1 Introduction

> 'It is true that everywhere in Muslim countries (apart from Turkey) family law is derived at least nominally from the Sharia, but it is equally true that its substance and its mode of application are no longer the same. […] we know little of the ways in which Sharia-based family law, this last bastion of the Islamic ideal of social relations, operates in today's Muslim world; whether indeed it has any significant relevance to the life of today's Muslims; and if it does, how far and through what processes it is translated into social reality.' (Mir-Hosseini 2000: 13)

> 'Islamic courts do not attract much attention, because few people consider them a central issue of political contention, though in a grand sense they are. Yet they have gone through and are going through a process of change that is very similar to that of other institutions bearing symbolic weight in the political system.' (Lev 1972: 7)

1.1 Background to the research

1.1.1 The Indonesian Republic, Islam and the Islamic courts

With an estimated population of 253,6 million, of which about 86 percent are registered as Muslims,[1] Indonesia is the most populous Muslim-majority country in the world. Indonesia is a religious state, though not an Islamic state, as its constitution of 1945 makes no reference to Islam or sharia.[2] This was again underscored during the constitutional reforms of 1999-2002, when Parliament rejected a proposal from Islamist parties to adopt a constitutional clause declaring that sharia applies to the Muslim population. Instead, the constitutional reforms encompassed the adoption of human rights provisions,

1 www.cia.gov/library/publications/the-world-factbook/geos/id.html, last accessed March 2014.

2 The *Pancasila* (five pillars), which are part of the constitutional preamble, laid down the five principles that form the ideological foundation of the 1945 Indonesian Constitution. The first principle, belief in the One and Almighty God, clearly shows the religious nature of the Indonesian Republic as it formally left no space for atheism or polytheism. See Otto (2010: 442, 443)

including freedom of religion and the prohibition against discrimination based on race, gender, disability, language or social class (Hosen 2005 and 2007).[3]

At the same time, Indonesia's judicial system has an Islamic courts branch[4] applying national legal norms that have their base in Islamic law. This is a consequence of the plural legal system inherited from the Netherlands Indies, in which different systems of law apply to different religious and ethnic identities (Hooker, M.B. 1975). Under this legal regime, the Islamic courts have jurisdiction over Muslim family law issues, whereas general courts adjudicate family law for other religious groups.[5] The 'religious' Islamic courts are in fact 'state' courts, subject to statutory law and official part of the state legal system headed by the Supreme Court.

The Indonesian government does not refrain from regulating issues pertaining to religion and Islam – quite the contrary, it always has done so, with the objective of increasing state authority over Islamic issues. Some of those regulations limited the Islamic institutions' room to manoeuvre. For instance, Indonesia's first president, Soekarno, introduced Presidential Decree 1/1965, providing the President with the power to dissolve all organizations practicing 'deviant' religious teachings. Under the presidency of his successor President Suharto, the so-called New Order regime (1966-1998) forced all Muslim political parties to merge into a single party in 1973. In 1985 the New Order required all organizations, including Muslim ones, to take the elaborate *Pancasila* ideology as their sole foundation (*azas tunggal*),[6] which in fact meant that they formally had to renounce their Islamist foundation.[7]

From the late 1980s onwards, however, room for Islam in public life was expanded when the New Order's regime took an 'Islamic turn' (Liddle 1996). This period saw the foundation of new Islamic organizations and institutions such as the Indonesian Association of Muslim Intellectuals (*Ikatan Cendekiawan Muslim Indonesia*, *ICMI*) with an advisory role to the government in 1990 and, in the year 1991, the Islamic bank Bank Mualamat Indonesia. The change in

3 For a comprehensive analysis of all the constitutional reforms, see Butt & Lindsey (2012).

4 I prefer 'Islamic court' over the more literal 'religious court' as translation for the *pengadilan agama*. *Pengadilan agama* are courts which have jurisdiction over the Muslim population. Since they have no jurisdiction over the Indonesian population with a different religion, I follow Daniel S. Lev who used the term 'Islamic courts' as the common denominator of the institution that has been renamed several times by the authorities, from priest councils (*priesterraden*) in 1882, *penghulu* courts (*penghoeloegerecht*) in 1931, to *pengadilan agama* in 1957. In 2006 the last formal change in name took place when the *pengadilan agama* in Aceh Province were formally renamed 'sharia courts' (*Mahkamah Syar'iyah*).

5 See paragraph 2.4.

6 *Pancasila* is Sanskrit for 'the five pillars,' which are belief in one God, nationalism, humanism, democracy, and social justice. The New Order regime used this concept to formulate a single national ideology, which served as a means of promoting national unity.

7 The traditionalists *Nahdlatul Ulama* and Modernist Muhammadiyah were both originally founded as Islamist organizations, in the sense that the main mission stated in their statutes was the Islamization of Indonesian society.

policy became visible in every town and village when the New Order started funding the construction of thousands of mosques throughout Indonesia. In public life Islam manifested itself through Islamic prayers to open meetings and increasing numbers of people in public service who presented themselves as devout Muslims (Otto 2010: 448-450). With these policies the New Order clearly sought to gain support from Muslim organizations and their supporters.

The second half of the New Order era was characterized by a paternalistic, often patriarchal state ideology (Suryakusuma 1988) and an increasing regulation and incorporation of Islamic norms and institutions into the state (Otto 2010, Salim 2008). However, contrary to what an outsider would perhaps expect, the New Order continued to follow a relatively liberal regime regarding Muslim women's rights in family law issues (Lukito 2012; Bowen 2003; Cammack 1999 and 1997).

The political discourse on the Islamic courts followed a similar trajectory as the policies described above. Initially, under Soekarno's presidency, the debates in the young republic centred on the question of whether a modern state needed Islamic courts at all. However, the support of the two main Muslim political parties, the Council of Indonesian Muslim Associations (*Majelis Syuro Muslimin Indonesia*, *Masyumi*) and the Awakening of the *Ulamas* (*Nahdlatul Ulama*; NU),[8] resulted in the Islamic courts being retained by the government. In 1957 a government regulation[9] even expanded the Islamic courts by requiring an Islamic court to be established in every district in the 'outer islands.'[10]

During the first years of the New Order the very existence of the Islamic courts was again threatened when political elites favoring their abolition drafted the 1973 Marriage Bill, and once again the Muslim organizations came to the rescue. Because of the protests, the government even decided to continue the Islamic courts' central position pertaining to Muslim family law matters in the 1974 Marriage Law. The 'Islamic turn' in New Order politics led to an increase in the Islamic courts' powers, culminating in the 1989 Islamic Judiciary Law,[11] which finally made Islamic courts full-fledged members of the legal system, placing them on an equal footing with the general courts and affording them the power to enforce their own judgments.

The 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*) is another landmark in Indonesian policy on Islam and 'a rupture' in the history of Indonesian Muslim Family law, as for the first time a government decided to legislate a large part of sharia-based rules on family matters, a field in which

8 In the 1955 parliamentary elections these two Muslim parties managed to win 102 of the 257 seats in Parliament.

9 Government Regulation 45/1957.

10 The term 'outer islands' is an equivalent of the Dutch *buitengewesten*, referring to the provinces outside Java and Madura.

