

Washington International Law Journal

Volume 21
Number 1 *Special Issue: Islamic Law and
Islamic Legal Professionals in Southeast Asia*

1-1-2012

The Islamic Legal System in Indonesia

Mark E. Cammack

R. Michael Feener

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Mark E. Cammack & R. M. Feener, *The Islamic Legal System in Indonesia*, 21 Pac. Rim L & Pol'y J. 13 (2012).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol21/iss1/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

THE ISLAMIC LEGAL SYSTEM IN INDONESIA

Mark E. Cammack[†] and R. Michael Feener[‡]

Abstract: This chapter describes the historical evolution and current structure of Indonesia's Islamic legal structure. The current system of Islamic courts in Indonesia is traceable to a late nineteenth century Dutch decree establishing a system of Islamic tribunals on the islands of Java and Madura. The decree created collegial courts in which a district-level religious official called the *penghulu* acted as chair and was assisted by member judges chosen from the local religious elite. The courts were authorized to decide matrimonial and inheritance disputes, but execution of the courts' decisions required an executory decree from the civil court. The system was expanded to south Kalimantan in the 1930s, but at the same time the jurisdiction over inheritance was transferred to the civil courts. At independence, the Islamic judiciary was placed under the authority of the Ministry of Religion, which used executive powers to expand the system to other parts of the country. It was not until 1989 with the passage of the Religious Judicature Act that the existence of the courts was guaranteed by statute. The 1989 Act also vested the courts with enforcement powers and mandated changes in the organization and staffing of the courts modeled after the parallel system of civil courts. The substantive jurisdiction of the courts has also been expanded to include inheritance cases as well as a so far little-used power to decide cases involving economic transactions based on Islamic law. In 2004, the administrative supervision of the Islamic judiciary was transferred from the Ministry of Religion to the Supreme Court. In 1999, the province of Aceh was granted special autonomy status that included the authority to enforce Islamic law in areas beyond the established jurisdictions of Shari'a courts in the rest of the country. These developments add a new dimension to the institutional structures for the practice of Islamic law in the country.^{††}

I. BACKGROUND

Indonesia is a sprawling archipelagic state of some 17,000 islands, more than 800 of which are permanently inhabited, stretching more than 3,000 miles from Sumatera in the west to New Guinea in the east. The archipelago has been home to a number of locally powerful states from the middle of the first millennium, but the territory that comprises the current Republic of Indonesia was never under a single administrative authority prior to the colonial era.¹ While Indonesian nationalists often speak of “300

[†] Professor of Law at Southwestern Law School. The authors wish to thank the staff members and editors of the *Pacific Rim Law & Policy Journal* for assistance with editing and sources. We express special thanks to Marek E. Falk who spent countless hours preparing the manuscript for publication.

[‡] Research Leader of the Religion and Globalization cluster at the Asia Research Institute and Associate Professor of History at the National University of Singapore.

^{††} In accordance with the policies of the *Pacific Rim Law & Policy Journal*, foreign words that have entered common English usage will not be italicized. Foreign words that are not in common usage will be italicized. Arabic words will not use diacritical marks such as macrons. However, apostrophes and reverse apostrophes will be employed to signal the letters *hamza* and *'ayn*, respectively.

¹ M.C. RICKLEFS, A HISTORY OF MODERN INDONESIA SINCE C. 1200, 18-24 (3d ed. 2001).

years of Dutch colonial domination,” it was not until the early years of the twentieth century that the Dutch were able to extend their authority to all of what is today Indonesia.²

Because of its location on the maritime trade route between China in the east and the Subcontinent and the Middle East on the west, the Indonesian archipelago has absorbed a wide variety of ideas and practices from outside the region. South Asian religions provided the basis for the first states in the region and remained the primary source of supra-local power in Java and Sumatera through the thirteenth or fourteenth centuries of the Common Era.³ Muslim traders traveled through the region from the early centuries of Islam, and there is evidence of the existence of a Muslim kingdom in northern Sumatera at the end of the thirteenth century CE.⁴ The last of the great pre-Islamic Indic kingdoms collapsed in the first part of the sixteenth century,⁵ and when the political center of gravity on Java moved back inland from the north coast port cities to the wet rice regions of the interior, power there also came to be held in Muslim hands.⁶

While some sources note the existence of Islamic legal institutions of various types in some of these early Southeast Asian Muslim states, information about the actual administration of Islamic law in island Southeast Asia before the colonial period is scarce and unsystematic.⁷ While there is scattered information of Islamic legal institutions in Dutch records, those materials have not generally been collected or analyzed. Despite the general dearth of information, however, the history of the current system of Islamic tribunals is well known. The origin of Indonesia’s Islamic courts can be traced to a Dutch Royal Decree promulgated in 1882 that authorized a system of Islamic tribunals for the islands of Java and neighboring Madura.⁸ The courts were formally designated as

² *Id.* at 187-89.

³ *Id.* at 6, 21-22.

⁴ *Id.* at 4.

⁵ *Id.* at 41.

⁶ *Id.* at 47-50.

⁷ There is not yet any comprehensive survey of pre-colonial Islamic legal institutions across the Indonesian Archipelago as a whole. Focused studies of particular places and periods are, however, available that do give some sense of the range of earlier developments in various parts of the region. *See, e.g.,* Martin van Bruinessen, *Shari’a court, tarekat and pesantren: Religious Institutions in the Banten Sultanate*, 50 *ARCHIPEL* 165, 165-99 (1995); AMIRUL HADI, *ISLAM AND STATE IN SUMATRA: A STUDY OF SEVENTEENTH-CENTURY ACEH 161-67* (Wadad Kadi & Rotraud Wielant eds., 2004); CLAUDE GUILLOT & LUDVIK KALUS, *LES MONUMENTS FUNÉRAIRES ET L’HISTOIRE DU SULTANAT DE PASAI À SUMATRA* 107-09 (2008).

⁸ Stb. 1882, No. 152.

“*priesterraden*” (priests’ councils),⁹ a label that reflected the Dutch penchant for understanding Islamic institutions according to familiar Christian categories.¹⁰ In everyday usage, however, the courts were called “*raad agama*” (religious courts).¹¹ This label was also inaccurate, as the word “*agama*” refers to religion generally and not Islam. The name caught on, however, and its Indonesian equivalent, *pengadilan agama*, was eventually adopted as the official designation of Islamic courts everywhere in the country except Aceh.

The 1882 Decree mandated that a *raad agama* be established in every district in which there was a civil court or *landraad*.¹² The substantive jurisdiction of the courts was limited to matrimonial cases and inheritance.¹³

The 1882 Decree applied only on Java and Madura.¹⁴ In the 1930s the Dutch carried out a reform of the Islamic judiciary that both expanded the system of Islamic courts and also narrowed their powers.¹⁵ The reform created additional first instance courts, called *kerapatan qadi*,¹⁶ in southern Borneo.¹⁷ The 1930s reforms also resulted in the creation of the first Islamic appeals courts in the region: the Kerapatan Qadi Besar, located in the city of Banjarmasin, heard appeals from the newly established courts in Borneo (now Kalimantan), while appeals from the courts in Java and Madura were heard by the Mahkamah Islam Tinggi (Islamic High Court), initially located in Batavia but later moved to the Central Java city of Surakarta.¹⁸ Other changes, ostensibly designed to enhance the professionalism and independence of the courts, included the creation of the position of court clerk and provision for the payment of salaries to the court chair.¹⁹ The most important change related to the jurisdiction of Islamic tribunals. The regulations promulgated in the 1930s narrowed the powers of the Islamic

⁹ *Id.* art. 1.

¹⁰ DANIEL S. LEV, *ISLAMIC COURTS IN INDONESIA: A STUDY IN THE POLITICAL BASES OF LEGAL INSTITUTIONS* 13 (1972).

¹¹ *Id.* at 13-14.

¹² Stb. 1882, No. 152, art. 1.

¹³ Stb. 1835, No. 58; ZAINI AHMAD NOEH & ABDUL BASIT ADNAN, *SEJARAH SINGKAT PENGADILAN AGAMA DI INDONESIA* 32 (1983).

¹⁴ Stb. 1882, No. 152, art. 1.

¹⁵ LEV, *supra* note 10, at 17-30.

¹⁶ By the 1830s, the colonial administrators no longer understood Islamic institutions in terms of Christian categories, and the courts in Java were re-designated as “*penghulu* courts.” See *id.* at 18.

¹⁷ R. SUPOMO, *SISTEM HUKUM DI INDONESIA SEBELUM PRANG DUNIA II* 78-79 (1953).

¹⁸ LEV, *supra* note 10, at 117-20.

¹⁹ HARRY J. BENDA, *THE CRESCENT AND THE RISING SUN: INDONESIAN ISLAM UNDER THE JAPANESE OCCUPATION, 1942-1945*, 83-88 (1958).

courts by transferring jurisdiction to decide inheritance cases of Muslims to the civil courts.²⁰

The Dutch did not seek to regulate the administration of Islamic law beyond the territory of Java, Madura, and parts of Borneo. In other parts of the colony, the matter remained under the control of local authorities.²¹ While detailed information about the administration of Islamic law in these areas is scarce, one source has identified three general patterns. In some parts of the Indies, including Gayo, Alas, and Batak in North Sumatra; parts of south Sumatra; Bangka; Belitung; and Minahasa, there was a group of religious officials who attended marriages and performed other religious functions but did not adjudicate disputes.²² In these areas, disputes arising out of Muslim marriage and divorce were decided by either the Dutch courts or the native courts. Other areas, including Aceh, Jambi, Sambas, Pontianak, the east coast of Borneo, south Sulawesi, Ternate, and Ambon had separate Islamic tribunals staffed by judges called “*qadi*” (sometimes written “*kadi*” or “*kali*”) or “*hakim*.”²³ Finally, in the Minangkabau region of west Sumatra, religious issues were decided by an assemblage of customary, or *adat*, leaders and religious officials that was called the “Friday Council.”²⁴

When Indonesia achieved independence after World War II, the new state formally recognized the accumulated body of Dutch legislation, including the regulations of 1882 and 1937 that established Islamic tribunals in Java, Madura, and south Kalimantan.²⁵ The leaders of the new nation were divided on the issue of Islamic law and Islamic courts, and the status and survival of a separate system of Islamic tribunals was for many years uncertain.²⁶ A 1948 law called for the absorption of the Islamic courts into the civil courts, but because of the general state of chaos caused by the revolution, the law was never implemented.²⁷ By the time the first law on judicial organization was passed in 1951, the defenders of Islamic courts were able to mobilize enough clout both to prevent their elimination and to

²⁰ Stb. 1937, No. 638.

