2 Indonesia's Islamic courts: a unification project

> 'Courts are, among other things, symbols of authority, and Islamic courts are symbols of Islamic authority. This may in fact be a more important function, from the point of view of those who have power to maintain them or let them be done away with, than the judicial work the courts do.' (Lev 1972: 4)

2.1 INTRODUCTION

This chapter discusses the historical development of the Islamic courts' jurisdiction in Indonesia: first during colonial times, and subsequently after independence. I take as my starting point the idea that knowledge of its history increases understanding of the present-day Islamic court and the symbolic value of recent reforms. Given that the Republic of Indonesia continued the colonial *penghulu*[1] court system on Java and Madura and established similar Islamic courts outside Java, this chapter focuses entirely on regulations concerning the Islamic court on Java. I acknowledge the different ways in which the Islamic courts' history developed outside Java, especially in regions where Islamic courts lacked formal recognition,[2] and therefore portray the courts' history in South Sulawesi separately in Chapter 6.

In this chapter I argue that ever since the VOC first issued special regulations concerning Muslim family law in 1642, a gradual convergence of Islamic and national law has taken place. This convergence first accelerated when the *penghulu* courts were made part of the colonial legal system in the nineteenth century. Soon the traditional Islamic institution had to prove its relevance amid two seemingly opposing forces. On the one hand there was a strong desire within the late nineteenth and early twentieth century colonial government and judiciary to unify and modernize the court system. On the other hand the *adat* law policy in which local customary law was to remain the law of the native (*Inlander*) gained prominence as well among the same political and judicial colonial elite. As a consequence of the gradual adoption by the colonial

1 The *penghulu* was the highest Javanese Islamic official of a district (*kabupaten*) and the head of a Muslim bureaucracy responsible for Muslim affairs.

2 Bowen (2003) gives an elaborate history of the Acehnese Islamic courts, which were never incorporated into the colonial court system.

government of *adat* instead of Islam as the basis of family law in the Netherlands Indies, as well as the colonial judiciary's antipathy for the old-fashioned *penghulus*, the Islamic courts increasingly lost the jurisdictional battles with the general colonial courts. When in the 1930s the colonial government decided to significantly decrease the jurisdiction of Islamic courts, these 'old-fashioned' *penghulu* courts[3] gained strong symbolic value as courts with an Islamic foundation, and, as a consequence, generated support from Muslim organizations that had an alternative, more Islamic, view of modernization. This support proved to be decisive for the Islamic courts' survival.

After independence, proponents of the Islamic court generally viewed the national legal system as an indispensable part of a modern Muslim state, and strove for an actualization of Islamic courts' procedure and law more in keeping with modern times. Hence, I analyze the development of the Islamic court after independence on the basis of Horowitz's observation in the Malaysian case that 'simultaneously, then, staunch proponents of Islam and detractors of Islamic law are mollified by a course of innovation that is heavy on the convergence of legal systems' (Horowitz 1994: 576). Innovation accelerated in Indonesia after the 'Islamic turn' of the New Order regime in the 1980s (Liddle 1996), and resulted in a bureaucratization and rationalization of the Islamic courts, but without compromising their Islamic character. On the contrary, some of the colonial *adat* law reforms were reislamized. The 1989 Islamic Judiciary Law annulled the loss in the first half of the nineteenth century of the Islamic courts' jurisdiction in inheritance and marital property matters. After the fall of the Suharto regime in 1998 this process of convergence of legal systems continued when in 2005 the government put the Islamic courts, previously being administered by the Ministry of Religious Affairs, fully under the umbrella of the Supreme Court and again increased their jurisdiction. After this process, the Islamic courts even gained powers in a field which previously never had been part of the colonial *penghulu* courts: Islamic banking.

2.2 Islamic courts in the Netherlands Indies

2.2.1 *Jaksa* courts, *surambi* courts and *the role of penghulus* in the sultanates of Java

When the first Dutch merchant ships arrived on the coast of Java in 1596, the Javanese Muslim sultanates of Demak (1475-1548), Cirebon (1479-1906), Banten

3 Hisyam (2001) provides rich accounts of how the Muslim organizations established in the first half of the twentieth century initially stereotyped the *penghulus* as rather old-fashioned, colonial civil servants, with lack of Islamic knowledge, and subsequently refutes this image by showing that many *penghulus* in fact did have considerable Islamic education and knowledge.

(1527-1813) and, last but not least, the powerful sultanate of Mataram (1588-1681) had all integrated Islamic law into their court systems: the so-called *jaksa*[4] courts.[5] Through trade and the *hajj,* as well as religious studies, the Indonesian sultanates maintained contact with the rest of the Muslim world. The *jaksa* courts were sultanate courts at the regency level and held jurisdiction in all civil and criminal matters. As in the rest of the Muslim world, three systems of law in a broad sense operated in the sultanates (An Na'im 2002: 12): first, sultanic law consisting of decrees and regulations promulgated on the basis of the ruler's authority (*siyasa*); second, Islamic doctrines (*fiqh*), of the *syafi'ite maddhab*, and ultimately based on a divine authority; third, customary norms based in *adat* that ruled the daily lives of local communities. Within the *jaksa* courts an Islamic judge (*qadi*) passed judgments in Muslim family law and inheritance law.

The position of *qadi* was not the same in each sultanate or each period. In the Banten Sultanate in West Java, the *qadi* was also in charge of tax-collection and he personally appointed the lower rank officials in the Islamic bureaucracy who collected Islamic tax of *zakat* and other taxes at the local level. Thus, the role of *qadi* in Banten extended beyond the position of chief judge of Islamic justice (see Hisyam 2001; Bruinessen 1995). In Mataram under the reign of Sultan Agung (1613-1646), the venue of the courts was changed from the sultan's palace to the veranda of the grand mosque (*surambi*). Eventually, the chief of the grand mosque (*penghulu*) presided over the Islamic courts in all the regencies of the Mataram Sultanate (Lubis 1994:58-59). Because of the perceived resemblance between *penghulus* and Catholic priests, the Dutch called those *surambi* courts 'priest councils' (*priesterraden*).

The chief *penghulu* was the highest authority in religious affairs in a regency under the indigenous regent, serving as both the chief Islamic judge of the Islamic court and the head of the Islamic bureaucracy. This bureaucracy ran from the chief *penghulu* and other *penghulus* at the regency level, to the *naib* at the sub-district level, and *kaum* (in West Java *amil*) in the villages. All these functionaries could advise the local population in marital and divorce affairs, but only a *penghulu* could act as a judge (Hisyam 2001: 35-36; Juynboll 1882). In their judicial role, the *penghulus* decided family law and inheritance cases and advised in criminal cases within the *jaksa* court, presided over by the sultan or his representative (Lubis 1994). Islamic *hudud* punishments, like the cutting off of thieves' hands, and the sanctions of retaliation (*qisas*) and blood

4 Jaksa is Sanskrit for prosecutor.

5 In this part my main focus is the colonial influence on the Javanese Islamic courts, since it was the Dutch regulation of the Javanese courts that eventually created the context in which a national Islamic judiciary could develop (see for instance Lev 1972). In the Muslim kingdoms outside Java Islamic justice also existed, in some areas as a separate part of the judicial organization of a Sultanate and in other areas side-by-side or as part of the customary justice system. A Dutch colonial perspective on where Islamic justice was 'indigenous' can be found in Van de Velde, J.J. (1928), Chapter I and II.

money (*diyyat*) were imposed during the reign of Sultan Agung, but how often we do not know (Gobée 1884).[6]

2.2.2 The *penghulus* in VOC regulations (1602-1798)

After the founding of Batavia in 1619, the VOC initially decided to implement Dutch laws within its occupied territories.[7] Thus, the Instruction of 16 June 1625[8] stipulated that the law in the East Indies would consist of all ordinances that applied in the cities and rural areas in the Netherlands. At that time the VOC territory consisted of relatively few settlements (Ball 1982: 5-6). With the foundation of the magistrate court (*Schepenbank*) in 1620 – renamed Court of Justice (*Raedt van Justitie*) in 1626 – the VOC established a general court for the whole population of the 'Christian republic' of Batavia, and formally abolished the indigenous courts in its directly ruled territory.

The VOC soon realized that Dutch substantive law was at odds with the customary and religious practices of the indigenous population. Therefore, it issued several instructions to regulate indigenous legal matters. A VOC instruction of 26 May 1640 stipulated that in inheritance cases of 'Chinese, Heathens and Moors', the laws and customs of the relevant population would apply. Likewise, Article XIII of the Statutes of Batavia (*Bataviasche Statuten*) of 1642 stipulated that indigenous law would apply to the indigenous population (*inlander*) in family law and inheritance matters.

Although in the seventeenth century different ethnic and religious communities inhabited the VOC's territory, with different normative systems governing their everyday matters (including family law), the VOC chose not to set up a plural court system in its directly ruled territory of Batavia and surroundings. This changed in the eighteenth century, by which time the VOC had become a major player in local political and military struggles, as a consequence of which a large part of the island of Java had come under its rule. Large parts of East and Central Java became VOC territory according to the peace treaty with the Mataram Sultanate of 11 November 1743. The West Javanese Sultanates of Cirebon and Banten became VOC protectorates in 1680 and 1752 respectively. The legal system of the East Indies, designed for small VOC settlements

6 In the nineteenth century, most crimes were settled with *diyyat* or compensation money to the victim (Gobée 1884: 19).

7 The description of the legal position of indigenous law and courts, including Islamic courts, vis-à-vis European law and courts in section 2.2.2 and 2.2.3 is partly based on an annex in the General Elucidation of the proceedings of the House of Representatives of the Netherlands 1904-1905, titled 'the origin and development of the differences in the administration of justice between the European and Native population of the Netherlands Indies' (*Kamerstukken II* 1904/1905, 125.1, A, pp 15-34).

8 *Plakkaat van 16 Juni 1625*, see Van der Chijs, J.A., Nederlandsch-Indisch Plakkaatboek, 1602-1811.

like Batavia and other ports in the archipelago, became unsustainable and was reorganized.

On 30 November 1746, the VOC established the *landraad* in Semarang (Central Java), a general court for the indigenous population in which European judges were instructed to apply indigenous law.[9] In civil and criminal matters, the *landraad* existed alongside the *Raad van Justitie*, the first instance court for Europeans, which applied European law. One court was insufficient for such a large territory and in practice the court only attracted inhabitants of Semarang and its direct surroundings. Hence, it is unlikely that the *landraad* did take over all the judicial functions in marriage, divorce and inheritance affairs: so the *penghulus* continued performing their traditional tasks. Nonetheless, the establishment of the *landraad* by the VOC marks a turning point, as it introduced a plural formal court system in the VOC territories of Java: the *Raad van Justitie* applying Dutch law for Europeans and the *landraad* applying indigenous law for the indigenous population.

