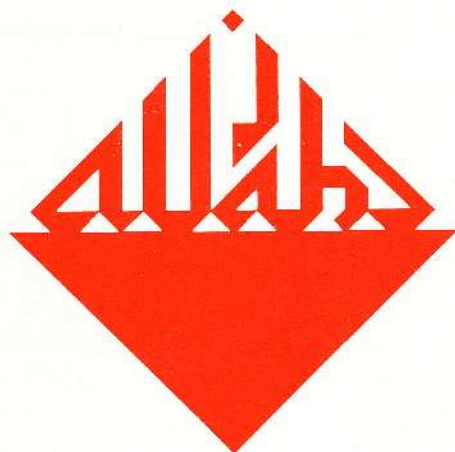


# STUDIA ISLAMIKA

INDONESIAN JOURNAL FOR ISLAMIC STUDIES

Volume 10, Number 1, 2003  
SPECIAL ISSUE



---

INTRODUCTION: ISLAMIC LAW  
IN SOUTH-EAST ASIA

MB Hooker

---

PUBLIC FACES OF *SHARĪ'AH* IN CONTEMPORARY INDONESIA:  
TOWARDS A NATIONAL *MADHĪIAB*

MB Hooker and Tim Lindsey

---

FIQH, WOMEN AND HUMAN RIGHTS:  
COMPETING METHODOLOGIES

Ajmand Ahmad

---

ISLAMIC CONTRACTS OF  
FINANCE IN MALAYSIA

Matt Richards

---

# STUDIA ISLAMIKA

Indonesian Journal for Islamic Studies

Vol. 10, No. 1, 2003

## EDITORIAL BOARD:

*M. Quraish Shihab (UIN Jakarta)*

*Taufik Abdullah (LIPI Jakarta)*

*Nur A. Fadhil Lubis (IAIN Sumatra Utara)*

*M.C. Ricklefs (Melbourne University)*

*Martin van Bruinessen (Utrecht University)*

*John R. Bowen (Washington University, St. Louis)*

*M. Atho Mudzhar (IAIN Yogyakarta)*

*M. Kamal Hasan (International Islamic University, Kuala Lumpur)*

## EDITOR-IN-CHIEF

*Azyumardi Azra*

## EDITORS

*Saiful Mujani*

*Jamhari*

*Jajat Burhanuddin*

*Fu'ad Jabali*

*Oman Falhurahman*

## ASSISTANT TO THE EDITORS

*Heni Nuroni*

## ENGLISH LANGUAGE ADVISOR

*Chloe J. Olliver*

## ARABIC LANGUAGE ADVISOR

*Nursumad*

## COVER DESIGNER

*S. Prinka*

STUDIA ISLAMIKA (ISSN 0215-0492) is a journal published by the Center for the Study of Islam and Society (PPIM) UIN Syarif Hidayatullah, Jakarta (STT DEPPEN No. 129/SK/DITJEN/PPG/STT/1976) and sponsored by the Australia-Indonesia Institute (AII). It specializes in Indonesian Islamic studies in particular, and South-east Asian Islamic studies in general, and is intended to communicate original researches and current issues on the subject. This journal warmly welcomes contributions from scholars of related disciplines.

All articles published do not necessarily represent the views of the journal, or other institutions to which it is affiliated. They are solely the views of the authors. The articles contained in this journal have been refereed by the Board of Editors.

STUDIA ISLAMIKA has been accredited by The Ministry of National Education, Republic of Indonesia as an academic journal (SK Dirjen Dikti No. 69/DIKTI/2000).

*MB Hooker and Tim Lindsey*

## Public Faces of *Shari'ah* in Contemporary Indonesia: Towards a National *Madhhab*\*

### **A Public Religion in a Secular State**

*Shari'ah* (Islamic law) is a matter of debate and disputation in contemporary Indonesia. Indonesia is not an Islamic state (whatever that might be) but a secular state with a secular Constitution that contains a predominantly Muslim population: around 190 million of a total of 217 million.<sup>1</sup>

Although it does not constitute the state, Islam is not, however, simply a private religion in Indonesia. It has a public presence in the form of political parties that assert an Islamic identity,<sup>2</sup> the influential national Islamic organisations that support them<sup>3</sup> and, controversially, in the Pancasila, the state ideology of Indonesia. Islam is also publicly present in a broad range of institutions, including *pesantren* (private Islamic boarding schools), the national IAIN<sup>4</sup> tertiary education system, the Religious Court system and a Ministry of Religion that is largely pre-occupied with Islamic issues, as well as state-sanctioned religious bodies like the Majelis Ulama Indonesia (Council of Indonesian Religious Scholars).

As a public and state-institutionalised religion suspended in the framework of a secular nation state, it is inevitable that the place of Islam in all its public forms—religious, political, social, ideological, educational, normative—is contested and debated. This, in turn, brings the status of Islamic law into issue. Islam, more than any other religion except, perhaps, Judaism, is legalistic. Although the Qur'ân itself contains relatively little that Western lawyers would see as law<sup>5</sup> (Glenn, 2000: 159, 171-2) it is, with

the *Sunnah*<sup>6</sup> and *ḥadīth*<sup>7</sup> the basis of huge and sophisticated jurisprudential traditions, the *fiqh*, that blend what are, in Western legal traditions, law', 'religion', 'philosophy' and 'morality' There is thus, in practice, little distinction in Islam between 'belief and law', unlike, for example, Christianity. In theory, a Muslim could never accept the injunction, 'render to Caesar the things that are Caesar's, and to God the things that are God's' (Mark 12: 17) because those things that are Caesar's are, first and foremost, God's. In practice, however, this distinction is precisely what Indonesian Muslims have been forced to accept.

This means that public discourse on the role of Islam and, in particular, *sharī'ah*, has been consistently vigorous since before independence was declared in 1945.<sup>8</sup> So, for example, the controversy within and outside the MPR<sup>9</sup> (Indonesia's supreme legislative assembly) in August 2002 that led to the defeat of a proposal to constitutionally entrench *sharī'ah* as an obligation for Muslims (see below) is the same debate that took place among Indonesia's leaders as they prepared for independence half a century ago.

### A Tradition of Dislocation

The key issue for debate has thus always been the same: what are the conflicts and the accommodations that revealed laws create in the contemporary Indonesian state and how should they be dealt with? Although this issue has changed little in the past century, much of the debate today takes place in a vacuum or is, at best, disjointed. There is little consensus between participants in the debate—especially as between those representing the state and those claiming to speak for Islam—and even within those two groups. There is also little consistency in the arguments advanced. In particular, there is rarely linkage between argument about the status of *sharī'ah* and argument about its content, although it is hard to see how status can be determined without agreement as to content.

This is well demonstrated by the results of a recent survey conducted by the Centre for the Study of Islam and Society (Pusat Pengkajian Islam dan Masyarakat) at the Universitas Islam Negeri (UIN),<sup>10</sup> Jakarta, on 'Islam and the Culture of Good Governance' (*Islam and Good Governance*, 2002: 1-3). Conducted in 16 provinces<sup>11</sup> in late 2001, this survey of 2000 Indonesian Muslims suggested

that they hold apparently conflicting ideas about the role of *shari'ah* in their country. For example, 36.4% agreed (23% had no opinion) that religion and the state must be separated; 77.7% agreed (9.9% had no opinion) that Muslims who do not fast during the fasting month should not be subject to arrest; 80% (10% had no opinion) opposed punishment for Muslims who do not pray; 42.4% (18.5% had no view) opposed stoning as a punishment; and 46.9% (27.3% had no view) opposed bans on *riba* interest payments for banks. At the same time, however, 57.8% agreed (19.7% had no opinion) that Islamic government led by '*ulamâ*' was the best; 61.4% (15.4% had no opinion) agreed that the state has a positive obligation to force Muslims to obey *shari'ah*; and 45.7% (20.6% had no opinion) agreed that only Islamic religious experts should be candidates at elections.

This profoundly fragmented and often incoherent nature of *shari'ah* discourse in Indonesia is, we argue, a consequence of the many faces Islam presents in that country. They must all be considered to make sense of the current position of Islamic religious law in the modern Indonesian nation-state.

This means that when we ask the question, 'What is *shari'ah* today?', we must look for it in a range of forms, including bureaucratic Islam administered by government departments; jurisprudence (judicial decisions); *fatâwâ* (legal opinions or rulings); politically inspired discourse on the idea of the 'Islamic' state; the *shari'ah* as a national code (the *Kompilasi Hukum Islam* — Compilation of Islamic Law, 1991); and the new forms of *shari'ah* education taught in the IAIN and in a growing number of *pesantren*. In short, there is no one answer to the question 'What is *shari'ah* today?', but instead a range of possible answers, depending on who you are asking, when and where.

We are not sure that this is fully understood. It appears that both scholars and observers, whether Indonesian or foreign, tend to choose the answer to the question, 'What is *shari'ah* today?', that suits their own interests or purpose and ignores the others. The result is usually a lopsided and incomplete definition driven by a pre-existing ideological or political position. This only adds to the dislocated nature of contemporary *shari'ah* discourse in Indonesia.

The Indonesian example is, of course, not unique. The same tensions are found in all states with a significant Muslim popula-

tion and they are expressed in a variety of ways appropriate to the respective national histories and cultures (Peters, 1992; 1996). The Indonesian case is particularly interesting both because of its complexity and because it illustrates a tension which may formulate a new, national *madhhab* ('way', school of Islamic law).<sup>12</sup>

The idea of a *madhhab nasional shari'ah* is not a new one. Hazairin suggested a new *madhhab* that would be 'in conformity with the cultural realities of Indonesia' and 'would draw on significant aspects of local historical contexts' (Feener, 2001: 109, 115) and worked towards it over 50 years ago in his long-remembered and influential studies on bilateral inheritance (Hazairin, 1950; Cammack, this volume; Feener, 2001: 102-15). However, developments in the public institutionalisation of Islamic education, justice and administration since Hazairin's time present us now with a much more complex set of variables.

It is the thesis of this article that all faces and expressions of *shari'ah* in Indonesia must be read together and that together they point to a debate about Islamic law that, while fragmented, might be said to be peculiar to Indonesia. Can they be made to amount to assonance or is dissonance the characteristic of this *Madhhab Nasional Shari'ah Republik Indonesia*? And if dissonance is the defining characteristic, is that necessarily a bad thing? We will suggest some answers to these questions in the conclusion to this article.

