent that those principles were reflected in *adat*.²⁶ This policy attributed *Syariah* no formal recognition or status.²⁷

The reception theory should be viewed as part of Hurgronje’s concern to limit the potential public sphere of Islam. He had advocated that within the colony, the practice of Islam should be divided into spiritual and political spheres. He proposed that the Dutch should be neutral and tolerant towards religious observance, but vigilant in suppressing political aspirations of Islam—by force, if necessary.²⁸ This, he argued, would reduce Indonesian resistance, often under the banner of Islam, to Dutch rule.²⁹ Of course, this was an affront to Islam, under which there is no formal separation of religion and state.³⁰

Although both the Dutch and the new reception theories might have led to the same result—the subordination of Islamic law—they differ in important respects. In the reception theory, the Dutch found a ready-made justification to avoid giving Islamic law independent legal authority. Although calculated to reduce opposition, it was in essence a passive

²⁴ Harry J. Benda, *Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia*, in READINGS ON ISLAM IN SOUTHEAST ASIA 61, 63 (Ahmad Ibrahim, Sharon. Siddique, & Yasmin Hussain eds., 1985).

²⁵ *Id.*; see Mohammad Daud Ali, *The Position of Islamic Law in the Indonesian Legal System*, in ISLAM AND SOCIETY IN SOUTHEAST ASIA 187, 193 (Taufik Abdullah & Sharon Siddique eds., 1986).

²⁶ JOHN R. BOWEN, ISLAM, LAW, AND EQUALITY IN INDONESIA: AN ANTHROPOLOGY OF PUBLIC REASONING 48-49 (2003); B. J. BOLAND, THE STRUGGLE OF ISLAM IN MODERN INDONESIA (1971); LEV, *supra* note 23; M. Irfan Idris, *Konstitusionalisasi hukum Islam dalam hukum nasional*, 3 Jurnal Konstitusi 139-51, 143-44 (2006); Moch. Nur Ichwan, *The Politics of Shari’atization: Central Governmental and Regional Discourses of Shari’a Implementation in Aceh*, in ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 193 (R. Michael Feener & Mark E. Cammack eds., 2007).

²⁷ Hooker, *supra* note 21; M. B. HOOKER, ISLAMIC LAW IN SOUTH-EAST ASIA 248 (1984). The reception theory’s “selecting out” of *Syariah* from the formal legal system led some Indonesian Islamic scholars, notably Professor Hazairin of the University of Indonesia, to refer to it later as the *teori iblis* (devil’s theory) because it allowed non-Muslim sources of law to be placed above divine law, revealed by God. M.B. HOOKER, *INDONESIAN SYARIAH: DEFINING A NATIONAL SCHOOL OF ISLAMIC LAW* 3 (2008).

²⁸ HARRY J. BENDA, THE CRESCENT AND THE RISING SUN: INDONESIAN ISLAM UNDER THE JAPANESE OCCUPATION, 1942-1945 23-24 (1958).

²⁹ *Id.*

³⁰ See BOLAND, *supra* note 26, at 13-14.

approach giving effect to what the Dutch claimed was the status quo. The independent state, on the other hand, needed to be rather proactive and responsive in the face of calls for it to accommodate a greater role for Islam within the state.

III. THE POLYGAMY CASE (2007)

Polygamy in Indonesia is, as elsewhere, contentious—condemned by some as discriminatory against women, and defended with great conviction by others as a practice explicitly sanctioned by Islamic law.³¹ To provide context to the *Polygamy Case*, I will discuss the Indonesian state's attempts to regulate polygamy and some of the resistance it has faced, and continues to face, even from within its own judiciary.

A. *Polygamy Reform and Resistance: The Marriage Law and Kompilasi*

In 1973, the central government, then under the authoritarian rule of Soeharto, introduced a Draft Marriage Law that caused great concern amongst Indonesia's more conservative Muslims. The bill proposed to prohibit polygamy and unilateral divorce, both regarded by many Muslims as permissible under Islamic law. The bill also sought to transfer to the general courts jurisdiction over all marriage issues—including Islamic marriage and divorce, which up to that point had been the core of religious court work. This was seen as a serious symbolic and practical threat to Islamic law in Indonesia. Left with jurisdiction over very few matters, the religious courts—the only institution of state that could apply Islamic law with executorial force—may have withered into insignificance.³² The central government was said to have several motives to enact the bill. These included improving the legal status of women in marriage and reducing Islam's potential as a source of political and legal authority competing with that of the state.³³

³¹ "Polygamy," in everyday parlance, is often used to indicate the practice of a man taking multiple wives. In fact, however, it means having more than one spouse and can, therefore, refer to the practice of a woman taking multiple husbands. Polygyny—being married to more than one wife—is the correct term. This article, however, continues to use "polygamy" not least because it is the term used by the Constitutional Court in the *Polygamy Case* (2007).