2.2.3 'Priests' in the Netherlands Indies until the 1882 Priest Councils Regulation

In 1798, the VOC went bankrupt and the Dutch government took over the administration of all VOC territories. Daendels, Governor-General of the Netherlands Indies from 1807-1810, decided to expand the legal system. More *landraad* courts were established on Java, increasingly dividing the colonial legal system into indigenous and European sections. Even in the indirectly ruled sultanates of Banten and Cirebon the *jaksa* courts had to accept a transfer of jurisdiction in murder cases to the *landraad* headed by the Dutch *resident*, the official colonial representative at the regency level and advisor to the indigenous ruler (*regent*).

During this time of expansion of the *landraad*, Daendels instructed the indigenous rulers of Java's Northeast Coast and Cirebon not to obstruct chief *penghulus* and *penghulus* in settling marriage, divorce and inheritance matters, including the division of property (*boedelscheidingen*) (Nederburgh 1880: 5-6). Article 73 of the Instruction of 1 September 1808 concerning the Reorganization of the European and Indigenous Administration and the Court System at the Javanese Northeast Coast even recognized the judicial powers of the *penghulus* in marriage and inheritance affairs as it intended to install an appeal possibility at the *landraad* for the *penghulus'* judgments.[10] Thus, the Dutch colonial government of the early nineteenth century recognized the *penghulus'* role in

9 To this end a compilation indigenous law *''Mahometaanse wetboek Moghaerer''* was issued in 1750. See 3.3.1.

10 *Plakaat van 1 September 1808 in zake de reorganisatie van het Europeesch en Inlandsch bestuur en van het Inlandsche rechtswezen.*

family and inheritance matters and may even had the intention to formally regulate their jurisdiction. However, the Instruction of September 1808 would not be implemented, due to geopolitical developments in Europe.

After the Netherlands was occupied by the French troops of Napoleon Bonaparte, the British conquered Java. A short but consequential period of British administration of the Netherlands Indies followed (1811-1816). Lieutenant-Governor Raffles issued in 1814 the 'Regulation for the more effectual administration of justice in the provincial courts of Java.' Java was reorganized into sixteen regencies, each of which formally headed by an indigenous regent, but with the colonial *resident* in charge of the civil administration, tax levying and indigenous administration of justice. In each regency (*residentie*) a *landraad* was established headed by the *resident*. In Semarang, and Surabaya two new *raden van justitie* (first instance courts for Europeans and appellate courts for the *landraad*) were established besides the one that already existed in Batavia.

The *landraad* still had to apply indigenous law and customs, subject to general principles of justice and fairness. The *penghulus* (and *jaksas*) were transformed from judges into advisers of the *landraad*. Neither *penghulu* nor *jaksa* courts were made formally part of this colonial court system. In 'The History of Java', Raffles demonstrated that he had been aware of the imperative role *penghulus* played in the traditional administration of justice on Java, but he considered this to be contrary to the 'fully impartial administration of justice' he intended to introduce, since they had too many links to the sultan and the regent, who also acted as judges in *jaksa* court hearings (Raffles 1817: 309-327).

Not long after the Dutch returned to power in 1816, they issued the 1819 Instruction on the Courts of Justice in the Netherlands Indies (the 1819 Courts of Justice Instruction),[11] which continued most reforms of Raffles' 1814 Regulation. The 1819 Courts of Justice Instruction recognized substantive indigenous law and custom 'as long as they are compatible with the general principles of justice and Dutch regulations' (Article 3). The *penghulus* retained their place as expert advisors of the *landraad*, who had to be consulted in civil and criminal matters.

However, other than the British, the Dutch, through the 1820 Regulations concerning the Duties, Titles and Rank of Regents on Java (the 1820 Regents Regulation), explicitly recognized the role of *penghulus* in settling marriage, divorce and inheritance.[12] Article 13 of the 1820 Regents Regulation read:

> 'The indigenous regency head (*regent*) supervises matters of the Muslim religion and guarantees that the priests, in accordance with the Javanese norms and customs, are free in practicing their profession, such as in marriage matters, division of property in divorce and inheritance matters (*boedelscheidingen*) and such.'

11 *Instructie voor de Raden van justitie* (S 1819/20).

12 *Het reglement op de verpligtingen, titels en rangen der regenten op het eiland Java* (S 1820/22).

This recognition of the role of *penghulus* (or 'priests' as the Dutch called them) in marriage, divorce and inheritance matters, however, should not be confused with an official recognition of the formal jurisdiction of *penghulus* as judges. The formal incorporation of the *penghulus* into the legal system of the Netherlands Indies turned out to be a gradual process in which, perhaps surprisingly, case law played an important role.[13]

Initially, case law remained indecisive about the *penghulus'* jurisdiction in judicial matters. In 1834, the Court of Justice of Semarang was the first court that understood Article 13 of the 1820 Regents Regulation to have granted *penghulus* jurisdiction over disputes concerning marriage, divorce and inheritance (Nederburgh 1880: 9-10). This judgment proved controversial, leading to the issuance of two missives by the Supreme Court (*Hooge Raad*) in Batavia[14] formulating strong disagreement with the judgment.

The first missive read as follows: 'Article 13 of S 1820/22 only established the fact that they [indigenous population] can consult the priests. By providing priests and chiefs with any larger jurisdiction, the *landraad*, under [the supervision of] the *resident* has exceeded the limits of its jurisdiction.' The second missive of the Supreme Court clarifies that Article 13 speaks of the profession of 'priests' and does not mention 'priest councils' (*priesterraden*) at all. Therefore, according to the missive, 'it is not probable that Article 13 was intended to establish a 'council' or 'court' so that the *landraad* remains the only court for the indigenous population, even in cases where Muslim laws apply.'[15] The missives make clear that in 1835, the Supreme Court in Batavia did not consider the *penghulus* as judges whose judgments were final and binding for the parties. Against the background of this jurisdictional controversy, in 1835 the Governor-General issued the Resolution concerning Judgments in Civil Actions Resulting from Disputes among the Javanese (S 1835/58)[16] to clarify the scope of Article 13:

> '[...] As ampliative and explication, in order to explain Article 13 of the regulation on the duties, titles and ranks of the district heads on the Island of Java [S 1820/22]; that in many instances disputes occur, among Javanese, about matters of marriage, [about] property after divorce and death and such, that must be decided according to Islamic law; that it is the priests who must give a judgment, yet that all civil actions, for settlement and payment, as a result of those decisions, will be brought before the general courts, in order to, whilst respecting those decisions and to ensure the executions thereof, do justice.'

13 The part below is mainly based on Nederburgh 1880.

14 The Supreme Court was established in 1806 in the former *Raad van Justitie* in Batavia.

15 The missive of 18 May 1835; and the missive of 15 September 1835. For the discussion on the stance of the Supreme Court about the status of decisions of *penghulu* courts, see Nederburgh (1880: 9-18).

16 *Resolutie van den Gouverneur Generaal ad interim in Rade, van den 7den December 1835 no. 6. Uitspraak in civiele actiën, voortspruitende uit geschillen, tusschen Javanen onderling* (S 1835/58).

The colonial government clearly overruled the Supreme Court. S 1835/58 is important to the history of the Islamic court in Indonesia in three ways. First, it is the first colonial regulation that established the competence of *penghulus* to adjudicate disputes concerning marriage, and division of property after death or divorce. As such, it opposed the stance of the Supreme Court, which in the very same year, 1835, had described judgments of 'priests' as 'advice.' Secondly, it established a legal mechanism to enforce the priests' decisions through the colonial legal system. A request for implementation of decisions by 'priests' had to be addressed to the colonial court (*landraad*). Officially, this stipulation was intended to ensure enforcement of *penghulu*s' judgments, but of course an increased control over the *penghulus* had also been a consideration. This dependency on the general court to enforce judgments of the Islamic court would remain in place for more than 150 years, and would only be lifted in 1989 by the Law on the Islamic Judiciary, which would provide the Islamic court with autonomy in matters of enforcement capacity. Thirdly, the phrase 'respecting those decisions and to ensure the execution thereof', implied that an implementation request at the *landraad* was not an appeal, and, therefore, the *landraad* could only look at procedural and jurisdictional issues and not treat the legal substance of the priests' judgments. Several courts indeed initially interpreted S 1835/58 in this way, and considered the judgments of *penghulus* to be final.

On the whole, S 1835/58 proved to be an essential event in the history of the Islamic court. As we have seen, neither the British legal reforms of the early nineteenth century, nor the opinions of the *Hooge Raad* pointed to a future incorporation of *penghulu* courts into the colonial court system. With S 1835/58, the colonial government formally and incontestably recognized the jurisdiction of *penghulus* in family law disputes.

The Regulation on the Judicial Organization and Justice Policies (S 1847/23)[17] maintained the *penghulu*s' jurisdiction, and enforcement requests still had to be directed to the *landraad*. Initially, the possibility of appeal at the *landraad* was included in the draft of the Regulation, but in the end it was decided that *penghulus*' decisions were final and could not be formally appealed (Nederburgh 1880: 25-26). Nonetheless, Article 3 of S 1847/23 introduced three delicate adjustments to the jurisdiction of the priests, making it less straightforward. The first adjustment is that chiefs (according to Nederburgh, Chinese chiefs) appear alongside priests as institutions with jurisdiction in the abovementioned civil disputes. Secondly, the 'priests and chiefs' administered justice over the 'indigenous population (*Inlanders*) and persons who are equated with them', whereas the subjects of S 1835/58 were the Javanese (*Javanen*). As we will see in Chapter 7, this generalization created confusion about the status of the Islamic courts outside Java. Thirdly, Article 3 changed

17 *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie.*

the jurisdiction of the priests to 'those civil disputes, which according to their religious laws or old customs and institutions (*instellingen*), should be decided by their priests or chiefs.' S 1835/58 had been very specific about the priests' jurisdiction; it applied in disputes concerning marriage, and division of property after a divorce or death. Based on interviews with people involved in the law-making process, Nederburgh concluded that those changes were not intended to change the jurisdiction of the *penghulus*, but anticipated the creation of judicial bodies for the Chinese population presided over by their chiefs, which was planned but never came about (Nederburgh 1880: 28). However, as I will explain below, in practice this lack of specificity regarding the jurisdiction of the *penghulus* provided the general colonial courts room to decide what this jurisdiction exactly encompassed.

In 1848, the Netherlands adopted a constitution turning the Netherlands into a parliamentary monarchy. In addition to the constitutional provisions considered applicable to the Netherlands Indies, special provisions were incorporated into a proto-constitution, the Governmental Regulation of the Netherlands Indies (*Regeringsreglement van Nederlandsch Indië*; RR).[18] The RR adopted a provision concerning the jurisdiction of priests which is very similar to Article 3 of the Regulation on the Judicial Organization in Article 78(2) RR which established their jurisdiction in matters where 'according to the local religious laws, and old customs (*godsdienstige wetten en oude herkomsten*) priests and chiefs were to decide.'