### The Public Faces of *Shari'ah*

In examining the faces of *shari'ah* we describe the institutions and laws that the state has established to create a public framework for its application, because it is through these formal mechanisms that *shari'ah* has its existence in the national legal system. In other words, our focus in this article is on the public faces of Islamic law in Indonesia. This is not to suggest that there are not also private faces or that they are not important. We do not, however, deal with them in this article, both for reasons of length and because a detailed study of individual Religious Court judgements is necessary first and it has not yet been possible to locate a sufficient and representative sample.<sup>13</sup>

A common starting point for any discussion of the relationship between the temporal state and Islamic law in Indonesia is reference to the so-called 'Constitution' (or 'Charter', better 'Treaty')

of Madina of 622.<sup>14</sup> This can, however, only be a nominal foundation for any Islamic theory of reconciliation between revelation and government—even a cursory reading of this document will demonstrate its insufficiency in the conditions of the 21st century—but that is not to say that it is totally without relevance. As Nurcholish Madjid (2002) has argued recently, the Treaty of Madina can be read as an important historical example of the idea of *al-mujtama' al-madani*, that is, a community based on contract and agreement. But this itself raises difficult issues as to the nature of social contract and the distribution and exercise of power in the modern state, not least of which is the question of with whom could the secular state contract? Can anyone or any organisation be said to represent Muslims? The answer in contemporary Indonesia must surely be 'no', given the deep-seated and historically bitter rivalry between and within Islamic political parties, Islamic popular organisations and Islamic religious groups (Ricklefs, 1993: 210-26; 320-3; 343-8; 354-8; 373-82).

There is another important source for ideas about 'Islamic' polity, this time closer to home but more distant, it would seem, in public discourse: the complex of law texts from the Malay and Javanese worlds of the 17<sup>th</sup> to early 20<sup>th</sup> centuries. These include, for example, the *Undang-Undang Melaka*, the *Undang-Undang Laut Melaka*, the *Surya Agama*, the *Adat Aceh*, the *Sejarah Melayu* (*Sulalatu'l-Salatin*—the Malay spirit text of sovereignty) and the *Majallat Johor*, to name a few (Hooker & Hooker, 2001; Ricklefs, 1993: 118). Surprisingly, the modern Indonesian proponents of the Islamic state idea have made almost no reference to these historical examples, perhaps by reason of inherited colonial attitudes that narrowly read these texts as literary, rather than political and religious, works. In brief—and at the risk of over-simplification—they provide definitions of sovereignty and the exercise of power derived from *shari'ah*. These definitions are important historically because they show an indigenous response to the revelation of Islam fixed in the context of South-east Asian Muslim cultures.

While these Malay and Javanese texts are, again, manifestly insufficient for the 21<sup>st</sup> century, they are less so than the Treaty of Madina, even if only because they are longer and more detailed. They are valuable because they demonstrate a distinct regional Islamic response to Middle Eastern precedent. These texts are not

copies of Arabian precedent, they are truly original, an early precursor for a *Madhhab Nasional*. This makes them potentially all the more relevant to current debate, as maintaining a regional identity within which Islam's professed universalism has been a consistent concern of Indonesian Muslim leaders over the past century.

Finally, it would be remiss not to mention the politics of Islam in contemporary Indonesia. While largely outside the scope of this article, they are the context for the *shari'ah*. There is a mass of material dealing with a wide range of subjects including political parties, ideologies and the idea of a statehood, as well as more recent publications that attempt to find a place for political Islam in the fledging democracy that has emerged in Soeharto's wake.<sup>15</sup> We will deal here only with national Islamic party politics as they relate to the place of *shari'ah* in state ideology.

We turn now to the public faces of *shari'ah*, of which we have identified at least six.

### The Face of *Shari'ah* in State Ideology

As mentioned, Indonesia is not an Islamic state and the Constitution —*Undang-Undang Dasar 1945*— does not refer to religion except in the vaguest of terms, and in standard formulae asserting freedom of religious expression. But this does not mean that Islam, or more specifically *shari'ah*, has been totally distanced from the Constitution. On the contrary, Islam was an important issue, perhaps the most important, in the debates surrounding the drafting of the Constitution in 1945.<sup>16</sup>

Before we turn to those events, however, it should be understood that the question of the relationship between Islam and the then-putative Indonesian state did not spring into being, fully formed, in the tumultuous months before the Japanese surrender. Rather, it was the product of decades of dispute, typified by the celebrated debate between the secularist nationalist leader (and later first President) Soekarno and the Islamic politician, Mohammed Natsir, from 1938 to the early 1940s. Their public correspondence showed the high degree of mutual incomprehension,<sup>17</sup> or even refusal to see another point of view, that was to mark the way the parties dealt with the question of Islam or secularism as the basis of the state (*dasar negara*) in 1945.



### The Jakarta Charter (*Piagam Jakarta*)

In 1945 all sides of politics agreed on a Preamble to the 1945 Constitution that was an uneasy compromise between the contesting ideologies and beliefs represented among the nationalist leaders, pasted together by the future first President, Soekarno. It identified five fundamental principles (Pancasila) as the *dasar negara*. These are 'Belief in One Supreme God', 'Just Humanitarianism', 'Unity of Indonesia', 'Democracy guided by Consultation' and 'Social Justice'. There was, however, and remains, serious and seemingly insoluble disagreement as to the first *sila* —the implications of 'Belief in One Supreme God'.

Belief is prescribed for all Indonesians by the Pancasila but in 1945 the Muslim position added the words 'with obligation to carry out (implement) the *shari'ah* for adherents of Islam' This, the so-called 'Jakarta Charter (*Piagam Jakarta*) or 'seven words' (Fecner, 2001: 86), did not, however, form part of the final draft of the Constitution when it was promulgated in August 1945. It was dropped at Soekarno's insistence as the Constitution was being finalised (Yamin, 1959-1960: 145).

'Belief in one Supreme God' has therefore been, and is, the official formulation of the first *sila*, with the Indonesian term *Tuhan* 'capable of encompassing Christian, Islamic, Buddhist, Hinduistic and even animistic notions of the supreme deity' (van Langenburg, 1990: 133), being used for God in place of the identical Arabic word, *Allah*, with its stronger Islamic connotations. So far as the state is concerned, the first *sila* also marks the outer limits of religious obligation for Indonesians, Muslim and otherwise.

Despite this official position, however, the missing words of the *Piagam Jakarta* have never disappeared from the debate on what the state of Indonesia is supposed to represent for Islam, the religion to which the vast majority of the population adhere. The missing words are so central, in fact, that some Muslim groups have persistently called for reinclusion of the *Piagam Jakarta* in the Constitution since 1945. It has even been argued that, as the words were only removed by informal agreement, they were never validly erased and are, in fact, therefore still there.

### Article 29

On 29 August 2002 the issue of the *Piagam Jakarta* was reopened in the MPR, this time as a formal proposal to amend art 29 of the 1945 Constitution to make the practice of *shari'ah* an obligation for adherents of Islam. By overwhelming majority, however, the current MPR—the first truly democratically elected assembly in Indonesian history (Lindsey, 2002)—vindicated Soekarno's position 57 years earlier by formally rejecting the proposal. They did this despite the initial support of the Vice President, Hamzah Haz, his party PPP<sup>18</sup> and several smaller Islamic parties.<sup>19</sup> The Muslim parties, including PKB<sup>20</sup> and PAN,<sup>21</sup> both influential parties, opposed the amendment.

This result demonstrated, once again, that while secular nationalist leaders and non-Muslim religious groups oppose the *Piagam Jakarta*, there are also deep divisions within Muslim society itself about the inclusion of these words in a reformed Constitution. There are various different reasons for this split within the Indonesian *ummah*, or Islamic congregation.

In 1945 the Charter was dropped at President Soekarno's insistence as the Constitution was being finalised, in part because of fears that Christians in Eastern Indonesia would abandon the new Republic in favour of the returning Dutch colonial forces and in part because of secular nationalist objection (Ricklefs, 1993: 258, 262). Certainly, the fears of dividing largely Christian Eastern Indonesia from the overwhelming Muslim majority in central and western Indonesia, thus provoking secession and possible collapse of the state, still played a role in the thinking of Muslim politicians in 2002.

It is also probable, however, that international pressure on the government not to support 'extremist' Islam played a part in the MPR's rejection of the *Piagam Jakarta*. The amendment proposal was certainly seen outside Indonesia as part of a new radical Islamic agenda. This perception is probably not accurate—the role of *shari'ah* has been a mainstream political debate in Indonesia for over half a century. There can be no doubt, however, that most Indonesian politicians were concerned not to be associated with what the West might consider as Islamic radicalism and a vote for the *Piagam Jakarta* would have been read in this way.<sup>22</sup>

There were, however, other, probably more influential, reasons for rejecting the reinstatement of the *Piagam Jakarta*. First, it is by no means clear what *shari'ah* means. As in most countries

with a significant Muslim population, there are many different interpretations of Islamic doctrine in Indonesia and consensus is not easily reached on issues of law in particular. If *shari'ah* became a constitutional obligation for Indonesian Muslims, the question would arise: whose version of *shari'ah*?

Likewise, the two leading popular Islamic movements in Indonesia, Nahdlatul Ulama and Muhammadiyah, are moderate. Together they claim a membership of around 70 million but they have long feared the *Piagam Jakarta* on the grounds that it would hand a political weapon to their smaller, more radical competitors. Both PKB (created by Nahdlatul Ulama) and PAN (which has links to Muhammadiyah) therefore opposed the amendments and this was probably fatal (McBeth, 2002).

Finally, Indonesia already has a state-run *shari'ah* judicial system. There are 339 Religious Courts, comprising 326 Religious Courts of first instance (Pengadilan Agama) and 25 High Religious Courts (Pengadilan Tinggi Agama) covering 27 Provinces.<sup>23</sup> From the High Religious Court appeal lies to the Supreme Court (Mahkamah Agung) in Jakarta. Decisions of these Courts are binding on Muslims, although jurisdiction is limited chiefly to marriage, divorce, inheritance and charitable trusts (*waqf*) (Cammack, 1996; Hooker, 1999a; McBeth, 2002). It is therefore not clear what would be added by a *shari'ah* amendment in any case. It could be argued that the existence of the Religious Courts and the ability to enforce their judgements already creates an obligation on Muslims to follow *shari'ah*. Certainly this is true of marriage, divorce, inheritance and *wakaf*, but that would leave open the question of the rest of the content of *shari'ah*, which is presently largely without judicial force in contemporary Indonesia.<sup>24</sup>

### *Shari'ah* and Pancasila

Despite its defeat, the art 29 proposal demonstrated, again, that ideological debate over *shari'ah* in Indonesia since 1945 remains centred on the *Piagam Jakarta* and thus on what the first principle of the Pancasila means. The Pancasila is, however, an ideology and, by their nature, ideologies vary according to circumstance. This is certainly true of the Pancasila, in particular as between the 'Guided Democracy' of President Soekarno (1959-1966), the 'New Order' under President Soeharto (1967-1998) and the post-Soe-

harto *reformasi* era (1998 to the present). And, because Islam has been reduced to a component of a national ideology by the Pancasila, it is no exception to this variance. There are therefore no certainties for *shari'ah* in Pancasila.

This is the irony of the *shari'ah*-state tension: the discussion must be in terms of ideology and a religion, while it may be framed, controlled and expressed in ideological terms is, in its essence, not an ideology. The proponents of Islam seek certainty of revelation in the institutions of the state (basically a constitutional position) but in return for this they must accept that Divine revelation is not the only source of authority in the secular Indonesian nation. This is the fundamental disjunction: that Revelation has a constitutional form. A Constitution is, of course, not designed to do this —it is poorly equipped to justify a religion and, of course, revelation does not require justification. Essentially this is what Pranowo (1990) refers to when he asks, 'which Islam and which Pancasila?' Both are variable through time and the variations are conditioned by the politics of the day. By their nature these variations are short term and mostly unedifying, but they still have to be dealt with on a day-to-day basis. How is this to be done?