11 Law 7/1989.

the previous administrations of the Netherlands Indies and the Republic of Indonesia typically chose not to interfere (Nurlaelawati 2010: 22, 23).

Those simultaneous processes of the Islamization of Indonesian law, and the Indonesiazation of Islamic law (Cammack 1997), resulted in an Indonesian Muslim family law which is a blend of three elements: traditional *syafi'ite fiqh*,[12] norms based in customary law (*adat* law), and state legislation and regulations. Those processes signify a serious effort by the Indonesian state to become the authoritative 'source of social and legal meanings' in Muslim family law matters (Cammack et al. 1996: 53).

1.1.2 The Islamic courts and women's rights

In the decades following Daniel Lev's quote of 1972, mentioned at the outset of this chapter, the Islamic courts have attracted much more attention from the academic world. Indonesia's Muslim family law has most commonly been characterized as relatively liberal in terms of women's rights (Lukito 2006 and 2012; Otto 2010; Hooker, M.B. 2008; Cammack 1999 and 2007; Bowen 2003; Soewondo 1977a and 1977b; Katz & Katz 1975 and 1978); the Islamic courts' and Supreme Court's application of family law norms has even been described as 'activist' in nature (Bowen 2000). In his court study of 1972 Daniel Lev already considered the Islamic courts responsive to the demands of those who primarily addressed them: women. Some thirty years later John Bowen observed a similar attitude of the Islamic courts, having a positive effect on legal reasoning regarding family law issues. Whether the starting point is Islamic, custom-based (*adat*), nationalist, or liberal in nature 'legal reasoning in Indonesia does approach (not arrive at) a set of values and norms, such as gender equality, fairness and agreement (2003: 257).'

However, Bowen also warns that in turbulent times 'there is always danger of back-sliding' (2003: 257). Indeed, the halting of initiatives for gender-equal reforms of the 1991 Compilation of Islamic Law in Parliament can be considered a sign of the continuing strong influence of conservative forces in Indonesia (Mulia 2007; Hooker, M.B. 2008). What is more, recent research on the Islamic courts' adjudication in two different regions in Indonesia revealed several judgments that might be indicative of a more conservative attitude. In a number of cases Islamic courts in West Java, Banten and Jakarta granted permission for polygamy, bypassing clear provisions in the Compilation of

12 The *syafi'ite maddhab* is one of the four major *maddhab* of Sunni Islam (the others being the *maliki*, the *hanafi*, and the *hanbali maddhab*) and with regard to the leading opinions about norms of marriage and divorce, the differences between the *maddhab* can be considerable (see Coulson 1978; Schacht 1982). In this book I will not attempt to discuss the complexity of *ulama* opinions held by different *maddhab* or even within the *syafi'ite maddhab,* but focus on those divorce norms that have been applied in the Islamic court.

Islamic Law and Marriage Law intended to limit the practice (Nurlaelawati 2010 and 2013). In the district of Sidrap, South Sulawesi, the Islamic court followed the wishes of the family in a number of cases to divorce a couple against the will of the spouses themselves, justified by reference to strong family ties in the local *adat* (Idrus 2003). In contrast, with regard to many other marriage, divorce and inheritance issues, Nurlaelawati and others (Lukito 2012; Benda-Beckmann, K. 2009; Manan 2006) have also indicated that the Islamic courts continue to apply the provisions in the Compilation rather leniently, considering the particular cultural context of the case and the position of the women concerned. In brief, the academic literature on the Islamic courts is inconclusive about the issue.

1.1.3 The rise of Islamist discourses during the Reformasi

The turbulent situation to which Bowen refers was triggered by the Asian financial crisis of 1997, which, combined with public indignation at widespread corruption practiced by the New Order elite, led to mass protests and eventually to President Suharto stepping down in 1998. Regime change brought democratization and decentralisation and a new era in government policy towards Islam, as it meant lessened state control over national and local Islamic institutions. On the negative side, this left more space for extremist separatist, regionalist, or Islamist organizations to operate.

The military's handling of the independence struggles that flared up in East Timor, Aceh and Papua, and the bloody internal strife in the Moluccas and Sulawesi – which soon became sectarian – did not at all correspond with the recently adopted principles of democracy and human rights (Wilson 2008; Klinken 2007; Bertrand 2004; Colombijn & Lindblad 2002). It took about seven years, until 2005, before the main domestic conflicts were more or less resolved through peace agreements between the warring parties and the Indonesian government. Nonetheless, even during the disorderly years of the early *Reformasi*, the democratic commitment was visible in the political arena, where dozens of new parties competed with each other in relatively free and peaceful elections (Assyaukanie 2004). In the years 1999 and 2004, parliamentary and presidential elections took place, as well as many more provincial, district and local elections.

As a result of the decentralisation reforms of 1999 and 2004, the regions gained more power and independence from the central government. This led to a situation in which regional political actors increasingly played the ethnic and religious card (Davidson & Henley 2007; Warren & Lucas 2003). Illustrative of local Islamic politics is the introduction of local sharia-based regulations in a large number of districts, pertaining to a range of matters such as Muslim dress-codes for civil servants and school pupils, prohibitions with regard to gambling and the selling of alcohol, night curfews for women and the intro-

duction of Qur'an recitation ability as a requirement for politicians as well as for prospective brides and grooms.

The introduction of these local regulations has been characterized as a sign of Indonesia's 'shariatization' (Ichwan 2007) and 'arabization' (Bruinessen 2006). Other observers have valued the developments in very negative terms and labelled it as a 'creeping sharia' (Marshall 2005; Zorge et al. 2006), with one observer even speaking of 'Taliban-like vice squads' marching the streets to uphold these regulations (Dhume 2007). The bomb attacks on Western targets in Jakarta (2000, 2003, 2004, and 2009), Bali (2002, 2005) and Makassar (2001) only contributed to the image of Indonesia as increasingly coming under the influence of Islamists radicals.

Many academics have provided a nuanced view of the nature and impact of sharia-inspired regulations (Nurlaelawati 2013; Buehler 2008a, Bush 2008), including those introduced by the autonomous province of Aceh (Kloos 2013; Ichwan 2007; Salim 2007). Such regulations were typically introduced or supported by local branches of national non-Islamist parties and, moreover, are not strictly enforced in most cases. These academics view their introduction primarily as an attempt by those parties to appropriate parts of the local Islamist agenda for their own political benefit, and not as the result of a genuine aspiration of Islamist politicians to turn Indonesia in an Islamic state.