²¹ SUPOMO, *supra* note 17, at 73-74.

²² *Id.* at 73.

²³ *Id.* at 74. Examples of decisions by Islamic tribunals from south Sulawesi and Ternate can be found in 29 ADATRECHTBUNDELS: BEZORGD DOOR DE COMMISSIE VOOR HET ADATRECHT 37-201 (1928).

²⁴ SUPOMO, *supra* note 17, at 74.

²⁵ See UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [CONSTITUTION] Aug. 18, 1945, art. 2 [hereinafter CONSTITUTION] (stating that “[a]ll State Institutions and Laws shall continue in effect until new [Institutions and Laws] are created by statute”).

²⁶ LEV, *supra* note 10, at 63-75. For a discussion of the early history of Islamic courts in independent Indonesia by one of the key players in the process, see NOEH & ADNAN, *supra* note 13.

²⁷ LEV, *supra* note 10, at 64-65.

secure inclusion of language that would eventually serve as the basis for the creation of new courts in those parts of the country where they did not yet exist.²⁸ The 1951 statute did not expressly authorize the existence of Islamic courts, but stated that provision for the administration of Islamic justice would be made through a separate government regulation.²⁹ This became the basis for a program of unification and expansion that eventually resulted in the emergence of a nation-wide system of uniform Islamic courts.³⁰ The Ministry of Religion worked with local leaders to acquire control over existing Islamic tribunals and established a limited number of new courts by means of ministerial regulation.³¹ Finally, in 1957, the cabinet approved a government regulation (*peraturan pemerintah*) authorizing the formation of Islamic courts everywhere in the outer islands where they did not already exist.³² Patterned after the Royal Decree of 1882, the 1957 regulation authorized the establishment of Islamic courts wherever there were civil courts and granted the courts territorial jurisdiction co-extensive with the civil courts.³³

Suharto's New Order (1965-1998) was marked by a series of major changes to Indonesia's Islamic legal system. The first of these came in 1974 with the passage of the Marriage Act.³⁴ The Marriage Act assigned new functions to Islamic tribunals that greatly expanded the courts' caseload.³⁵ In response to the challenges presented by the Marriage Act, the Ministry of Religion undertook an ambitious program of expansion, restructuring, and

²⁸ *Id.* at 65-75.

²⁹ Act No. 1 of 1951, art. 1 (4).

³⁰ Mark Cammack, *Indonesia's Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?*, 63 *INDONESIA* 143, 147-48 (1997) [hereinafter Cammack, *Islamization*].

³¹ See LEV, *supra* note 10, 75-92 (describing the expansion of the Islamic judiciary).

³² Government Regulation Regarding the Creation of Islamic Courts in the Regions Outside of Java and Madura, Regulation No. 45 of 1957.

³³ *Id.* art. 1.

³⁴ The Marriage Act, Act No. 1 of 1974. For a concise overview of the 1974 law's major provisions, see Azyumardi Azra, *The Indonesian Marriage Law of 1974: An Institutionalization of the Shari'a for Social Changes*, in *SHARI'A AND POLITICS IN MODERN INDONESIA* 76, 76-95 (Arskal Salim & Azyumardi Azra eds., 2003).

³⁵ By far the most significant change to the functions of the Islamic courts made by the Marriage Act is the requirement that men wishing to divorce obtain judicial approval. Prior to the passage of the act, a Muslim husband could divorce his wife by simply declaring a repudiation. Under prior law, men were required to register their divorces with the Office of Religious Affairs (*Kantor Urusan Agama* or KUA), but the Islamic courts had no role in divorces initiated by men. The requirement of judicial authorization to divorce is not explicitly stated in the Marriage Act itself, but is contained in executive branch implementing regulations. See Government Regulation Regarding Implementation of Law No. 1 of 1974, Regulation No. 9 of 1975.

modernization to equip the courts to carry out their new functions.³⁶ Though the sponsors of the Act initially intended the opposite, the passage of the Marriage Act had the effect of significantly strengthening the Islamic courts and solidifying their place in the Indonesian legal system.³⁷

The expansion and modernization of the Islamic judiciary following the implementation of the Marriage Act was initially carried out as a matter of executive branch policy without formal legislative authorization. In 1989, however, the Indonesian legislature passed the Religious Judicature Act, which formalized the changes already underway and elevated Islamic courts to a status essentially equal to the parallel state courts.³⁸

Another important development during the Suharto era was the promulgation in 1991 of a code of marriage, inheritance, and charitable trusts rules (*wakaf*)³⁹ called the Compilation of Islamic Law (Kompilasi Hukum Islam or “Compilation”).⁴⁰ The purpose of the Compilation was to promote consistency and uniformity in the application of the law by providing judges with a definitive and accessible Indonesian language reference on subjects within the jurisdiction of Islamic courts.⁴¹ Although the Compilation purports to set forth the law of marriage, inheritance, and charitable foundations for Indonesian Muslims, it was never submitted to the legislature or formally enacted into law.⁴² The document was drafted by a committee of Supreme Court judges and Department of Religion officials, and was formally promulgated through the issuance of a presidential instruction ordering its use in the Islamic courts.⁴³ The explanation for the

³⁶ See Mark E. Cammack, *The Indonesian Islamic Judiciary*, in ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 146, 146-69 (R. Michael Feener and Mark E. Cammack eds., 2007) [hereinafter Cammack, *Judiciary*].

³⁷ That strengthening the Islamic courts was not a goal is apparent from the draft submitted by the government. See Mark Cammack, *Islamic Law in Indonesia's New Order*, 38 INT'L & COMP. L.Q. 53, 53-73 (1989) [hereinafter Cammack, *New Order*]. The government's initial proposal would have transferred jurisdiction over Muslim marriages from the Islamic courts to the civil courts. *Id.* If this scheme had been adopted, the jurisdiction of Islamic courts on the outer islands would have been reduced to matters of inheritance only, and the courts in Java, Madura, and south Kalimantan would have been effectively put out of business. *Id.*

³⁸ See generally Cammack, *Islamization*, *supra* note 30, at 143-68.

³⁹ This word may also be transcribed as *waqf*.

⁴⁰ Compilation of Islamic Law, Pres. Instruction No. 1 of 1991; THORALF HANSTEIN, ISLAMISCHES RECHT UND NATIONALES RECHT: EINE UNTERSUCHUNG ZUM EINFLUSS DES ISLAMISCHEN RECHTS AUF DIE ENTWICKLUNG DES MODERNEN FAMILIENSRECHTS AM BEISPIEL INDONESIENS TIEI 1, 378-431 (2002) (providing a critical overview of the sources, structure and contents of the Compilation).

⁴¹ Ahmad Imam Mawardi, *The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia*, in SHARIA AND POLITICS IN MODERN INDONESIA 125, 127 (Arskal Salim & Azyumardi Azra eds., 2003).

⁴² *Id.* at 130-31.

⁴³ See Compilation of Islamic Law, Pres. Instruction No. 1 of 1991.

decision to address the need for clear and definite rules through the preparation of a presidential instruction rather than through the enactment of a statute lies in the sensitive and controversial character of the issues. A public debate about the law of marriage and inheritance would have been highly divisive, and the achievement of an acceptable legislative outcome was far from certain. The use of a compilation as the vehicle for lawmaking proved to be an effective means of avoiding these problems.

In May 1998, President Suharto was forced out of office after more than three decades in power. He was succeeded by his vice president, B.J. Habibie, who responded to the wave of popular demands for fundamental political change by declaring a new era of Reform (“*Reformasi*”). Habibie and subsequent Indonesian presidents over the past decade have proceeded to carry out a series of major constitutional and political reforms intended to restrain executive power and promote government accountability. Although Islamic legal institutions were generally not directly targeted in these reforms, the post-Suharto legal and political restructurings have raised the possibility of further significant changes in official positions on Islamic doctrine and the administration of Islamic law in Indonesia.⁴⁴ Of particular relevance here are the establishment of a new Constitutional Court in 2003, and the ongoing processes of decentralization.⁴⁵

Beyond the impacts of these formal restructurings of the Indonesian legal system, various aspects of “official Islam” as it had developed under Suharto’s New Order have come to be publicly contested since the dawn of Indonesia’s *Reformasi* period.⁴⁶ All of these changes have contributed to dynamic developments that have shaped the roles and work of Islamic legal professionals in the country over the past decade. This article presents an introductory overview of the contemporary Indonesian Islamic legal system as a background to contextualize the discussions of the Indonesian Islamic court judges and lawyers in the articles that follow in this volume.

⁴⁴ See Moch. Nur Ichwan, *Official Reform of Islam: State Islam and the Ministry of Religious Affairs in Contemporary Indonesia, 1966-2004*, 215-346 (2006) (unpublished dissertation, University of Tilburg) (providing overview of state-directed reforms of Islam in the post-New Order period).

⁴⁵ For a discussion of the broader legal and political complexities of decentralization in the post-Suharto period, see Leo Schmit, *De-Centralisation and Legal Reform in Indonesia: The Pendulum Effect*, in *INDONESIA: LAW AND SOCIETY* 146, 146-90 (Tim Lindsey ed., 2d ed. 2008).

⁴⁶ This can also be clearly seen in debates over a proposed revision of the 1991 Compilation of Islamic Law that was made public in 2004. See, e.g., Siti Musdah Mulia with Mark E. Cammack, *Toward a Just Marriage Law: Empowering Indonesian Women Through a Counter Legal Draft to the Indonesian Compilation of Islamic Law*, in *ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS* 128, 128-45 (R. Michael Feener & Mark E. Cammack eds., 2007); see also R. MICHAEL FEENER, *MUSLIM LEGAL THOUGHT IN MODERN INDONESIA* 182-221 (2007) [hereinafter FEENER, *MUSLIM LEGAL THOUGHT*] (providing a broader overview of Indonesian debates on Islamic law in the *Reformasi* period).