There seems to be no single answer to this question in Indonesia but, instead, a complex of themes that revolve around the notion of an 'Islamic' state. This debate is inevitably politics-driven and thus opportunistic and frequently incoherent. There is no certainty of policy; indeed, certainty as a value translatable into law' is consistently downgraded. Some, such as Nurcholish Madjid (1987), deny the practicality of an Islamic state or even argue that Islam does not make such a state necessary at all. These are common views in contemporary<sup>25</sup> Indonesian thinking (Azra, 2001; Sjadzali, 1991) and they usually present the fact of Pancasila as sufficient 'Islamic' reference for the secular Republic of Indonesia. But this Pancasila account of Islam ultimately has little depth or conviction from a religious perspective: it is hard for many devout Muslims to see it as anything other than heterodox, theologically.

The *Piagam Jakarta* is, of course, the other reference frequently made but asserting an obligation on Muslims to follow *shari'ah* does not resolve much, as there is no generally accepted definition of *shari'ah* for implementation or agreement as to what as-

pects of the corpus of Islamic legal thought are appropriate for implementation in modern Indonesia.<sup>26</sup> In fact many authors asserting the Charter and demanding *shari'ah* give little space at all to what a reformed *shari'ah* system might be like.

It would be inappropriate to ignore the fact that, whatever their lack of consistency, these debates do extend to somewhat wilder shores. Here, 'Islamic' and '*shari'ah*' can be references to such ideas as the imposition of *hudud* criminal punishments, enforcing a proper 'Islamic' dress for women, restricting the movements of women and forcing the use of Arabic language, the imperial tongue of Allah. These debates are known to us mainly at second-hand and are associated with Aceh and Makassar and, to a much lesser extent, Minangkabau, as well, of course, as small fringe groups such as Jemaah Islamiyah or Laskar Jihad. There is a shortage of reliable detail as to precisely what is proposed - beyond vague polemic - and no one has yet explored the sociological practicalities of implementing such policies. Examples from elsewhere (Pakistan, Sudan, for example) are not encouraging and even in neighbouring Malaysia, where the debates are much better documented (for example, Othman, 1994 and Ismail, 1995), no practical solutions have been put forward.

The consequences of this are best seen in Aceh. Government agreement to allow *shari'ah* to run in Aceh, as part of the autonomy package in Law No 18 of 2000 appears to be meaningless in practice, because there is no agreement among Acehnese leaders, secular and religious, state or rebel, as to what a reformed *shari'ah* system in Aceh might be like. The authors are aware of at least four different draft *shari'ah* codes currently in development in Aceh, all of which are radically different in content, but there is not even consensus as to whether a new *shari'ah* court will be created and, if so, whether appeals would lie to the Mahkamah Agung in Jakarta. A team has been established to attempt to resolve these questions, comprising members of the Supreme Court, the Department of Religion and the Ministry of Justice, as well as members of the Indonesian legislature and Acehnese representatives, but no agreement was in sight at the time of writing.<sup>27</sup>

### The Fading<sup>28</sup> of the Pancasila

Another, although more recent, problem for the Pancasila as a reference point for Islamic political thought is its diminished au-

thority since the fall of Soeharto in 1998. The peak of political subordination of Indonesian Islam by the state through the medium of the Pancasila was the Law on Social Organisations, No 8 of 1985. Known as the *Azas Tunggal* (or sole foundation) Law, this statute required all political and social organisations—including popular Islamic organisations such as Nahdlatul Ulama and Muhammadiyah—to adopt the Pancasila as their sole philosophical base. Refusal to do so, for example by insisting that only Islam could be the philosophical basis of a Muslim religious organisation, or any questioning of the Pancasila, was seditious.

Most major Islamic organisations eventually complied, acknowledging—nominally at least—that Pancasila was their sole foundation on the grounds that it embraced and, to use the words of the Preamble to the Constitution, was inspired by Islam. Some, however, maintained defiance, even characterising Pancasila as un-Islamic, polytheistic and heretical. This opposition was seen by the state as political dissent and subversion and treated as a security issue, with killings, intimidation and detention (van Langenburg, 1990: 123, 133-4, n 43).

Since the end of the New Order with Soeharto's resignation in 1998, there has been a distinct retreat from the high water mark of the *Azas Tunggal* Law. New Order ideology was saturated by what Lubis (1995: 8) calls a deliberately mystified and obfuscated account of the Pancasila that allowed the government broad freedom of interpretation and thus action (van Langenburg, 1990; Reeve, 1990; Pemberton, 1994). This has led to the Pancasila being seen as a political tool of Soeharto's Orba<sup>29</sup> and thus discredited, like the Orba itself, once Soeharto lost power. Successor administrations, under Presidents BJ Habibie, Abdurrahman Wahid and Megawati Soekarnoputri in turn, have been more reliant on Islamic parties for support and have been unable to assert the levels of control over ideology and religion that Soeharto once enjoyed. This has now been formally acknowledged. MPR Decision (*Ketetapan*) No V/MPR/2000 on the Implementation of National Unity and Unification now acknowledges, for example, that the Pancasila has been 'misused' to support the status quo and that it should become a national ideology that is 'open to discussion for the future of Indonesia' (Wadde, 2002: 79).

The problem is, of course, that while Pancasila's meaning is now uncertain, no replacement account has yet been developed. This means that to the extent that the Pancasila is a key reference point for political Islam, it is now a far more unclear and far less legitimate one than it was under Soeharto. How Pancasila fares in the future in a far more ideologically complex political scene is certain to strongly influence —and be influenced by— the debate on the relationship between the state and *shari'ah* in Indonesia. To a significant extent, this debate will ultimately be decided within the state, that is, by the government and its bureaucracy.

### The Bureaucratic Face of *Shari'ah*

Almost all pre-modern, colonial and independent states attempt control of Islam or, for that matter, any religion, to some extent. The reason is simple: religions are alternative sources of authority to the state and believers may oppose or support secular authority on theological grounds (Hooker, 1999a: 97). Islam, in particular, claims to be a complete revelation for all time and this makes it relatively harder in theory for it to be reconciled to temporal authority, although this is, of course, what inevitably occurs. The history of Islamic peoples thus shows many examples of different methods of state control of religion, but common to all periods and places is the importance of bureaucratic regulation.

The Republic of Indonesia inherited from the Dutch a theory of government that saw the state as a gigantic bureaucracy —the so-called *beamtenstaat*. While Islam was, of course, the subject of much colonial policy, it was not institutionally part of the Dutch *beamtenstaat*. This changed with independence, however, and Islam was rapidly absorbed into the Republic's successor bureaucracy with the creation of the Ministry of Religion in 1946, the first year of the revolution against the Dutch. Regarded as the only foothold left for Islam in the national government after the loss of the *Piagam Jakarta*, the Ministry was quickly monopolised by that religion at the expense of others (Feener, 2001: 87).

The Indonesian religious bureaucracy today is not distinct from any other arm of the state administration in either its style or its systems. It is less concerned with doctrine or scholarship than with implementing state policy objectives. The Department thus exists chiefly to operate the key religious institutions that have been

cooped by the state, the Religious Courts (Pengadilan Agama) (in conjunction with the Department of Justice and the Supreme Court or Mahkamah Agung: Law on Religious Justice No 7 of 1989, paragraphs 5(1) and (2)) and, largely through those courts but also in its own right, marriage and divorce; the *hajj* (the pilgrimage to Mecca obligatory for Muslims who can afford it); *waqf* (religious charitable trusts) and *zakât* (the charitable alms obligatory for Muslims). Of these, the administration of the Religious Courts is seen as the most important and, for reasons of space,<sup>30</sup> that is our focus here.

### Administration of the Courts

Responsibility for the administration of the Religious Courts is somewhat chaotic and confused. Officially, the Supreme Court, under the auspices of the Department of Justice, 'conducts technical juridical oversight' of the courts. It does this chiefly through a specialist panel of Islamic judges who determine matters on cassation (*kasasi*),<sup>31</sup> from the High Religious Courts. This panel is currently headed by Justice Syamsuhadi. The Department of Religion, by contrast, "handles organisational, administrative and financial aspects' of the courts (*Sketsa Peradilan Agama*, 1998); however, the representatives of the Commander-in-chief of the Armed Forces and the Department of Defence are also regularly consulted on matters within the purview of the Department of Religion.<sup>32</sup> The Department of Justice usually delegates its involvement in religious law to the General Justice System and Administrative Agency (Badan Peradilan Umum dan Tata Usaha Negara) while the Department of Religion has its Directorate for the Supervision of the Islamic Religious Justice System (Pembinaan Peradilan Agama Islam).

As Hooker (1999a: 100-2), Pranowo (1990: 43) and Lev (1972: 99-101) have shown, however, the Department of Religion has also, in the past, operated as a sort of *de facto* court of cassation from the Religious Courts. This was confirmed by a Ministerial Decision in 1963 (Pranowo: 1990) but in 1970 the Supreme Court was explicitly granted this power by the Law on Judicial Powers No 14 of 1970 and this was confirmed by Law No 14 of 1985 on the Supreme Court and the Law on Religious Justice, No 7 of 1989 (art 5(1)) (Hooker, 1999a: 99, 104). The data are sparse and unclear, but it nonetheless



appears that the Department is occasionally still consulted on disputes arising from Religious Court decisions, albeit usually informally; and that the Directorate sometimes issues advice to judges on issues of interpretation (Hooker, 1999a: 101, 104).<sup>33</sup>

These issues are further complicated by Law No 35 of 1999, the so-called *satu atap* or 'one roof law, which provides for the transfer of organisational, administrative and financial responsibility for all courts from the Ministry of Justice to the Supreme Court, over a five-year period.<sup>34</sup> Article 11A of this law excludes the Religious Courts from the five-year period and does not fix a particular time limit for their transfer. Likewise, it is clear that even if transfer is ever effected from Justice to the Supreme Court, the Department of Religion will continue to have a role, regardless. Nonetheless, the current sharing of responsibility for the Religious Courts between the Supreme Court, the Department of Justice and the Department of Religion means that the 'one roof changes, when-ever they occur — and even if they are restricted to the other courts— will inevitably affect the Religious Courts.