1.1.4 Indonesian Islam as a research subject

Unsurprisingly, Islam in contemporary Indonesia has become a popular research subject, involving a wide range of issues. Important research has been carried out on the relation between the Indonesian state, law, and Islam (Otto 2010; Elson 2010; Assyaukanie 2009; Salim 2008; Allen 2007; Bruinessen 2006; Azra 2006; Ichwan 2006; Hefner 2000; Federspiel 1998; Liddle 1996), while many other researchers have conducted in-depth studies about the rise of Islamist organizations in Indonesia (Osman 2010; Sidel 2006; Noorhaidi 2006; Trotter 2006; Kolig 2005; Bubalo & Fealy 2005; Barton 2004).[13] An outspoken counter-movement within the Islamist wave is Muslim feminism. Several studies are specially dedicated to those Muslim women and men who justify gender equality from within the traditional Islamic principles, through reinterpretations of Islamic norms in the Qur'an and Sunna (Doorn-Harder 2007; Feener 2007; Mulia 2007; Wahib 2004; Hooker, V.M. 2004). To Muslim

13 I follow Graham E. Fuller's broad definition of an Islamist: 'an Islamist is one who believes that Islam as a body of faith has something important to say about how politics and society should be ordered in the contemporary Muslim world and who seeks to implement this idea in some fashion' (Fuller 2003: ix).

feminists, who have achieved considerable exposure for their ideas, women's rights and Islam are fully compatible.

The Islamization of Indonesian society since the 1990s, including its outward social manifestations, is the subject of yet another strand of research (Bruinessen 2013; Wichelen 2010 & 2009; Nurmila 2009; Hooker, M.B. 2008; Bennett 2007 & 2005; Jones, C. 2007; Rinaldo 2008; Warburton 2006; Smith-Hefner 2005; Bush 2005; Blackburn 2004). The picture that appears from this research is that especially since the 1980s social changes have taken place in the Muslim middle classes. It has not only become fashionable but even the norm to express one's Muslimness more manifestly, leading to strong peer pressure to conform to Muslim practices.

Thus, recent studies about Islam in Indonesia not only show that orthodox and liberal voices of Islam have sounded more openly during the *Reformasi*, but also that Islam has retained its central place in public discourse. In this regard, Ichwan concludes that although the New Order's 'state Islam' was dismantled during the *Reformasi*, within a decade the Indonesian state was already in the process of creating a new 'state Islam.' This process took place in the context of a decentralized government, with the regional branches of the Ministry of Religious Affairs and the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, MUI) being key players in the process (Ichwan 2006).

It is impossible to cast 'state Islam' or the 'state of Islam' in present day Indonesia as 'liberal' or 'conservative,' since governmental policies differ per issue. Indonesia has been very intolerant with regard to Muslim minority groups, and has permitted the introduction of sharia-based district regulations, thereby increasing pressure on Muslim men and women, especially within the bureaucracy and state institutions, to dress and behave like 'good Muslims.' At the same time the government retained relatively liberal statutory rights for women and introduced a quota of thirty percent female parliamentary candidates for each political party through the 2003 General Elections Law. Moreover, despite all the political dynamics and controversies surrounding the issue in the past, the Islamic courts and the relatively moderate Muslim family law they apply never came under threat, which may suggest that they have been successfully entrenched in society.

1.1.5 Research about the Indonesian Islamic courts

For a long time after Lev's comprehensive work of 1972, few researchers showed interest in the Islamic courts and Muslim family law in Indonesia, even when academic attention for Muslim family law saw a short-lived increase after the introduction of the Marriage Law in 1974. Researchers have described the Marriage Law's cumbersome legislative process and linked its legal provisions to societal changes (Katz & Katz 1975 & 1978; Soewondo 1977a and b; Vreede de Stuers 1974). However, after this momentary rise, the

attention of the international academic world faded again. This silence lasted until the late 1980s when Jan Michiel Otto and Sebastiaan Pompes conducted research concerning the position of polygamy and inter-religious marriages in the Marriage Law and in legal practice (Otto & Pompe 1988, Pompe & Otto 1990, Pompe 1991).[14]

The introduction of the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law was followed by a series of international publications by John Bowen and Mark Cammack, with Bowen primarily focusing on property and inheritance issues (2000, 1998 and 1996), and Cammack on marriage and divorce rights (1999, 1997 and 1989). In addition to these legal analyses, Mark Cammack, together with others, has published several socio-legal works in which the everyday practice of the Islamic courts, with the support of analyses of demographic statistics, are linked to legal and societal developments in Indonesia (Heaton & Cammack 2011; Cammack, Donovan & Heaton 2007; Heaton, Cammack & Young 2001, Cammack, Young and Heaton 1997; Cammack, Young and Heaton 1996).[15]

After the *Reformasi*, the Islamic courts and Muslim family law gained much more academic attention, resulting in the publication of comprehensive monographs on the Islamic courts: one on their legal history (Hanstein 2002), and three studies in legal anthropology (Nurlaelawati 2010; Bowen 2003), one of which took a feminist starting point (O'Shaughnessy 2009). Additionally, a number of academic articles are dedicated to new administrative and legal developments pertaining to the Islamic courts (Benda-Beckmann, K. 2009; Cammack and Feener 2012; Cammack 2007).

Meanwhile, much research has appeared in Indonesia about the Islamic courts, mostly focusing on the jurisdictional changes that took place over time, under the influence of the governments' changing attitudes concerning Islamic law (e.g. Nurrudin & Tarigan 2004; Arifin 1996; Zuhri 1996; Harahap 1990; Noeh & Adnan 1983). Others addressed the development of substantive Muslim family law and its relation with *fiqh* (Nasution & Aini 2007; Syarifuddin 2006; Summa 2004). A number of works described the role of case law within the Islamic courts (Zein 2010; Manan 2006 and 2008).

This study draws heavily upon these works about the Indonesian Islamic courts, as well as on legal anthropological research about Islamic courts conducted elsewhere (Peletz 2002 in Malaysia; and Mir-Hosseini 2000 in Morocco and Iran).

14 Keebet von Benda-Beckmann's excellent work about property disputes in a Minangkabau village (1984) is also worth mentioning. It did pay attention to the Islamic court as part of a larger study on all institutions and norms at play in local disputes.

15 I must also mention Jones, who has published prolifically on changes in marriage and divorce practices in Southeast Asia from a demographic point of view (Jones, G.W. 1984, 1992, 1994, 1997, 2001, 2005 and 2008; Jones, G.W. & Gubhaju 2007).

1.2 Conceptual Framework

1.2.1 Approaches and research questions

This study about Islamic courts differs from most of those mentioned above as it is not a study clearly situated in law, legal anthropology, political science, or sociology, even if it draws its methodologies from all of these disciplines. It takes the view that 'interdisciplinarity involves integrating and organising traditional forms of knowledge, skill and experience in a new and original fashion' in order to increase knowledge (Banakar & Travers 2005: 6). My interdisciplinary research is socio-legal in nature and belongs to the domain of law, governance and development (LGD), which combines top-down and bottom-up perspectives to analyze how law and governance relate to development (Hyden, Court & Mease 2004; Seidman & Seidman 1994; Arnscheidt, Rooij & Otto 2008).