As he had done regarding the Regulation on the Judicial Organization Nederburgh argued that Article 78(2) was not intended to and did not annul S 1835/58 (Nederburgh 1880: 31, 32). Nevertheless, the inclusion of 'old customs' in Article 78 (2) RR and Article 3 of the Regulation on the Judicial Organization broadened the *landraad*'s discretion in decisions concerning what the jurisdiction of *penghulus* was. No one knew exactly what the old customs were and what they said about *penghulus*. In this way, the *landraad* could exercise considerable control over them. Indeed, after 1848, case law of the *landraad* and *Raad van Justitie* would demonstrate that those courts assumed discretion in interpreting what the old customs were, thereby limiting the priests' jurisdiction and effectively nullifying their judgments in all disputes concerning marital property and inheritance.[19]

18 S 1855/2.

19 For a description of the case law on the appeal issue see Nederburgh (1880) and Van der Velde (1928).

2.2.4 The unification of Javanese *penghulu* courts under the 1882 Priest Councils Regulation

After including the *penghulus* in the RR as 'priests', and with mounting criticism in the Dutch parliament concerning the economic, political and religious power of local *penghulus*,[20] notably in West Java, the Dutch government attempted to regulate and decrease their powers.[21] The Regulation concerning the Priest Councils on Java and Madura (1882 Priest Councils Regulation)[22] was part of this strategy, since it pulled away the priest councils from the administrative control of the Javanese regents and brought them under the direct administration of the Department of Internal Affairs (Lev 1972: 13). The official aim of the 1882 Priest Councils Regulation was to curb corruption and to prevent inconsistent judgments by the *penghulus*. In fact, the Dutch government had the additional aim of increasing control over the *penghulus* and Islamic justice on Java (Hanstein 2002: 50).

The 1882 Priest Councils Regulation consisted of a mere seven articles – and in fact did not include measures that were necessary to curb corruption, like providing a salary for its officials. Only the chief *penghulus* received a salary as heads of the Islamic bureaucracy, and for their advisory work at the general colonial court, among other duties (Berg 1882: 18).[23] The judicial work in the priest councils of all other *penghulus* remained unsalaried, making their income dependent on informal fees and was therefore 'ineffective' in achieving its anti-corruption aim (Lev 1972: 14).

The 1882 Priest Councils Regulation did increase government control over the *penghulus* by creating a unified administration of Islamic justice on Java and Madura, tearing down in the process the Islamic pillar of the Javanese sultanate legal system. According to Daniel S. Lev, the removal of the *penghulus* from the indigenous court system resulted in an Islamic judiciary 'that was more independent from the local aristocracy and had a more supra-local orientation' (Lev 1972: 14-17). As such, it may be seen as the birth of the national Islamic court of today. On the other hand, the *penghulus'* associations

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20 A good example is the debate in 1870 between the Minister of Colonial Affairs, the Governor-General of the Netherlands and the Parliament concerning the strong economical position of priests in the Preanger, West Java. Source: Invoering der reorganisatie van de Preanger regentschappen, *Kamerstukken II* 1870-1871, 82, 1-3, pp 1221-1231. I will further elaborate on the central role of *ulamas* in West Java, and Dutch attempts to diminish their power in Chapter 5.

21 Article 17 of the Instruction to the Regents (*Instructie voor de Regenten in de Gouvernementslanden*; S 1867/114), for instance, was intended to increase control of the colonial government over the priests. It stipulated a priests registration requirement for the Regent and prohibited unregistered individuals to act as a priests. The registers had to be send to the *resident* (Berg 1882: 2).

22 *Reglement betreffende de priesterraden op Java en Madura (S 1882/152).*

23 This was stipulated in S 1867/125. See Hisyam (2001) on the *penghulu* under the Dutch administration.

with the colonial regime undermined their independence in the eyes of the Javanese Muslim community. Independent and often anti-colonial *kyais* and *ulamas* questioned the *penghulus'* motives and expertise in Islamic matters and consequently became a rival authority to them at the local level (Lev 1972: 12-13; Hisyam 2001, Laffan 2003).[24]

Even so, the 1882 Priest Councils Regulation laid down some foundational aspects of the future Islamic courts. Article 1 stipulated that alongside every *landraad* on Java and Madura there should be a priest council. Articles 2 and three stipulated that a priest council should consist of a minimum of three and a maximum of eight *penghulus* and was presided by the chief *penghulu.* The Governor-General of the Netherlands Indies appointed and dismissed the *penghulus.* This was a slight change regarding an Instruction of the Governor-General (S 1867/168) which provided that the resident appointed the *penghulus* and the Governor-General the chief *penghulus*. Articles 4, 5 and 6 concerned procedure. To render a judgment valid, a panel of *penghulus* had to consist of at least three members, including the chief *penghulu* as chair. The judgment, including the legal justification, had to be written down, signed by all members of the panel of *penghulus*, and kept in a registry.[25] The litigants were to receive a copy of the judgment. Article 7, finally, stipulated that when a priest council transgressed its jurisdiction, the judgments could not be enforced through an *executoirverklaring* by the *landraad*. These procedural stipulations were meant to improve the internal and external checks and balances, and to improve consistency of judgments. They would remain in force until 1989 when the Law on the Islamic Judiciary withdrew them.

2.2.5 The jurisdiction of the priest councils in case law from 1848-1927

The 1882 Priest Councils Regulation did not regulate the jurisdiction of priest councils. Thus, the imprecisely worded Article 3 of the 1847 Regulation concerning the Judicial Organization and Article 78(2) of the 1854 RR still applied. Hence, the judge of the *landraad,* the appellate Court of Justice and ultimately the Supreme Court had broad discretionary powers in determining the jurisdiction of the priest councils, Their case law regarding the execution of priest councils' decisions (*executoirverklaring*) determined in fact this jurisdiction.

In his dissertation, J.J. van de Velde (1928) has made a legal analysis of this case law in the period 1848-1926. His analysis demonstrates that judgments of the Supreme Court, the Court of Justice of both Semarang and Surabaya,

24 See also Chapter 4.

25 Raffles (1817) noted that traditionally the *penghulu* in the *surambi* courts already wrote down their decisions and kept a registry.

and a number of *landraad*[26] were initially inconclusive about the jurisdiction of *penghulu* courts, but by the early twentieth century case law had settled the matter. I will not go into the details of the judgments themselves but restrict myself to summing up the different legal issues in which the priest court was or was not competent according to this case law.

First of all, case law of the period 1848-1926 established that the judge considered the priests councils competent in validating marriage and divorce. The jurisdiction of the *penghulus* in these fields was undisputed (Velde 1928: 68-70). Secondly, *landraad* case law and the appellate Court of Justice had been inconclusive about the enforceability of priest councils' judgments concerning maintenance or support (*nafkah*) until, on December 27 1894, the Supreme Court in Batavia denied enforceability of a decision of the priest council of Tegal, and argued that this whole overdue *nafkah* dispute should have been brought before the *landraad*, because disputes concerning overdue *nafkah* had to be considered general debt cases (Velde 1928: 71-73). In theory, this meant that from 1894 onwards the priest councils had no jurisdiction to order the husband to pay a certain amount of overdue *nafkah*. However, in practice the *penghulu* did not apply the principle of precedent, and without exception would accept all *nafkah* cases including those concerning overdue maintenance (Velde 1928: 61).

Thirdly, disputes concerning the division of property upon divorce (*boedelscheidingen*) were one of the fields explicitly mentioned in S 1835/58 as falling under priest councils' jurisdiction. However, although the *landraad* and the appellate *Raad van Justitie* generally considered a consensual division of marital property to fall within the jurisdiction of the priest councils, the *landraad* considered disputes to fall within their own jurisdiction (Velde 1928: 70-71). The same approach could be found in case law concerning inheritance matters. The priest councils were generally considered competent in determining who the inheritors were, and in establishing the subsequent division of the inheritance (Velde 1928: 126). However, towards the 1920s, *landraad* case law and the *Raad van Justitie* denied the priest council's jurisdiction in cases where the inheritance was disputed. As appears from three decisions by priest councils in the 1920s, they did not always consider themselves competent in inheritance cases in which the property was disputed, and referred the parties to the *landraad* (Velde 1928: 74-78).

Thus, before the 1931 Regulation on Religious Justice[27] regulated the jurisdiction of priest councils (see 2.2.7 below), the development of case law in the early twentieth century most commonly pointed to a refusal of their jurisdiction in disputes concerning property and debts in divorce and inherit-

26 In the Dutch language the correct plural form for landraad is *landraden*, but I choose to use *landraad* for the singular and plural form in order not to confuse the reader.

27 *Reglement op de godsdienstige rechtspraak, de benoeming van voogden en de inlandse boedelkamers op Java en Madura* (S 1931/53).

ance cases. In practice, this meant that by the 1920s, the *landraad*, Court of Justice and the Supreme Court considered the priest councils to be competent to issue declaratory judgments only, while the *landraad* was competent to order an action from one of the parties. One may say that as an echo of the first missive of the Supreme Court in 1835, and with the exception of judgments concerning the validity and the validation of marriage and divorce, the formal status of the *penghulu* courts' judgments in disputes concerning marital property and inheritance was again reduced to advice (*fatwa*) and the *penghulus*' role as judges reduced to mediators. S 1835/58 had lost all legal force. Of course, this does not mean that the priest councils in practice did not issue court orders on those matters anymore, but rather that their orders could no longer be enforced through the colonial legal system.

2.2.6 *Adat* law at the heart of colonial policies concerning Islam

The limitation of the priest councils' jurisdiction through case law was closely linked to controversies among experts and government advisers in the late nineteenth and early twentieth century, centering on the role of Islamic law in the life of Indonesians. Up to the 1880s, experts like Winter, Keyser and Van den Berg had formulated the prevailing opinion that Islamic law ruled the lives of Indonesian Muslims, and that the differences between prescribed norms and local practices were caused by persistent local customary norms, regulations by the local authorities or incorrect behavior – a theory that has become known as *receptio in complexu*.

As a critique of *receptio in complexu*, the so-called *adat* law (*adatrecht*) school of the Dutch scholars Snouck Hurgronje, Van Vollenhoven and Ter Haar developed the reception theory (*receptietheorie*). Reception theory held that it was not Islamic law that ruled everyday life in Indonesia, but customary law or *adat* law. According to the *adat* law school the role of Islamic law had to be limited to those Islamic norms that the local *adat* law had incorporated or received. Thus, living norms rather than prescribed norms of Islamic law were central.