So far, four years into the five years allowed, little has been done to implement the 'one roof transfer as bureaucrats squabble to devolve responsibility and keep hold of budgets. At present, the process is paralysed and there is widespread frustration and uncertainty about how Islamic law will be administered in the future. The current difficulty is that the Ministry of Justice is resisting transferring its judicial affairs budget to the Courts, which are already under-funded (Lindsey, 2001b). As will be seen below, the Religious Courts are particularly impoverished, so there is real concern among *shari'ah* judges that their position will become untenable if the two Departments and the Supreme Court cannot resolve their differences quickly. This concern is what is driving recent and controversial calls to end cassation from the High Religious Court to the Supreme Court and establish the High Religious Court as the summit of a freestanding *shari'ah* judiciary, along the Malaysian model.<sup>35</sup>

In a sense, these problems of the bureaucratic face of *shari'ah* in Indonesia symbolise the broader problems for Islamic law in Indonesia: formal recognition and official status is diluted by close, but often dysfunctional, control by a secular *beamtenstaat* that does not prioritise Islamic law. The result is a lack of clear religious

substance, subordination to government ideology, a strong sense of legal uncertainty and administrative chaos. Certainly, it means that the Department of Religion has not been able to exercise leadership in defining and developing *shari'ah* in Indonesia for at least the past four decades.

### **The Judicial Face of *shari'ah***

What then does the *shari'ah* actually mean to the individual in practice -in the real world of rights and obligations, apart from ideology and bureaucracy —and how does the state regulate the determination of rights and obligations at Islam on a day-to-day basis? The answer is in the jurisprudence (decisions) of the Religious Courts.

### **Clean Courts?**

As a preliminary we emphasise what is well known: that the Indonesian judicial system is deeply corrupt, usually incompetent and generally ineffective (Lev, 1996; Lindsey 2001a; Lindsey 2001b). The courts are seen as dysfunctional and obstructive and Indonesians are therefore highly litigation averse. A recent survey by the Asia Foundation (2001) has shown, however, that these generalisations do not appear to apply to the Religious Courts. If this survey is representative then the Religious Courts are, in fact, perceived by Indonesians as consistently among the most reliable and least corrupt of all government institutions, ranked not only well above all other Courts but also above, for example, the police, the armed forces, Komnas HAM (National Human Rights Commission), legal aid organisations, other NGOs and the ombudsman.<sup>36</sup> The Religious Court judiciary is seen as 'doing its job well', being trustworthy' and not arrogant or corrupt.<sup>37</sup>

Of course a cynic might say that there is no point in corruption in the Religious Courts because most litigants in this jurisdiction have no money anyway, coming as they do from the poorer classes of urban and rural society. This means that both what is at stake in litigation and what is available for bribes is much less than in the general courts (Pengadilan Negeri — State ('District') Court; Pengadilan Tinggi — High Court; Mahkamah Agung — Supreme Court) or the Commercial Court (Pengadilan Niaga), for example. Others point to the fact that lawyers are relatively less

often engaged by litigants in the Religious Courts, both because most lack funds to pay fees and because judicial attitudes mean it is perfectly possible in this jurisdiction to be a successful litigant without legal representation.

### Justice against the Odds

Whatever the reasons it remains undeniable that the Religious Courts are perceived by Indonesians as working effectively and there is support for this in the data available from the courts themselves. The best indicators are the available case statistics, drawn from the courts' publication *Sketsa Peradilan Agama*<sup>38</sup> (1998).

#### *Religious Courts (1998)*

- a. 55,805 cases ongoing from 1997.
- b. 173,933 new cases received.
- c. 7369 cases withdrawn.
- d. 153,281 cases decided.
- e. Leaving 69,088 cases not yet decided.

This represented a 19% increase in the number of cases decided, compared with 128,787 cases decided in 1997.

#### *High Religious Courts (1998)*

- a. 787 cases ongoing from 1997.
- b. 1559 new cases received.
- c. 36 cases withdrawn.
- d. 1768 cases decided.
- e. Leaving 542 cases not yet decided.

This represented a 60.43% increase in the number of cases decided, compared with 1102 cases decided in 1997.

These completion rates are all the more impressive because they have been achieved in conditions that are extremely poor, even given the typically under-funded and basic infrastructure of most courts in Indonesia other than the Supreme Court and the Commercial Court. It is worth giving some detail of the very basic conditions in which Indonesia's *shari'ah* judges are required to work, noting that very little has changed in this regard since Lev's account of these courts 30 years ago (Lev, 1972).

First, staffing levels. It is important here to bear in mind that these courts are servicing nearly 200 million Muslims. In 2000, there was a total of only 2634 judges appointed to the Religious Courts and High Religious Courts combined, comprising 2227 men to 407 women. Two-thirds of these judges were aged less than 45. In 1997-98<sup>39</sup> there were 3742 Clerks of Court in Religious Courts and, by 2000, 786 Assistant Bailiffs had been appointed. In the same year there were 2467 administrative staff. On any measure these numbers are grossly inadequate and this is reflected in the crowded court hearing schedules and individual judges' heavy case loads: an average of nearly 90 cases each in 1998.

We turn next to facilities provided to the Courts. At present, all 25 High Religious Courts have their own buildings. The average office area is 300 m<sup>2</sup> on land varying between 1500 to 2500 m<sup>2</sup>, generally not located on a main road. Religious Courts of first instance are less fortunate. Of 314, nine occupy temporary rented houses. The average building is tiny, 150 m<sup>2</sup> in size on land averaging 300 m<sup>2</sup>, again, usually far from a main road, often in a quite isolated quarter.<sup>40</sup> So-called 'permanent offices' are also provided for remote locations far from the capital of a District or Municipality to provide access to justice for locals. There are not many of these, and most were provided by the local government. Generally the standard of all these buildings is poor, with little or no air-conditioning and some buildings in obvious disrepair.

Office furniture typically consists of a single hearing room (chamber), table and chairs for the judge and clerk of court, chair and bench for the defendant, claimant, witnesses and visitors, judge's robes and jacket for the clerk and basic decorations. These facilities are very simple, both in quality and quantity and are often badly deteriorated. On average there is only one set of judge's robes and clerk's jacket for courts outside Jakarta. Some judges therefore have to attend hearings dressed in their street clothes. Most courts lack a sound system, which is obviously important for hearings in crowded courtrooms and for calling litigants. Some judges fund improvements to facilities from their own incomes, which are already meagre.

Incredibly, no Religious Court, either High or at first instance, has separate rooms for a library and therefore reading facilities such as table and chairs are not available. Where library collections

exist, they are usually held in judges' chambers. The quality and number of volumes is typically very limited. Procurement of publications does not keep up with developments in the law, either in terms of Islamic law or general law. No court that we have visited had, for example, complete collections of volumes of reported decisions of the religious panel of the Supreme Court or of key local Islamic legal journals such as *Mimbar Hukum* or *Studia Islamika*.

It is normal in Indonesia for government officials like court staff to be provided with government housing. Ninety-four official houses have been built for court staff, consisting of 10 Type B houses, 28 Type C houses and 56 Type D houses, but only 10 of the 25 Chief Judges of the High Religious Court are provided with housing. None is available for other judges, Clerks of Court or other staff. Likewise, for the 314 Religious Courts, only 84 houses are provided for Chief Judges, including 28 Type C houses and 56 Type D houses.

There are 95 vehicles and 274 motorcycles available for use by the Religious Courts, as staff are often required to travel long distances to work or to attend hearings. The 25 High Religious Courts each have one vehicle, and in total have 37 motorcycles which date back to 1982 and 1984 and are now unusable. Likewise, 74 of the 314 Religious Courts have one vehicle each. Other vehicles purchased in 1982 are now unusable. Two hundred and thirty seven Religious Courts have a motorcycle, vintage 1980-81, mostly unusable.

The Religious Courts at both levels now have the following office equipment between them, in total: 2207 typewriters with Roman type face, 252 typewriters with Arabic typeface. These typewriters, most of which are manual, are older than five years. Not all courts have a stencil machine, and those that do generally have machines older than 15 years. All courts except Makassar now have a photocopy machine. Procurement of computers, however, is not yet widespread. Some High Courts have computers procured in 1994-95 but most of the first instance courts do not yet have any. Few staff have been trained in computer use.

Of course the Religious Courts' achievement of both good completion rates and a reputation for being relatively free of corruption in these conditions are, to an extent, a product of the Court's limited jurisdiction and simple structure (both aspects inherited from

the Dutch system). But they are also a product of a commitment expressed by many judges to providing a proper service to litigants. Judges tend to see them in religious terms as members of the *ummah*, whom they, as *kyai*, or religious leaders, have an obligation to serve. Most judges interviewed by the authors felt they had an obligation to their *ummah* to support social welfare and assist individuals in difficulty, even if it meant bending or ignoring the law.

We turn now to the formal regulatory structure of the Religious Courts.

#### *Law on Religious Justice, No 7 of 1989*

This is the foundational statute. It consists of a Preamble and seven chapters.

There are three noteworthy features of the Preamble. First, religious justice is described as pertaining to the certainty of law, itself a primary function of Law No 14 of 1970 on Judicial Power. This reference to the general court structure of the Republic of Indonesia clearly indicates the full integration of Religious Justice within the national court system. As mentioned, there is no separate *shari'ah* judicial system in Indonesia, as has emerged, for example, in Malaysia.

Second, the pre-existing regulations on the religious courts (that is, the colonial and immediate post-colonial regulations) are described as 'disjointed' and thus not suited to a national system of judicial administration.

Thirdly, it proposes a 'unified law ... in a national legal system ...' based upon Pancasila and the Constitution of 1945: General Provisions (ss 1-5). These sections formally establish Religious Courts and a Religious Appeal Court.

#### *The Composition of the Court (ss 6-48)*

These sections establish the qualifications the religious judiciary must hold, and provide for the appointment and dismissal of judges and administrative staff. A judge must be a public servant and a 'graduate in *shari'ah* law or a graduate with a mastery of Islam'. Neither qualification is further defined. All officers of the court must take an oath in the name of Allah and swear to 'be faithful to and defend and apply the Pancasila as the basis and ideology of the state, [and] the Constitution of 1945 ...'.

This part of the Act also regulates the perennial subject of jurisdiction. The Minister of Justice, Minister for Religion, Chief Justice, Attorney General and the President generally share authority over the appointment, dismissal, suspension and arrest of judges. The President appoints and dismisses Religious Court judges on the advice of the Minister for Religion with the assent of the Chief Justice of the Supreme Court (s 15(1)). If a judge acts criminally, negligently or culpably, the Chief Justice and the Minister of Religion must formulate appropriate investigation procedures (s 19(3)). To ascertain whether he should be removed, the President can suspend a judge from office on the advice of the Minister for Religion with the assent of the Chief Justice (s 21(1)). A judge can also be arrested by the Attorney General (Jaksa Agung) with the assent of the Minister for Religion and the Chief Justice. The Minister for Religion has jurisdiction over those matters with regard to lower level administrative staff and generally supervises Religious Court judges (s 12(1)).

The new legislation has been in operation now for almost 10 years but we are little the wiser as to how it actually works. The reported jurisprudence is sparse and when available minimalist, in the sense that, in most cases, decisions are given in a bare form - sometimes only one or two pages - with little concern expressed to explain the reasoning. The only constant feature of Religious Court decisions is the use of *Pancasila* and, to a lesser extent, the *Kompilasi*, as basic reference points but these tell us almost nothing about legal reasoning.