³² LEV, *supra* note 23; see Anthony H. Johns, *Indonesia: Islam and Cultural Pluralism*, in ISLAM IN ASIA: RELIGION, POLITICS, AND SOCIETY 202 (John L. Esposito ed., 1987).

³³ June S. Katz & Ronald S. Katz, *The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems*, 23 AM. J. COMP. L. 653 (1975); June S. Katz & Ronald S. Katz, *Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited*, 26 AM. J. COMP. L. 309 (1978); Cammack, Young, & Heaton, *supra* note 3; Mark Cammack, *Islamic Law in Indonesia's New Order*, 38 INT'L & COMP. L. Q. 53 (1989); Butt, *supra* note 20.

In the face of widespread protest from Muslim groups, the government significantly amended the bill. The Marriage Law, as enacted in 1974, preserves the religious courts' jurisdiction to decide marriage law disputes between Muslims. The Law declares that marriages will be valid if performed in accordance with the religious law of the parties, presumably meaning that the various religious laws and customs governing marriages in Indonesia, including Islamic marriage law, continue "as is," provided that they are consistent with the Marriage Law.³⁴

In this regard, the Marriage Law did not do away entirely with polygamy. It did, however, make entering into a valid state-recognised polygamous marriage legally difficult. It requires a man who wishes to marry polygamously to first obtain consent from a religious court. Article 4 of the Marriage Law declares that judicial permission is not to be granted unless:

- 1) the man's current wife or wives have agreed to the marriage;
- 2) he guarantees to, and can in fact, provide the necessities of life for his wives and their children; and
- 3) he can and will act justly towards his wives and children.³⁵

In addition, the man's current wife or wives must:

- 1) be unable to perform her duties as a wife;
- 2) suffer from physical defects or an incurable illness; or
- 3) be unable to bear children.³⁶

A polygamous marriage concluded without judicial consent is considered to have never taken place, leaving the man open to fines and imprisonment under the Indonesian Criminal Code.³⁷

Research conducted soon after the passage of the Marriage Law showed, however, that many religious court judges ignored the government's attempt to restrict polygamy, resolute that the state lacked authority to

³⁴ Undang-Undang No. 3019, Th. 1974 Tentang Perkawinan, art. 2(1), [Law No. 3019, Year 1974 on Marriage] (Jan. 2, 1974) [hereinafter Marriage Law]; *see, e.g., id.* art 7(1) (setting the minimum age for marriage at nineteen for males and sixteen for females, and breach of this provision will render the marriage invalid, regardless of the religions of the parties).

³⁵ Marriage Law, art. 4(1).

³⁶ *Id.* art. 4(2).

³⁷ Undang-Undang Hukum Pidana, art. 279 [Law on Criminal Code] [hereinafter Criminal Code].

interfere with Islamic law.³⁸ These judges were said to allow polygamous marriage without determining whether the Marriage Law's requirements had been met.

The Soeharto government responded to this perceived recalcitrance by bringing the religious courts, and their judges, more squarely under its control. First, from the late 1970s, religious court decisions were made subject to judicial "supervision" by the Supreme Court through the formal appeals process.³⁹ The Supreme Court could, therefore, overturn decisions of religious courts which ignored the Marriage Law. This was said to have increased compliance with the Marriage Law because religious court judges feared reversal on appeal if they did not frame their decisions with reference to the state law. Second, the procedures for recruiting and training religious court judges were overhauled. Prior to 1989, religious court judges had been part-time locals, recruited largely on the basis of their Islamic credentials — particularly their ability to read Arabic and their knowledge of key *fiqh* literature. Under the 1989 Religious Courts Law,⁴⁰ they are now employed as full-time career judges, regularly transferred to other religious courts around the archipelago, and required to undergo academic training, including training in secular law.⁴¹

Finally, and perhaps most importantly, the government produced within the *Kompilasi* codified Islamic law doctrine on marriage, inheritance, and gifts, casting the *Kompilasi* as a comprehensive guide for religious court judges to use in their cases.⁴² The *Kompilasi*, assembled by the Supreme Court and the Religious Affairs Ministry, is said to be the product of extensive consideration of thirty-eight *fiqh* texts, interviews with 166 *ulama* and comparative studies of the Islamic law applied in Egypt, Tunisia, and Morocco.⁴³ It adds very little to the Marriage Law on the issue of polygamy. However, unlike the Marriage Law—which does not set out Islamic marriage law principles and which applies to all citizens regardless of their religion or beliefs—the *Kompilasi* purports to contain the Islamic law on marriage that Indonesian religious courts should apply.⁴⁴ Before the

³⁸ Mark E. Cammack, *The Indonesian Islamic Judiciary*, in *ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS* 146 (R. Michael Feener & Mark E. Cammack eds., 2007).