During the first half of the twentieth century the *adat* law school would prevail. In the opinion of the *adat* law proponents, the indigenous population should as much as possible be ruled by their own *adat* law norms and, therefore, the *landraad* should apply the local *adat* law (defined as *adat* norms with legal consequences) in their judgments. Although they saw *adat* law as a living law, the *adat* law scholars also tried to preserve local customary law, thus, whether intentionally or not, sustaining traditional hierarchies which facilitated colonial rule (Benda-Beckmann, F. & Benda-Beckmann, K. 2011; Burns 2004; Prins 1954). Van Vollenhoven expressed his concern about the encroachment of both Islamic and European law on *adat* practices within society (1931: 70). Like Snouck Hurgronje (Adatrechtbundel I 1911: 210), he was of the opinion

that the regulation and unification of priest councils in 1882 was based on 'misconceptions of the colonial administrators' concerning the role of Islamic law in society (Vollenhoven 1931: 565).

The influence of the *adat* law school was visible in the new proto-constitution of the Netherlands Indies, the *Indische Staatsregeling* (S 1925/415; IS), which replaced the old 1854 RR (Nurlaelawati 2010 :48).[28] Article 134 (2) on the jurisdiction of the *penghulu* courts amended Article 78 (2) 1854 RR as follows: 'civil lawsuits between Mohammedans fall under the jurisdiction of the religious judge, provided that this is in accordance with their *adat* law, and not contrary to stipulations in [colonial] legislation.' Hence, Islamic law was made subordinate to *adat* law, and the general colonial courts had to take local *adat* norms as starting point in judgments concerning execution of *penghulu* courts' judgments. Both in policy and the administration of justice the opinions of the *adat* law specialists became central, rather than those of Islamic law specialists.[29]

2.2.7 Limiting the formal jurisdiction of the *penghulu* courts (1931)

Case law of the colonial courts, *adat* law policy and the *adat* law clause in Article 134(2) of the 1925 IS all pointed to a change in policy towards the *penghulu* courts. Indeed, in 1922 the Dutch government created a commission to assess the jurisdictional division between the priest councils and the *landraad* on Java and Madura. The commission was headed by RA Hoesein Djajadiningrat, a specialist in both Islamic law and Javanese and Sundanese literature and culture, employed by the Law School (*Rechtshogeschool*) in Batavia, and who, moreover, in 1924 would become the first native Indonesian with the rank of Professor. The commission also included Professor Ter Haar, a main proponent of the *adat* law school as well as representatives of *penghulus* and Muslim organizations, the most renowned being Mohammad Dahlan of the *Muhammadiyah* (Lev 1972: 18).

Despite the presence of the *penghulus* and the representatives of the Muslim organizations, the commission drafted a report recommending a major transfer of the *penghulu* courts' jurisdiction to the *landraad*. With the exception of the dower (*mahr*) and maintenance (*nafkah*), jurisdiction over all matters concerning

28 The *Indische Staatsregeling* came into force on January 1 1926. Only one of seventy-seven decisions by the Dutch colonial courts and four (of 166) of the priest councils discussed in Van de Velde 1928 were issued after this date, hence my decision to discuss the Netherlands Indies case law of 1848-1926 in section 2.2.5.

29 Snouck Hurgronje as an Islamic law expert took a slight different position than his successors. He believed that the development of Islam should be the main focus of colonial policies, whereas the *adat* law scholars of the last decades of the colonial period, like Ter Haar, mainly 'were interested in securing and preserving what they understood as tradition' (Lev 1972: 17).

property, including inheritance matters, was transferred to the *landraad*, which should apply *adat* law rather than Islamic law. Execution of Islamic courts' decisions still required an *executoirverklaring*. The commission also recommended to improve the education and provide a salary of all staff of the *penghulu* courts, a matter the Muslim organizations had brought up (Lev 1972: 17-22; Hanstein 2002: 50-52).[30]

The subsequent draft regulation adopted the recommendations of the Djajadiningrat Commission. The draft Regulation was accepted by the Dutch parliament, with the caveat (S 1931/53, Article 5) that, because of the sensitivity of the subject, the Governor-General of the Netherlands Indies would decide when it would come into force. In 1931, in order to prevent protest by the Muslim community, Governor-General De Jonge decided to introduce only the procedural second and third chapter of the 1931 *Penghulu* Courts Regulation. It was six years later when Tjarda van Starkenborgh Stachouwer, the last Governor-General of the Netherlands Indies, introduced the first chapter concerning the transfer of jurisdiction through S 1937/116.[31] As could have been expected, it led to heavy protests from Muslim organizations (Hanstein 2002: 52). Moreover, even Hazairin, a well-known Dutch-trained *adat* law scholar with a PhD from Leiden University, called reception theory 'the theory of the devil which insults the faith of Muslims, God, the Qur'an, and the Traditions of the Prophet' (Nurlaelawati 2010: 48).

Among the most active opponents of the 1931 *Penghulu* Courts Regulation were the *penghulus* of the Islamic courts on Java and Madura, who decided to organize themselves in the Association of *Penghulus* and their Staff (*Perhimpunan Penghoeloe dan Pegawainya;* PPDP) to advance their interests. On 16 May 1937, the PPDP held its first conference, during which it submitted a joint statement to the colonial government. The statement protested the withdrawal of their jurisdiction in inheritance and *waqf* cases, and stressed the inconsistent nature of *adat* law vis-à-vis Islamic law. The PPDP even threatened to label people living under *adat* law as apostates (Hanstein 2002: 55). The *penghulu*'s fierce resistance was partly due to the fact that inheritance cases were the most rewarding, since it was customary to pay a fee (*usur*) of ten percent of the value of the property,[32] while the Department of Internal Affairs, because

30 Nonetheless, to dissatisfaction of the *penghulu*, the Dutch never implemented it. See Hisyam (2001).

31 In the same year, the 1937 Regulation on Religious Justice in parts of Southern and Eastern Borneo (*Reglement op de godsdienstige rechtspraak voor een gedeelte van de residentie Zuider- en Oosterafd. van Borneo*; S 1937/638) regulated and recognized the local Islamic courts that were called *qadi* courts and a separate regulation (S 1937/ 639) established an Islamic high court in Banjarmasin. Other than the *penghulu* courts in Java and Madura, the *qadi* courts in Kalimantan would retain jurisdiction in inheritance matters.

32 Ironically, Muslim organizations like *Sarekat Islam* in the past were amongst those who had harsh criticism of the customary *usur* practice, for which there is no base in Islamic law (Hisyam 2001:192-197)

of budgetary reasons, kept postponing the implementation of the provision stipulating a salary to all *penghulu* courts' staff (Lev 1972: 21). However, this aspect of personal interest should not distract us from the genuine ideological opposition to the colonial government's *adat* policy.

In the end the protests were unsuccessful, and the colonial government did not relent (Hanstein 2002: 55). The *penghulus* then turned to a strategy of silent rejection, and continued their role as Islamic experts in inheritance cases giving legal opinions (*fatwa*) concerning the division of the inheritance. Those *fatwa* would only be effective when they resulted from an agreement between all parties (Lev 1972: 185-222). As mentioned above, even before 1937 *landraad* case law had established that disputes concerning an inheritance should be brought before the *landraad*, and judgments of *penghulu* courts in such disputes could not be enforced.

A second reform in 1937 seems to be at odds with the limitation of the *penghulu* courts' jurisdiction. The creation of an Islamic high court in Surakarta, falling under the responsibility of the Ministry of Justice, seems atypical in the era of the *adat* law school.[33] However, there is an explanation for this further institutionalization of Islamic courts. Shapiro states that the establishment of appellate Islamic courts is often driven by concerns for political control (Shapiro 1986: 222). In other words, the colonial government expected the Islamic high court to implement the reforms of 1931 and 1937, and to make sure the first instance *penghulu* courts would do the same. The Islamic high court indeed implemented the jurisdictional changes, and as we will see in Chapter 6, denied the jurisdiction of Islamic courts in South Sulawesi on the grounds that it never had been a customary institution there.

Some *penghulus* opposed the creation of the Islamic high court, probably out of fear that the colonial government wanted to increase its grip on them (Lev 1972: 30). But generally the Islamic high court was welcomed by Muslim intellectuals and seen as a significant increase in status of the Islamic court. This was already an indication that opposition was not directed against state influence as such, but rather against any perceived attack on the last bastion of Islamic law, Muslim family law. The issue of family law proved to have the power to unite the otherwise divided Muslim organizations and temporarily silence their criticism of the *penghulus*, who were generally appointed from the ranks of the local nobility and according to independent *ulamas*, sometimes lacked expertise in Islamic law (Lev 1972: 12-13).

When Dutch colonial rule was abruptly brought to an end by the Japanese invasion of 1942, the Dutch, in spite of the limitation of the Islamic courts' jurisdiction, had sown the seeds for Islamic courts as a recognized branch of the national judicial system. In 1882, the courts had been brought under colonial administration, making them less dependent of local rulers. The

33 The chapter concerning the Islamic high court (*Hof van Islamietische Zaken*) for Java and Madura in the 1931 *Penghulu* Courts Regulation came into force through *Staatsblad* 1937/610.

Islamic high courts were intended to ensure more consistent judgments. They were welcomed as a modernization of the Islamic court and had the potential to speed up its bureaucratization. Nonetheless, the image of the Islamic court as an old-fashioned remnant of the past proved persistent. It would take another fifty years before the tide would turn.

2.3 The Japanese occupation (1942-1945)

Few changes took place under Japanese occupation (1942-1945) with regard to Islamic courts. However, in the future political landscape in the independent Republic of Indonesia regarding the Islamic courts already became visible. The nationalist parties, as well as the growing communist party, wanted to abolish the Islamic courts. Islamic parties objected, and pressured the Japanese to increase the jurisdiction of the Islamic courts and improve the standard of the judges' Islamic education. In January 1945, Indonesian representatives of political parties in the *Sanyo Kaigi* (an advisory body of the Japanese government in Indonesia, established in 1944 in order to plan Indonesia's future independence) voted on the question of whether it was necessary to retain the Islamic court alongside the general court. Many influential Indonesian politicians, including Soepomo and Hatta, preferred unification of the legal system, and wanted to abolish the *penghulu* courts altogether. However, the proponents of the Islamic court outvoted their opponents by one vote: six votes against five (Lev 1972: 36-39). As a result of this narrow escape, the Japanese changed nothing with regard to the *penghulu* court other than renaming it *Sooryo Hooin*.

The status quo in the *Sanyo Kaigi* concerning the Islamic character of the future Republic seemed to change on the eve of the declaration of independence (17 August 1945). From June to August 1945 a preparatory committee had been in the process of drafting the constitution of the future independent republic of Indonesia. The Islamic and secular representatives worked out a compromise; the so-called Jakarta Charter. The preamble of the draft constitution said that 'the state is based on the belief in the all-mighty God, with the obligation to carry out sharia for the adherents of Islam.' This clause was also incorporated into Article 29 of the draft constitution.

The sharia clause was removed from the constitution, because prior to the proclamation of independence, secular forces surrounding president-to-be Sukarno had succeeded in convincing him and influential Muslim leaders that the Islamic clauses would threaten national integrity (Lev 1972: 43). In itself, adoption of the Jakarta Charter would not necessarily have meant that the Islamic courts would obtain a broader jurisdiction. An inclusion of the sharia clause in the constitution could also have resulted in the application of Muslim family law by general court judges, a practice that is quite common in Muslim

majority countries (Otto 2010). However, those Muslims who supported a sharia-based constitution felt betrayed.