II. THE STRUCTURE OF THE INDONESIAN ISLAMIC JUDICIARY

With the sole exception of Aceh,⁴⁷ Indonesia has a unitary national judiciary that applies a uniform body of national law. The fundamentals of this structure are contained in Article 24 of the Constitution.⁴⁸ That article establishes four parallel systems of courts each with its own set of competencies organized under the Indonesian Supreme Court.⁴⁹ The Islamic courts (*peradilan agama*) comprise one of these three systems.⁵⁰ The other courts making up the judiciary are the courts of general jurisdiction: state courts (*peradilan negeri*), military courts, and administrative courts.⁵¹

In 2003, the Indonesian Consultative Assembly created a new Constitutional Court with the power to review the constitutionality of legislation.⁵² The creation of the Constitutional Court was among a number of major structural reforms designed to promote legality and limit presidential power following the collapse of the Suharto government.⁵³ During its first decade in operation, the Constitutional Court has interpreted its review powers broadly to hear constitutional challenges on a diverse array of issues and has invalidated a number of major pieces of legislation.⁵⁴ The Court is unlikely to have a significant impact on Islamic law, however, because its jurisdiction is defined in such a way that most Indonesian Islamic law falls outside the Constitutional Court's review powers.⁵⁵ The Court's constitutional review jurisdiction is limited to statutes (*undang-undang*) enacted by the People's Representative Assembly (Dewan Perwakilan Rakyat or "DPR").⁵⁶ The limitation of the Court's constitutional review powers to statutes means that the Court does not have authority to hear challenges to executive branch regulations or other central government laws that are not statutes.⁵⁷ This means that the Compilation of Islamic Law is

⁴⁷ See *infra* Part IV (discussing Islamic legal institutions in the Special Autonomous Region of Aceh).

⁴⁸ See CONSTITUTION, art. 24(2).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Constitutional Court Act, Act No. 24 of 2003; see also CONSTITUTION, arts. 24(2), 24C(1).

⁵³ See Tim Lindsey, *Constitutional Reform in Indonesia: Muddling towards Democracy*, in *INDONESIA: LAW AND SOCIETY* 23, 23-47 (Tim Lindsey ed., 2008) (providing overview of the post-Suharto constitutional reforms).

⁵⁴ See PETRA STOCKMANN, *THE NEW INDONESIAN CONSTITUTIONAL COURT: A STUDY INTO ITS BEGINNINGS AND FIRST YEARS OF WORK* (2007), available at <http://home.snafu.de/watchin/Constitutional Court.pdf> (recounting the creation and early record of the Constitutional Court).

⁵⁵ See Constitutional Court Act, Act No. 24 of 2003, art. 10(1)(a).

⁵⁶ *Id.*

⁵⁷ See *id.*

not subject to Constitutional Court review because it was promulgated through a presidential instruction. The limitation of the Court's jurisdiction to enactments of the DPR also means that the Islamic *qanun* passed by the provincial government in Aceh are beyond the Court's review authority, as are the regional regulations (*peraturan daerah* or "*perda*") promulgated by district or municipal governments that seek to enforce Islamic law or morals.⁵⁸

A. *What Are the Various Courts That Make Up the Islamic Judiciary?*

The organization and powers of the Islamic branch of the Indonesian judiciary are set forth in the Religious Judicature Act that was passed in 1989.⁵⁹ The Act provides for the existence of first instance courts, called *peradilan agama*,⁶⁰ in every district (*kabupaten*) and municipality (*kotamadya*),⁶¹ and for an Islamic appeals court, called *peradilan tinggi agama*,⁶² in every province.⁶³ In 2010 there were 343 first instance Islamic courts and twenty-nine Islamic appeals courts nation-wide.⁶⁴

⁵⁸ *See id.* In one important case, the Constitutional Court rejected a challenge to the rules governing polygamy in the 1974 Marriage Act. Mahkamah Konstitusi Republik Indonesia, Decision No. 12/PUU-V/2007. The petitioner in the case argued that the Marriage Act's requirements that Muslim men wishing to take a second wife satisfy certain statutory requirements and obtain permission from the court violated his constitutional rights to freely practice his religion and his right against being subjected to discriminatory treatment. *Id.* The Court's decision is noteworthy primarily for its approach. Rather than address the issue within a conventional rights framework, the Court framed the issue as a question of the correct interpretation of Islamic law. *See id.* The Court implicitly accepted the premise of petitioner's argument—that any statutory restrictions on the practice of polygamy not allowed by Islamic law violate the constitution. *See id.* Viewed from this perspective, the constitutionality of the statute becomes a question of Islamic law. The Court quoted Qur'anic texts on marriage and polygamy, and set forth its views on the function of polygamy as it relates to Islamic understandings of marriage. *Id.* On the basis of this analysis, the Court concluded that the restrictions on polygamy contained in the Marriage Act are permissible under Islamic law, and for that reason are constitutional. *Id.*

⁵⁹ Religious Judicature Act, Act No. 7 of 1989.

⁶⁰ *Id.* art. 1(1). The specification of a uniform designation for all Islamic tribunals marked a change from previous practice in which Islamic courts around the country had different names based on their different origins.

⁶¹ *Id.* art. 4(1).

⁶² *Id.* art. 1(2).

⁶³ *Id.* art. 4(2).

⁶⁴ CATE SUMNER & TIM LINDSEY, *COURTING REFORM: INDONESIA'S ISLAMIC COURTS AND JUSTICE FOR THE POOR 1* (2010), available at <http://www.lowyinstitute.org/Publication.asp?pid=1470> (follow "Download item" hyperlink).

B. *What Is the Composition of the Court? Are Trials Conducted by a Single Judge or a Panel of Judges?*

One of the more noteworthy innovations to the administration of Islamic law introduced by the Dutch was the creation of courts consisting of a panel of judges. While Islamic tribunals historically consisted of a single judge (*qadi*), the Dutch-chartered *priesterraden* created in 1882 were collegial in form, consisting of a court chair and member judges.⁶⁵ The 1882 Decree designated the *penghulu*—the chief religious official of the district—as court chair, and called for the appointment of three to eight member judges.⁶⁶ The member judges were recruited from among the local religious scholars and only served in a semi-official capacity only.⁶⁷ The Decree did not specify requirements for a quorum, but in practice, the courts came to be comprised of a chairman and two member judges.

It is uncertain whether the collegial form of the Dutch *priesterraden* was a result of ignorance or deliberate choice.⁶⁸ Whatever the reason for the practice, however, the use of a panel of three judges for Indonesian Islamic courts survived. The 1989 Religious Judicature Act states that each Islamic court is to be staffed by a court chair, a deputy chair, and member judges.⁶⁹ The number of member judges to be assigned to a particular court varies according to where the court is located. The Act does not specify requirements for a panel. However, the Basic Act on Judicial Power, enacted in 2004, requires a minimum of three judges to hear and decide any case.⁷⁰

One important change instituted after the implementation of the Marriage Act and later codified in the Religious Judicature Act concerns the qualifications for appointment to the position of Islamic judge. Up until the 1970s, the Islamic courts continued to follow the model established during the colonial era of a single full-time judge assisted by locally prominent religious figures who were not court employees.⁷¹ Following the implementation of the Marriage Act, the use of part-time judges began to be phased out. This was accomplished through the implementation of new

⁶⁵ Stb. 1882, No. 152, art. 2.

⁶⁶ MUHAMAD HISYAM, CAUGHT BETWEEN THREE FIRES: THE JAVANESE PANGHULU UNDER THE DUTCH COLONIAL ADMINISTRATION, 1882-1942, 59 (2001) (describing the *penghulu* in the Netherlands East Indies).

⁶⁷ Cammack, *Islamization*, *supra* note 30, at 145.

⁶⁸ LEV, *supra* note 10, at 13-14; BENDA, *supra* note 19, at 83-84.

⁶⁹ Religious Judicature Act, Act No. 7 of 1989, arts. 9-10.

⁷⁰ Basic Act on Judicial Power, Act No. 4 of 2004, art. 17(1).

⁷¹ Cammack, *Judiciary*, *supra* note 36, at 151.

qualifications requiring that all Islamic court judges be members of the Indonesian civil service and have either a law degree or a degree from an Islamic institute.⁷² These new requirements were first enforced as a matter of policy and later included in the Religious Judicature Act.⁷³

The imposition of new requirements for the Islamic judiciary necessitated the hiring of large numbers of new full-time judges. Between 1977 and 1983, the number of full-time Islamic court judges more than doubled, increasing from 225 to 680.⁷⁴ The expansion of the Islamic judiciary continued with the addition of approximately 100 new judges each year. There are now more than 3,000 Islamic judges nation-wide.⁷⁵

C. *Who Has Appellate Authority over the Islamic Courts?*

As mentioned earlier, the first Islamic appeals courts in Indonesia were established by the Dutch.⁷⁶ During the colonial period and for the first three decades following independence, the appeals process for Islamic courts remained separate from the rest of the Indonesian legal system.⁷⁷ While the Basic Act on Judicial Power enacted in 1970 gave the Supreme Court the power to hear appeals from decisions by Islamic courts,⁷⁸ it was not until 1977 that the Supreme Court began to exercise those powers.⁷⁹ Although some Islamic court judges were at first opposed to the Supreme Court taking a role in the administration of Islamic law, the judges' initial opposition evaporated as they came to appreciate the benefits of Islamic court integration with the secular judiciary.⁸⁰

The Supreme Court's appellate jurisdiction over Islamic courts was re-affirmed in the Religious Judicature Act, which declares the Supreme Court to be the highest judicial authority on matters of Islamic law.⁸¹ The Religious Judicature Act also formalized the program for the standardization and expansion of an Islamic appeals process that began following the

⁷² *Id.* at 153.

⁷³ Religious Judicature Act, Act No. 7 of 1989, art. 13.

⁷⁴ Cammack, *Judiciary*, *supra* note 36, at 160-61.

⁷⁵ SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, PROFIL PERADILAN AGAMA, available at http://www.badilag.net/data/ditbinadpa/peradilan_agama_V_indonesia_2009.pdf.

⁷⁶ *See supra* note 18 and accompanying text.

⁷⁷ Cammack, *Judiciary*, *supra* note 36, at 154.

⁷⁸ Basic Act on Judicial Power, Act No. 14 of 1970, art. 10(3). In the years before the Supreme Court began to exercise appellate jurisdiction, the bureau within the Ministry of Religion that had charge of administering the courts occasionally served as a form of appeals court by issuing pronouncements on cases. LEV, *supra* note 10, at 94.

⁷⁹ Cammack, *Judiciary*, *supra* note 36, at 154.

⁸⁰ *See id.* at 154-56.