³⁹ *Id.* at 154-55.

⁴⁰ Law No. 7 of 1989 on the Religious Courts.

⁴¹ Cammack, *supra* note 38, at 161-62.

⁴² M.B. HOOKER, *INDONESIAN ISLAM SOCIAL CHANGE THROUGH CONTEMPORARY FATAWÁ* 23 (2003); Butt, *supra* note 20.

⁴³ Ahmad Mawardi, *Socio-Political Background of the Enactment of Kompilasi Hukum Islam di Indonesia* (Master's Thesis) 13-22 (1998).

⁴⁴ General Elucidation, *Kompilasi*. Indeed, the Marriage Law mentions "Islam" only twice in its text in provisions that do not establish substantive rules.

issuance of the *Kompilasi*, religious court judges could apply their own particular understanding of Islamic doctrine governing marriage by pointing to Article 2(1) of the Marriage Law, which provides that marriage is valid if performed in accordance with the parties' religious laws. However, since the issuance of the *Kompilasi*, religious court judges should refer exclusively to the *Kompilasi*.

The *Kompilasi* offers two important benefits for the state. First, the *Kompilasi*'s restrictions on polygamy are implicitly cast as being imposed by Islamic law, not by the state, as with the Marriage Law. Against claims that the government breaches Islamic law by limiting the circumstances in which polygamy is permitted, the government can point to the *Kompilasi*, claiming that it is a world-standard compilation of Islamic law devised by experts and based on *fiqh*. Second, the central government has denied sources of Islamic law, such as *fiqh*, direct legal authority; Islamic rules on marriage remain contingent upon their recognition by the state through the *Kompilasi*.

B. *The Kompilasi in Practice*

Soon after the *Kompilasi*'s enactment many religious court judges began referring almost exclusively to it, rather than *fiqh*, in their judgments.⁴⁵ The result was that they were said to turn down most polygamous marriage requests, declaring that it was impossible to be fair and just to more than one wife.⁴⁶

The "secularization" of the Islamic judiciary and the *Kompilasi* has not, however, settled the contest over polygamy between Islam and the state. There is some evidence, albeit scant, that religious court judges have resumed endorsing polygamous marriages by primarily referring directly to *Syariah* sources rather than the *Kompilasi* or the Marriage Law. From an examination of Surabaya religious court decisions from 2003-2005, Hooker observed that the court would generally permit a polygamous marriage if presented with three pieces of documentary evidence:

- 1) a statement of income from the husband,
- 2) a signed statement that he can provide for his current and future wives, and
- 3) a written statement that the second wife was fully aware of potential problems and risks and promised to be kind to the first wife.⁴⁷

⁴⁵ Cammack, *supra* note 33, at 72-73.

⁴⁶ *Id.* at 73.

⁴⁷ HOOKER, *INDONESIAN SYARIAH*, *supra* note 27, at 12-13.

This evidence is far less than the Marriage Law and the *Kompilasi* require. If the Marriage Law were followed to its letter, the man must also produce evidence of his existing wife's or wives' inability to "perform her duties as a wife" or bear children, or "physical defects" or "incurable illness."⁴⁸ Nevertheless, the Surabaya courts would usually approve the marriage, declaring it necessary to prevent the husband from being tempted into extra-marital sex. To justify this decision, the courts would often cite Chapter 4, verse 3 of the Quran:

[M]arry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly [with them]; then only one, or that which your right hands possess. That will be more suitable, to prevent you from doing injustice.⁴⁹

Hooker warns that these cases should not be considered representative; they cannot be taken to indicate that all 300 or so of Indonesia's religious courts have reverted to direct sources of Islamic law.⁵⁰ Estimates suggest, however, that religious courts across Indonesia were, at time of writing, approving a high proportion of applications for permission to marry polygamously. According to *Hukumonline*, Indonesia's leading source of legal news, 1,016 applications for permission to marry polygamously were lodged in religious courts in 2004, of which 800 were approved; in 2005, 186 were approved from 989 applications; and in 2006, 776 were approved from 1,148.⁵¹ While this seems quite a small number given Indonesia's population, the proportion of approvals may support claims of a return to a relatively permissive approach to polygamy.⁵²

⁴⁸ Marriage Law, *supra* note 35, art. 4(2).

⁴⁹ Holy Quran 4:3.