2.4 Islamic courts after independence

In this section, I will demonstrate that as Islamic courts gradually generated more political support and as a result their jurisdiction, consistency of judgments and efficiency were increased by various measures and laws. The end result of this gradual process was a more uniform Islamic court. This process of bureaucratization was not only part of a nationalist agenda of increasing state control over Muslim family law matters, but was also the result of a concurrent agenda of the Ministry of Religious Affairs and an Islamist faction in the Supreme Court to Islamize family and inheritance law in order to ideologically undo some of the main effects of the colonial reception theory.

2.4.1 Islamic courts during the independence struggle (1945-1949)

Although a large majority within the preparatory committee had voted against the establishment of a Ministry of Religious Affairs only a year before, on 3 January 1946 the revolutionary government founded such a Ministry, in an attempt, according to Lev, to appease those Muslim parties that were disappointed with the Constitution (Lev 1972: 44). Only a few months after the Ministry was established, Law 22/1946 on the registration of marriage, divorce and reconciliation (*pentjatatan nikah, talak dan rujuk*), was issued, largely based on colonial regulations, but now centralizing civil registration of Muslims under the Ministry's control (Huis & Wirastri 2012). Because of administrative difficulties caused by the revolution this law was initially only in force on Java and Madura.[34]

The Minister of Religious Affairs issued Decree 6/1947, taking charge of three matters concerning the *penghulu* courts. Firstly, it declared the Ministry responsible for the appointment of *penghulus*, which under colonial rule had been the responsibility of the Governor-General of the Netherlands Indies. Secondly, the decree also transferred the administration of religious affairs, including the *penghulu* courts from the Minister of Home Affairs to the Ministry of Religious Affairs. Thirdly, through the decree the Minister of Religious Affairs took over the administration of the Islamic high court which previously had fallen under the Ministry of Justice.

Moreover, the decree also created two *penghulu* offices: first, the district *penghulu*, in charge of the district mosque and other religious affairs, and

34 Law 32/1954 put the law into force throughout Indonesia.

second, the *penghulu hakim*, chief judge of the Islamic court.[35] Through these actions the Ministry of Religious Affairs made clear its intention to unify the country's administration of Islamic marriage and divorce under its authority, and took a next step towards the creation of a specialized Islamic judiciary in Indonesia.

Working together with Muslim parties, the Ministry turned out to be a countervailing power to the majority within the cabinet and parliament that wanted to unify all civil courts. Proof of the latter can be seen in Bill 19/1948 which would have abolished the Islamic court and created Islamic chambers within the general court (Hanstein 2002: 59-60). This Bill had already been accepted by parliament, but never came into force due to political turmoil. Thus, the Islamic courts survived the revolutionary years merely by chance.

2.4.2 The Islamic courts under Sukarno (1945-1965)

The recognition of the Republic of Indonesia by the Dutch government in 1949 did not end the political instability of the revolutionary years. In West Java, Muslim militias of the so-called *Darul Islam* movement, led by Kartosuwirjo, continued the struggle for an Indonesian Islamic State (*Negara Islam Indonesia*, *NII*, promulgated in 1949). In Aceh and South Sulawesi militant Muslim groups joined the rebellion. In West Java the leaders of the *Darul Islam* surrendered only in 1962, whilst in South Sulawesi the rebellion lasted until 1965 when the rebel leader, Kahar Muzakkar, was shot.[36]

The Jakarta Charter and the *Darul Islam* rebellion had an enduring impact on the Indonesian government's stance towards groups with Islamist aspirations. However, the government's hard stance towards the Islamist groups in the last years of Sukarno's presidency did not mean that it was suspicious towards all Islamic institutions. The government decided to retain and expand the jurisdiction and number of Islamic courts, perhaps to keep the support of the remaining Muslim organizations, the NU in particular.

Emergency Law 1/1951 on the Jurisdiction and Procedures of the Civil Courts,[37] which abolished all indigenous *adat* courts,[38] stipulated a future

35 Actually, in the late nineteenth century, after the chief *penghulu* had become advisor of the *landraad,* in many areas of Central Java such dualism had already developed. In the regencies concerned a *penghulu kaum*, as head of the central mosque and responsible for other religious matters was established alongside the *penghulu landraad* who had only a judicial role. In contrast, in West Java the chief *penghulu* remained the head of both judicial and spiritual Islamic matters (Van den Berg 1882: 7).

36 A more elaborate discussion about the *Darul Islam* is provided in Chapter 4 about West Java, and Chapter 6 about South Sulawesi.

37 Emergency Law 1/1951.

38 No *adat* courts existed on Java.

government regulation concerning the Islamic courts. Government Regulation 45/1957 concerning the Establishment of Islamic courts outside Java and Madura[39] required the formation of an Islamic court in each district (*kabupaten*) where there was a general court; this meant an enormous expansion of the Islamic courts in Indonesia. In addition, appellate Islamic courts were to be established in each province. Islamic courts outside Java and Madura retained their competence over inheritance cases[40] if 'according to the living law they are to be resolved according to Islamic law' (Article 4). In other words, as had been the case in the colonial period, judges were to decide to what extent *adat*, Islamic, or civil law norms were part of the 'living law' of a community (*masyarakat*) and – equally important – to decide what was meant by '*masyarakat*' (Lev 1972: 116).

Just three years after GR 45/1957 had granted a conditional jurisdiction in inheritance matters to the Islamic courts outside Java, in 1960 the Supreme Court limited their jurisdiction once again. In a case originating from the general district court of Makassar,[41] the Supreme Court argued that Islamic courts held no jurisdiction over issues in which, according to the living law, Islamic law did not apply. Because living law in inheritance cases in Indonesia was *adat* law, according to this ruling competence in inheritance cases lay with the general courts.

Before independence, the *Indische Staatsregeling* of 1925, the Netherlands Indies' 'proto-constitution,' stipulated that Islamic courts held jurisdiction over those matters where *adat* had received Islamic norms. In line with the reception theory it considered Islamic norms to be part of *adat*. The 1960 Supreme Court judgment took things a step further and separated Islam from *adat* – it was either Islam or *adat*. This line of reasoning was similar to the framing of *adat* in the Basic Agrarian Law in 1960, and reflected the nationalist, socialist and anti-feudal discourses of that time (see Bedner & Huis 2008). Thus, it created a national *adat* law, a prescriptive rather than a descriptive *adat* law (see Bowen 2003: 254), semantically and officially separating *adat* law from the various local communities living on certain territories within the Indonesian state.

Meanwhile the Minister of Religious Affairs attempted to further increase its control over the Islamic courts. In 1963 it issued Decision 19/1963 in which it assumed cassation power with regard to cases that originated in the Islamic courts. The decision provided that 'The head of the Directorate of Religious Justice is given the authority to examine and determine whether or not a decision of a religious court, in the first or second instance, fulfills the conditions and rules laid down by statute, and also to declare such a decision invalid' (Lev 1972: 95-96). By granting the Directorate cassation power the

39 Government Regulation 45/1957.

40 The transfer of jurisdiction in inheritance matters from the Islamic court to the *landraad* by S 1931/58 only applied to Java and Madura.

41 Supreme Court judgment 109/K/Sip/1960. See Lev 1972: 68.

Ministry hoped to increase uniformity in the Islamic courts' decisions. However, the number of cases the Directorate received were too limited, half a dozen from 1963 until 1971, to make a real difference (Lev 1972: 99).

2.4.3 The 1974 Marriage Law and the position of the Islamic courts

In 1965, a coup took place, allegedly by communist elements within the military, which General Suharto successfully quelled in a military counter-action. President Sukarno's position was immensely weakened by the coup. Finally, in 1967 Sukarno stepped down and General Suharto became the new president of Indonesia. President Suharto's New Order regime that had organized a total crackdown of the communist party, introduced policies to increase its control over the Muslim parties as well.

In 1971, the Republic of Indonesia organized general elections for the second time. With 62.8 percent of the votes, it turned out to be an enormous victory for the Golkar party – President Suharto's main political base in Parliament. With such strong support in Parliament, President Suharto decided to radically reorganize the political landscape of Indonesia. In 1973 the Muslim parties – despite their doctrinal differences – were forced to merge into a single party, the United Development Party (*Partai Persatuan Pembangunan*, or PPP). The nationalist parties and the smaller Protestant and Catholic parties were joined together into the Indonesian Democratic Party (*Partai Demokrat Indonesia*, PDI).

In the context of this political transformation, a marriage bill was submitted to Parliament. The Marriage Bill of 1973 had been drafted by the Ministry of Justice and proposed far-reaching substantive legal reforms and a further limitation of the jurisdiction of the Islamic courts.[42] With a majority in Parliament, the new ruling party Golkar was overconfident, as it could single-handedly pass the bill. Importantly, the Ministry of Religious Affairs, a stronghold of the traditionalist Muslim organization *Nahdlatul Ulama* and a strong supporter of the Islamic courts, had not been involved in the drafting process. As it appeared, Golkar had hugely underestimated Muslim opposition to the Bill.

In Parliament only the PPP opposed the Bill, but with 20 percent of the seats was in no position to prevent it from being enacted. Yet, the Muslim movements that were associated with the politicians in this party (*Nahdlatul Ulama, Muhammadiyah, and Sarekat Islam*) had an enormous and active powerbase within society. Protests mounted. The law was portrayed as an attack on the divine law of Allah, and led to emotional outcries in Parliament (Hanstein

42 In this section I will concentrate on the jurisdictional consequences of the marriage law. The substantive norms will be treated in Chapters 3 and 4.

2002: 282-284).[43] On the 27th of September, two days before the start of the holy month of Ramadan, a group of hundreds of young people, many of them women, entered the parliament building, while a crowd of demonstrators took possession of the streets. By this time the government realized that opposition had to be taken seriously. The Minister of Justice started negotiations with the Minister of Religious Affairs and the PPP, in order to work out a compromise (Nurlaelawati 2010: 69). The Ministry of Religious Affairs, bypassed during the drafting process, now reclaimed its place in Muslim affairs.

The Bill proposed to replace the religious basis of marriage with a civil one (Article 2) and to require permission from a general court for divorce (Article 40) and polygamy (Article 3) (e.g. Katz & Katz 1975 and 1978; Cammack et al. 1996; Butt 1999; Bowen 2003; O'Shaughnessy 2009). Hence it proposed a more secular basis for family law, meaning a further decline in the Islamic courts' jurisdiction. Bowen argues that the strong symbolism of losing control over the last strongholds of Islamic law, i.e. family law and the Islamic courts, was at least as important as the proposed substantive reforms in the Bill. According to the PPP and its supporters, if state courts should decide upon Islamic family law issues at all, it ought to be Islamic courts, by judges with their authority vested in their mastering of Islamic law (2003: 181). The Bill was indeed conceived as an attack on Islam itself, since it jeopardized the last bastion of Islamic law in Indonesia, and, I should add, bypassed the Ministry of Religious Affairs, the last stronghold of Muslim organizations in the government. The New Order government decided to give in to most of the demands of the Muslim organizations and removed the most controversial articles of the Bill, whilst the Islamic courts retained their jurisdiction in divorce and polygamy matters.