⁸¹ Religious Judicature Act, Act No. 7 of 1989, art. 3-5(1).

passage of the Marriage Act in 1974.⁸² The Act mandates the creation of Islamic appeals courts in each province, and establishes a uniform name and organizational structure for Islamic appeals courts throughout the country.⁸³

D. What Are the Typical Rates of Appeal for Various Types of Cases?

The Islamic courts decided a total of 295,589 cases in 2010.⁸⁴ Only a small fraction—less than one percent—of all cases from the first instance courts is appealed to the Islamic high courts. In 2010, the high courts decided 2,224 appeals.⁸⁵ By contrast, a large share of cases appealed to the high courts is reviewed by the Supreme Court. In 2010, the Supreme Court decided 808 cases that originated in the Islamic courts.⁸⁶

E. What Is the Structure of Administrative Supervision of the Islamic Courts?

The question of administrative supervision of the Islamic courts was one of the first topics addressed by the new national government following Indonesian independence from the Dutch.⁸⁷ The prominence given to the issue was a result of political circumstances rather than its merit. A major point of contention in the days leading up to the declaration of Indonesian independence was the question of whether a guarantee of state implementation of Islamic law should be included in the constitution.⁸⁸ Language to that effect was included in the draft constitution, but then removed at the last minute when representatives of eastern parts of the country said they would not be part of the country if the guarantee were

⁸² *Id.* art. 4.

⁸³ *Id.*

⁸⁴ SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, TABLE IIIA: STATISTICS REGARDING CASES OF COMPLAINT DIVORCE, PETITION DIVORCE, AND OTHER MATTERS DECIDED BY COURTS WITHIN THE JURISDICTION OF THE ISLAMIC HIGH COURTS IN ALL OF INDONESIA FOR 2010, available at <http://www.badilag.net/data/ditbinadpa/DATA PERKARA CERAI TALAK CERAI GUGAT DAN PERKARA LAIN YANG DIPUTUS.pdf>. The Directorate for Religious Courts is the division within the Supreme Court with administrative authority over the Islamic courts.

⁸⁵ SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, TABLE V: STATISTICS REGARDING APPEALS FOR COURTS WITHIN THE JURISDICTION OF THE ISLAMIC HIGH COURTS IN ALL OF INDONESIA FOR 2010, available at <http://www.badilag.net/data/ditbinadpa/DATA PERKARA TINGKAT BANDING.pdf>.

⁸⁶ SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, TABLE VI: STATISTICS REGARDING CASSATION FOR COURTS WITHIN THE JURISDICTION OF THE ISLAMIC HIGH COURTS FOR ALL OF INDONESIA IN 2010, available at <http://www.badilag.net/data/ditbinadpa/DATA PERKARA TINGKAT KASASI.pdf>.

⁸⁷ LEV, *supra* note 10, at 43-44.

⁸⁸ *Id.* at 41-43.

retained.⁸⁹ One of the steps taken to address bad feelings caused by the eleventh hour change was the creation of a Ministry of Religion.⁹⁰ Part of the portfolio assigned to the Ministry of Religion was supervision of the Islamic courts.⁹¹ Supervisory power over the civil courts remained as it had been under the Ministry of Justice.⁹²

As Daniel Lev has suggested, the existence of what amounts to a Muslim lobby within the state bureaucracy was probably more valuable to Muslim interests than the vague constitutional guarantees that Muslims had been denied.⁹³ Muslim interests eventually came to appreciate the value of the Ministry of Religion's role, and when the arrangement came under threat during the *Reformasi* period, the Ministry fought to preserve it.⁹⁴ One of the first reforms undertaken after the fall of the Suharto government related to the system of judicial administration.⁹⁵ Although one of the planks in the judicial reform program involved divesting the Ministry of Religion of its powers over Islamic courts, the impetus behind the reforms had little or nothing to do with Islamic institutions. The target of the reforms, rather, was the civil courts, which had become thoroughly corrupt over the course of thirty years of New Order rule.⁹⁶ The specific problem addressed by the change was the "two-roof" system in which the administration of first instance and appeals courts was shared between the executive branch, which had responsibility for judicial recruitment and court operations, and the Supreme Court, which was in charge of technical juridical matters.⁹⁷ It was believed, simplistically as it turns out, that eliminating executive authority over the courts would be a solution to corruption and incompetence in the civil judiciary.

A 1999 amendment to the Basic Act on Judicial Power did away with the two-roof administrative structure and consolidated both administrative

⁸⁹ FEENER, MUSLIM LEGAL THOUGHT *supra* note 46, at 56.

⁹⁰ *Id.* at 43-44.

⁹¹ *Id.* at 64.

⁹² *Id.* at 63-64.

⁹³ *Id.* at 43-45.

⁹⁴ Cammack, *Judiciary*, *supra* note 36, at 156-57.

⁹⁵ Tim Lindsey & Mas Achmad Santosa, *The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia*, in *INDONESIA: LAW AND SOCIETY* 2, 13 (Tim Lindsey ed., 2d ed. 2008).

⁹⁶ See SEBASTIAAN POMPE, *THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE* 165-71 (2005) (describing the Indonesian judiciary under Suharto's New Order).

⁹⁷ Tim Lindsey, *Black Letter, Black Market and Bad Faith: Corruption and the Failure of Law Reform*, in *INDONESIA IN TRANSITION: SOCIAL ASPECTS OF REFORMASI AND CRISIS* 278, 280-81 (Chris Manning & Peter van Diermen eds., 2000).

and juridical authority over the judiciary in the Supreme Court.⁹⁸ The Ministry of Religion and other supporters of the Islamic courts had initially lobbied for their total exemption from the restructuring.⁹⁹ It was argued that transferring control over the Islamic courts out of the executive branch was not necessary because the problems of political interference and judicial corruption that plagued the civil judiciary were far less serious in the Islamic courts. Preserving the role of the Ministry of Religion in the management of the Islamic courts was also said to be necessary because of the courts' distinctive religious character. While the effort to exempt the Islamic courts from the plan failed, opponents of the change succeeded in blocking the specification of a timetable for relinquishment of Ministry of Religion control.¹⁰⁰ In the end, however, this concession proved entirely meaningless, and in June 2004 full responsibility for administration of the Islamic courts was transferred to the Supreme Court.¹⁰¹

Fears that placing the Islamic courts under the supervisory authority of the Supreme Court would alter the religious character of the courts have not been borne out thus far. The immediate effect of the transfer was that the group of officials who had managed the operations of the Islamic courts for the Department of Religion now performed that function as employees of the Supreme Court.¹⁰² The significance of the change is tempered by the fact that by the time the transfer of authority occurred, the Ministry of Religion's policies for the courts were not much different from the policies of the Supreme Court. Probably the most significant effect of the transfer of control over the Islamic courts to the Supreme Court has been an increase in the level of funding for the courts.¹⁰³

⁹⁸ Basic Act on Judicial Power, Act No. 35 of 1999, art. 1 (amending Basic Act on Judicial Power, Act No. 14 of 1970, art. 11).

⁹⁹ Cammack, *Judiciary*, *supra* note 36, at 156-57.

¹⁰⁰ *Id.* The Act establishes a five-year deadline for the transfer of administrative responsibilities over the civil courts from the Ministry of Justice to the Supreme Court, Basic Act on Judicial Power, Act No. 35 of 1999, art. 11A(1), but pointedly states that no deadline is specified for the transfer of administrative responsibilities for the Islamic courts, *id.* art. 11A(2).

¹⁰¹ Basic Act on Judicial Power, Act No. 4 of 2004.

¹⁰² The administrative supervision of the Islamic courts is carried out by the Directorate General for Religious Courts. Initially the Directorate was housed in temporary office space separate from other Supreme Court administrative employees. Since 2009, however, Directorate General for Religious Courts has been housed in the same office tower with the Directorates of the other court systems.

¹⁰³ Interview with Dr. Wahyu Widiana, Director General for Religious Courts (July 20, 2011).

III. THE JURISDICTION AND POWERS OF THE ISLAMIC COURTS

A. *What Are the Legal Sources of the Courts' Jurisdiction and Powers?*

The Indonesian constitution, promulgated in 1945, contained just two brief articles on the subject of the judiciary and judicial power.¹⁰⁴ Those articles stated that judicial power was to be exercised by a Supreme Court and other judicial bodies established by statute,¹⁰⁵ and that the organization and powers of the courts and the requirements for judicial appointment were to be specified by statute.¹⁰⁶ One of the many additions to the constitution included in the post-Suharto amendments was a specification of the four court structures that now comprise the Indonesian judiciary—the civil courts, Islamic courts, administrative courts, and military courts.¹⁰⁷

The Marriage Act deals with the substantive law of marriage and divorce and addresses the powers of the courts only incidentally.¹⁰⁸ Initially intended as a non-sectarian national marriage law, the statute as actually enacted and implemented prescribes different substantive rules and different enforcement institutions based on the religion of the parties. Although the law distinguishes among Indonesia's various non-Muslim religions for some purposes, the principal distinction is between Muslims and non-Muslims. The statute assigns jurisdiction over the marriage and divorce of non-Muslims to the civil courts and jurisdiction over Muslim marriage and divorce to the Islamic courts.¹⁰⁹

¹⁰⁴ The 1945 constitution was not originally intended to be permanent, and in 1949 a new constitution establishing a federal structure took effect. ADNAN BUYUNG NASUTION, *THE ASPIRATION FOR CONSTITUTIONAL GOVERNMENT IN INDONESIA: A SOCIO-LEGAL STUDY OF THE INDONESIAN KONSTITUANTE, 1956-1959* (1992). The 1949 constitution remained in effect for just one year. *Id.* In 1950, a provisional constitution was enacted pending the creation and approval of a permanent constitution by a constituent assembly. *Id.* When the constituent assembly reached an impasse in 1959, Sukarno dissolved it and restored the constitution of 1945. *Id.*

¹⁰⁵ CONSTITUTION, art. 24.

¹⁰⁶ *Id.* art. 25.

¹⁰⁷ CONSTITUTION, 24(2). This language, which is now contained in Article 24(2), was added during the third round of constitutional amendments approved in 2001.

¹⁰⁸ *See* Marriage Act, Act No. 1 of 1974. The Act does state that the Islamic courts have jurisdiction over Muslims and the civil courts have jurisdiction over all others. *Id.* art. 63. The bulk of the statute, however, addresses substantive matters of family law. *See generally id.*

¹⁰⁹ *Id.* art. 63(1). The government's original proposal assigned the entire responsibility for enforcement of marriage and divorce to the civil courts, which would have left the Islamic courts with virtually nothing to do. *See* Cammack, *New Order*, *supra* note 37, at 57-58. For a particularly good discussion of the controversy over the proposed Marriage Act, see MUJIBURRAHMAN, *FEELING THREATENED: MUSLIM-CHRISTIAN RELATIONS IN INDONESIA'S NEW ORDER* 163-80 (2006) *available at* <http://igitur-archive.library.uu.nl/dissertations/2006-0915-201013/full.pdf>.

