



# Courting reform

INDONESIA'S ISLAMIC COURTS AND  
JUSTICE FOR THE POOR

Cate Sumner

Tim Lindsey

Lowy Institute Paper 31

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INDONESIA'S ISLAMIC COURTS

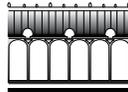
AND JUSTICE FOR THE POOR

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# Executive summary

Western perceptions of Islam in Indonesia are often dominated by images of radical minorities seeking a shari'ah state. In reality, however, mainstream Islamic institutions have played an important part in the post-Soeharto process of democratisation and institutional reform. Among them are Indonesia's Islamic courts, the *Pengadilan Agama* or Religious Courts.

This paper shows how Indonesia's family courts for Muslims — long among the most liberal in the Muslim world — have embraced reform within a judicial system notorious for corruption and incompetence, taking the lead in efforts to deliver decisions that are more accessible, transparent and fair for women and the poor. These courts may still have a way to go to reach standards of judicial service achieved in certain developed countries, but they are nonetheless an example of how state Islamic institutions can contribute to Indonesia's broader reform agenda by focusing on the needs of poor and marginalised groups.

The Religious Courts have long been the official and decisive forum where the Indonesian state applies its tightly constrained interpretation of shari'ah, historically largely restricted to private law and, in particular, divorce. Aceh aside, these courts have been largely unaffected by the push for conservative legal Islamisation that emerged after Soeharto's fall in 1998. Instead, the Religious Courts have maintained support for the state's Pancasila secularism and interpretations of shari'ah that are based less on the traditional sources of Islamic law (the Qur'an, the

*hadith* or traditions of the Prophet Muhammad, and *fiqh* or Islamic jurisprudence) and more on state legislation, even if that sometimes conflicts with the traditional sources.

The national Religious Court system is regarded by many Indonesians as one of the few exceptions to the institutionalised dysfunction of much of the rest of the judicial system. Because of their success in doing so, they have attracted new funding from the state. In many ways they now stand as models of socially oriented judicial reform not just for other courts in Indonesia but perhaps also for Islamic courts elsewhere in Southeast Asia.

The national Religious Court system is regarded by many Indonesians as one of the few exceptions to the institutionalised dysfunction of much the rest of the judicial system. Surprisingly — given the often-stated view in Indonesia that the courts there comprise a ‘mafia’ of sorts — the Religious Courts are generally seen as not corrupt and as providing good service to litigants. This perception has been consistent for most of the last decade. Civil society, academia, women’s NGOs and the *Komnas Perempuan* (National Women’s Commission) also regularly collaborate with the Religious Courts, which are perceived to be open to engagement with reform-oriented stakeholders external to the court, and willing to act on social welfare and access to justice issues.

It is a little-known fact that the Religious Courts have the largest number of cases of any jurisdiction in Indonesia. Because of this, the reforms under way in the Religious Courts will have an impact on the majority of court users in Indonesia. In particular, Indonesia’s Religious Courts play a crucial role in development and poverty alleviation. Access to the Religious Courts for the poor has increased tenfold over the last two years through the Religious Courts’ waiving court fees for the poor. Most of these *prodeo* cases involve women as applicants before the Religious Courts. This is important because these family law cases help female heads of household (approximately 14% of Indonesia’s 65 million households) document their role. This, in turn, facilitates access to the Indonesian government’s social welfare programs, including cash transfers, free health treatment, subsidised rice and enrolment of children at state schools. Increased access to

the Religious Courts thus helps break entrenched cycles of poverty in women-headed households.

The reforms achieved within the Religious Courts since the fall of Soeharto in 1998 coincided with the development of a National Access to Justice Strategy and Presidential Instructions that link access to justice with Indonesia’s poverty alleviation programs and the Millennium Development Goals. This raised the profile of the Religious Courts as an institution critical to broader Indonesian participation in pro-poor programs by reason of their work on personal status issues (especially legalising marriages and divorces and assisting in the provision of birth certificates for children). Indonesia’s new Medium-Term Development Plan 2010-2014 has also injected approximately Rp 300 billion (A\$40 million) into more programs aimed at increasing access to Indonesian courts for women, the poor and those living in remote areas. This new five-year development blueprint now seeks to extend access to justice reforms trialled in the Religious Courts to other court jurisdictions in Indonesia.