Through the events surrounding the 1973 Bill the New Order realized that it had a problem, i.e. what Cammack et al. have called 'the direct conflict between state positivism and Islam' (Cammack et al. 1996: 53). The political solution was government support for national Islamic courts. As the Dutch had realized before, unification of Islamic courts fuses the State with the Divine to a considerable extent. In this way a clear choice between the two loci of ultimate legal authority can be avoided, and the state could, and can, exercise control over ever-sensitive Muslim family law issues in an effective and legitimate way. Nonetheless, the 1974 Marriage Law did also constitute a major change in terms of nation-building and rule of law formation. For the first time in the history of the Islamic court, substantive family law rules for Muslims were established in national legislation, constituting a next step in the process of the rationalization of its administration of justice.

43 For example, H.A. Balya Umar, a member of the PPP fraction in Parliament, warned that the law would lead to 'alcoholism, drug addiction and extramarital intercourse.' He even predicted 'manslaughter, violence, rape, increased prostitution and hospitals full of sexually transmitted disease patients' if the law was implemented (Hanstein 2002: 283).

2.4.4 The Supreme Court's cassation powers over the Islamic courts (1970-1979)

Law 14/1970 on Judicial Power made the Islamic courts into one of the four pillars of Indonesia's judicial system, alongside the general courts, the military courts and the administrative courts. Article 10(3) stipulated that the Directorate of Religious Justice had to transfer its cassation powers, which it had assumed in 1963 (see 2.4.2), to the Supreme Court.

It was not until 1977 that the Supreme Court took further steps to actually implement its newly acquired authority over the Islamic courts, when it issued a regulation (PerMA 1/77) concerning procedures for appeals in cassation of Islamic courts' judgments. In reaction, the Ministry of Religious Affairs sent a circular (Circular 89/1978) to all Islamic courts in Indonesia, instructing them to prevent litigants from seeking cassation. A year of heated public debates followed, fueled by fears that cassation review by the Supreme Court posed a threat to the Islamic courts' Islamic character. When the Supreme Court in 1979 passed judgment in two cassation cases originating in the Islamic courts, the Ministry faced a *fait accompli*, and gave up its initial resistance (Cammack 2007: 154-155).

In case 13/K/Ag/1979 concerning desertion as a divorce ground, the Supreme Court reaffirmed the status of the 1974 Marriage Law and its 1975 Implementing Government Regulation (GR 9/1975) vis-à-vis the *taklik al-talak* conditions, which since 1955 were included in the standard marriage contract of the Ministry of Religious Affairs. Article 19(b) of GR 9/1975 listed six divorce grounds, one of which was 'desertion by one of the spouses for a period of two years or more', while in the *taklik al-talak* marriage contracts, desertion of the wife for six months or longer was a condition for a *talak* divorce.[44] The first instance Islamic court and the Islamic high court argued that the six-month desertion clause in the *taklik al-talak* marriage contract was still valid. The Supreme Court reversed the decision, stating that since the *taklik al-talak* marriage was conducted after the issuing of the 1974 Marriage Law, the valid divorce grounds were those listed in the more recent legislation. The Ministry was quick to act, and adjusted the standard *taklik al-talak* contracts according to the new statutory provision.

Case law could potentially settle many legal issues the Marriage Law had left open as a result of a difficult political compromise. More specifically, jurisdiction over property disputes, child support, spousal support, and custody (*hadana*) remained unregulated. The Ministry of Religious Affairs initially took the position that Islamic courts had jurisdiction over these matters. However, in 1975 the Supreme Court decided to settle the matter through a circular,[45]

44 See Chapter 3.

45 Supreme Court circular MA/pemb/0807/75.

which stated that laws not explicitly replaced by the Marriage Law were still valid. By implication, the 1931 *Penghulu* Courts Regulation still applied, and so the Islamic courts had no jurisdiction in custody and property cases (Cammack 1989: 66; Hanstein 2002: 324-325). The execution of the Islamic courts' judgments still had to be processed by the general court. As a result, the Islamic courts' judges and their staff were left with the feeling that they were still regarded as second-class courts.[46] It was not until the late 1980s that the true emancipation of the Islamic courts began.

2.4.5 Bureaucratization and upgrading of the Islamic courts in the 1980s

Although on several occasions the New Order resorted to violence to pacify Muslim resistance, it also applied a more peaceful strategy: the incorporation of Islamic institutions into the state (Cf Otto 2010). In 1975, the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, MUI) was established to mobilize Muslim support for the New Order's development policies. The New Order sought Islamic legitimacy through supportive legal opinions (*fatwa*) of Muslim scholars on sensitive issues such as, for instance, birth control (Hooker, M.B. & Lindsey 2002; Bruinessen 1996; see also Feener 2010). Similarly, a broadening of the jurisdiction of the Islamic courts was a way for President Suharto to reach out to the Muslim organizations that secretly disagreed with the obligation to adopt the New Order *Pancasila* ideology, rather than Islam, as the sole foundation of their organization (Nurlaelawati 2010: 81).[47]

By the early 1980s, the jurisdictional issues between the Ministry of Religious Affairs and the Supreme Court were settled, and cooperation between the two institutions began. In 1982, Busthanul Arifin, Supreme Court judge and a strong proponent of Islamic legal institutions, became the first chair of the Islamic division of the Supreme Court. This was a major change, since previously there had been little support for the Islamic court within the Supreme Court (Pompe 1996: 75; 387-389). Munawir Syadzali, Minister of Religious Affairs (1983-1993), realized that the views of part of the Supreme Court and the Ministry had moved closer and lobbied the Supreme Court in order to develop a joint agenda (Nurlaelawati 2010: 80-84).

The rapprochement between the Ministry of Religious Affairs and Busthanul Arifin immediately achieved results. Three programs were put into motion simultaneously: first, a standardization plan to improve the manage-

46 The subtitle 'the repositioning of Islamic courts from inferior (*pupuk bawang*) courts towards proper courts of justice' of Gunaryo and Ramadhan's work *Pergumulan Politik & Hukum Islam* (Political struggle and Islamic law) reflects this feeling (Gunaryo and Ramadhan 2006).

47 Nurlaelawati (2010: 81) describes how Busthanul Arifin had framed the Compilation of Islamic Law project in precisely this manner when he proposed the law-making project to President Suharto.

ment of Islamic courts; second, a law-making program to draft a Bill on the Islamic Judiciary; and third, the drafting of a Compilation of Islamic Law that would be used as the main legal source for substantive Islamic law.

In this section I will focus on the standardization plan, as the 1989 Islamic Judiciary Law (see 2.4.6) and the 1991 Compilation of Islamic Law (See 4.2.5) will be discussed in separate sections below. This plan was issued in 1983 and 'set forth a bold agenda for improvement in the facilities and staffing of the courts' (Cammack 2007: 151). The pragmatic purpose of the plan was to manage the enormous increase in the caseload of the Islamic court. In 1974, the Islamic courts processed only 23,758 cases, while in 1979, due to the legal obligation stipulated in the Marriage Law to divorce before the court, this number had increased to 257,337 cases (Cammack 2007: 150-151). The caseload required swift action, and in 1984 the plan was implemented in anticipation of its formalization in the Islamic Judiciary Law. In practice, the standardization plan unified the Islamic courts in several ways: their appearance; their equipment, including the books which were to be included in the courts' library; and importantly, their judges, who now were to hold a secondary degree of academic training.

However, Cammack has also stressed that the New Order's agenda behind the standardization plan of 1983 was not an increase of efficiency but of control: 'when the plan to vest control over Muslim courts [through the Marriage Bill of 1973] proved politically unworkable, the strategy changed from an attempt to transfer the functions of the Islamic court to the regular court, to transforming the Islamic judiciary based on the model of the regular court' (Cammack 2007: 154).

At the same time the modernization of the Islamic court was part of the New Order's strategy to generate support of Muslim organizations. Furthermore, the New Order cannot be viewed as a single entity. The main actors within the Ministry of Religious Affairs and the Supreme Court were also part of the New Order, but had a different goal: the upgrading of Muslim family law and the Islamic courts and, ultimately, the strong symbolic act of giving Islamic law its rightful place in Indonesian law. These are fundamental differences with the agenda of the Marriage Bill of 1973, which had been more liberal in character.

Hence, the making of the Marriage Bill of 1973 and the standardization plan reflect the agendas of the actors behind the plans. The Ministry of Religious Affairs had been left out altogether from the drafting committee of the Marriage Bill, which was dominated by officials of the Ministry of Justice (see above), while officials of the Ministry of Religious Affairs, together with Busthanul Arifin of the Supreme Court, were the main actors for the design of the standardization plan. Throughout the New Order the Ministry remained Islamic in orientation. It had accepted the *Pancasila* ideology as the state's foundation, but '[i]n this Ministry and associated institutions, Islam is of high priority and its values are constantly lauded and put forward as worthy for

the state and nation to follow' (Federspiel 1998: 97). By taking the lead in the standardization plan and the drafting processes of the Islamic Judiciary Bill and the Compilation of Islamic Law, this Islam-oriented Ministry could retain a degree of control over the Islamic courts.

The symbolism of a modern Islamic court applying an Islamic law compatible with modern times was surely appealing to most Muslim organizations. Of course, Muslim society in Indonesia is plural, and should not be equated with or reduced to supporters of a larger role of Islamic law and the Islamic court in society (Federspiel 1998, Bruinessen 1996; Geertz 1976). Nonetheless, what Horowitz observed about Malaysian Islamic courts applies to Indonesia too: 'While the urge to recapture Islamic authenticity has been strong, the secular system, within its sphere, remains the subject of considerable respect of the Islamic reformers'(Horowitz 1994: 244).[48] This is reflected in the behavior of the Indonesian *ulamas* with regard to the reforms. Although some *ulamas* initially voiced objections to the Indonesian state's increasing say in Islamic matters, in the end the *ulamas* affiliated with the main Muslim organizations *Muhammadiyah* and *Nahdlatul Ulama* agreed to the reforms without much resistance (Nurlaelawati 2010: 82-84).

2.4.6 The 1989 Islamic Judiciary Law

The second program set in motion by the Ministry of Religious Affairs and Supreme Court judge Busthanul Arifin was the drafting of a Bill concerning the Islamic Judiciary. Besides the creation of a unified and more efficient Islamic court system, their aim was to increase the jurisdiction of the Islamic court by amending and annulling colonial legislation which had favored an *adat* law based family and inheritance law with some essential issues falling under the general courts' jurisdiction.