Three approaches are combined in this study: an institutional history approach, a legal history approach, and an approach focusing on the Islamic courts' present-day role in divorce matters. The first approach concerns historical analysis, the span of which exceeds most other works on the Indonesian Islamic courts. It constitutes of two parts: first, the development of the Islamic courts' jurisdiction in the Netherlands Indies and Indonesia; and second, the trajectory of the Islamic courts in the two field locations Cianjur and Bulukumba. The first part explores the broader question of how the Islamic courts as state religious institutions have developed historically under the supervision of the consecutive governments of the Netherlands Indies and the Republic of Indonesia. More specifically, it analyzes the relation between changes in governmental policies towards Islam and *adat* on the one hand, and the development of legislation concerning the Islamic courts' jurisdiction on the other. The second part of the institutional history approach explores and compares the distinctive historical development of the Islamic courts on Java and those in South Sulawesi focussing on the relationships among the central government, Islamic courts, *ulamas*, and local communities. The underlying assumption is that differences between the historical trajectories of the Islamic courts of Cianjur and Bulukumba may explain differences in their present-day functioning.

The second approach is the legal history one, in which I analyze the development of Indonesian Muslim family law. Point of departure is M.B. Hooker's observation that the Islamic judge in the Netherlands Indies traditionally applied an amalgam of *shafi'ite* doctrine, customary law (*adat* law), and governmental regulations. Focussing on the Islamic courts' application of certain legal concepts over time, this approach provides a comprehensive legal historical analysis of the continuities and changes in the Islamic courts' legal doctrine. Legal doctrine can be defined as the rules, principles and concepts that are

authoritatively stated in legislation and law books, or are deduced from judicial decisions (Cotterrell 1986: 2)

I look at the developments in the Islamic courts' legal doctrine in Indonesia as constituting a development within a judicial tradition, thereby following Feener and Cammack's suggestion that it is helpful 'to develop approaches to law based on Islam within the framework of 'traditions' (Feener & Cammack 2007: 2). I define 'judicial tradition' as the legal heritage transmitted over generations within a judicial institution or system, with each generation consciously building on the transmitted heritage of their predecessors, the authoritativeness of which is based on a certain origin or historicity. Legal change proceeds within a judicial tradition by conscious reinterpretation of legal heritage, but always with due consideration for its origins and historical background (see Glenn 2007, 2005).

I start my analysis of the Islamic courts' judicial tradition in the sixteenth century when Javanese Islamic judges, applied an amalgam of Islamic law, *adat* law, and sultanic ordinances, and end with present-day Indonesian Muslim family law. I view present-day Indonesian Muslim family law as legislation that was primarily built upon an existing judicial tradition, and as the appropriation of that legislation by the judicial tradition. Even if legislative reforms have stalled since 1991, the development of Indonesian Muslim family law is ongoing: by judges' interpretations and application of legal norms in everyday adjudication processes.

I realize that my focus on the work of judges and legislators might be seen as lacking appreciation for an essential distinctive feature of the great legal tradition of Islamic law: it is developed by Muslim scholars, rather than judges or legislators (see Coulson 1978; Schacht 1982). With my approach I do not intend to challenge the authority of Islamic scholarly thought in past and present-day debates about Muslim family law reforms (Hooker, M.B. 2008; Feener 2010). Nor do I dispute the innovative means *ulamas* have employed in an attempt to provide non-*fiqh*-based provisions in the Compilation of Islamic Law with Islamic legitimacy (Nurlaelawati 2010). I simply describe the continuities and discontinuities in the application of Muslim family law within the Islamic courts, treating it as a fully-fledged judicial institution within Indonesia's legal system, with a long history.

However, I do consider a comparison between the Islamic courts' application of law at a certain time and traditional *syafi'ite fiqh* alone to be an inappropriate way to measure changes pertaining to the legal sources applied in the Islamic courts. Such a comparison would be a snapshot of a legal situation, ignoring the possibility that judges for centuries applied other legal sources than *fiqh*. This would be a-historical, unconcerned with historical developments of legal doctrines within the Islamic courts.

Horowitz (1994) points out with regard to Muslim family law in Malaysia that,'[t]he possibilities of legal change – the directions, the methods, and the content of change – are simultaneously limited and liberated by what the

proponents of change know and know about, by what they are reacting against and aspiring toward' (1994: 242). With regard to Indonesia, I hold the opinion that actors of legal change within the Islamic courts' judicial tradition, whether judges, lawmakers, or *ulamas*, may be pushed to stretch or narrow the limits of certain norms, but in the end they will have to remain within certain boundaries, or else the tradition will discontinue. With this focus, the legal history approach attempts to offer an explanation why the adjudication by the Islamic courts is characterized by both flexibility and rigidity, depending on the legal issue concerned.

The third approach concerns the present-day role of Islamic courts in divorce matters, which directly relates to the main research questions of this study:

> *What is the Islamic courts' role in realizing women's divorce and post-divorce rights and how is their performance in this regard?*

This study attempts to formulate answers to those questions in two ways. First, through the results of field research and legal analysis of selected cases, it explores whether the Islamic courts play a significant role in protecting women's divorce and post-divorce rights in the local communities concerned. Second, it evaluates the role and performance of the Islamic courts from the perspective of access to justice, rule of law and nation-state formation.

There are three reasons for a focus on women's divorce and post-divorce rights in this study of the Indonesian Islamic courts. First, the Islamic courts in Indonesia are primarily 'divorce courts.' Over the years divorce cases consist of more than 90 percent of the Islamic courts' caseload. A judicial divorce is the only one recognized by Indonesian law and the Islamic courts' influence on local communities is most profound in divorce cases. Second, divorce and post-divorce rights are not gender-neutral but gendered and contested. The normative tensions between statutory rights and obligations and local norms, between the norms forwarded by judges and litigants, and between norms articulated by the husband and those by the wife, come to the surface during a divorce suit. This makes divorce and post-divorce rights apt to depict what the gendered norms are, how litigants employ them strategically, and how the Islamic court judges apply them. Third, divorce and post-divorce rights are commonly considered to be essential for the protection of women and their children, especially when women are economically dependent on their husbands. Hence, a study about divorce can teach us how vulnerable women in a certain community are in this respect and to what extent there is a need for a legal system – in this case Islamic courts – which is able to protect women and children from potential negative financial consequences of a divorce. In order to be able to fulfil such function it is required that the Islamic courts are accessible and their judgments just, implemented by those concerned and, if not, that execution is enforceable through the court (Otto 2002).

This brings us back to the second way to attempt to answer the research question: through the examination of the Islamic courts' functioning from the perspectives of access to justice, rule of law, and nation-state formation. This examination requires that the abovementioned main research question is further divided into several sub-questions.