#### *The Powers of the Court (ss 49-53)*

Two points of particular interest emerge from this short chapter of the Act. First, s 49 establishes the courts' jurisdiction over marriage, inheritance and *waqf*. However, it goes on to provide (s 49(2)) that marriages are to be 'based on or regulated by the operative marriage laws' This is a reference to Law No 1 of 1974 on Marriage, which, as will be discussed below, is also cited in the *Kompilasi*. The significance of this section lies in its reference to *shari'ah* as defined in a state law - it is not a reference to *shari'ah* alone.

Secondly, s 50 provides that where property or 'other civil matters' arise in cases of marriage, inheritance or *waqf*,<sup>41</sup> the general courts, that is, the civil courts, must first decide the issue.

This provision retains the colonial practice of separating property matters from personal relationships. As mentioned above, it is practically impossible to split jurisdiction in family law this way (with the possible exception of *wakaf*). At best, therefore, this provision is often avoided using various devices (especially *fatâwâ*). At worst, it is inoperable.

#### *Law on Procedure (ss 54-91)*

This section is divided into three parts: a general section, investigation of marriage disputes and fees. There are two interesting features in the general provisions.

First, the Religious Courts must follow the laws of civil procedure operating in the general courts (s 54), although the particular legislation is not actually specified.

Secondly, s 62 states that all decisions must 'contain the provisions of relevant regulations on the unwritten source of law which forms the basis of the decision'. What this means is quite unclear. It may be a reference to *adat* or local Muslim practice but Indonesian jurisprudence will need to be examined to answer this question with more certainty.

Regarding marriage disputes, the court's function is solely to regulate divorce. The sections relevant to divorce in this chapter are clearly aimed at controlling the process of divorce by removing it from individual initiative and subjecting it to administrative procedure and, hence, delay. The same steps were taken in Singapore in the late 1950s and slightly later in Malaysia (Hooker, 1984).

#### **The 'Rational' Face of *shari'ah*:**

##### **The *Kompilasi* as Muslim Code**

The *Kompilasi* is certainly the most important document on *shari'ah* in modern Indonesia. The idea of enacting a 'Muslim Code' or 'Islamic Code' is not new. It has been discussed for at least the past half century. The *Kompilasi* is not, however, a product of Islamic scholarly traditions in Indonesia. It is a creation of the state and it is almost completely enveloped by the Pancasila. Section 1 of the Elucidation states, for example:

For the people and nation of Indonesia which is founded upon the Pancasila and the Constitution 1945 there is a right to the existence of a single national law which will guarantee the continuation of religious life



based upon the principle of Belief in One Almighty God, while simultaneously representing the embodiment of the legal awareness of the Indonesian community and people.

Although a creation of the state rather than of religion, the *Kompilasi* is not a statute (*undang-undang*), but 'a guide to applicable law for judges within the jurisdiction of the Institutions of the Religious Justice in solving the cases submitted to them' (Elucidation, s 5). Sections 3 and 4 of the Compilation's explanatory memorandum or Elucidation<sup>42</sup> appear to state what 'applicable law' is, by setting out the following sources for *shari'ah*, (a) 'standard texts of the Shâfi'î *madhhab* (school of Islamic legal doctrine)', (b) 'additional texts from other *madhâhib*, (c) 'existing jurisprudence', (d) the *fatâwâ* (legal rulings or opinions) of '*ulamâ*' (religious scholars, those who possess '*ilm*, or knowledge)' and (e) 'the situation in other countries'. This is a formal acknowledgement of eclecticism for sources of *shari'ah*. The *Kompilasi* claims to be a summary of these sources for use by Religious Court judges, but the extent to which this selection is governed by the state, that is, is 'top down', is suggested by the fact that this selection of sources ignores the *Kitab Kuning* ('yellow books'). These texts are the bases of instruction in the *pesantren*, which largely sit outside the state religious and educational systems but are hugely influential sources of modern Islamic thinking.

The *Kompilasi* came into force by way of Presidential Instruction. The authority for Presidential Instructions is found in s4(l) of the 1945 Constitution, which merely states that the President 'holds the power of government in accordance with the Constitution'. The Presidential Instruction directed the Minister of Religion, 'to implement the Instruction'. The Minister then issued a 'Ministerial Decision' to implement the Instruction. The Decision declares its own legal basis to be s 17 of the 1945 Constitution, which, at that time,<sup>43</sup> stated that, 'Minister shall lead Government Departments' (s 17(3)) and 'assist the President' (s 17(1)). The decision then provides detailed instructions to various government agencies to 'apply the *Kompilasi* in conjunction with other laws'. Neither the Ministry of Justice nor the Supreme Court is mentioned. Rather, the Ministerial Decision refers to the Religious Ministry's decisions on organisational structure. In other words, the *Kompilasi* is a bureaucratic handbook.

Despite this, the *Kompilasi* quickly became, to all intents and purposes, binding law in Indonesia, at least so far as the Religious Courts are concerned. As Cammack (1996: 67-8) puts it:

In a comment on the Compilation published by the Department of Religion and designated as required reading for Islamic judges, a justice of the Supreme Court, who was also one of the document's drafters, hails the Compilation as a codification of Islamic law.<sup>46</sup> The comment asserts that the Compilation elevates family law matters to the status of enforceable state civil law, and banishes forever the dogma that marriage and divorce is a private affair beyond the ambit of state control. ... Thus, at least in the eyes of the government, the [Compilation's] rules now have the force and status of Islamic doctrine.

The *Kompilasi* itself consists of three books. The first concerns Marriage Law (ss 1-70); Book II relates to Inheritance (ss 171-214); and *waqf* is the subject of Book III. The colonial legislation regulated these same subjects. The provisions of the *Kompilasi*, however, are far more detailed. What follows is a discussion of some of the issues arising out of the substantive provisions of the *Kompilasi*.

### *Kompilasi and Fiqh*

The contents of Book I on Marriage (which includes divorce) fall into three categories: (a) straight-out reproduction of *fiqh* (Islamic jurisprudence), though in a much simplified form; (b) *fiqh* rules, the operation of which are contingent on the completion of bureaucratic procedures; (c) rules of *fiqh* as amended or controlled by the judicial process in the Religious Courts. These categories are discussed in turn.

Several points flow from the straight-out reproduction of *fiqh*. First, the *Kompilasi* rules are very simple statements—they are obviously drafted to be understood by judges with only a very limited knowledge of *fiqh*. The implication of this appears to be that these simple versions are considered sufficient on their own for adjudication on *fiqh*, without reference to other sources. That there is no mention of any classical text tends to support this conclusion, but ultimately confirmation will be required from examining post-1991 jurisprudence (judicial decisions). Additionally, although it may be assumed that the distillation of *fiqh* in the *Kompilasi* is largely taken from the *madhhab* Shâfi'î, this is by no means proved and it is certain that influences from other *madhâhib* can

also be found. Clearly, a careful study of the sources of each provision of the *Kompilasi* will ultimately be required, although none has yet been undertaken.

The rules of *fiqh* that have been put into bureaucratic formulae are also interesting. Chapter XVI of the *Kompilasi*, for example, deals with the Termination of Marriage. Sections 129-142 and 146-148 require a daunting quantity of paperwork to be completed before a marriage is validly terminated. Although these 'rules' do not, in theory, affect the substance of *fiqh*, they do subject it to a secular process which actually determines its application. In other words, the *fiqh* is mediated by the *beamtenstaat* to such an extent that without procedural compliance the *fiqh* will not be applied. Thus, a husband who wishes to carry out a *ṭalâq* divorce must submit an oral and a written request to the Religious Court. If the judge permits the *ṭalâq*, then copies of the declaration are registered 'as evidence of the divorce'. (The *ṭalâq* right is considered further below.) The Law also contains provisions regulating the issue of summons to attend court hearings. Various methods of delivery are specified, including the requirement that it be displayed on public notice boards and in newspapers. There are further examples of *fiqh* being restricted by bureaucratic procedures in the *Kompilasi*.

The purpose of these restrictions is thus, ultimately, to allow the state to control personal status. The state has a vested interest in this because divorced wives and fatherless children throw a burden onto state agencies. The '*ulamâ*' thus equivocate. On the one hand the much-abused *ṭalâq* is divinely permitted. On the other, the negative social consequences are plain for all to see. To retain the divine permission but to formulate a bureaucratic obfuscation is a sensible response, at least from an administrative point of view, but it is, of course, unknown in the classic *fiqh*.

### *Polygamy*

As to instances where the rules are amended and controlled by judicial processes, the policy of the *Kompilasi* is clearly stated early on in the text. According to s 4, the validity of a marriage is determined by both *sharī'ah* and the Marriage Law of 1974. The point here is that, so far as the state is concerned, *sharī'ah* alone is insufficient. For example, the Marriage Law regulates the minimum

age for marriage and a Muslim man's right to take more than one wife is likewise severely restricted. To enter into a polygamous marriage, a man must obtain permission from a Religious Court. Without judicial approval, the marriage 'shall have no legal force' (s 56(3)).

Referring to s 5 of the Law on Marriage of 1974, the *Kompilasi* states that the husband must also obtain the permission of his existing wife or wives (s 58(1)). A wife's refusal to grant permission is not absolute; the Religious Court may override it if the wife is barren, unable to fulfil her marital obligations or has an incurable illness (s 59 referring to s 57). However, a husband must still show that he is capable of behaving justly towards all his wives and children and ultimately this will be a matter of fact for the court.

The result is that polygamy is, in principle, possible but is controlled by the state as a matter of social policy rather than law. This is well understood by the judges of the Religious Court. Many of those interviewed by the authors, for example, make it clear that both *shari'ah* and the Marriage Law and even the *Kompilasi* come second to a perceived state policy of providing support for single women and their children, for both economic and moral reasons which appear to be strongly felt by the judiciary. So, for example, Religious Court judges in locations as diverse as Jakarta, Surabaya, Palembang and Makassar have observed to the authors that they will grant permission for a polygamous marriage where a mistress is pregnant, regardless of whether the law allows it, in the expectation that birth will be followed by a quick divorce. This is intended to ensure that the child is legitimate and the mother has the status of divorcee rather than an unmarried mother (often seen as equivalent to a prostitute) and to ensure that she can obtain some form of property settlement through the divorce, rather than being forced into the sex industry, as is often feared will be the result.

Other provisions of the *Kompilasi* have a similar effect. For example, Chapter X of the *Kompilasi* aims to prevent any marriage forbidden by legislation or Islamic law' The Religious Court has jurisdiction over the matter, but the Marriage Registration Office (Clerk), who must also be informed of the marriage, is forbidden to 'implement or aid in the implementation' of a marriage that contravenes the Marriage Law of 1974 (ss 8, 68-69). Without the

appropriate document from the Marriage Registration Office, there is no 'marriage'. The document is everything.

### *Divorce*

The *Kompilasi* sets out two methods for the termination of marriage (Chapter XVI): *ṭalâq*, or a 'claim for divorce' (s 114). The grounds for divorce are set out in s 116. This part of the *Kompilasi* appears to aim to control *ṭalâq* and give the wife an avenue to initiate divorce. *Ṭalâq* is controlled by way of judicial supervision. The Religious Court may refuse a request by a husband for *ṭalâq* but the refusal is open to appeal and cassation (s 130). A wife may submit a claim for divorce on specific grounds, which include desertion for two years, lack of a harmonious domestic life and imprisonment of the husband for more than five years. In addition, the court may order alimony payments and the protection of the wife's assets during the period of the divorce claim.