The primary authority on the jurisdiction and powers of the Islamic courts is the Religious Judicature Act of 1989.¹¹⁰ The 1989 Act was intended as a comprehensive statement of the organization, powers, and jurisdiction of the Islamic courts.¹¹¹ Both the form and the content of the Act were patterned after similar statutes governing the Supreme Court¹¹² and the civil courts.¹¹³ The statute has been amended twice—once in 2006 and again in 2009.¹¹⁴

B. *What Is the Subject Matter Jurisdiction of the Islamic Courts?*

The subject matter jurisdiction of the Dutch-chartered Islamic tribunals in Java, Madura, and south Kalimantan was limited to marriage and divorce.¹¹⁵ When new courts were created in other parts of the country after independence, the jurisdiction of these new tribunals was defined more broadly to include both matrimonial causes and inheritance.¹¹⁶ This discrepancy in the jurisdiction of Islamic courts in different areas remained until the passage of the Religious Judicature Act in 1989, which, for the first time, established a uniform jurisdiction for all Islamic tribunals nationwide.¹¹⁷

The 1989 Act granted Islamic courts jurisdiction in three broad areas: 1) marriage; 2) inheritance, which included wills (*wasiat* or *wasiyya*) and gifts (*hibah* or *hiba*); and 3) religious endowments (*wakaf* or *waqf*).¹¹⁸ The

¹¹⁰ Religious Judicature Act, Act No. 7 of 1989.

¹¹¹ DEPARTEMEN AGAMA, PERADILAN AGAMA: SEJARAH PERKEMBANGAN LEMBAGA DAN PROSES PEMBENTUKAN UNDANG-UNDANGNYA (2001) (providing in-depth analysis of the history and debates surrounding the passage of the Religious Judicature Act).

¹¹² Act on the Supreme Court, Act No. 14 of 1985.

¹¹³ Act on the Civil Courts, Act No. 2 of 1986.

¹¹⁴ Religious Judicature Act, Act No. 7 of 1989, amended by Act No. 3 of 2006, Act No. 50 of 2009. A number of other laws deal with the powers of the Islamic courts incidentally. These include the Compilation of Islamic Law, Pres. Instruction 1 of 1991; the Act on *Wakaf*, Act No. 41 of 2004; and the *Kompilasi Hukum Ekonomi Syariah* [Compilation of Islamic Finance Law], Sup. Ct. Reg. No. 2 of 2008.

¹¹⁵ NOEH & ADNAN, *supra* note 13, at 32.

¹¹⁶ Cammack, *Islamization*, *supra* note 30, at 148.

¹¹⁷ *Id.* at 156-57.

¹¹⁸ Religious Judicature Act, Act No. 7 of 1989, art. 49. The scope of the courts' *wakaf* jurisdiction is not specified and presumably encompasses all matters related to the creation and management of *wakaf* property. The Act on *Wakaf*, approved in 2004, contains substantive regulations on matters related to the creation and management of *wakaf*. Act No. 41 of 2004. It states broadly that disputes on issues related *wakaf* are to be decided by Islamic courts. *Id.* art. 62(2). Whatever the scope of the courts' powers on the issue, the number of *wakaf* cases in the Islamic courts is very small. In all of 2009, there were only twelve *wakaf* cases decided by the Islamic courts nationwide. SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, TOTAL CASES DECIDED BY ISLAMIC COURTS WITHIN THE JURISDICTION OF THE ISLAMIC HIGH COURTS FOR ALL OF INDONESIA IN 2009 [hereinafter DIRECTORATE FOR RELIGIOUS COURTS, TOTAL CASES], available at http://www.badilag.net/data/ditbinadpa/TABEL_JENIS_PERKARA_DIPUTUS_TAHUN_2009.pdf.

courts' inheritance jurisdiction was made subject to an important qualification, however. The Act made the courts' inheritance jurisdiction voluntary by offering Muslim litigants the option of having inheritance questions decided by the Islamic courts according to Islamic law or by the civil courts according to customary law (*adat*).¹¹⁹

In 2006, the Indonesian Legislature approved an amendment to the Religious Judicature Act that made a number of important changes to the courts' powers.¹²⁰ One of the most important changes was the elimination of the "choice of law" rule with respect to inheritance.¹²¹ With the abolition of this rule, Indonesian Muslims are presumably no longer permitted to have their inheritance cases decided according to *adat* in the civil courts.

The 2006 amendment also added new competencies to the Islamic courts. By far the most important addition, at least potentially, is the power to decide disputes involving "Syariah economics" ("*ekonomi Syariah*").¹²² The meaning of this vague term is clarified in the elucidation to the statute, which states that "what is meant by '*ekonomi Syariah*' are commercial activities carried out according to the principles of the Shari'a."¹²³

As of early 2009, the Islamic courts had decided only a handful of cases under their new economic jurisdiction.¹²⁴ Although the new jurisdiction is very small, both as a proportion of the courts' caseload and in absolute terms, the change represents a potentially significant shift in the role of the Islamic judiciary. The critics of the Islamic courts in Indonesia have generally acquiesced to their existence because of the critics' belief that the family law matters over which the courts have jurisdiction are comparatively unimportant, and that the work of the courts in deciding those cases is something less than truly "legal."

¹¹⁹ Cammack, *Islamization*, *supra* note 30, at 156-57.

¹²⁰ Religious Judicature Act, Act No. 3 of 2006 (amending the Religious Judicature Act, Act No. 7 of 1989).

¹²¹ This change was contained in the General Elucidation to the act. *Id.*

¹²² *See id.*, point 37 (amending the Religious Judicature Act, Act No. 7 of 1989, art. 49). The Act also vests the Islamic courts with jurisdiction over *zakat*, *infaq*, and *shadaqah (sadaqa)*, though what is meant by this grant of power is uncertain, and the number of cases on these issues is very small. *Id.*

¹²³ The elucidation also includes a non-exhaustive list of subjects encompassed by "*ekonomi Syariah*," including Shari'a-compliant banking, finance, microfinance institutions, insurance, fund management, time deposits, securities, pawn brokerage, pension funds, and other business transactions. *Id.*

¹²⁴ SUPREME COURT OF INDONESIA, DIRECTORATE FOR RELIGIOUS COURTS, TOTAL CASES DECIDED BY ISLAMIC COURTS WITHIN THE JURISDICTION OF THE ISLAMIC HIGH COURTS FOR ALL OF INDONESIA IN 2009, *supra* note 118. During 2009, the courts decided only five cases concerning *ekonomi Syariah*. *Id.*

As might be expected, the expansion of the courts' powers did not go unopposed.¹²⁵ Opponents of the change argued that the judges who staff the Islamic courts lack the expertise needed to adjudicate complex financial questions. It was argued in response that civil court judges lack necessary training in Islamic legal concepts. One important step toward equipping the courts for their new function was the preparation of a Compilation of Islamic Finance Law (Kompilasi Hukum Ekonomi Syariah or KHES) to be used as a legal reference by the courts in deciding economic cases.¹²⁶ The committee charged with drafting the KHES completed its work in 2008, and in September of that year the Supreme Court issued a regulation that formally promulgated the KHES as the authoritative reference for Islamic courts in cases on Shari'a-compliant economic transactions.¹²⁷

C. *What Are the Requirements for Personal Jurisdiction?*

The basic principle that governs the question of personal jurisdiction is that Islamic courts have jurisdiction in disputes involving Muslims within the area of their substantive competence, while civil courts have jurisdiction in cases involving non-Muslims.¹²⁸ Thus, Indonesian Muslims who wish to divorce are required to file their claim in the Islamic court while the civil courts have jurisdiction over the divorces of Indonesians of other religions.

Questions regarding whether the court can properly exercise jurisdiction over the parties are comparatively rare in litigation before Islamic courts. The 1989 Religious Judicature Act does not specify any criteria for determining whether a party seeking to invoke the courts' jurisdiction is a Muslim.¹²⁹ As a practical matter, the issue is decided by consulting the individual's official identity card (*kartu tanda penduduk*),

¹²⁵ The question of jurisdiction to decide disputes involving economic transactions based on Islamic law was debated once again during consideration of the Syariah Banking Act, Act No. 21 of 2008. While the Act confirms the power of the Islamic courts to decide such cases, opponents of Islamic court jurisdiction over economic issues won inclusion of a provision permitting parties to agree to have their cases decided by the civil courts. *Id.* art. 55(1)-(2).

¹²⁶ Compilation of Islamic Finance Law, Sup. Ct. Reg. No. 2 of 2008, available at <http://www.badilag.net/component/content/2646.html?task=view>.

¹²⁷ *Id.*

¹²⁸ This rule is stated at a number of points in the Religious Judicature Act, Act No. 7 of 1989. Article 1(1) defines the *Peradilan Agama* as a "court for persons whose religion is Islam"; Article 2 states that "[t]he religious courts exercise judicial power for those seeking justice who are Muslim in regard to specified civil actions as regulated by the statute"; and Article 49(1) states that "Islamic courts have the task and authority to examine, decide and resolve cases at first instance between Muslims." *Id.*

¹²⁹ See Religious Judicature Act, Act No. 7 of 1989. Article 172 of the Compilation of Islamic Law does include criteria for determining whether an heir is a Muslim. Pres. Instruction No. 1 of 1991, art. 172. That article states: "[a]n heir will be regarded as a Muslim if shown by (literally, "known from") [her] identity card or [her] deeds or [her personal] acknowledgement or the testimony [of witnesses]." *Id.*

which identifies all Indonesians as adherents of one of the country's six recognized religions.¹³⁰

D. How Is the Venue Decided for Particular Kinds of Cases?

The 1989 Religious Judicature Act stipulates that, with the exception of matters specifically addressed in the act, the procedural law applicable in the Islamic courts is based on the Civil Procedure Code.¹³¹ The relevant provisions of the civil procedure law stipulate that jurisdiction over a case lies with the court in the district in which the defendant resides or, in cases involving real property, the district in which the property is located.¹³²

The 1989 Religious Judicature Act includes special provisions governing the proper venue for divorce cases. As a measure intended to protect the interests of women, the Act requires that suits for divorce be filed in the court for the district in which the wife resides regardless of whether the case is initiated by the husband or the wife.¹³³ This rule does not apply if the wife has left the marital home "without the permission of her husband."¹³⁴

E. What Are the Courts' Powers?

As with many other matters concerning Islamic courts, the rules relating to the executory powers of Indonesia's Islamic courts were shaped

¹³⁰ The requirements that all Indonesians declare adherence to one of six officially recognized religions and that religion be listed on state issued identity cards were established as part of Suharto's extreme anti-communism. Because of its association with Chinese heritage and therefore communist leanings, Confucianism was not among the religions recognized during the Suharto era, but was added to Islam, Protestantism, Catholicism, Buddhism, and Hinduism as an approved religion during the presidency of Abdurrahman Wahid. An effort during the post-Suharto period of "Reform" (*Reformasi*) to put an end to the practice of including religion as one of the demographic characteristics listed on individual identity cards ultimately failed, and the Act on Population Administration, enacted in 2006, once again preserves the requirement that identity cards state the holder's religion. Act No. 23 of 2006, art. 64.