The first sub-question concerns the concept access to justice, further explained in section 1.2.2:

> *To what extent are the Islamic courts successful from an access to justice perspective in adjudicating and enforcing the divorce and post-divorce rights of women at the level of local communities?*

This 'access to justice' perspective, views the Islamic courts as both a justice provider, essential to the realisation of women's divorce and post-divorce rights, and a state legal institution which is bound by procedural and substantive rules. Through field research on the Islamic courts in two local communities this part of the study examines four issues: first, the number of women that access the Islamic courts to file a divorce suit and the divorce grounds they legally base their divorce on; second, the number of women that make additional post-divorce claims on spousal support, child support, and marital property, and the reasons women have for making (or not making) such claims; third, the Islamic courts' treatment of women's divorce cases and post-divorce claims; and fourth, the ex-husband's execution of court orders concerning post-divorce matters and the enforceability of such court orders.

The second sub-question involves a rule of law analysis of Islamic courts and Supreme Court judgments and focuses on how the Islamic courts apply certain statutory norms concerning divorce and post-divorce matters, as well as their discretionary judicial powers:

> *How do the Islamic courts apply the principles of the rule of law in divorce and post-divorce matters and what are the consequences of their decisions for women with children* ?

The legislator often deliberately adopts incomplete or generally and ambiguously worded legal rules. This practice relates to two social needs legal rules fulfill: 'the need for certain rules which can, over great areas of conduct, safely be applied by private individuals, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case' (Hart 1960: 130). Through adjudication courts provide interpretations of such open rules. When those interpretations are applied consistently in the court system, they have become case law (Shapiro 1981: 155).

Supreme Court Judge Abdul Manan has demonstrated that many legal changes pertaining to substantive Muslim family law in Indonesia are precisely the result of the courts' interpretations of Muslim family law rules in the adjudication process (Manan 2006). Hence, this study explores how the Islamic courts adjudicate both open and precise rules pertaining to divorce and post-divorce cases, the extent to which they apply principles from other legal traditions, the extent to which they conform to the principles of the rule of law and the consequences for women and children concerned.

The third sub-questions concerns the comparative aspect of this study:

> *How can differences between the functioning of the two Islamic courts be explained?*

In this part of the study I compare the access to justice situation pertaining to, and the workings of the Islamic courts in Cianjur and Bulukumba. Through comparative research I highlight the similarities and differences between the functioning of the two courts and formulate possible explanations.[16] Thus, the differences between the functioning of the two Islamic courts are explained in view of each Islamic courts' distinctive legal, historical, political, social and cultural contexts.

The last sub-question concerns state-formation and sees the Islamic courts as part of a larger nation-building project of the Indonesian state (see 1.2.3):

> *What role do the Islamic courts play in the Indonesia's nation-state formation project?*

My comparison of the Islamic courts in two distinctive regions provides insights into the condition of 'nation-state formation' in each district concerned and sheds light on possible factors that hamper this project.

1.2.2 Access to justice and the rule of law

Access to justice and the rule of law are key concepts for the way this study values the Islamic courts' functioning. Access to justice is a goal of many development programs (cf. World Bank 2007; UNDP 2007; 2004; Asian Development Bank 2005), yet those programs often lack a comprehensive analytical

16 Apart from a short explorative article (K. von Benda-Beckmann 2009), I have not encountered such a comparative approach with regard to adjudication in Islamic courts. See Ziba Mir-Hosseini (2001) for excellent comparative research on Islamic courts in Iran and Morocco.

framework to make a thorough access-to-justice valuation possible. A comprehensive access-to-justice assessment would include such indicators as women's legal knowledge and strategies, accessibility of the court, its use or non-use by women, and the enforceability of court decisions (Bedner & Vel 2010). I have employed the following definition of access to justice, which is based on Bedner and Vel's definition, but specified for divorce and post-divorce cases of Muslim women:

> Access to justice for Muslim women in divorce matters exists if: Muslim women, who believe to hold certain divorce and post-divorce rights, have access to a state or non-state institution of dispute resolution, can make their case be listened to, and obtain proper treatment of their case, in the sense that the rule of law is sincerely taken into account, leading to outcomes that are just, both socially and legally, and enforceable.

For reasons specified below, I have made some changes to Bedner and Vel's definition. First, I have awarded the rule of law a less paramount position. Rather than assessing whether the Islamic courts work according to the rule-of-law principles, I primarily assess to what extent they 'are sincerely taken into account.' Rule of law here basically means that the state and citizens are bound by and act consistently in accordance with substantive and procedural law and, additionally, that law itself is prospective, made public, general, stable and certain (Bedner and Vel 2010: Section 4.1).

However, courts cannot simply dismiss widely held normative convictions, as they would remove themselves too far from popular notions of justice (Shapiro 1981). Indeed, judges and other staff in the Islamic courts often apply procedures leniently and in many cases, though not all, this appears to be done out of consideration with the litigants' private situation, financially or otherwise (Cammack 2007). The problem is that a lenient application of law may create inconsistency in the Islamic courts' judgments. Bowen, who generally is very positive about this leniency, also acknowledges that the outcomes of inheritance disputes 'are not *predictable* on the basis of norms, rules or laws' due to conflicting legal norms, and the fact that 'power shapes outcomes' (Bowen 2003: 253-254). Nurlaelawati is more concerned with the rule of law and legal certainty, and problematizes the inclination of judges 'to go along with the present, temporal interests of the seekers of justice' and in so doing to sidestep the purpose of the law regarding marriage and divorce registration (Nurlaelawati 2010: 224). In short, it is clear that there is a tension between the use of discretion by judges and the consistency of judgments, which impacts upon predictability of judgments, legal certainty and the rule of law.

Nonetheless, this study does not necessarily consider a lenient application of the law or a breach of procedure to be a negative indicator of access to justice. The judge possesses discretionary powers, and may have a sound legal justification for bypassing certain rules and base this on the common good, fairness and agreement. Therefore, I assess in which cases this happens and

analyze whether this bypassing of certain rules is legally justified or more arbitrary in nature, and, ultimately, what the consequences are for women in divorce and post-divorce cases.

In addition, I place a strong emphasis on the importance of two other prerequisites of the rule of law and 'real legal certainty': the execution and enforceability of court judgments (Otto 2002). Post-trial field research may demonstrate that a decision of a state court is not as 'final' in local practice as it is in a formal-legal sense. K. von Benda-Beckmann found in Minangkabau in the early 1980s that 'in itself, the fact that a state court has decided in one's favor is not enough to convince opponents and village functionaries of the strength of one's rights' and that 'they [court decisions] are [merely] advanced as additional legitimation for one's position' (Benda-Beckmann, K. 1984: 141). Such post-trial research is often neglected in court studies, but should be part of any assessment of the effectiveness of court decisions.

The pre-trial phase is also an essential part of this study, because it is the time women decide to bring a case before the Islamic court or not. Pre-trial research typically focuses on the barriers that discourage women to access the legal system: a lack of legal knowledge and awareness, practical barriers such as time, cost and effort, psychological barriers such as anxiety about going to court, or to face the (ex-)husband in a suit, and cultural barriers, e.g. patriarchal society, preference for private negotiations (Sumner 2008; A.C. Nielsen & World Bank 2006).