As we have seen the 1974 Marriage Law had been a political compromise and the result of fierce negotiations between two opposing camps (see 2.4.3). Consequently, a number of substantive matters which were considered too controversial in the political process towards the adoption of the Marriage Law were not included in the law. The Ministry of Religious Affairs had assumed that the Islamic courts were competent in those matters, however, the Supreme Court decided that the 1931 *Penghulu* Courts Regulation still applied and that the general rather than the Islamic courts held jurisdiction in disputes concerning marital property, maintenance and child custody (See

48 In the late colonial period, Muslim organizations like the *Nahdlatul Ulama*, *Muhammadiyah* and *Sarekat Islam* had already voiced their concern about the colonial 'priest councils', and the need to modernize their administration and improve the education of the judges. In matters of substantive law they preferred non-interference of the colonial state (Hisyam 2001, in particular Chapter V).

2.4.4). Additionally, colonial legislation still applied in inheritance matters, according to which the general – and not the Islamic – courts were competent, with the exception of South and East Kalimantan. Moreover, S 1835/58 still applied and consequently the Islamic courts had no autonomy in enforcing their judgments. The drafters of the Bill on the Islamic Judiciary therefore intended to introduce major reforms.

The Ministry of Religious Affairs and Busthanul Arifin strategically framed their plea for a broadening of jurisdiction of Muslim family law within the framework of *Pancasila.* One year after the Tanjung Priok riots of 1984, which were crushed with excessive force by the special forces and left hundreds of Muslim anti-*Pancasila* protesters dead, they tried to convince President Suharto that support for a modernization and emancipation program pertaining to the Islamic courts was a chance for the New Order to demonstrate to Muslim organizations that the New Order and its *Pancasila* ideology were not anti-Islam in character after all. Their strategy proved successful and in 1985 the drafting programs of the Law on the Islamic Judiciary and the Compilation of Islamic Law could take off. President Suharto even decided to support the project of the Compilation of Islamic Law personally, with his own private funds (Nurlaelawati 2010: 82).

With regard to the aim of creating a unified and efficient Islamic Court the 1989 Islamic Judiciary Law adopted most points of the abovementioned standardization plan (see 2.4.5). As a consequence, the organization of the Islam court was unified and modeled on the general court. With regard to education Islamic court judges were required to hold either a law or a sharia law degree (Article 13(1)).

With regard to procedure not much changed. The same legislation applies as in the general courts, except where the law explicitly stipulates otherwise (Article 54). Thus, on Java and Madura the colonial *Herziene Inlandsch Reglement* (HIR)[49] and on the other islands the *Rechtsreglement voor de Buitengewesten* (RBg),[50] remained in force. An example of a special procedure is Article 89(1), which stipulates that a divorce request or suit must be filed at the Islamic court where the wife resides, regardless of whether it is the husband or the wife who initiates the divorce. The party initiating the suit must pay the administrative costs, irrespective of who wins or loses. In this way, the law facilitates women's access to divorce in the Islamic court, especially in cases where the husband has left and is untraceable (Bedner & Huis 2010: 180).

In Parliament, the new provisions concerning unification and organization of the Islamic court system were passed smoothly. The issue of jurisdiction over inheritance and property disputes, however, provoked controversy. The drafting committee proposed to give the Islamic courts full jurisdiction over all matters of matrimonial property and inheritance. For the opposition, headed

49 S 1941/44.
50 S 1927/227.

by the political party PDI – which in terms of numbers could not prevent the law being passed, but which succeeded in gaining support from the influential Armed Forces Faction in Parliament – this was unacceptable. The PDI favored the existing limited jurisdiction of the Islamic courts and opposed the introduction of an Islamic inheritance based on the 1 : 2 ratio regarding female and male heirs. Again, the role of Islamic courts in Indonesia became subject of fierce public debate (Cammack 2007: 157).

In the end, the members of the Armed Forces Faction succeeded in reaching a compromise. The General Elucidation to the 1989 Islamic Judiciary Law includes the clause 'that prior to the [registration of the] case the parties can choose which body of law shall be used in the division of the estate.' In other words, parties in inheritance cases must agree first whether they want the lawsuit to fall under *adat* or Islamic law, and thus the general court or the Islamic court handles the case.

Last but not least, the 1989 Islamic Judiciary Law led to an important increase in jurisdiction for the Islamic court. It now held a shared competence to decide cases between Muslims in inheritance matters and full competence in disputes concerning child custody, division of property, and alimony which previously fell under the general court (Elucidation to Article 49(1)). Moreover, the 1989 Islamic Judiciary Law made the Islamic courts competent to enforce their decisions independently from the general court. On an ideological level, the 'rightful' competence over inheritance cases lost in 1937[51] was, at least partly, reinstated, and this was considered a major victory for the proponents of Islamic law.

In short, the Ministry of Religious Affairs and Busthanul Arifin succeeded in bringing family and inheritance law for Muslims under an Islamic institution. The sentiments the subject carries, as well as the strategy of linking the issue to *Pancasila*, is revealed in the words of Yahya Harahap, Supreme Court judge and member of the drafting committee of the Compilation of Islamic Law, who in 1990 published a standard work on the 1987 Law of the Islamic Judiciary. In the introduction to this work he provided a justification for the increase of the jurisdiction of the Islamic court, and linked this to *Pancasila*. Summarized, his plea reads as follows: the unification of law since colonial times has caused 'religious reductionism',[52] which must be halted because it is felt by the Muslim community to be a violation or assault (*pemerkosaan*) on Islam.[53] Therefore, Islam had to retrieve its rightful place in family and

51 As mentioned in section 2.2.6, in the colonial period prior to 1937 the competence of *penghulu* courts was not settled. Case law of the colonial court prior to 1937 indicated that *penghulu* were considered competent in dividing an inheritance by means of a declaratory judgment, but not competent in issuing a condemnatory judgment on the matter.

52 Religious reductionism generally attempts to explain religion by boiling it down to certain non-religious causes.

53 *Pemerkosaan* also means 'rape' and has a strong emotional connotation. Yahya Harahap uses the term five times in a single paragraph.

inheritance law. A plurality of family law and inheritance law is fully in compliance with *Pancasila* and the motto of the Indonesian Republic 'unity in diversity' (*bhineka tunggal ika*). Therefore, he argued, an increased role for Islamic law would be no threat to the unity of Indonesia (Harahap 2009: 1-7).[54]

2.4.7 The Islamic courts after the Reformasi, *1998 to the present*

In 1998, the New Order's legitimacy had been undermined by the Asian financial crisis and following mass demonstrations and riots, President Suharto stepped down. In the next few years Indonesia introduced far-reaching institutional changes. In this so-called *Reformasi* period, it amended its constitution four times, adopting a true division of powers, a decentralized government, democratic standards of government, human rights, and a constitutional court to guard the new reforms. An attempt by the PPP and smaller Islamic parties to include the Jakarta Charter in the Constitution failed to gain support of the large Muslim and non-Muslim political parties, and any reference to sharia remains absent (Hosen 2005).

On the other hand, the trend towards incorporating Islamic institutions and norms into national policies, which had begun under the New Order of the late 1980s (Hefner 2000), continued during the *Reformasi*. In the *Reformasi* era, national legislation has been introduced which adopted religiously inspired norms (Otto 2010). Sharia-inspired district regulations played an important role in local political constellations.[55] The special autonomy of the Aceh province even led to the formal introduction of Islamic penal law (*jinayat*) for certain crimes.[56]

The Islamic court system was also affected by those developments. The third amendment of the Constitution adopted the Islamic court system as one of the pillars of Indonesia's court system in Article 24(2).[57] In other words, the position of the Islamic court is constitutionally guaranteed. Moreover, Law 35/1999 as reaffirmed by Law 4/2004 on the Judiciary introduced a one-roof system, with the Supreme Court administering all court branches. By implication, it transferred the administration of the judiciary from the executive to the Supreme Court (Otto 2010: 457-458).[58] For the Islamic court this meant

54 The first edition published in 1990 already includes this introduction.

55 See Bush 2008, for an analysis of the sharia-inspired district regulations in Indonesia, See Buehler (2008a) and Buehler & Tan (2007) for an analysis of the role Islamic regulations play in the local district politics of South Sulawesi.

56 Law 11/2006 formalized the *qanuns* issued in Aceh since 2002, introducing the corporal punishment of caning for gambling, drinking and adultery.

57 Article 24(2) of the Constitution: The judicial powers shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, and by a Constitutional Court.

58 With the notable exception of the Constitutional Court.

that 60 years of financial and administrative supervision by the Ministry of Religious Affairs came to an end in 2005. The transfer of the Directorate for Religious Justice (*Badan Peradilan Agama, or Badilag*) including its staff and assets to the Supreme Court ensured continuity (Law 4/2004, Article 44).

Wahyu Widiana, Director-General of *Badilag* from 2000 to 2012, has acknowledged that there were persons within *Badilag* and the Islamic courts who were skeptical regarding the transfer to the Supreme Court. However, the increase in funds and e-management programs muted their criticism.[59] In terms of equipment and facilities the transfer meant a significant improvement. Salaries of judges, clerks and other staff increased. The most visible change is the springing up of large new Islamic court buildings along the main roads of district capitals. Only a few years before, most of the first instance Islamic courts had been located in small buildings – often on the compound of the district office of the Ministry of Religious Affairs.[60]

Next, the Supreme Court – supported by AusAid – initiated programs for transparency and digitization that resulted in better online facilities for court users and laptops for Islamic courts' staff (Sumner & Lindsey 2010; Widiana 2011). Ausaid and other donors were attracted by the relatively positive image of the Islamic courts in terms of performance and integrity as well as by its role as access to justice provider, in relation to women's issues in particular (Sumner & Lindsey 2010; Sumner 2008; Cammack 2007). This growing attention has led to more funds, better facilities and higher status for the Islamic courts.

2.4.8 The amendment of the 1989 Islamic Judiciary Law

Article 13(1) and Article 14(1) in the 2004 Law on Judiciary stipulate that the provisions concerning the organization, administration and finances of each judicial sector under the Supreme Court shall be regulated by a separate law. Hence, in 2005 a drafting team was composed to amend the 1989 Islamic Judiciary Law. The team was chaired by Akil Mochtar, a prominent Golkar politician. The draft was presented to Parliament in February 2006 and on 22 March 2006, the President signed Law 3/2006 amending the 1989 Islamic Judiciary Law.[61]

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59 Personal communication with Wahyu Widiana, Director General of Badilag, 19-11-2009.

60 Personal communication with staff of the Islamic court of Cianjur, the Islamic court of Bulukumba, the Islamic high court of Makassar and the Director General of Badilag.