⁵⁰ *Id.*

⁵¹ *Mengungkap sisi gelap poligami*, HUKUMONLINE, Dec. 23, 2006 <http://www.hukumonline.com/berita/baca/hol15941/mengungkap-sisi-gelap-poligami> (last visited Feb. 6, 2010); *Syarat Poligami akan Diperkuat*, HUKUMONLINE, Feb. 19, 2009 <http://www.hukumonline.com/berita/baca/hol21230/syarat-poligami-akan-diperkuat> (last visited Feb. 6, 2010).

⁵² Nina Nurmila, *Negotiating Polygamy in Indonesia: Between Islamic Discourse and Women's Lived Experiences*, in *INDONESIAN ISLAM IN A NEW ERA: HOW WOMEN NEGOTIATE THEIR MUSLIM IDENTITIES* 23, 32 (Susan Blackburn, Bianca J Smith, & Siti Syamsiyatun eds., 2008). If the number of unregistered, informal, polygamous marriages is included, then the incidence of polygamous marriage is probably far higher. According to Indonesian legal aid for women (LBH Apik) statistics, about half are conducted under Islamic or customary law and not reported, or are reported using a false identity at the Religious Affairs Office. *Mengungkap sisi gelap poligami*, HUKUMONLINE, Dec. 23, 2006, <http://www.hukumonline.com/berita/baca/hol15941/mengungkap-sisi-gelap-poligami> (last visited Feb. 6, 2010).

C. *The Parties' Arguments in the Polygamy Case (2007)*

The applicant, a man named M Insa, objected to provisions in the Marriage Law that he claimed prevented him from engaging in polygamy. He had gone to the Religious Affairs Office expecting to be able to marry polygamously, but officials rejected his request because he had not obtained judicial consent. Dissatisfied, he applied to the Constitutional Court for a review of the Law.

Insa argued before the Court that several aspects of the Marriage Law contradicted Islamic law, including: the provision in Article 3(1) declaring that marriages should be, in principle, monogamous; the various requirements that men must meet in order to obtain judicial consent for polygamy; and the invalidation of unapproved polygamous marriages.⁵³

In support of his claim, Insa made several non-constitutional arguments. These included that restricting polygamy increased the divorce rate, adultery, and the tendency of widows to become sex workers. The Constitutional Court dismissed these as unsubstantiated claims, pointing out that research had shown the contrary, and that, in fact, factors other than restrictions on polygamy were probably at play.⁵⁴

Insa's two main constitutional arguments were as follows. First, Article 28B(1) of the Constitution states that every person has the right to create a family and to continue their lineage through a valid marriage. He claimed that restricting polygamy impeded the exercise of this right. The Court rejected this argument, declaring that the Marriage Law did not prohibit Muslims from marrying.⁵⁵ The Law even allowed them to marry polygamously—it merely imposed preconditions to ensure that the purposes of marriage were met.⁵⁶

Second, Article 28E(1) of the Constitution gives citizens freedom to embrace a religion and to worship in accordance with that religion. Insa

⁵³ *Polygamy Case*, *supra* note 6, para. 3.1. Insa did not attempt to challenge the constitutionality of the *Kompilasi*, even though, as mentioned, it requires judicial consent for polygamous marriage and imposes the same restrictions as the Marriage Law. As the *Kompilasi* is a Presidential Decree, it falls outside of the jurisdiction of the Constitutional Court. Only the Supreme Court has jurisdiction to hear challenges against Decrees, and even then can only assess the validity of Decrees as against statutes and not the Constitution.

⁵⁴ *Id.* para. 3.16.

⁵⁵ This argument attracted criticism during the trial. One Human Rights Commission Commentator who provided testimony said: "You can only use the right to create a family once. You cannot use it over and over." *Menteri Agama: Poligami Bukan Hak Asasi Manusia*, HUKUMONLINE, June 28, 2007.

⁵⁶ *Polygamy Case*, *supra* note 6, para. 3.18.2.

argued that restricting polygamy was tantamount to breaching Islamic law. Below, I discuss the Court's treatment of this second argument. Before doing so, I turn to some of the arguments that the government put before the Court in support of the constitutionality of the Marriage Law.

Included in the case file is an opening statement from Minister for Religious Affairs HM Maftuh Basuni. He began by observing that Article 28J(2) of the Constitution allows the state to impose limits on the human rights that the Constitution provides and that, even though the Constitution contains a right to marriage, it contains no right to polygamous marriage.⁵⁷ In any event, the Minister asserted, the Marriage Law does not prohibit polygamy.⁵⁸

The Minister then argued that in fact, Islam favoured monogamy over polygamy. After referring to Chapter 4 verse 3 of the Quran, set out above, he cited Chapter 4 verse 129: "You are never able to be fair and just as between women, even if it is your ardent desire; but turn not away (from a woman) altogether, so as to leave her hanging. If you come to a friendly understanding, and practice self-restraint, God is Oft-forgiving, Most Merciful."