The important conclusion is that, as with polygamy, the *ṭalâq* right to divorce granted by *sharī'ah* is tightly controlled by the state for social policy purposes, to the extent that the wife has an initiative outside of, and quite separate from, *sharī'ah*. This right has clearly been embraced by women. The case statistics obtained by the authors are more or less consistent across provinces: women consistently more often initiate divorce proceedings than men. To take three fairly typical examples, the total of cases received in the South Sulawesi Religious Court for January 2001 was 492. Of these, 112 (22.7%) were divorce applications brought by husbands and 358 (72.7%) divorces brought by wives. The balance of 22 cases (4.5%) included 4 annulments of marriage and two polygamy cases. The total number of cases received in the South Jakarta Religious Court for the year 2001 was 1834. Of these, only one was a divorce application brought by a husband and 601 (33%) were divorces brought by wives. The balance of 1232 cases (67%) included 12 annulments of marriage and eight polygamy cases. The total number of cases received in the Jakarta II High Religious Court for January 2001 was 4699. Of these, 1484 (31%) were divorce applications brought by husbands and 2960 (62%) divorces brought by wives. The balance of 255 cases (6%) included 16 annulments of marriage and 20 polygamy cases. The Religious Courts have virtually become 'divorce on demand' courts for women.

The remainder of Book I merely repeats *shari'ah* rules in simple form. The same is true for Book II (Inheritance) and Book III (*wag* for charitable trusts). In these two areas the *Kompilasi* is chiefly concerned with administrative procedures, and there are no substantive variations on the established *fiqh* rules, which are, in any case, stated in very simple versions.

### An Eroded State *Shari'ah*

It is clear therefore that the Islamic religion in Indonesia — at least insofar as it relates to the legal system — is the subject of almost total state executive control. Ultimate authority rests there, not in revelation. At the practical level, the *shari'ah* is now thoroughly 'reformed', indeed trivialised, in the *Kompilasi*. In a real sense this is the logical outcome of a process begun by the Dutch one hundred and fifty years ago. The Indonesian experience is thus ultimately little different to that of countries colonised by the French and British, where:

Islamic law ... was reduced in scope while norms were isolated from jurisprudence and enframed within a colonial legal system and court structure ... During this process the classical structure of Islamic law -resting on diverse sources and with many differing interpretations — was eroded as it became characterised by norms isolated from Islamic methodology, homogenous and rigidly applied. (Strawson, 2002: 206)

### The Educational Face of *Shari'ah*

While the judicial and bureaucratic faces of *shari'ah* in Indonesia are essentially continuations and elaborations of colonial policies toward Islam, this is not true of education. Indeed, the past 25 years have seen a revolution in *shari'ah* education.

This is mainly due to the foundation and establishment by the Department of Religion of State Islamic Institutes (Institut Agama Islam Negeri or IAIN) of which there are now 14 (Jabali & Jamhari, 1423/2002). Simultaneously, the Ministry of Religion has produced a Core Syllabus for the 14 State Institutes (latest 1998) each of which then has written its own variation (*lokal*) on the core text. It is vital to understand this material because most of the Religious Courts judges are now IAIN graduates. In 2000, for example, of a total of 2634 judges across all High and first instance Religious Courts, 1793 (68%) were IAIN graduates (*Sketsa Peradi-*

lan, 1998). The courts, therefore, to a very great extent, form their understanding of *shari'ah* from IAIN interpretations.

The IAIN curricula are now remarkable for their breadth and integration of modern educational theory and secular subject matter. This should not, however, be understood to belittle or downgrade the other key source of Islamic learning in Indonesia, one also experienced by many Religious Court judges: the traditional *pesantren* education. Some *pesantren* are, of course, parochial, chauvinist and narrowly focused on the classical texts of Islamic scholarship. Many, however, take a broader, more inclusive approach towards curriculum, closer to the IAIN model.<sup>45</sup> While some *pesantren* remain Arabic text oriented, most have now also begun to include non-Arabic, Indonesian and English texts in their widely varying curricula.

### The IAIN Core Syllabus

The Core Syllabus of the IAIN system is arranged by 'Bloc' We shall describe each briefly, paying particular attention to the required reading, and then indicate compliance with or deviance from the Core by contrasting two syllabi from Surabaya (East Java) and Palembang (South Sumatra), which we consider broadly representative of other IAINs. There is no space to do more here but it is clear that localisation is generally the norm.

#### *First Bloc: 'General Subjects'*

Apart from languages these include:

- 'Methodology of Islamic Studies'. This is a general introduction to the study of religion with an emphasis on the history of Islam. The set texts are wholly in Indonesian and include Mukti Ali, Nasution and Taufiq Abdullah. The only non-Indonesian work is Richard C Martin's *Approaches to Islam in Religious Studies*.
- 'Pancasila'; texts in Indonesian including *P4 Islam* and Hazairin's *Demokrasi Pancasila*.
- 'National Defence and Security' (*Kewiraan*); the concept of Indonesia, the archipelago, the Revolution and warfare based on Pancasila. Texts are wholly in Indonesian.

### Second Bloc

This has 11 courses wholly on the classical subjects, which include *fiqh*, *ḥadīth*, *kalām*, *taṣawwuf*, *fiḥsāfāt*, *tafsīr* and so on. The required reading is from Arabic, Indonesian and English texts. The Arabic includes both classical and modern commentary, but the balance between these two sources is by no means evenly distributed. While we do find Nawāwī, Ibn Rushd, and al-Mawardī, the majority of prescribed texts are drawn from contemporary Egyptian and Beirut material.

### Third Bloc

The same subjects are repeated at a more advanced level but, in addition, *non-fiqh* subjects are taken. They are about one-third of the total and include general legal studies, the Indonesian court system, procedure, research methods, economics and banking, commercial law, comparative law and legislation, criminal law and *fatāwā* (a minor item).

The core curriculum has just over 50 topics, of which one-third are not in the classical curriculum. Some degree of Arabic language competence is required but so also is English. The required reading is overwhelmingly modern and not from the classical canon. Taking this as our control we can now compare the local IAIN curricula.

### IAIN Local Curricula: Surabaya

The first is IAIN Sunan Ampel, Surabaya, which offers 90 courses of which 56 are described as *lokal*. The Surabaya equivalent to the national first bloc is the same set of courses but not taken together. Instead, they are spread and the Arabic texts prescribed are exclusively modern commentary. The Pancasila and *Kewiraan* courses are, however, included without change.

The real interest for this article lies in the second and third blocs, which are much elaborated in Surabaya by courses that describe themselves as *lokal*. The first section of these consists of Indonesian secular laws on a wide range of subjects, including procedure, structure of the judicial system, land law, criminal law, family law and so on. In addition, the sociology and politics of law are subjects extensively covered. The required readings are the standard textbooks produced by Indonesian authorities but



occasionally we find translations from English (for example, Lev, 1972).

Secondly, considerable attention is paid to *adat* (traditional customary law) law in both blocs. This is not a subject in the national curriculum. In the Surabaya case the subject is taken twice. The first offering is a stand-alone theoretical subject where the texts cited include Soepomo and Ter Haar, together with local comment (essentially a reprise of these two authors). This course thus relies solely on the Dutch scholarship. The other *adat* course, on marriage, is quite focused and takes the Marriage Law No 1 of 1974 as a base but, again, attempts to discuss it in terms of the ideas of Soepomo and Ter Haar. There is, however, one, more modern reference: Dr Subekti's collection of *adat* in the jurisprudence of the Mahkamah Agung. This is an under-utilised source but a very important one, as Lev (1965) pointed out years ago. Surabaya sees it the same way.

Finally, the Surabaya syllabus places great emphasis on economics. No less than 10 courses are given and they include accounting, banking, management, economics, mathematics, and information, including Islamic economics. The textbooks are all in English and the Indonesian reference are translations or commentary.

### IAIN Local Curricula: Palembang

Turning now to the IAIN Raden Fatah in Palembang, South Sumatra, we find an even greater degree of local initiative. The syllabus for 2000 covers the basic subjects but the emphasis is almost entirely on contemporary issues. In fact, the word *kontemporer* appears regularly. For example even in *fatwâ* studies the sources cited are all modern Egyptian (especially Yûsuf al-Qardâwî) in Indonesian translation or contemporary Indonesian studies (Atho Mudzhar). The same is true for the courses on *fiqh* in all its aspects. Even in *hadîth* —perhaps the most 'Arabic' of all subjects— while the classic texts are required reading, we also find works on *hadis yang tekstual dan yang kontekstual* ('textual and contextual *hadîth*').

In the broad range of courses on state/civil law there is also an emphasis on texts which reflect local (*SumSel*<sup>46</sup>) concerns and issues.

We must not, however, over-emphasise the local aspect at the expense of the wider contexts. In the latter we find a quite extraordinary range of references including modern Indonesian authors (for example, Nasution, Nurcholis Madjid) as well as authors in English (or translation) including extracts from unspecified works by Brockelmann and, again, Lev.

Perhaps the clearest example of the variation between local and national curricula, however, is to be found in the special courses which Raden Fatah offers. The best example is the D3 level *Perbankan shari'ah* (*shari'ah* banking), which has an extraordinary 34 courses. These include economics, economic theory, accountancy (at various levels), Islamic economics, state monetary policy, statistics, management and information technology (IT) in finance.

The conclusion to draw from this examination of curricula is that clear intention of the IAIN curricula, both national and local, is to fit the graduate for modern employment. Whether this is in the context of Islam or not seems, ironically, to be a secondary consideration. This raises two issues. First, do the IAIN curricula, in fact, actually offer courses on *shari'ah*? The answer is 'yes' insofar as the core bloc is concerned, but this amounts to only about one third of the total content of the curricula. The rest are basically the secular laws of Indonesia with a heavy emphasis on procedure, court structure and economic aspects of law. Secondly, because IAIN curricula are not uniform across Indonesia by reason of *lokal* variation, should we therefore expect variation in the jurisprudence of the Religious Courts? Judges, after all, can only act in the light of their own knowledge and training. The answer seems to be that variation exists but whether it is the norm or not has yet to be shown.

### **The Decisive Face of *Shari'ah*: The *Fatwâ***

This is the last of the public faces of Islam in Indonesia we have identified. A *fatwâ* is a formal advice, which may be a ruling or an opinion, on a point of law or dogma. It is not binding.

With the exception of Majelis Ulama Indonesia (MUI —the Indonesian Council of Religious Scholars), all the main *fatwâ*-issuing bodies are outside the government. They are independent sources of authoritative statements and, for this reason, carry a moral weight for the Muslim public. Perhaps even more important, the

*fatwâ* is the only form of *shari'ah* in Indonesia uncontaminated by secular thought. The advices or answers given by the '*ulamâ'* are founded purely on the classical texts of Islam.