I argue that a focus on legal knowledge and barriers alone is incomplete. Studies conducted in the United States have found that if it is common knowledge that implementation and enforcement of court judgments are problematic, women simply do not bother to make alimony claims (Kisthardt 2008). The presence of a similarly negative 'shadow of the law' (Mnookin & Kornhauser 1979) in Indonesia is not unlikely. Moreover, the attitude of court staff and the experiences of other women with the court, as well as the presence of strong alternative normative systems can encourage or discourage women to petition a claim.

1.2.3 Nation-state formation

One of the aims of this research is to look at the role the Islamic courts play in nation-state formation. Esman has defined nation-building as 'the deliberate fashioning of an integrated political community within fixed geographic boundaries in which the nation state is the dominant political institution' (cited in Heady 1979: 244-245).[17] In view of its large number of ethnic groups and sub-groups, it is neither self-evident that Indonesia has an integrated political

17 A recent research identified as much as 1000 ethnic groups and sub-groups in Indonesia (Suryadinata, Arifin & Ananta 2003).

community, nor that all local communities consider themselves to be part of such community to the same extent.

I define nation-state formation as the development of a centralized authoritative state structure, with a monopoly on violence, law-making and adjudication, in which subjects are being attached to the state through a shared idea of belonging to a single nation, and have become national citizens through active participation in the state. These monopolies can only be achieved if the state's use of power and the rules governing its use are widely regarded as legitimate. This legitimacy in turn relates to the state's ability to fulfil essential functions such as providing security, administration of justice and financial and macroeconomic management, in ways which meet the expectations of the population. Thus nation-state formation encompasses the processes of centralising control, creating and maintaining administrative structures and interacting and negotiating with subjects (Cf. Tilly 1990).

According to Peletz, the Malaysian Islamic courts and the family law they apply, are essential to the process of nation-state formation, as they penetrate deep into communities and families, generating individual rights and obligations based on a national citizenship, rather than membership of a certain ethnicity, class, kin or gender. Thus, Peletz underlines the Islamic courts' role in the reproduction and transformation of symbols and meanings of nationhood and cultural citizenship (Peletz 2002: 4).

By looking at the extent to which communities follow the legal requirements of judicial divorce and marriage registration, this study examines their participation in the state, and, conversely, the extent to which the state has penetrated into the community. The existence of competing state and non-state institutions that challenge the Islamic courts' authority by taking over part of their functions is a negative indicator for nation-state formation, even if it may have advantages to local communities. Finally, the extent to which the courts' decisions are implemented and are enforceable is also strongly correlated with nation-state formation (Cotterrell 1986: 301-302).

1.2.4 Normative pluralism

A person's perception of what her or his rights are may differ considerably from what her or his statutory rights are according to a judge. This difference can be related to the presence of traditional normative sources, such as *adat* law and Islamic doctrine, but also moderns ones, such as human rights. In this study I do not engage in the conceptual or normative discussion about

legal pluralism,[18] but it is important to note that in Indonesia non-state normative sources have a long history of recognition and are still influential in adjudication processes in the courts, as well as alternative dispute resolution processes (Lukito 2012; Benda-Beckmann, F. 2002, 1989; Benda Beckmann, K. 1984, 1981).

Locally, customary or religious institutions[19] may form a strong alternative for state institutions and even be the first option to redress for the local communities concerned. The norms recognized by those customary and religious institutions may differ significantly from those laid down in state law. In disputes people will present their case based on their ideas of justice, and may combine different normative sources to present their case. Particularly relevant in this context is Bowen's insight that legal reasoning in Indonesia involves a 'double movement of reference' (Bowen 2003: 4). One movement is inward, towards indigenousness, authenticity and Indonesian values (*adat* law and *syafi'ite fiqh*). The other is outward, towards universality, modernity, and transcultural values of social equality, as well as transnational interpretations of Islam.

In this study I have viewed the Islamic courts as places of interaction between state and society and I have analyzed the extent to which litigants used norms derived from alternative normative sources to frame their disputes. Through an empirical analysis of the pre-trial, trial and post-trial phases of the court processes and a close reading of court judgments and files I have been able to sketch whether and how judges take *adat* law and other norms into consideration, whether and how they make use of their discretionary powers to overrule statutory norms in such cases, and what that means for the outcome of those cases in terms of divorce and post-divorce rights.

O'Shaughnessy concluded in her research about Islamic courts in Central Java that Islamic judges are first of all responsible for transmitting the state's patriarchal ideology, with the nuclear, male-headed family positioned as the nation's cornerstone, and stigmatizing divorce as 'anti-national, and therefore inappropriate and shameful' (O'Shaughnessy 2009: 70, 71). Yet, Peletz has demonstrated how the Malaysian Islamic courts did change the patriarchal hierarchies and traditionally associated gender roles within the family, the clan, and the community in subtle ways, even if they at the same time preserved other patriarchal concepts such as the male-headed family (cf. Peletz 2003: 4). In this research I demonstrate how the Indonesian Islamic courts,

18 The main problem the legal pluralists have with a state-confined concept of law is that, in their eyes, such concept overvalues state law and tends to ignore other social normative orderings and institutions that resolve 'legal' issues. Tamanaha in turn has criticized legal pluralists for poorly defining what they mean by 'legal', with the potential effect that all rules of conduct may be considered Law. See Benda-Beckmann, F. 2002; Tamanaha 1993; Griffiths 1986; Hooker, M.B. 1975.

19 In this research I have primarily focussed on the position of local Islamic authorities. See Chapters 5 and 7.

through 'the shadow of the law' (Mnookin & Kornhauser 1979), may preserve or transform norms pertaining to divorce in subtle ways, but that the extent to which this happens depends on the Islamic courts' role and functioning in the local communities concerned and the level of competition of the local alternative normative systems and institutions. Thus, the functioning of the Islamic court in a certain area sheds light on the state of nation-state formation in that area.

1.3 Research Methods

1.3.1 Multiple methodologies

This socio-legal study required the application of multiple methodologies. It involved legal history research, research in social and political history, empirical field research, and the legal analysis of legislation and case law. The field research included quantitative and qualitative research methods. The major part of the fieldwork was spent on qualitative research, more specifically, on court room observation and interviews. Quantitative research consisted of two divorce surveys, one in Cianjur and one in Bulukumba; the collection of court files, data from court registers and annual reports of the Islamic courts of Cianjur and Bulukumba; and the collection of secondary data, primarily population surveys. In each area I worked with assistants who had experience in conducting and organising research in Indonesia, with a local network and with knowledge of the local languages, which has been indispensable to this study.

1.3.2 Field research

Field research has been a core element of my research. This study is based on data collected during field research in Cianjur in West Java (eight months) and Bulukumba in South Sulawesi (four months) conducted in three stages from November 2008 through August 2010. My research objects were the Islamic courts in those two districts.