The Minister claimed, as have some Indonesian scholars,⁵⁹ and scholars elsewhere,⁶⁰ that 4:129 effectively prohibits polygamy altogether because it declares that being fair and just towards two or more wives is impossible. Thus, contrary to Insa's contention, Islamic law was therefore entirely consistent with the Marriage Law's emphasis on monogamy.

Further, the government claimed in a written statement submitted to the Court, that verse 4:3, viewed in its historical context, does not permit polygamy without qualification. This reasoning, apparently based on the arguments of moderate scholars, is grounded in Quranic historical context. The provisions of the Quran relating to polygamy were revealed in the seventh century, soon after the Uhud war. Many men were killed in the war, leaving multitudes of widows and fatherless children. At that time, it seemed reasonable for the surviving men to support not only their own

⁵⁷ *Id.* para. 2.2.1; Article 28J(2) states: "in the enjoyment of their rights and freedoms, each person is obligated to submit to limits determined by law with the sole purpose of guaranteeing recognition and respect for the rights of others."

⁵⁸ *Polygamy Case*, *supra* note 6, para. 2.2.1.

⁵⁹ Nurmila, *supra* note 52, at 21.

⁶⁰ See H.A. Jawad, *Women and the Question of Polygamy in Islam*, 35 ISLAMIC Q. 181, 184-85 (1991); Mansoor Moaddel, *Religion and Women: Islamic Modernism Versus Fundamentalism*, 37 J. FOR SCI. STUD. RELIGION 108, 116 (1998); Amira Mashhour, *Islamic Law and Gender Equality - Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 569-70 (2005); JAMILA HUSSAIN, *ISLAM: ITS LAW AND SOCIETY* 87 (2d ed. 2004).

wives and children, but also those of their fallen comrades. Marriage was seen as one way to formalise this.⁶¹ Viewed in this context, the government contended that the Quranic provisions on polygamy aimed to ensure that men treated their “adopted” wives and orphans fairly—for example, by not misusing any money or inheritance they might have obtained when taking on the extra wives and children.⁶² After explaining this historical context, the government concluded that under Islam, “. . . in theory and practice, polygamy is not something that must be done; rather it is a door used in emergencies.”⁶³

D. *The Court’s Decision in the Polygamy Case (2007)*

Because the applicant had employed arguments based on Islamic law, the Constitutional Court announced that it would consider the Islamic teachings (*ajaran Islam*) on polygamy before addressing the constitutionality of the contested provisions of the Marriage Law.⁶⁴ The Court began by setting out several verses of the Quran in Arabic, including 4:3 and 4:129, with Religious Affairs Department-sanctioned Indonesian translation. The Court pointed out, as had expert witnesses during case hearings, that when Islam was revealed through the Prophet Mohammad, polygamy had been widely practiced for centuries throughout the world. Polygamy was not, therefore, created by Islam. On the contrary, in an effort to protect the dignity of women, Islam attempted to bring some gradual order (*menertibkan*) to polygamy by ensuring that polygamy did not occur arbitrarily on the whim of men.⁶⁵

Again referring to expert testimony heard during the hearings, the Court then discussed the purpose and nature of marriage using terminology from the Quran and adopted in the *Kompilasi*. According to the Court, the purpose of marriage is to “make the heart peaceful (*sakinah*).” This can be preserved if partners maintain *mawaddah*—that is, in the words of the Court, they “love one another without hoping for anything in return, but only because of their desires to make sacrifices by giving happiness to the other partner.”⁶⁶ This statement strongly resembles Article 3 of the *Kompilasi*, which states that the purpose of marriage is to “create a home which is *sakinah*, *mawaddah* and friendly (*rahmah*).” Without mentioning the

⁶¹ *Polygamy Case*, *supra* note 6, para. 2.2.2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* para. 3.15.

⁶⁵ *Id.* para. 3.15.1.

⁶⁶ *Id.* para. 3.15.2.