61 In 2009, law 7/1989 would be amended for a second time. Law 50/2009 mainly concerns internal (by the Supreme Court) and external (by the Judicial Commission) checks on the Islamic court and includes a dishonorable discharge sanction for personnel demanding unofficial fees. Moreover, to increase the access to justice, law 50/2009 stipulates that every Islamic court has to create a legal aid office within its building which provides legal information to court clients free of charge.

Most media attention centered on the Islamic courts' broadened jurisdiction, now including sharia economics (*ekonomi syariah*; Islamic banking, trading and such),[62] and the special position of the Acehnese Islamic court (*Mahkamah Syariyah*), which because of its competence in Islamic criminal matters (*jinayat*) falls partly under the jurisdiction of the general court. A team was formed in 2006, headed by Supreme Court judge Abdul Manan, who has a background as Islamic court judge, in order to compose a Compilation of Sharia Economic Law. This Compilation was introduced by Regulation of the Supreme Court 2/2008.

Besides sharia economics, Law 3/2006 adopted significant changes with regard to inheritance law, which passed almost unnoticed through Parliament.[63] As we have seen, the Law on the Islamic Judiciary included the possibility for litigants to choose whether they wanted an inheritance case settled according to Islamic or *adat* law. This provision caused a lack of procedural clarity when there was no agreement between the parties about which body of law should apply. For defendants, it offered opportunities to delay and frustrate the adjudication process. Matters were complicated even further by the stipulation in Article 50 that ownership disputes were to be decided by the general court first before a case could proceed to the Islamic courts.

Law 3/2006 intends to make the procedures clearer and favors the Islamic court. The General Elucidation to Law 3/2006 explicitly abolishes the phrase that allows the parties a choice of law, as it declares the Islamic court the single institution to hold jurisdiction in inheritance cases of Muslims. Furthermore, Article 50 has been amended and at present stipulates that the Islamic court is competent to settle property disputes among Muslims in divorce or inheritance cases. Therefore, these do not have to be referred to the general court first. The relatively smooth passing of the Law is remarkable, particularly in view of the strong opposition to the inheritance provisions proposed in 1989.[64]

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62 Recently, the 2009 amendment (48/2009) on the 2004 Law on Judicial Power has imposed an overlapping jurisdiction in sharia economics between the Islamic and general courts. The impact of this overlapping jurisdiction remains to be seen. The impact of the Islamic courts in this field is small anyhow, since according to official staticstics of *Badilag* very few *ekonomi syariah* cases are adjudicated by the Islamic courts. All Islamic courts together have adjudicated a single case in 2007, four cases in 2008, five cases in 2009, nine cases in 2010, five cases in 2011 and thirteen cases in 2012. Source: Badilag 2013, *Majalah Peradilan Agama*, Vol 2: 67.

63 An exception was the website www.hukumonline.com, which provides information for legal practitioners in Indonesia. Hukumonline, Klausul *'Pilihan Hukum' Waris dalam UU Peradilan Agama Bakal Dihapus* [The 'choice of law' clause in inheritance in the law on the Islamic Judiciary will be erased], 22 February 2006.

64 A possible explanation for the smooth passing of the amendments of 2006 is that the government of President Yudhoyono heavily relied on the Islamic political parties for support, whereas the PDI-P, the successor of the PDI, which together with the armed forces had led opposition against an Islamic inheritance law for Muslims, rejected to join a broad cabinet.

Another major reform is that Law 3/2006 for the first time provided the Islamic court competence to adjudicate cases involving non-Muslims. As many non-Muslims are involved in sharia economics and Islamic banking,[65] the Islamic courts' authority over Muslims was extended to 'those people who voluntarily have subjected themselves to Islamic law' (Article 49 and its elucidation). A new amendment in 2009 (Law 50/2009) lacks this additional phrase and has created confusion about whether sharia economics cases involving non-Muslims should be adjudicated by the Islamic court or not.[66]

On the whole, the Islamic courts' full jurisdiction in the fields of sharia economics and Muslim inheritance, is a continuation of the emancipation process that started with the 1989 Islamic Judiciary Law. For those supporting a more Islamic character of Indonesian national law this situation is applauded as a restoration of the rightful place of Islamic law. In the words of Supreme Court judge Abdul Manan:

> 'the Islamic community (*umat Islam*) had the opportunity to reclaim its jurisdiction that was brought to the fore by Van den Berg and his allies in the *receptio in complexu* theory: the laws that applies to Muslims are their religious law, specifically Islamic law, in the field of marriage, inheritance, *wakaf* and *sedekah*' (Manan 2008: 312).

2.5 Conclusion

This chapter described the development of the colonial and Indonesian policies towards the Islamic courts, which passed the subsequent stages of denial, tolerance, regulation, incorporation, limitation, persistence and emancipation.

65 Professor Eman Suparman of Padjadjaran University estimates that more than fifty percent of sharia economics is controlled by non-Muslims. See Hukumonline, 'UU Peradilan Agama yang Baru Kembali Persempit Subjek Hukum', 11 June 2010.

66 Hukumonline, 'UU Peradilan Agama yang Baru Kembali Persempit Subjek Hukum,' 11 June 2010.

Table 1: Stages of government policies regarding the Islamic courts

Denial	*Acceptance*	*Recognition*	*Incorporation*	*Limitation*	*Persistence*	*Emancipation*
VOC Instruction of 16 June 1625	Daendels Instruction of 1808	The 1820 Regents Regulation	The 1882 Priest Councils Regulation	1925 IS	The 1974 Marriage Law	The 1989 Islamic Judiciary Law
		S 1835/58		Case Law *1848-1926*		The 2006 Amendments on the 1989 Islamic Judiciary Law
		1954 RR		The 1931 *Penghulu* Courts Regulation		

I began my legal analysis in the year 1642, when the VOC first issued a regulation concerning Muslim marriage, divorce and inheritance for Muslims, marking the beginning of the development of a legal plural colonial legal system, partly based on Islamic law. Subsequently I have analyzed the continuities and changes in the regulations pertaining to the position of *penghulu* courts during the eras of the VOC (1609-1798), the Netherlands Indies (1798-1945), the Japanese period (1942-1945), the Old Order (1945-1967), the New Order (1967-1998) and the *Reformasi* (1998-2013)

I have demonstrated that the VOC and the Netherland Indies both considered Islamic law to be a legal source for adjudication in marriage, divorce and inheritance of Muslims. Both did not codify the substantive norms, and in both eras the *landraad* consulted the *penghulus* as local Muslim legal experts in these matters. The VOC had already laid the foundation for a unified – but plural – legal system, by having established courts for the indigenous population (*landraad*), a Court of Justice (*raad van justitie*) for the European population, which also were appellate courts for the *landraad*, and a Supreme Court (Hooge Raad).

An important change took place after the demise of the VOC in 1798: a gradual strengthening of control by the colonial state over the Islamic courts and their officials. In the early nineteenth century the Netherlands Indies became a colony of the Netherlands, which gradually attempted to establish its central authority – including its monopolies on violence, lawmaking and adjudication – over formally indirectly ruled territories. Within a century the Indonesian population was governed by a proto-constitution, numerous administrative laws and regulations, a criminal code and a Dutch civil code – the latter only partly applying to the indigenous citizens, as in most civil law issues they formally fell under their own religious and customary laws.

On Java and Madura, the colonial government incorporated Islamic courts into the unified court system. Formally speaking this incorporation happened

only in 1882, but in fact already in 1820. As a result, the procedures pertaining to the *penghulus*, the *penghulu* courts and their administration of justice were standardized, thus marking the start of processes of rationalization and bureaucratization. In such a plural legal system, legal issues inevitably arise concerning the relative jurisdiction between the different branches of the court system. Hence, ever since the issuance of S1820/22 and its recognition of the *penghulus'* adjudicative powers in Muslim family law and inheritance matters, jurisdictional tensions between the *penghulus* and the *landraad* existed, especially in cases involving property.

In this chapter I have suggested that case law from 1848-1926 of the regular colonial courts settled many jurisdictional issues in favor of the *landraad*, long before the 1931 Penghulu Courts Regulation, implemented by S 1937/136, formally granted the *landraad* jurisdiction in all property disputes. In the eyes of proponents of Islamic law this symbolized the subjugation of Islamic law to *adat* law. In fact, many judgments of the colonial courts on property issues even predate the rise of the *adat* law paradigm. This suggests that for the *landraad*, the choice of *adat* law was not exclusively ideological, but perhaps also the result of a sustained preference within the colonial court system to have such important legal issues handled by a court headed by Dutch judges.

The legal supremacy of *adat* law over Islamic law provoked protests from Muslim organizations, and as a consequence the Islamic courts acquired symbolic value as their bastion against secularization and *adat* rule. As a consequence, the Islamic court not only generated the support of Muslim organizations, but also, after independence, of the Ministry of Religious Affairs. This support proved essential for the Islamic courts' survival in the first decades after independence, when their very existence came under threat. The battle was finally won in 1974, when the 1973 Marriage Bill was rejected and the new Marriage Law created a substantive role for the Islamic courts.

In the late 1980s, the Islamic turn in Indonesian politics brought about a broadening of the Islamic courts' jurisdiction through the 1989 Islamic Judiciary Law. I agree with Cammack that the Islamic courts' emancipation cannot be solely explained in terms of Islamization of Indonesia, and that it just as much involved an Indonesianization of Islamic law, signaling that the state had finally managed to take control over the Islamic courts and substantive Muslim family law (Cammack 1997; Otto 2010: 479-481). Ever since, the Islamic courts have become more and more bureaucratized, modernized and modeled on the general courts. These processes have accelerated after the fall of Suharto in 1998, when the Islamic courts sector was placed under the Supreme Court, and became a target of modern management programs, including computerization and e-management, jointly organized by the Supreme Court and foreign donors (Lindsey & Sumner 2010).

I do not agree with Cammack, however, that those processes were the result of an alternative strategy of the Indonesian state to turn them into a Muslim variant of the general courts when their abolition proved infeasible (Cammack

2007). The Indonesian state, of course, is not monolithic. I have demonstrated that this modernization along the lines of the general courts was equally driven by proponents of Islamic law within the state apparatus, as a strategy to improve its position in Indonesia. The most notable among these were the Ministry of Religious Affairs and an Islamic faction within the Supreme Court.

Thus, I have argued that, much as in Malaysia, the political struggles between 'proponents and detractors of Islamic law are mollified by a course of innovation that is heavy on the convergence of legal systems' (Horowitz 1994: 576). As long as proponents of the Islamic court perceive the process of bureaucratization along the lines of the general court as constituting the modernization and upgrading of a consistently Islamic institution, actors within the Islamic court, the Ministry of Religious Affairs and Muslim organizations will support the convergence as part of a strategy 'to give Islam its rightful place in society.'

This also implies that a religious-based state institution can never completely achieve formal legal rationality, because the strong religious symbolism involved cannot be bypassed. As we will see in Chapters 3 and 4, this is especially true in the case of substantive Muslim family law.