Between the two Islamic courts, and the respective districts, there are significant similarities as well as differences. I provide a description of the districts of Cianjur and Bulukumba in Chapter 5 and Chapter 7, so I will only give a brief sketch here. Both Islamic courts have a caseload of 450-500 divorces per year and are located in the main town of a rural district. Both districts are among the few Indonesian regions that in the seventeenth century already became VOC territory, meaning that relatively early colonial accounts are

available of the areas and their Islamic courts.[20] After independence, both districts were affected by the Islamic *Darul Islam* uprising and in both districts conservative Islam has been on the rise after *Reformasi*. These significant similarities have made comparison more feasible as the differences were brought back to a relatively small number of factors.

The differences between the locations are mainly cultural and historical. Ethnically, Cianjur is primarily Sundanese while Bulukumba is Buginese-Makaserese. Although both have a bilinear kinship model in which the wife's family traditionally has a relatively strong position with regard to marital property, there is a significant difference in the aggressiveness with which honor is defended. South Sulawesi was notorious for its honor killings and, although the killings have decreased significantly after independence, women's honor remains an issue. Another main difference is that in South Sulawesi men traditionally migrate to find work (*merantau*), whereas in West Java this was less common. Since the 2000s many West Javanese women work abroad as domestic workers.

The historical differences regarding the Islamic courts are also related to the colonial administrative divisions: Cianjur is a part of Java, Bulukumba of the non-Javanese outer islands. Those geographical differences meant different legal and political trajectories for the Islamic courts. Cianjur's Islamic court's status as formal state institution dates back to the incorporation of the Javanese Islamic courts into the colonial legal system in 1882, whereas the Islamic court of Bulukumba was incorporated into the national legal system only in 1958. Cianjur traditionally has a large number of independent *ulamas*, whereas in South Sulawesi *ulamas* traditionally were less numerous and linked to the customary authorities. Such cultural and historical differences between the two districts and their Islamic courts have provided me with the tools to formulate possible explanations for their differences in performance.

1.3.3 Qualitative research

Qualitative research primarily consisted of courtroom observations and interviews. Firstly, with regard to court observations, a potential problem was that divorce hearings are closed sessions. In both Islamic courts I obtained permission to attend the closed sessions, provided the parties did not object, which no one did. In both field sites, I was a regular observer of the Islamic court for a period of months, in which I could talk with other visitors and court staff about divorce cases and other topics in rather informal settings. In the

20 In 1667 Bulukumba came under direct rule of the VOC through het Bongaais Tractaat (the Bungaya Treaty; see section 6.2.3). Ten years later in 1677 Cianjur came under direct VOC rule (see Chapter 5).

late afternoons most staff had completed their daily work, which was an opportunity to talk about local divorce practice, or any other subject.

Moreover, I am confident that my presence in the courtroom did not disturb the court hearings, as the judges clearly fell back into their daily routines and the judges, claimants, defendants and witnesses discussed the case without restraints. As I observed, the presence of lawyers, who in both locations only seldom represented clients in divorce cases, had much more of an impact on the judges and their handling of procedure than the presence of this researcher.

The second part of my qualitative research consisted of semi-structured and unstructured interviews. My informants included the judges, the courts' staff, the court clients and lawyers in the Islamic courts of Cianjur and Bulukumba. In the higher level of the judiciary key informants included a Supreme Court judge, the director-general of the Office of the Islamic Court of the Supreme Court (*Badan Peradilan Agama Mahkamah Agung*) and judges of the appellate Islamic courts of West Java and South Sulawesi. Together with the divorce surveys described below, these interviews constituted the core data for the empirical part of the two case studies.

Interviews with informants from civil society and with staff of local government institutions proved indispensable in understanding the local and national contexts of divorce and post-divorce rights and have provided me with a clear picture of the legal, religious, cultural and political issues involved. Interviews with staff of government institutions, included those of the District Office of Religious Affairs in Bulukumba, several KUAs in Cianjur and Bulukumba, and the District Office of the Civil Registry of Bulukumba. The civil society informants included heads of Islamic boarding schools (*kyais*), male and female Islamic teachers (*ustadz* and *ustadza*), academics and women's rights activists.

Finally, I have interviewed, and had informal conversations with, ordinary citizens, many of whom I met during my travel from one location to another, in the restaurants or eating stalls I visited, or elsewhere. The information I obtained from such informal encounters sensitized me to the local context of divorce and the role government institutions play in local communities. For instance, when I was preparing my field research in Jakarta, on several occasions taxi drivers, told their own or their relatives' marriage and divorce stories, including anecdotes about the available legal loopholes for those who want to remarry without a prior formal divorce. I learned that such loopholes often were facilitated by the KUAs and that it was essential to look at the relation between the KUAs and the Islamic courts. Such information has been essential to this study.

1.3.4 Surveys

Each of the two divorce surveys targeted 120 divorced women with children. The divorce surveys made possible an assessment of the context of the respondents' divorce, and included questions about a whole range of issues: their personal background; their ideas about men's and women's rights in divorce; their sources of information; whether their marriage had been registered; whether their divorce was a judicial divorce at the Islamic court or not; whether they did or did not petition for spousal support, child support or marital property, and why (or not); whether they had reached an agreement with their former husbands concerning child support or marital property, and if so, whether this had been implemented; whether the women surveyed were satisfied with the support from their former husbands; and finally how they perceived their economic situation in comparison with that prior to their divorce.

A problem inherent to a divorce survey in Indonesia is that after divorce, women often return to the care of their family, and do not live a typical single parent's life. Consequently, they constitute a 'hidden population,' which on a practical level means that researchers cannot simply trace them by going through local civil registries in search of female-headed households. A frequently used survey method for hidden populations is the chain-referral method, also known as snowball method. In this method an initial group of respondents is identified. This first group then provides information on other potential respondents, who in their turn provide referrals for other respondents (Robinson et al. 2006). The weakness of this method is the high probability that the sampling group will consist mainly of the social network(s) of the initial group of respondents, and that other social groups are left out of the survey.

To address some of the weaknesses of the abovementioned sampling methods, Watters and Biernacki (1989) have developed the targeted sampling method. Targeted sampling requires extensive research to describe the area and the target group, and identify appropriate locations within that area for inclusion in a sampling plan. Existing secondary data sources are reviewed in order to describe the target group and geographic areas to be surveyed. I have employed the targeted sampling method for the surveys in this study, with three important adjustments due to time and budget limitations. First, for each divorce survey I have chosen four sub-districts on the basis of their varying distances to the court, and comparable numbers of inhabitants. In each of those sub-districts the surveys were conducted in one town quarter and one village. Second, the sampling groups in each village or town quarter consisted of a targeted amount of fifteen respondents. Third, although the preparation of the survey and the estimation of the sampling-group population were based on the available qualitative and secondary data, I had no resources to conduct an extensive pre-study prior to the divorce surveys.

For each divorce survey I recruited eight research assistants who each were to survey fifteen respondents. In Cianjur, these were eight students of the local Suryakancana University; and in Bulukumba eight students of the local Higher Institute of Islamic Studies Al-Gazali. The research assistants spoke the local languages, which are Sundanese in Cianjur, and Buginese, Makassarese and Konjo in Bulukumba. Prior to conducting the divorce surveys I organized a training day for the research assistants in which we read the questionnaire together and I gave them instructions about the street outreach method and the way to conduct the interviews.