Kompilasi, the Court declared that maintaining *mawaddah* and *sakinah* underlie the requirement under Islamic law that men seek permission from existing wives before entering into another marriage.⁶⁷

The Court then announced that most *ulama* (Islamic scholars) agree that polygamy is *mubah* (neither “good” nor “bad”) or *halal* (permitted) under Islamic Law, provided that the man meets various conditions, which broadly correspond with those imposed in the Marriage Law. These include, being just to one’s wives and sharing (*al-qisth*)—that is, providing for existing wives, prospective wives, existing children and future children that come from the polygamous marriage.⁶⁸ If the man cannot satisfy these requirements, then according to the *ulama* polygamy can become *makruh* (objectionable, but not prohibited) under Islamic law. Whether these requirements have been met depends on the particular circumstances of the parties—matters that, according to the *ulama*, can legitimately be determined by statute and through courts.⁶⁹ The Court continued:

[T]he state, as the highest organization in a community, created on the basis of agreement, does not only have the authority to regulate (*bevoeg te regel*) but also the obligation to regulate, (*verplicht te regel*) to guarantee the realization of justice, through laws that fall within its jurisdiction and which are upheld through the courts. This accords with the *fiqh* cited by the expert Prof. Dr. Hj. Huzaemah T. Yanggo The state (*ulil amri*) has the authority to determine the requirements which must be fulfilled by citizens who wish to enter into a polygamous marriage in the interests of the public benefit, particularly to achieve the goals of marriage—that is, to create a happy and everlasting family (household) based on the Almighty God, which is identical to the meaning of a family which is *sakinah*, as set out above.⁷⁰

Finally, the Constitutional Court pointed out that, according to Islamic law, polygamy is something that humans can regulate, at least to some extent. The Court distinguished between acts of devotion or worship of God (*ibadah*) and relations between humans (*mu’amalah*). *Ibadah* are, the Court stated, covered in some detail in the Quran and considered immutable. Humans are not permitted to interfere with *ibadah*. On the other hand, the

⁶⁷ *Polygamy Case*, *supra* note 6, para. 3.15.2.

⁶⁸ *Id.* para. 3.15.4.

⁶⁹ *Id.* paras. 3.15.3-3.15.4.

⁷⁰ *Id.* para. 3.15.4.

Quran refers to mu'amalah in less detail, leaving its regulation largely to humans.⁷¹ Polygamy does not fall into the category of ibadah, the Court observed, so Islam does not prohibit the state from imposing preconditions upon its exercise.⁷²

IV. THE RELIGIOUS COURTS LAW CASE (2008)⁷³

In this case, the constitutionality of Article 49(1) of the Religious Courts Law was challenged. Article 49(1) sets out the matters over which Indonesia's religious courts have jurisdiction.⁷⁴ The religious courts have the duty and authority to investigate, decide and resolve cases at first instance between Muslims in matters of:

- a) marriage (*Perkawinan*)
- b) succession (*Waris*)
- c) gifts (*Hibah*)
- d) bequeaths (*Wakaf*)
- e) payment of alms (*Zakat*)
- f) charitable gifts (*Infaq*)
- g) gifts to the needy (*Shadaqah*)
- h) Syariah economic matters (*Ekonomi syari'ah*).

The applicant, a young Islamic school (*Madrasah*) graduate from Serang, Banten, argued that Islam required Muslims to abide by Islamic law in its entirety, and not merely those areas of law listed in Article 49(1). Adherence to Islam requires Muslims to be subject to Islamic criminal law, including the penalty of hand amputation for theft, he claimed.⁷⁵ The applicant argued that by limiting the matters of Islamic law that religious courts could apply and enforce, Article 49(1) breached the constitutional rights to religious freedom of the applicant and the entire Indonesian Muslim community.⁷⁶

⁷¹ *Id.* para. 3.15.6.

⁷² *Id.*

⁷³ *Religious Courts Case*, *supra* note 8.

⁷⁴ Undang-Undang No. 7, Th. 1989 Peradilan Agama, art. 49(1) (Dec. 29, 1989) [hereinafter Religious Courts Law].

⁷⁵ *Religious Courts Case*, *supra* note 8, para. 2.1.

⁷⁶ *Id.*

A. *The Court's Decision in the Religious Courts Law Case (2008)*

This case was ultimately decided on grounds unrelated to Islam. The Court declared that the applicant had asked it for a result it could not provide—namely, to add to the jurisdiction of the religious courts and to invalidate Article 49(1). The Court declared that it lacked jurisdiction to entertain the former request. The Court stated it was merely a “negative legislature”—it has power only to invalidate legislation that it finds to be inconsistent with the Constitution. It was not a “positive legislator.” Only the elected national legislature could add to, or otherwise amend, legislation.⁷⁷

As for the second request, the Court held that the constitutional basis for Article 49(1) was entirely sound. The Court pointed to Articles 24(2) and 24A(5) of the Constitution, which formally establish the religious courts as a branch of the Indonesian judiciary and state that their jurisdiction is to be “stipulated by legislation.”⁷⁸ Because the Constitution gives the legislature unbridled discretion to determine the religious courts’ jurisdiction, provided that it does so by statute, Article 49(1), therefore, fell well within the national parliament’s legislative powers granted by the Constitution. In any event, as one Constitutional Court Justice Muhammad Alim observed during one of the case hearings, a finding of invalidity could hardly have been in the applicant’s best interests. If the Court found that Article 49(1) was invalid, then revoking it would leave the religious courts with no jurisdiction at all, and hence no function.⁷⁹