¹³¹ Religious Judicature Act, Act No. 7 of 1989, art. 54. Indonesia has yet to enact a code of civil procedure, and the courts continue to apply colonial era laws. The Dutch promulgated two separate civil procedure codes. The *Herziene Indonesisch Reglement* [Indonesian Revised Rules], applicable in Java and Madura, was promulgated in 1848, and the *Rechtsreglement Buitengewesten* [Rules for Outer Islands], for the outer islands, was promulgated in 1927. Although the two enactments are very similar, both continue to be cited.

¹³² *Rechtsreglement Buitengewesten* [Rules for Outer Islands], Stb. 1927, No. 227, art. 142; *Herziene Indonesisch Reglement* [Indonesian Revised Rules], Stb. 1926, No. 559, art. 118. This simple rule obviously does not resolve all issues relating to venue. For a concise summary of the rules regarding filing of different types of claims in the Islamic courts, see ROIHAN A. RASYID, *HUKUM ACARA PERADILAN AGAMA* 48-53 (3d ed. 1992).

¹³³ Religious Judicature Act, Act No. 7 of 1989, art. 66(2), 73(1).

¹³⁴ *Id.*

by the colonial origins of the courts. Under the 1882 Dutch Decree, the decisions of the *priesterraden* did not have the force of law, but required an executory order from a civil court to be enforceable.¹³⁵ This rule remained in effect until the passage of the 1989 Religious Judicature Act, which, for the first time, constituted Indonesian Islamic tribunals as courts in the true sense of the word.¹³⁶ In order to carry out the courts' new enforcement powers, the Act requires that the support staff of every first instance Islamic court include a *juru sita*—an enforcement officer with the power to execute the court's orders regarding attachment and seizure of property.¹³⁷

A second limitation on the powers of the Islamic courts was eliminated in an amendment to the Religious Judicature Act.¹³⁸ Prior to the 2006 change, Islamic courts lacked the authority to decide questions relating to the ownership of property.¹³⁹ While property disputes are not within the express jurisdiction of the Islamic courts, questions regarding the ownership of property are relatively common in marital property and inheritance cases.¹⁴⁰ In the event that resolution of the case required a determination of property ownership, the law required that the matter be referred to the civil court.¹⁴¹ Only after the civil court had fully and finally decided the ownership issue could the Islamic court proceed to the merits of the underlying claim.

The requirement that ownership questions be referred to a separate tribunal was cumbersome and inefficient, and the Islamic courts often ignored it.¹⁴² As long as all of those claiming ownership of the disputed property were parties to the pending action—and therefore resolution of the property dispute did not require joinder of additional parties—Islamic

¹³⁵ Stb. 1882, No. 152. As Harry Benda wryly stated in commenting on the unenforceability of the decisions of the *priesterraden*, “[s]trictly speaking, the members of these councils were . . . no more judges than they were ‘priests,’ even in matters pertaining to their alleged jurisdiction.” BENDA, *supra* note 19, at 84. The requirement that the decisions of Islamic tribunals be confirmed by a civil court dates from at least 1835, when the colonial government issued a clarification to an earlier regulation requiring that suits for enforcement of the decisions of Islamic authorities be filed in a civil court. DEPARTEMEN AGAMA, *supra* note 111, at 9.

¹³⁶ See Religious Judicature Act, Act No. 7 of 1989, art. 38. This change is not stated explicitly in the act, but is implicit in the creation of the office of *juru sita*. See *id.*

¹³⁷ *Id.* On the role and powers of the *juru sita* and the various forms of attachment or confiscation of property carried out by the Islamic courts, see ROPAUN RAMBE & A. MUKRI AGAFI, IMPLEMENTASI HUKUM ISLAM 229-46 (2005).

¹³⁸ Religious Judicature Act, Act No. 3 of 2006 (amending the Religious Judicature Act, Act No. 7 of 1989).

¹³⁹ Cammack, *Islamization*, *supra* note 30, at 156.

¹⁴⁰ Cammack, *Judiciary*, *supra* note 36, at 160.

¹⁴¹ Religious Judicature Act, Act No. 7 of 1989, art. 50 (stating this requirement explicitly).

¹⁴² Cammack, *Judiciary*, *supra* note 36, at 160.

courts routinely decided ownership issues in a single proceeding with the underlying claim. The justification for this approach was based on the argument that halting proceedings in the Islamic court pending filing, decision, and appeal of claims relating to the ownership of property in the civil court would undermine the fundamental principle that justice be provided expeditiously and without delay.

The 2006 amendment to the Religious Judicature Act essentially ratified existing judicial practice. Under the amendment, the Islamic courts are authorized to decide ownership or other disputed issues that arise in the course of Islamic court proceedings, provided the parties disputing the collateral issue are also parties to the underlying claim.¹⁴³ While the law still requires referral of some issues for decision by the civil court, the change is symbolically significant as a further step toward the full recognition of the Islamic courts as genuine judicial institutions exercising the power of the state rather than advisory religious councils.

F. *The Majelis Ulama Indonesia*

Modern Indonesia's primary official body for the issuance of *fatwas* (pronouncements on points of Islamic law) is the Majelis Ulama Indonesia (Indonesian Council of Ulama or "MUI").¹⁴⁴ However, well before the establishment of this unified national body of *ulama* (Muslim legal scholars) in 1975, there already existed a number of regional *ulama* councils in various parts of the country. One of the first functioning institutions of this type was founded in Aceh in 1965, and the work of this organization in particular was influential in the establishment of the national MUI a decade later.¹⁴⁵

The MUI was founded with an expressed mandate for the production of *fatwas* to advise the Muslim community on issues facing contemporary society. Most often, however, MUI *fatwas* were issued in response to initiatives from various governmental departments, rather than as a response

¹⁴³ Religious Judicature Act, Act No. 3 of 2006, art. 50(2) (amending the Religious Judicature Act, Act No. 7 of 1989, art. 50).

¹⁴⁴ For more on the history of the MUI, treatments of some of its *fatwas*, and its place within the broader context of *ifta'* (the issuing of *fatwas*) in the region, see MOHAMAD ATHO MUDZHAR, *FATWA-FATWA MAJELIS ULAMA INDONESIA: SEBUAH STUDI TENTANG PEMIKIRAN HUKUM ISLAM DI INDONESIA, 1975-1988* (1993).

¹⁴⁵ For key documents on the history of the *Majelis* in Aceh during this period, see B. ISMAIL, *AMAL BAKTI EMPAT WINDU: MAJELIS ULAMA INDONESIA PROPINSI DAERAH ISTIMEWA ACEH* (2002). The specific development of the Acehnese MPU will be discussed further below.

to a legal question posed by an individual Indonesian Muslim.¹⁴⁶ The composition of the MUI has changed considerably at various points over the past three decades, often reflecting broader re-alignments of Indonesian politics. At its inception, the MUI was led by modernist/reformist Muslims affiliated with the Islamic organization Muhammadiyah. In the 1980s, leadership shifted to scholars associated with the traditionalist organization Nahdlatul Ulama, and thence back again to a head with a more reformist orientation. Such fluctuations continued to characterize MUI's leadership throughout the remainder of the Suharto period and persist even to this day.

The shifting balances between Muslims representing these different perspectives on the Majelis are generally dictated by political negotiations over the representation of various Islamic organizations.¹⁴⁷ The range of organizational affiliations also reflects, to some degree, differences in religious education and professional training among the ranks of the MUI; since its inception, the MUI has included both scholars with recognized credentials in the traditional Islamic religious sciences, as well as Muslim technocrats with little knowledge of the classical legal literature (*fiqh*), but highly developed senses of religious identity and visions for the development of a "more Islamic" society. This diversity of backgrounds for membership on the MUI is made possible, in part, by the relative lack of formal articulation of specific qualifications for being recognized as a member of the *ulama* by the body itself.¹⁴⁸ Members of the MUI are appointed by the government, which stipulates only the very general requirements that a member 1) be an Indonesian citizen, 2) be a Muslim, 3) be pious, 4) have expertise in the field of Islam, science, technology, or the social sciences, and 5) accept the basic guidelines of MUI operations.¹⁴⁹

The MUI has no formal authority or institutional capacity for the enforcement of Islamic doctrine in Indonesia. MUI *fatwas* have at times captured public attention and even inspired considerable public controversy, but they have never been directly cited in Indonesian court cases.¹⁵⁰ During

¹⁴⁶ C. van Dijk, *Religious Authority, Politics, and Fatwa in Contemporary Southeast Asia*, in ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS 44, 46 (R. Michael Feener & Mark E. Cammack eds., 2007).

¹⁴⁷ See Moch. Nur Ichwan, *Ulama, State and Politics: Majelis Ulama Indonesia After Suharto*, 12 ISLAMIC LAW & SOC'Y 45 (2005) [hereinafter Ichwan, *Ulama*] (discussing such developments in the *Reformasi* period).

¹⁴⁸ In the Indonesian language (Bahasa Indonesia), the Arabic plural noun "*ulama*" is used to refer to an individual, as well as to Islamic religious scholars collectively. The singular form of "*ulama*" is "*alim*."

¹⁴⁹ Pedoman Rumah Tangga Majelis Ulama Indonesia [Internal Rules for the Indonesian Council of Ulama], art.1, available at <http://fatwa-mui.org/konten/mengenai-mui/pedoman-dasar-dan-rumah-tangga>.