There are many *fatwâ*-issuing bodies in Indonesia but the four main ones are Nahdlatul Ulama (NU —whose *fatwâ* collections date from 1926), Muhammadiyah (from 1928), Perserikatan Islam (Islamic Association) or Persis (from 1923) and MUI (from 1973). Each of these four has influence and authority as an interpreter of Islamic law, at least for their respective memberships (several millions) and also for the wider Indonesian Muslim public.

While each source uses the classical texts, each also has its own method, or claims a method of interpreting these for contemporary life. The respective methodologies can be summarised briefly as follows. NU emphasises recourse to the mass of the scholarly texts. Muhammadiyah (see Hosen, this volume) argues for a reading of Qur'ân and *Sunnah*, taking them historically, that is by seeking their original meaning and applying those principles to modern circumstances. Persis attempts linguistic analysis of *hadîth* aiming for a clear certainty. MUI makes recourse to textbooks, with Qur'ân and *Sunnah*. However, a reading of the respective *fatâwâ* of these organisations in fact shows that the methodologies are by no means as consistent or exclusive as is claimed. Each of the four *fatwâ*-issuing bodies makes recourse to the sources outside their respective stated methodologies (Hosen, this volume). This is particularly apparent in difficult contemporary issues such as medical science and ethics and in finance (Hooker, forthcoming).

The lesson is that when we claim that the *fatâwâ* are now the only 'pure' expression of *shari'ah* in Indonesia, we must also admit that 'pure' needs careful definition. It may be a standard textbook, it may be the Qur'ân, *Sunnah*, or *hadîth* or modern Middle Eastern commentary, or a combination of all these with varying emphases over time (Hosen, this volume; Hooker, forthcoming). The *fatwâ* genre is complex on its own and complexity is added to when it is taken with the other public faces of *shari'ah* in the contemporary world of Indonesia.

There is a further issue which must also be kept in mind. All the major sources give *fatâwâ* by way of committee, that is, their *fatâwâ* are the result of the collective *ijtihad* (intellectual effort). The result is, however, a formalisation of decision-making and

the production of agreed texts, which are published in official form. They constitute a canon for Indonesian Islam starting from 1926 and continuing into the present. They are the modern face of the classical sources. It is, therefore, highly significant that they are largely absent from the Religious Courts. No Religious Court judge interviewed by the authors could claim that he or she had ever relied on a *fatwâ* in making a determination. Few had ever even been referred to one by the parties to a case. The result is that the only classical aspect of modern Indonesian *sharî'ah* is utterly disconnected from the national Islamic legal system.

### Conclusion: Dissonance as Assonance?

These, then, are the six public faces of *sharî'ah* in Indonesia. It would be pointless to pretend that there is any consistency. Indeed, to seek for consistency is to place too high a value on it as a necessary criterion. One might even say that it is an example of extreme Orientalism. This is one of the lessons from the colonial period during which the Dutch failed to acknowledge variety in Islamic expression and, concerned to render it uniform, also implicitly degraded its richness and complexity.

This brings us back, then, to the question posed by Hazairin half a century ago: has Indonesia developed a national *madhhab* or school of Islamic law, a 'way' in 'conformity with the cultural realities of Indonesia'? If by *madhhab* is intended a single, easily identified and coherent doctrinal interpretation of *sharî'ah*, then the answer must obviously be 'no'. On the contrary, Indonesian discourse on *sharî'ah* is marked by profound plurality and dissonance—and, as so often in Indonesia, paradox.

For example, Indonesia's democratically elected Islamic political parties cannot agree that *sharî'ah* should be constitutionally enshrined as an obligation for Muslims, although, of course, it is, as a matter of faith, binding. The same debate continues fiercely among Muslim leaders and scholars without signs of real resolution, despite the passage of half a century. Likewise, although there are persistent calls for an Islamic state subject to *sharî'ah*, there is no coherent or identifiable discourse regarding what an Islamic polity might be like.

Instead, Indonesian Islam remains largely defined by the *Pancasila*, a contrived secular ideology of political compromise. Used

for the past 40 or so years to contain and, at times, repress, Islam, its own content is now uncertain, as its legitimacy, bound to Soeharto's New Order, is now formally in question.

The Indonesian religious bureaucracy is not distinct from any other arm of the state administration in either its style or its systems. Its role is to administer the key religious institutions that have been cooped by the state - and, in particular, the courts. In this sense it is a model Pancasila institution. It is, however, in a state of disarray as it struggles with turf wars' to come to terms with the incomplete post-Soeharto reforms to the judiciary. The Department of Religion is thus less concerned with doctrine or scholarship and more with implementing state policy objectives - and surviving.

Likewise, Indonesia's Religious Courts, charged to administer Islamic law, have long been captured by the state and operate as an arm of the general court system and thus, the state bureaucracy. They administer a version of Islamic law that, in most important respects ignores, displaces or radically modifies classical *shari'ah*. The decisions of these courts are almost entirely bereft of reference to the classical expressions of *fiqh*, relying instead on statutes and the *Kompilasi*. The judges are generally motivated by a pragmatic interest in social outcomes rather than scholarship.

These courts are, however, popular among Muslims and widely respected as one of the few honest and reliable state institutions —above even democratically elected Islamic parliamentarians— despite the appalling conditions in which their judges work. Even in Aceh, which is generally understood to be home to Indonesia's most radicalised Islamic population, there is no real agreement as to what the alternative might be to the stunted but socially effective state *shari'ah* judicial system.

By contrast, the national Islamic education system is sophisticated and influential. There is variance from region to region but, again, a familiar trend can be identified: IAIN curricula are motivated not by a concern for classical scholarship but by an understandable desire to equip graduates to compete in a modern, industrialising economy. These are modern schools for Muslims, rather than modern Muslim schools.

*Fatâwâ* reflect the same patterns. The major *fatwâ*-issuing institutions, MUI, NU, Muhammadiyah and Persis, often produce con-

tradictory *fatâwâ*. They also have significantly different approaches to methodology but, in fact, frequently depart from their claimed method. In many cases, there is an apparent concern to produce socially useful and practical outcomes, whatever the doctrinal issues, and this is clearly driving the inconsistencies.

The themes of Indonesian *sharî'ah* are therefore threefold: a fluidity based on social responsiveness; a related lack of concern for classical scholarship that is tied to cooperation with a secular state system; and, above all, dissonance, both in the sense of a non-conformity with, for example, mainstream Arab accounts of Islamic law, and in the sense of continuing internal debate among Indonesian Muslims on key Islamic legal issues. In fact, it is difficult to point to any aspect of Indonesian *sharî'ah* that is accepted in practice by all Indonesian Islamic institutions and which would be considered orthodox in the Middle East — Arab intellectual imperialism has not won in Indonesia. In other words, Indonesian *sharî'ah* is both contested and, at the same time, in its pluralism and tolerance for that contest, distinctive.

If Hazairin was right to speak of an Indonesian *Madhhab Sharî'ah Nasional* then it was perhaps not in the conventional understanding of a *madhhab* as a clear, identifiable school of religious thought but in a more radical sense, as a national religious *style*, marked by dissonance rather than assonance — an inchoate *madhhab*. If Indonesia is developing its own national *madhhab*, then its characteristics might therefore be pragmatism driven by a concern for social welfare rather than legal scholarship; a pluralism that accepts continuing debate, even on key issues; and a tradition of institutional cooperation with the secular state that might even one day point toward a formal rapprochement between state and Islam. Of course, these qualities are not what most Muslim scholars would consider 'Islamic' let alone a recognisable *madhhab* but they are what has emerged in Indonesia half a century after the abandonment of the *Piagam Jakarta* and they should not surprise us. After all, as Taylor (1997: 50) says, 'most of the world's legal systems are hybridised and ... their characteristics are dynamic rather than fixed'. Put another way, perhaps these qualities are also a reflection of Islamic injunction, 'Difference of opinion among my community is a sign of the bounty of God'.<sup>47</sup>

## Endnotes

- \* This article is a product of the authors' joint research on Islamic law in Indonesia, sponsored by a three-year Discovery Grant from The Australian Research Council. Much of the material in this article is drawn from the authors' fieldwork in Indonesia for this project, which has involved interviewing judges, court officials, lawyers, litigants, IAIN staff and religious leaders and scholars in 7 provinces so far. The authors are grateful to Helen Pausacker, Rowan Gould and Luke Arnold of the Asian Law Center at the University of Melbourne for research assistance on this project.
1. There are no reliable figures for religious affiliation in Indonesia. The usual estimate of the size of the Muslim population is between 80 to 90%. AU, 1995, for example, puts it at 88.09%. These estimates, however, ignore the important question of the nature of belief. Should the definition include 'nominal' Muslims, so called *Islam statistik*? If so, how are they to be identified?
  2. The leading Islamic parties are PPP (Partai Persatuan Pembangunan — United Development Party), PKB (Partai Kebangkitan Bangsa — National Awakening Party), PAN (Partai Amanat Nasional — National Mandate Party), PBB (Partai Bulan Bintang — Crescent Star Party) and PDU (Partai Daulat Ummah — Sovereignty of the Community of the Faithful).
  3. Nahdlatul Ulama is the traditionalist Islamic organisation that supports PKB. Muhammadiyah is the modernist organisation, many of whose members support PAN. Officially, NU and Muhammadiyah are not aligned with any political party. Between them these organisations claim a membership of 70 million, although there is no way of verifying this figure.
  4. Institut Agama Islam Negri, State Institute of Islamic Studies.
  5. Glenn, 2000: 159 identifies only 500 of the Qur'ān's 6000 or so verses as 'law' in this sense.
  6. *Sunna*: the way, or practice, of the Prophet: what he said and did.
  7. *Ḥadīth* record the practices of the Prophet. The *Sunna* is known through the *ḥadīth*. *Ḥadīth* were recorded by the original Companions of the Prophet and then handed down through the centuries. Their validity and accuracy varies and is the subject of debate: see Hosren, this volume.
  8. See, for example, Pranowo, 1990.
  9. Majelis Permusyawaratan Rakyat, People's Deliberative (or Consultative) Assembly.
  10. Formerly the Jakarta IAIN.
  11. Jakarta, Banten, West Java, Central Java, Yogyakarta, East Java, North Sumatra, West Sumatra, South Sumatra, Lampung, Jambi, South Kalimantan, East Kalimantan, South Sulawesi and West Nusa Tenggara.
  12. For the Sunni Muslim (the vast majority in Indonesia), the classical *madhāhib* are Ḥanafī, Ḥanbalī, Mālikī and Shāfi'ī: Hooker, 1999a: 99.
  13. The authors are currently engaged in collecting Religious Court judgments for this purpose. Virginia Matheson Hooker is researching the private face of Islam in Indonesia in her *Living with Devotion*, forthcoming.
  14. An English translation can be accessed at <<http://islamic-world.net/islamic-state/macharter.htm>>.
  15. See, for example, Bahtiar Effendi, 2001.
  16. For detail of these debates, see Bouchier, 1999 and Nasution, 1992.
  17. Passages are reproduced in Noer, 1973: 273.