Arguably, these responses were sufficient to defeat the application. Nevertheless, answering the applicant’s argument that the Indonesian state had a constitutional obligation to apply and enforce the religious laws of its citizens, the Court declared:

[T]he Court is of the opinion that the Applicant’s argument does not accord with the understanding of the relationship between religion and the state [in Indonesia]. Indonesia is not a religious state which is based only on one religion; but Indonesia is also not a secular state which does not consider religion at all. It does not hand over all religious affairs entirely to individuals and the community. Indonesia is a state which is

⁷⁷ *Id.* para. 3.16; Risalah Sidang Perkara Nomor 16/PUU-VI/2008, Acara Pemeriksaan Perbaikan Permohonan (II), Jakarta, 31 July 2008, p. 7.

⁷⁸ *Religious Courts Case*, *supra* note 8, para. 3.17.

⁷⁹ Risalah Sidang Perkara Nomor 16/PUU-VI/2008, Acara Pemeriksaan Perbaikan Permohonan (II), Jakarta, 31 July 2008, p. 6.

based on the Almighty God. The state protects [the right of] all religious adherents to carry out the teachings of their respective religions. In relation to the philosophy of *Pancasila*, national law must guarantee the integrity of the ideology and the integration of the nation, and develop religious tolerance based on justice and civility. National law, therefore, can be an integrating factor which is a glue and unifier of the nation. The state's service to citizens does not depend on whether adherents to a particular religion, ethnic group or race are in the majority or minority. If the issue [in contention is whether] Islamic law is . . . a source of law, it can be said that Islamic law is indeed a source of national law. But it is not the only source of national law, because in addition to Islamic law, customary law, western law and other sources of legal tradition are sources of national law. Therefore, Islamic law can be one of the sources of material for law as part of formal government laws. Islamic law, as a source of law, can be used together with other sources of law, and, in this way, can be the material for the creation of government laws which are in force as national law.⁸⁰

A more direct statement made by Constitutional Court Justice Muhammad Alim during case hearings about the position of Islam within the state is also worthy of note:

[Y]ou must understand that in this Republic of Indonesia, the highest law is the 1945 Constitution, not the Quran. As Muslims, we consider the Quran to be the highest law but . . . the national consensus is that the Constitution is the highest law.⁸¹

V. CONCLUSION

The Indonesian state's attempts to limit the public space it allocates to Islamic law continue to be contested, including now in Indonesia's Constitutional Court. In the *Religious Courts Case*, the Constitutional Court has acknowledged the inherent conflict between the authority of the state and Islam, but has resolved the conflict in favour of the state. The Court adopted an approach that, for the most part, is consistent with that taken by

⁸⁰ *Religious Courts Case*, *supra* note 8, para. 3.18.

⁸¹ Risalah Sidang Perkara Nomor 16/PUU-VI/2008, Acara Pemeriksaan Perbaikan Permohonan (II), Jakarta, 31 July 2008, p. 7, per Muhammad Alim J.

the national legislature and executive: Islamic law is not formally applicable or enforced, except for the fields over which the religious courts have jurisdiction, which include marriage, divorce, inheritance, trusts, gifts, and Islamic finance. Importantly, the traditional texts of Islamic law are not the direct sources of the rules to be applied.

In the *Polygamy Case*, the Court sought to justify the government's restriction of unbridled polygamy by reference to Islamic law, including the Quran. The Constitutional Court's approach resembles the state's strategy adopted through the issuance of the *Kompilasi*. The *Kompilasi* did not merely set out the parameters for the operation of Islamic law. It did not, for example, declare simply that the Islamic courts should apply Islamic family law as propounded by a particular school of Islamic law. Rather, the *Kompilasi* set out, exhaustively, the principles of Islamic law that the state recognises and enforces. The very act of "engaging" with Islamic law and purporting to compile it into a law of the state denied traditional sources of Islamic law independent potency. Furthermore, despite its ruling in the *Religious Courts Case*, the Constitutional Court in the *Polygamy Case* was not content to declare merely that state law trumps Islamic law. Rather, it "engaged" with arguments on Islamic law, declaring, for example, that Islamic law was not entirely permissive of polygamy and permitted the state to play a role in non-*ibadah* matters such as these.⁸² The Court eschewed conservative interpretations of Islam permitting polygamy, and embraced the more moderate and inclusive interpretations of Islamic law generally favoured by the state and many Indonesian Muslims. By incorporating such a discussion within its decision the Court has solidified both the state's predominance over Islam and the preferred interpretations of Islam by the state and less conservative Muslim groups.