¹⁵⁰ For discussions of some of its most important *fatwas* and the debates that they engaged with, see M.B. HOOKER, *INDONESIAN ISLAM: SOCIAL CHANGE THROUGH CONTEMPORARY FATAWA* (2003).

the Suharto era (1965-1998), however, the regime was able to have its desired positions on religious issues expressed—and at times these were integrated into more formal legal documents, such as the Compilation of Islamic Law. This, however, has changed over the post-Suharto *Reformasi* period as the MUI has become less integrated into the broader administration of the Indonesian state. It has sometimes taken up positions in direct conflict with other governmental bodies, including the Ministry of Religious Affairs.¹⁵¹

G. *The Prosecutor*

The Office of Public Prosecutor (Jaksa) is established as part of the Indonesian Justice Department (Kehakiman) with a centralized structure linking the local, provincial, and national levels.¹⁵² It functions as the sole representative of the state in the prosecution of criminal cases before Indonesian courts.¹⁵³ The institution has undergone some significant development over the past six decades, with the most recent reformulation undertaken in 2004.¹⁵⁴ This legislation revised and clarified the prosecutor's duties of investigation, preparation, and prosecution of criminal cases.¹⁵⁵ It also elaborated a further mandate for the institution to pursue issues of human rights, as well as issues of "corruption, collusion and nepotism."¹⁵⁶ These *Reformasi*-era modifications, however, did not include any specific provisions for the prosecutor's office to handle cases of Islamic criminal law. On the national level, then, the Indonesian state has no formal institution specifically dedicated to prosecuting criminal violations of Islamic law. This has led to some complications in local experiments with the formal implementation of local Syariah regulations in various parts of the country over the past decade.

¹⁵¹ See Ichwan, *Ulama*, *supra* note 147 (providing an overview of these developments).

¹⁵² See Act on Public Prosecution, Act No. 16 of 2004, arts. 2, 3, 4.

¹⁵³ *Id.* art. 1.

¹⁵⁴ See Act on Public Prosecution, Act No. 16 of 2004.

¹⁵⁵ *Id.* arts. 30-37.

¹⁵⁶ *Id.*, General Elucidation of art. 30(1)(d). Documents on the history of this institution over the first four decades of Indonesian independence can be found in LIMA WINDU SEJARAH KEJAKSAAN REPUBLIK INDONESIA, 1945-1985 (1985), *microformed on* LC 94940015, Microfiche 94/50533 (K) (Libr. Cong. Photoduplication Serv.). The Public Prosecutor's office also maintains a website with more current information on its organization and activities. See KEJAKSAAN REPUBLIK INDONESIA, <http://www.kejaksaan.go.id> (last visited Oct. 26, 2011).

H. Decentralization

Prior to the *Reformasi*-era changes, Indonesia was one of the most highly centralized countries in the world, and decentralization was among the chief demands of the reform movement following Suharto's resignation.¹⁵⁷ This demand stemmed in part from a desire by local communities for more control over natural resources. Devolution of limited governmental powers to local authorities was also seen as a means for promoting democratic participation and preventing concentration of power in any one person or institution.

The redistribution of governmental power between the central government in Jakarta and the country's nearly 470 districts (*kabupaten*) and municipalities (*kotamadya*) was governed to a great extent by two laws passed in 1999 and 2004.¹⁵⁸ Under these statutes, the central government retained authority over six specified areas: foreign affairs, national defense, security, the administration of justice, monetary and fiscal policy, and religion.¹⁵⁹ Local authorities, on the other hand, were given freer reign to exercise power over matters not specifically reserved to the central government.¹⁶⁰

With the notable exception of Aceh,¹⁶¹ the enforcement of Islamic law was clearly not intended as a major area for the exercise of the independence of local authorities, as both religion and the administration of justice had been stipulated as exclusive preserves of the Indonesian central government.¹⁶² Nevertheless, some local leaders have used the powers granted them through the decentralization laws to implement regulations relating to morality, dress, and religious practice that are commonly regarded as based on Islamic law.¹⁶³ The enactment of such regulations reached a

¹⁵⁷ Indonesia had a brief and tumultuous experience of federal government in the 1940s. For more on this complex period of Indonesian history, see GEORGE MCTURNAN KAHIN, NATIONALISM AND REVOLUTION IN INDONESIA 386-433 (1952).

¹⁵⁸ Act on Local Governance, Act No. 22 of 1999; Act on Regional Government, Act No. 32 of 2004.

¹⁵⁹ Act on Local Governance, Act No. 22 of 1999, art. 7(1); Act on Regional Government, Act No. 32 of 2004, art. 10(3).

¹⁶⁰ Act on Local Governance, Act No. 22 of 1999, art. 7(1); Act on Regional Government, Act No. 32 of 2004, art. 10(1).

¹⁶¹ See *infra* Part IV.

¹⁶² Act on Local Governance, Act No. 22 of 1999, art. 7(1); Act on Regional Government, Act No. 32 of 2004, art. 10(3).

¹⁶³ Robin Bush, *Regional Sharia Regulations in Indonesia: Anomaly or Symptom?*, in EXPRESSING ISLAM: RELIGIOUS LIFE AND POLITICS IN INDONESIA 174, 174-75 (Greg Fealy & Sally White eds., 2008),

peak in 2003, with a sharp drop in the number of new laws passed over the course of 2004 and in the years since.¹⁶⁴

Authorization for these “Shari‘a ordinances” is based on articles in the regional autonomy laws that permit local heads of government, with the approval of the local legislature, to issue regional regulations (*peraturan daerah* or *perda*).¹⁶⁵ Because the regulation of religion is overseen by the central government and thus not an area of control delegated to local authorities, these “*perda* Syariah” are justified in terms of local governments’ general powers to combat social problems and preserve public order.¹⁶⁶ The regional autonomy legislation stipulates that *perda* may not be in conflict with laws or regulations that are higher in the hierarchy of laws.¹⁶⁷ Both the Minister of Home Affairs and the Supreme Court have the authority, in principle, to review the conformity of *perda* with other laws. However, to date none of these religiously-inspired *perda* has been declared invalid by these central government authorities.

Although there is no precise count of the number of religiously inspired *perda*, Robin Bush has identified a total of seventy-eight regional regulations dealing with morality or matters of Islamic practice and symbolism.¹⁶⁸ However, not all of these regulations are distinctively Islamic. The single largest category—thirty-five or forty-five percent of the *perda*—proscribe conduct such as prostitution, gambling, and sale or consumption of alcohol that is commonly denounced by religions and secular authorities alike.¹⁶⁹ The remaining *perda* catalogued in Bush’s study deal with one of three topics relating to Islamic skills or practice.¹⁷⁰ One requires the wearing of stipulated forms of “Islamic dress”—head coverings (*jilbab*) for women and collarless “Muslim shirts” (*baju koko*) for men.¹⁷¹ A second category of regulations requires that certain specified groups (school children, university applicants, couples wishing to marry, and civil servants)

¹⁶⁴ *Id.* at 178.

¹⁶⁵ Act on Local Governance, Act No. 22 of 1999, art. 69, 70; Act on Regional Government, Act No. 32 of 2004, art. 136(1), (4). Islamically inspired morals regulations have also been implemented through a variety of types of executive edicts, instructions and circulars.

¹⁶⁶ Arskal Salim, *Muslim Politics in Indonesia’s Democratization: The Religious Majority and the Rights of Minorities in the Post-New Order Era*, in INDONESIA: DEMOCRACY AND THE PROMISE OF GOOD GOVERNANCE 115, 127 (Ross McLeod & Andrew MacIntyre eds., 2007).

¹⁶⁷ Act on Local Governance, Act No. 22 of 1999, art. 70; Act on Regional Government, Act No. 32 of 2004, art. 136(4).

¹⁶⁸ Bush, *supra* note 163, at 176.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 176-78.

¹⁷¹ *Id.* at 176.

demonstrate an ability to read the Qur'an.¹⁷² A final category of *perda* contains regulations for the administration of the Islamic tax (*zakat*).¹⁷³ *Perda* of this kind have been enacted in diverse areas across the country, including various parts of Sulawesi, Java and Sumatra. The most extensive endeavors to introduce aspects of Islamic law into the Indonesian legal system have, however, been undertaken in the special autonomous region of Nanggroe Aceh Darussalam.

IV. ISLAMIC LEGAL INSTITUTIONS IN THE "SPECIAL AUTONOMOUS REGION" OF ACEH

After Indonesia initiated its *Reformasi* decentralization process in 1999, Aceh was granted the authority to formally implement Islamic law in the province.¹⁷⁴ Act No. 44 of 1999 formally recognized the "Special Status of the Province of Aceh Special Region" in the fields of religion, education, and customary law (*adat*),¹⁷⁵ and Act No. 18 of 2001 conferred (at least in principle, if not in practice) broader powers of self-governance to the province in the fields of religion, governance, economics, security, and defense.¹⁷⁶ This law made it possible to develop more vigorous Shari'a regulations by allowing the Aceh provincial legislature (Dewan Perwakilan Rakyat Daerah or "DPRD") to move forward with working out the details of new legislation (*qanun*), including those defining the new institutions by which Islamic law would be implemented.¹⁷⁷

After two laws dealing with the regulation of specific Islamic legal institutions,¹⁷⁸ the first of the new laws defining new institutions was *Qanun* No. 11 of 2002, which marked a new level of symbolic state engagement with the particulars of Islamic belief and practice in Aceh.¹⁷⁹ However, in

¹⁷² *Id.* at 178.

¹⁷³ *Id.*

¹⁷⁴ For a critical overview of Aceh's special autonomy and the broader Indonesian political contexts in which it was shaped, see Michelle Ann Miller, *What's Special about Special Autonomy in Aceh, in VERANDA OF VIOLENCE: THE BACKGROUND TO THE ACEH PROBLEM* 292-314 (Anthony Reid ed., 2006).

¹⁷⁵ Act on the Special Status of the Province of Aceh Special Region, Act No. 44 of 1999, art. 3(2).

¹⁷⁶ Act on the Special Autonomy for the Province of the Special Region of Aceh as the Province of Nanggroe Aceh Darussalam, Act No. 18 of 2001, General Elucidation.

¹⁷⁷ INTERNATIONAL CRISIS GROUP, INDONESIA: NATIONAL POLICE REFORM (2001), available at [http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/Indonesia National Police Reform.pdf](http://www.crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/Indonesia%20National%20Police%20Reform.pdf); 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, 203-08 (R. Michael Feener & Mark E. Cammack eds., 2007).

¹⁷⁸ Aceh Regional Regulation on the Organization and Administration of the State Shari'a Agency, *Perda* No. 33 of 2001; Act on the Judiciary of Islamic Shari'a, *Qanun* No. 10 of 2002 (Aceh).