18. Partai Persatuan Pembangunan.
19. These included PBB and PDU.
20. PKB.
21. PAN.
22. Not least because the amendment's chief advocate outside the MPR was Abu Bakar Ba'asyir, the leader of Jemaah Islamiyah, which the US has identified as an Al Qaeda front: McBeth, 2002 and which has since been implicated in the Bali Sari Club bombing of 12 October 2002.
23. The Religious Courts in the province of Bali are served by the High Religious Court in Mataram on Lombok. East Timor did not have either a Religious Court or a High Religious Court: *Sketsa Peradilan Agama*, 1998.
24. Although see Pompe, 1999 for examples of other ways in which *shari'ah* relating to sexual crimes can be enforced as traditional customary law (*adat*) under surviving Dutch colonial law.
25. That is, from the 1990s to the present.
26. A good recent discussion is in Halim, 2002.
27. August 2002. For reasons of space, we do not deal in detail with the debate over *shari'ah* in Aceh in this article. This will be dealt in another, forthcoming article.
28. The authors are indebted to Sarah Waddell (2002) for this term, which she uses in respect of Indonesian ideas of the integrist state.
29. Orde Baru — New Order.
30. Interview, Justice Syamsuhadi, Supreme Court Jakarta, 2002. There is also a significant lack of data in relation to the other activities of the Department of Religion. Resolving this is one of the objectives of the authors' current research.
31. A form of Civil Law appeal, loosely comparable to a Common Law appeal on a point of law.
32. Interview with Justice Syamsuhadi, Supreme Court of Indonesia, 2002.
33. This was confirmed in interviews with Religious Court judges and officers of the Department of Religion conducted by the authors in 2002.
34. The key provisions of this Law are art 11(1) and (2), which give Supreme Court control over the organisation, administration and financial affairs of the courts. The full text of the Law appears in the Appendix to Lindsey, 2001b.
35. Interview, Judge Suryadi, Department of Religion, Jakarta, 2002.
36. Table 28, Asia Foundation, 2001: 54.
37. Table 30A, Asia Foundation, 2001: 56.
38. Religious Judicial System Sketch.
39. It has not been possible to obtain data for all staff categories in the same years. Comparison must thus be made as between different years, although the authors acknowledge that this is problematic.
40. Recent development has enabled 97 of these buildings to be enlarged to 250 m<sup>2</sup>.
41. A form of Islamic charitable trust.
42. All Elucidations accompanying laws in Indonesia should be read as a part of the text of the statute itself.
43. The amendments to the 1945 Constitution made each year from 1999 to 2002 have radically reinvented that Constitution: see Lindsey, 2002. Article 17(3) now reads '[e]ach Minister shall hold a particular portfolio in govern-



ment' Article 17(1) is unchanged. A comparative table of amendments is annexed to Lindsey, 2002.

44. Harahap, M Yahya, 'Informasi Materi Kompilasi Hukum Islam: Mempositifkan Abstraksi Hukum Islam', [The Content of the Compilation of Islamic Law: Realising the Abstractions of Islamic Law], (1992) 3(5) *Mimbar Hukum* 17, cited in Cammack et al, 1996.
45. See the discussion in Jabali & Jamhari, 1423/2002: 93-128.
46. Sumatera Selatan: South Sumatra.
47. Qur'ân XLII: 10; also see Doi, 1984: 81 and Coulson, 1964: 86-9.

## Bibliography

- Ali, H Mohammad Daud and Hj Habibah Daud, (1995), *Lembaga-Lembaga Islam di Indonesia*, Jakarta: PT Raja Grafindo Persada.
- Asia Foundation/ AC Neilson (2001), *Survey Response on Citizen's Perceptions of the Indonesian Justice System*, Jakarta: Asia Foundation (August).
- Azra, Azyumardi (2001), 'Islamic Perspective on the Nation State' 39(2), *Al-Jami'ah* 292-309.
- Bourchier, David (1999), 'Positivism and Romanticism in Indonesian Legal Thought', in Tim Lindsey (ed), *Indonesia: Law and Society*, Sydney: Federation Press
- Butt, Simon (1999), 'Polygamy and Mixed Marriage in Indonesia', in Tim Lindsey (ed), *Indonesia: Law and Society*, Sydney: Federation Press.
- Cammack, Mark et al (1996), 'Legislating Social Change in an Islamic Society — Indonesia's Marriage Law' 44 *American Journal of Comparative Law* 45.
- Coulson, NJ (1964), *A History of Islamic Law*, Edinburgh: Edinburgh University Press.
- Doi, ARI (1984), *Shari'ah: The Islamic Law*, London: Ta Ha.
- Feener, R Michael (2001), 'Indonesian Movements for the Creation of a "National Madhhab"' 9(1), *Islamic Law and Society* 84-113.
- Glenn, H Patrick (2000), *Legal Traditions of the World: Sustainable Diversity in Law*, Oxford: Oxford University Press.
- Halim, Abdul (2002), *Peradilan Agama dalam Politik Hukum di Indonesia*, Jakarta: PT Raja Grafindo.
- Hazairin (1950), *Hukum Baru di Indonesia*, Jakarta: (no publisher).
- Hooker, MB (1984), *Islamic Law in Southeast Asia*, Kuala Lumpur: Oxford University Press.
- Hooker, MB (1999a), 'The State and Syariah in Indonesia', in Tim Lindsey (ed), *Indonesia: Law and Society*, Sydney: Federation Press.
- Hooker, MB (1999b), 'Islam and Medical Science in Indonesia', in Tim Lindsey (ed), *Indonesia: Law and Society*, Sydney: Federation Press. Hooker, MB (forthcoming), *Indonesian Islam: Social Change Through Contemporary Fatâwâ*, Sydney: Alien & Unwin.
- Hooker, VM and MB Hooker (2001), *John Leyden's Malay Annals*, Selangor: Malaysian Branch of the Royal Asiatic Society.
- Islam and Good Governance* (2002), 'Syariat di Mata Ummat', 3rd edn, 1-3 July.
- Ismail, Rose (ed), (1995), *Hudud in Malaysia*, Kuala Lumpur: SIS.
- Jabali, Fuad and Jamhari (eds) (1423/2002), *IAIN: Modernisasi Islam di Indonesia*, Jakarta: Logos.
- Katz, June and Ronald Katz (1975), 'The New Indonesian Marriage Law' 23 *American Journal of Comparative Law* 653.
- Lindsey, Tim (2001a), 'The Criminal State: Premanisme and the New Indonesia', in Grayson Lloyd and Shannon Smiths (eds), *Indonesia Today*, Singapore: ISEAS.
- Lindsey, Tim (2001b), 'Abdurrahman, the Supreme Court and corruption: Viruses, Transplants and the Body Politic in Indonesia', in Damien Kingsbury and Arief Budiman, *Indonesia: The Uncertain Transition*, Adelaide: Crawford House Publishing.
- Lindsey, Tim (2002), 'Indonesian Constitutional Reform: Muddling Towards Democracy' 6(2), *Singapore Journal of International Law* (forthcoming).

- Lev, Daniel S (1965), 'The Lady and the Banyan Tree' 14 *American Journal of Comparative Law* 282-307.
- Lev, Daniel S (1972), *Islamic Courts in Indonesia*, Berkeley: University of California Press.
- Lev, Daniel S (1996), 'Between State and Society: Professional Lawyers and Reform in Indonesia', in D Lev and R McVey (eds). *Making Indonesia*, Ithaca: Cornell University Press.
- Lubis, Nur Ahmad Fadhil (1995), 'Institutionalisation and Unification of Agama courts under the New Order', 2 *Studia Islamika* 1-51.
- Madjid, Nurcholish (1987), *Islam Kemoderenan dan Keindonesiaan*, Bandung: Mizan.
- Madjid, Nurcholish (2002), 'The Potential Islamic Doctrinal Resources for the Establishment and Appreciation of the Modern Concept of Civil Society' 1(2), *Jurnal Universitas Paramadina* 98-115.
- McBeth, John (2002), 'Islam and Society: The Case for Islamic Law' *The Straits Times*, 22 August.
- Mudzhar, Mohammad Atho (1993), *Fatwas of the Council of Indonesian Ulama: A Study of Islamic Legal Thought in Indonesia 1975-1988*, Jakarta: INIS.
- Nasution, Adnan Buyung (1992), *The Aspiration for Constitutional Government in Indonesia: A Socio-legal study of the Indonesian Konstituante 1956-1959*, Den Haag: CIP-Gegevens Koninklijke Bibliotheek.
- Noer, Dcliar (1973), *The Modernist Muslim Movement in Indonesia, 1900-1942*, Kuala Lumpur: Oxford University Press.
- Othman, Norani (ed) (1994), *Shariah Law and the Modern Nation State*, Kuala Lumpur: SIS.
- Pemberton, John (1994), *On the Subject of 'Java'*, Ithaca: Cornell University Press.
- Peters, Ruud (ed) (1996), *Jihad in Classical and Modern Islam: A Reader*, Princeton: Markus
- Wiener. Pompe, Sebastiaan (1999), 'Between Crime and Custom: extra-Marital Sex in Modern Indonesian Law', in Tim Lindsey (ed), *Indonesia: Law and Society*, Sydney: Federation Press.
- Pranowo, Bambang (1990), 'Which Islam and Which Pancasila', in Arief Budiman (ed), *State and Civil Society in Indonesia*, Melbourne: Centre of Southeast Asian Studies.
- Reeve, David (1990), 'The Corporatist State: the case of Golkar', in Arief Budiman (ed), *State and Civil Society in Indonesia*, Melbourne: Centre of Southeast Asian Studies.
- Ricklefs, M (1993), *A History of Modern Indonesia Since c.1300*, 2nd edn. London: Macmillan.
- Sjadzali, H Munawir (1991), *Islam and Governmental System*, Jakarta: INIS.
- Sketsa Peradilan Agama* (1998), Jakarta: Ministry of Religion.
- Strawson, John (ed) (2002), *Law after Ground Zero*, London: Glasshouse.
- Taylor, Veronica (1997), 'Beyond Legal Orientalism', in Veronica Taylor (ed), *Asian Laws Through Australian Eyes*, Sydney: LBC Information Services.
- van Langenburg, Michael (1990), 'The New Order State: Language, Ideology, Hegemony', in Arief Budiman (ed), *State and Civil Society in Indonesia*, Melbourne: Centre of Southeast Asian Studies.

Waddell, Sarah (2002), *The Role of the 'Legal Rule' in Indonesian Law Reform: the reformasi of water resources management in Indonesia*, unpublished PhD thesis, University of Sydney.

Yamin, Muhammad (1959-1960), *Naskah Persiapan Undang-undang Dasar 1945*, Jakarta: Yayasan Prapanca.

---

MB Hooker is Adjunct Professor, Law Faculty, Australian National University; Senior associate, Asian Law Centre, The University of Melbourne.

Tim Lindsey is associate Professor and Director Asian Law Centre, and Associate Dean (International) at The University of Melbourne.