For now, the Court appears to have closed itself off as a site of contest between the semi-secular state and Islam, at least over the constitutional right to freedom of religion. In this author's view, the treatment of Islam by the state and the Constitutional Court is defensible for practical and democratic reasons. Some commentators have signaled the so-called "santrification" of Indonesia—that is, an increase in outward support for conservative Islam, accompanied by support for literal interpretations of the traditional sources of Islamic law.⁸³ And, particularly since the 1990s, the rise of radical and sectarian tendencies has consumed much of the

⁸² *Polygamy Case*, *supra* note 6, paras. 3.15.3-3.15.4.

⁸³ Sally White & Maria Ulfah Anshor, *Islam and Gender in Contemporary Indonesia: Public Discourses on Duties, Rights and Morality*, in EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA 137, 138 (Greg Fealy & Sally White eds., 2008).

scholarship and commentary on Indonesian Islam. This attention can be attributed, at least in part, to the outbreak of unrest between Muslim and Christian groups in East Indonesia and increasing terrorism, including raids by paramilitary groups such as the Islamic Defenders' Front.⁸⁴ Many scholars, however, agree that a large majority of Indonesian Muslims are moderate and tolerant.⁸⁵ Although holding a strong sense of Islamic identity and ritually observing the five pillars of Islam, these Muslims also accept the multitude of local spiritual observances not necessarily inspired by Islam.⁸⁶

Most Indonesians, therefore, are unlikely to favour a "classic" or "rigid" version of Islamic law, nor the expansion of the fields of Islamic law enforced by the state.⁸⁷ Thus, there is arguably little public and political support for a greater role for Islam outside of the private sphere. This seems to be borne out in the lack of parliamentary representation for political Islam. Although Islamic parties hold seats in Indonesia's national parliament, the majority parties are not associated with Islam and most of the so-called Islamic parties are associated with moderate Islamic organisations.

While some smaller Islam-based parties might be vocal in their calls for a greater role for Islam, it seems fair to conclude that they enjoy very little support in Indonesia's legislature. For example, proposals to insert a constitutional amendment resembling the Jakarta Charter in 1999-2002 were ultimately voted down by an overwhelming majority of Indonesia's People's Consultative Council.⁸⁸ Islamic parties received only fourteen percent and seventeen percent of the vote in the 1999 and 2004 general elections respectively.⁸⁹ Results of the 2009 general elections, in which the vote for parties associated with Islamic aspirations declined significantly, appear to lend support and currency to these observations.

In this context, it may be that allocating a greater role for Islamic law within the Indonesian legal system would misrepresent the wishes of most Indonesian Muslims, who are more comfortable with a less conservative and more syncretic variety of Islamic law. Indeed, for many Indonesian

⁸⁴ Greg Fealy & Sally White, *Introduction in EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA 1, 1* (Greg Fealy & Sally White eds., 2008).

⁸⁵ See CLIFFORD GEERTZ, *THE RELIGION OF JAVA* (1960).

⁸⁶ M. C. Ricklefs, *Religion, Politics and Social Dynamics in Java: Historical and Contemporary Rhymes*, in *EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA* 115 (Greg Fealy & Sally White eds., 2008). Ricklefs points out that, although there appears to be increasing puritan, anti-feminist, intolerant, and anti-local Islamic forces developing in some parts of Indonesia, there are equally strong forces opposed to such versions of Islam. *Id.* at 133-34.

⁸⁷ Simon Butt, *Indonesia's Draft Criminal Code: Can Legal Diversity Exist Within a Single National Law*, 28 *ALTERNATIVE L. J.* 306, 307 (2003).

⁸⁸ Lindsey, *supra* note 5, at 269-70.

⁸⁹ ASSYAUKANIE, *supra* note 2, at ix.

Muslims, applying rules of “pure” Islamic law might involve the imposition of new rules. Arguments along these lines were said to have inspired the famous Dutch *adat* law scholars van Vollenhoven and ter Haar,⁹⁰ who agreed with Hurgronje that *adat* should be the primary source of law for indigenous Indonesians,⁹¹ though for different reasons than those that motivated the reception theory. They argued that *adat* should predominate so as to reflect the legal realities of life in Indonesia, not to suppress the political potential of Islam.⁹² Perhaps then the “new” reception theory is a fair compromise between the state and conservative Islam and the Constitutional Court has reflected the desires of not only the state, but also of the majority of Indonesian Muslims.

⁹⁰ See Ali, *supra* note 25, at 193.

⁹¹ FEENER, *supra* note 9, at 69-72.

⁹² Mark Cammack, *Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?*, 63 *INDONESIA* 143, 146 n.14 (1997).