The street outreach method was employed in order to locate the fifteen divorced women with children. The research assistants were instructed to first politely present themselves to local village officials, and after having explained the background and purpose of the survey ask their permission to conduct it. They could start asking for information about divorced women with children from those officials, but were also stimulated to simply ask around. In order to guarantee the quality of the research assistants' work, I instructed them to note down the address of the respondents, of which I revisited a random sample as a check. Moreover, we kept regular telephone contact and held a progress meeting, in which we discussed the research assistants' experiences and problems in the field.

It appeared that due to unanticipated local circumstances in Bulukumba, which made a one-to-one implementation of Cianjur's survey design infeasible, I had to make some adjustments. First, in some villages in Bulukumba it was not possible for the research assistants to reach the targeted number of fifteen respondents per village or town quarter (*kampung*) and therefore, previously divorced women who had already remarried were included in the survey. Six respondents had no children and skipped the questions about child support. Furthermore, one research assistant had to look for additional respondents in an adjacent village within the same sub-district to reach the target of 15 respondents. Despite the slight differences between the two surveys, they reached 120 divorced women in each district, all but six of them with children. Thus, te surveys have provided essential data about women's divorce and post-divorce experiences and the role of the Islamic courts in Cianjur and Bulukumba.

1.3.5 Collection of documents and files

During my field work I collected three types of documents: court files of divorce cases; court annual reports; and data obtained from register books. During my regular visits to the Islamic court, I collected the court files concerning post-divorce rights in several stages. I managed to collect all relevant court files and annual reports of the three years pre-dating the respective field work periods. Meanwhile, I also visited local government institutions and their

official websites in search of secondary data, such as socio-economic statistics, population data and more general information about Cianjur and Bulukumba.

Finding court files which included post-divorce claims proved challenging. It appeared that almost all cases were only registered as male or female-petitioned. I realized that, in order to find the relevant court files, someone had to go through all the court register's books to look for post-divorce rights that were petitioned during the divorce process. In both Islamic courts I suggested to go through the register books myself, and on both occasions the responsible official was happy to delegate this task. In this way my assistants and I had full access to the courts' register books. An additional advantage was that we thus managed to get acquainted with the courts' staff working in the same room as we did.

Through analyses of the registers, the annual reports and the court files of the Islamic courts of Cianjur and Bulukumba, I have been able to abstract the number and setting of the post-divorce cases, the number and nature of post-divorce claims, the sex of the petitioners, the number of cases heard in the defendant's absence, the number of court fee waiver (*prodeo*) cases, and many more relevant data.

The collected court files have enabled me to analyze the claims and counter claims of the litigants, the witness accounts and the legal justification of the judges, and allowed me to compare all these written data with the outcomes of the surveys and my observations in the courtroom. As I soon discovered, court files reproduce a bureaucratized, ideal world of a rational and formal-legally correct application of procedure, which often differs considerably from the reality of the application of law in the courtroom. Yet, I have found them to be a valuable source of information about legal reasoning in the court process, even if some of the legally valuable statements uttered in the sometimes hectic reality of the court room were lost in the production of tidy court proceedings.

I have also used the court files to retrace and interview eight women in Cianjur and twelve women in Bulukumba who had been divorced at the Islamic court one to two years before my field research took place. They provided valuable data about their experiences with the divorce process in general, and the implementation of the court orders concerning child support and marital property in particular. The combination of quantitative and qualitative research of this study has been essential to provide a reliable picture of the functioning of the Islamic court and its effects on the local communities concerned

1.3.6 The research process

The research process went as follows. The preparation for my first field work period in Cianjur consisted of a desk study and legal sources. I collected and

analyzed literature about the Islamic court in Indonesia and Islamic courts elsewhere; about marriage and divorce issues in Indonesia and elsewhere, including in 'Western' countries; about access to justice and the rule of law, and about Cianjur and West Java. As part of my legal research, I analyzed the relevant legislation and regulations as well as legal scholars' commentaries thereof. I participated in a work shop in the framework of the access to justice in Indonesia program; a program to which I contributed a case study about the Islamic court in Cianjur.

During my field research in Cianjur I discovered that many women did not divorce at the Islamic court. Staff of the Islamic court estimated that about three-quarters of the couples in West Java divorce out-of-court, but also indicated that no one really knows. I decided that it was essential for this study to conduct a divorce survey about judicial and out-of-court divorces, the reasons why couples opted for them, and the real consequences for the women and children involved (cf. Huis 2010). Together with my assistant, who had previously worked for the Indonesian Survey Institute (*Lembaga Survey Indonesia*), I designed a questionnaire at the field location, based on relevant methodological literature I accessed online through the Leiden University's remote workspace. I have used the same questionnaire for the divorce survey in Bulukumba.

During my field research in Bulukumba I found that its divorce and out-of-court divorce situation was considerably different from Cianjur's. The position of local Islamic authorities and their stance towards the Islamic courts appeared to be factors which could partly explain these differences. After having returned home, I delved deeper into the history of the Islamic court and local Islamic authorities in the two districts. Besides reading and analyzing relevant contemporary academic historical works, this part of the research also consisted of analyzing the accounts of colonial Islamic and *adat* law experts about the Islamic courts in the Netherlands Indies. Additionally, I analyzed information about the two Islamic courts as compiled in the *Adatrechtbundels* and a compilation of case law concerning the Islamic courts in the Netherlands Indies (Tan 1976).

The legal history approach required substantial historical research (see 1.2.1). In order to deduce the main characteristics of the Islamic courts' judicial tradition, I analyzed colonial sources, including case law concerning the Islamic court, nineteenth and early twentieth century dissertations on the subject and accounts of nineteenth and early twentieth century Dutch colonial experts on the subject of Islamic law.

1.4 Overview of chapters

The chapters in this study reflect the three approaches of my research. Chapters 2, 5, and 7 provide a historical analysis of the Islamic courts of respectively

Java, West-Java and South Sulawesi, placing their development in their local political, legal and social contexts. Chapters 3, 4 and 9 concern the legal history approach. Chapters 3 and 4 provide a legal and political analysis about the way the legal doctrine in Islamic courts developed in colonial times and how, after independence, through processes of codification and regulation this doctrine has been turned into an Indonesian Muslim family law. Chapter 9 describes recent developments within the Islamic courts' legal doctrine through a legal analysis of recent court cases. Finally, Chapters 6 and 8 examine what role the Islamic courts of Cianjur and Bulukumba play in divorce matters and their performance in terms of access to justice and the rule of law. Chapter 10 brings the three approaches together and links their research results with nation-state formation in Cianjur and Bulukumba. Subsequently, it attempts to formulate generalizations about the role and performance of Islamic courts in divorce and post-divorce matters and the direction in which Muslim family law in Indonesia seems to be moving.