¹⁷⁹ Act on the Observance of Islamic Law in the Fields of Doctrine, Ritual Practice, and Markers of Identity, *Qanun* No. 11 of 2002 (Aceh) [hereinafter Aceh Act on the Observance of Islamic Law]. Other

terms of actual enforcement, the most important Acehese *qanun* have been three laws passed in 2003: *Qanun* No. 12 on the consumption of alcohol,¹⁸⁰ No. 13 on gambling,¹⁸¹ and No. 14 on *khalwat* (“improper covert association”).¹⁸² As the only new statements on the content of Islamic criminal law to be applied in Aceh, these have been the focus of most of the new activities of the Syariah courts and other new, or newly reformulated, institutions of Islamic law there.¹⁸³ The major institutions relevant to these developments have been the *ulama* council (Majelis Permusyawaratan Ulama or MPU), the “Shari’a police” (Wilayatul Hisbah), and the Islamic courts (Mahkamah Syariah).¹⁸⁴

A. *Majelis Permusyawaratan Ulama*

Aceh’s *ulama* council, the MPU, is the oldest state-affiliated body of its kind in Indonesia, and in its original formulation in 1965 it served as the model for the national Majelis Ulama Indonesia (MUI) when that group was later founded by Suharto in 1975. In its current form, the Acehese MPU was established through *Perda* No. 3 of 2000, which strengthened the existing provincial *ulama* council.¹⁸⁵ Its definition and additional powers were later confirmed by the 2006 Act on Governing Aceh, which stipulates that the MPU is to be composed of both *ulama* and “Muslim intellectuals.”¹⁸⁶ This diversity of members reflects political considerations on both the local and national levels, and it has also been one of the biggest

laws along these lines include Act on Aceh Culture, *Qanun* No. 12 of 2004 (Aceh); Act on Acehese Culture, Act 23 of 2002 (Aceh) (including provisions for Islamic education to be “based on the Qur’an and the Sunna,” while also subject to the stated objectives of the Indonesian national educational system).

¹⁸⁰ Act on the Consumption of Alcohol, *Qanun* No. 12 of 2003 (Aceh).

¹⁸¹ Act on Gambling, *Qanun* No. 13 of 2003 (Aceh).

¹⁸² Act on *Khalwat* [Improper Covert Association], *Qanun* No. 14 of 2003 (Aceh). This explanation of the term “*khalwat*” is borrowed from William Roff’s work on analogous developments of regulating Islamic morality in the Malay Peninsula. See *Patterns of Islamization in Malaysia, 1890s-1990s: Exemplars, Institutions and Vectors*, J. ISLAMIC STUD. 210, 212 (1998).

¹⁸³ The courts have had far fewer cases related to the subsequent Act on *Zakat* [Obligatory Charitable Giving], *Qanun* No. 7 of 2004 (Aceh).

¹⁸⁴ These institutions and their various functions are discussed in more detail in R. Michael Feener, *Shari’a and Social Engineering: The Implementation of Islamic Law in Contemporary Aceh, Indonesia* (forthcoming).

¹⁸⁵ Provincial Regulation for the Special Region of Aceh on the Formation, Organization, and Operation of the Consultative Assembly of Ulama, *Perda* No. 3 of 2000. Aspects of the MPU’s redefined activities and the workings of its administration were further elaborated in Act on the First Amendment to *Qanun* No. 3 of 2000, Act No. 43 of 2001 (Aceh) and Act on Coordination between the MPU and the Executive, Legislature, and other Government Institutions, *Qanun* No. 9 of 2003 (Aceh).

¹⁸⁶ Act on Governing Aceh, Act No. 11 of 2006, arts. 1(16), 138(1) (Indon.).

challenges to the institution's effectiveness in defining the Shari'a agenda for the Acehese government.

The MPU is given a very powerful position in the new legal order of Acehese society, at least on paper. As the Act on Governing Aceh states, the MPU is positioned in an equal partnership with the provincial government and is supposed to be deeply involved in the processes of conceptualizing and drafting legislation.¹⁸⁷ The MPU is likewise invested with the right to issue *fatwas*—whether solicited or not—on matters of government, development, economy, and social development.¹⁸⁸ To date, however, the MPU has been unable to exercise all of these powers, and in fact has faced some considerable obstacles in terms of internal fractiousness, competition for influencing policy, and resources and facilities.

B. *Wilayatul Hisbah*

Perhaps the most commented-upon new Islamic legal institution in contemporary Aceh has been the Wilayatul Hisbah (“WH”), which is often referred to in English-language discussions as Aceh's “Shari'a police.” When the WH was first established, it only operated in and around Banda Aceh, the capitol of Aceh. By late 2006, however, WH had established offices at the district level (*kabupaten*) across the province. The WH was first created through the enactment of *Perda* No. 5 of 2000,¹⁸⁹ and further defined in sections of Qanun No.11 of 2002, where its officers are invested with the authority to “reprimand” (*tegur*) and “advise” (*nasehat*) those caught violating the Shari'a as defined by Acehese *qanun*.¹⁹⁰ The WH does not, however, have the authority to formally charge or detain alleged offenders and thus must work together with the civil police and the public prosecutor's office in order to bring a case to the Islamic courts.¹⁹¹

According to Qanun No. 11 of 2002, the WH can be organized and deployed at all levels of provincial administration down to that of the *gampong*—or village—level.¹⁹² However, this kind of reach has proven impossible to achieve due to the chronic and acute shortage of resources

¹⁸⁷ *Id.* art. 138(3).

¹⁸⁸ *Id.* art. 140(1).

¹⁸⁹ Act on the Implementation of Islamic Shari'a in the Special Region of Aceh, *Qanun* No. 5 of 2000, art. 20 (Aceh).

¹⁹⁰ Aceh Act on the Observance of Islamic Law, *supra* note 179, art. 14.

¹⁹¹ Provisions to grant these powers to the WH have been part of the criminal procedure bill (*Hukum Acara Jinayat*) that was passed in a lame duck session of Aceh's provincial legislature (DPRA) in 2009. The governor, however, has refused to sign the bill and to date it remains in effect a dead letter.

¹⁹² Aceh Act on the Observance of Islamic Law, *supra* note 179, art. 14(2).

allocated to them. Indeed, for the past two years, the WH has faced considerable problems in both hiring new staff and paying the salaries of those it already employed. To cope with its manifest inability to handle the enforcement of Aceh's *qanun* on its own, the WH has also begun working on new models of cooperation with village level officials (*geucik* or *imeum meunasah*) and with *adat* institutions to handle local infractions.

C. *Mahkamah Syariah*

Like other areas of Indonesia, Aceh had its own traditional institutions tasked with ruling on divorce and other matters according to local understandings of Islamic law. Modern administrative institutions for the state implementation of Islamic law were first introduced to Aceh under the Japanese occupation during World War II. During the period of the mid-twentieth-century Darul Islam movement in Aceh, new Islamic courts referred to as "Mahkamah Syariah" laid claim to considerably broader jurisdiction. Their position, however, was again circumscribed once central Indonesian government control was reasserted over Aceh in the 1960s.

In 2002, Aceh's religious courts were redefined as "Peradilan Syariah Islam" through Qanun No. 10 of 2002, which also, at least in theory, restored some wider jurisdiction to Aceh's Islamic courts.¹⁹³ However, the major changes in Aceh's religious courts came in 2003 when a presidential decision under President Megawati Sukarnoputri¹⁹⁴ and a decision from the head of the Indonesian Supreme Court¹⁹⁵ renamed the courts as "Mahkamah Syariah," moved them out from under the administration of the Ministry of Religious Affairs, and placed them under the rubric of the Indonesian Supreme Court as part of the "single roof" (*satu atap*) policy.¹⁹⁶

The 2006 Act on Governing Aceh¹⁹⁷ affirmed most of these arrangements that established the Acehnese Mahkamah Syariah as part of the broader Indonesian national system, providing for cassation of Mahkamah Syariah decisions by the Indonesian Supreme Court.¹⁹⁸ The Supreme Court is also given the authority for selecting and confirming the

¹⁹³ Act on the Judiciary of Islamic Shari'a, Qanun No. 10 of 2002 (Aceh).

¹⁹⁴ Presidential Decision on the Mahkamah Syariah and Provincial Mahkamah Syariah for the Province of Aceh, Pres. Decision No. 11 of 2003.

¹⁹⁵ Decision of Chair of Indonesian Supreme Court, KMA/070/SK/X/2004.

¹⁹⁶ Tim Lindsey et al., *Shari'a Revival in Aceh*, in *ISLAMIC LAW IN CONTEMPORARY INDONESIA: IDEAS AND INSTITUTIONS* 216, 251 (R. Michael Feener & Mark E. Cammack eds., 2007); *see also supra* text accompanying note 97 (discussing the shift from the "two-roof" system to the "single-roof" system).

¹⁹⁷ Act on Governing Aceh, Act No. 11 of 2006, art. 15 (Indon.).

¹⁹⁸ *Id.* art 131.

Head, Deputy Head and judges on Aceh's Mahkamah Syariah—all of whom ultimately serve at the pleasure of the Indonesian president.¹⁹⁹ Under these arrangements, funding and technical support for and administrative authority over the Mahkamah Syariah continue to come from the Indonesian Supreme Court in Jakarta.²⁰⁰

In terms of their actual day-to-day operation, Aceh's Mahkamah Syariah appear to be little different from Islamic courts in other Indonesian provinces. The vast majority of the cases before the courts continue to be related to divorce, followed in number by inheritance—and these cases are generally decided according to rules and norms commonly found in the decisions of religious courts elsewhere in Indonesia. Cases involving gambling, alcohol consumption, and *khalwat* have yet to amount to a significant portion of the Mahkamah Syariah's caseload. Across Aceh there has been a sharp decrease in the number of cases involving *qanuns* No. 12, No. 13, and No. 14 since 2005-2006. Most of the province's twenty-one Mahkamah Syariah did not hear a single new case of these types in 2008 or in the first half of 2009.²⁰¹

In general, Aceh's Mahkamah Syariah continue to follow patterns well attested to at the national level, including the increasing frequency of parties choosing to bring some form of representation with them when appearing before religious courts.

¹⁹⁹ *Id.* art 135(1).

²⁰⁰ *Id.* art 136.

²⁰¹ Statistics compiled by Muhammad Yusuf, Panitera/Sekretaris Mahkamah Syariah Aceh [Registrar/Secretary of the Syariah Court of Aceh] (June 5, 2009) (on file with R. Michael Feener).