Australian institutions have been involved in supporting the Religious Courts in developing their access and equity reforms. The Australian Agency for International Development (AusAID), the Family Court of Australia and the Federal Court of Australia have all supported different aspects of post-Soeharto legal system reforms. Although judicial cooperation links between Australian and Indonesian courts have existed for over fifteen years, this has recently evolved into practical engagement in key areas outlined in the Indonesian Supreme Court’s own Blueprint for Reform. The close working relationship that has developed between the Family Court of Australia and the Religious Courts has been particularly useful in assisting a judicial institution at the forefront of improving client services in Indonesia, and thus supporting broader development goals in Indonesia. The next five years could see significant change to access to justice in Indonesia’s courts. If so, it will have been led by Indonesia’s Religious Courts and supported by the Australian government and, in particular, the Family Court of Australia, a reminder to donors of the potential value of Islamic institutions as partners in development assistance interventions.

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The views expressed in this Lowy Institute Paper are those of the authors.

## Glossary

AusAID	Australian Agency for International Development
Badilag	<i>Badan Peradilan Agama</i> , Directorate-General for the Religious Courts
Badilum	<i>Badan Peradilan Umum</i> , Directorate-General for the General Courts
Bappenas	<i>Badan Perencanaan Pembangunan Nasional</i> , Indonesian National Development Planning Agency
BLT	<i>Bantuan Langsung Tunai</i> , direct cash assistance
BPS	<i>Badan Pusat Statistik</i> , Indonesian Central Bureau of Statistics
circuit court daerah	a court hearing held outside district capital cities region
Dinas Shariat fasakh ( <i>faskh</i> )	Shari'ah Office (Aceh) a form of Islamic divorce initiated by the wife if the husband has not fulfilled certain obligations
fiqh	Islamic jurisprudence
garis keras	hardline
General Courts	<i>Pengadilan Umum</i> , Indonesian courts with jurisdiction for criminal and civil matters (including family law matters for Indonesia's non-Muslim citizens)
hadith	traditions (records of the words and deeds) of the Prophet Muhammad

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hibah	charitable bequests
IALDF	Indonesia Australia Legal Development Facility, funded by AusAID
infaq	voluntary charity
isbat nikah	marriage legalisation
Jamkesmas	<i>Jaminan Kesehatan Masyarakat</i> , Indonesian health insurance program for the poor
kabupaten	district
Kompilasi Hukum Islam	Compilation of Islamic Law
kota	city
khuluk ( <i>khul'</i> )	a form of Islamic divorce initiated by the wife by redemption where she agrees to pay compensation to the former husband, often by repaying the dowry that was initially given to her
MA	<i>Mahkamah Agung</i> , Indonesian Supreme Court. The highest court of appeal for decisions of the General and Religious Courts
Mahkamah Syariat	Shari'ah Courts, the Religious Courts in the Indonesian province of Aceh where they have an expanded jurisdiction
MPU	<i>Majelis Permusyawaratan Ulama</i> , Ulama Consultative Council (Aceh)
Pancasila	'Five Principles', Indonesia's state ideology
PEKKA	<i>Pemberdayaan Perempuan Kepala Keluarga</i> , Empowerment of Female Heads of Household (NGO)
Pengadilan Agama	see 'Religious Courts'
PerDa	<i>Peraturan Daerah</i> , Regional Regulation
prodeo case	process whereby courts waive the court fee paid by applicants in civil cases
qadi	Islamic judge
<i>Qanun</i>	Regional Regulations ( <i>Peraturan Daerah</i> or <i>PerDa</i> ) in Aceh, drawing in part on shari'ah norms
Raskin	rice subsidy program of the Indonesian Government

GLOSSARY

Reformasi	reformation, reform
Religious Courts	<i>Pengadilan Agama</i> , Indonesia's 'Islamic courts', essentially family courts for Muslim citizens
shari'ah	Islamic law (also <i>syariah</i> , <i>shariat</i> , <i>syari'a</i> , etc)
sadaqah	voluntary charity
taklik ( <i>ta'liq</i> )	a form of Islamic divorce initiated by the wife provided that a breach of a lawful condition agreed to at the time of marriage has occurred
talak ( <i>talaq</i> )	a form of Islamic divorce, usually by the husband pronouncing the word 'talak' to his wife, normally three times
ulama ( <i>'alim</i> )	religious scholars. The Arabic plural is <i>'ulama</i> but the term <i>ulama</i> is often used in the singular in Indonesia
wakaf ( <i>waqf</i> )	the permanent dedication by a Muslim of property, usually land, for purposes recognised by Islamic law as pious, religious or charitable
zakat	charitable contribution required to be made by a Muslim in accordance with Islamic law

# Introduction

Western perceptions of Islam in Indonesia are often dominated by images of radical minorities seeking a shari’ah state. In reality, however, some mainstream Islamic institutions have played an important part in the post-Soeharto process of democratisation and institutional reform. This paper shows how Indonesia’s family courts for Muslims — long among the most liberal in the Muslim world — have been part of this. They have embraced reform within a judicial system notorious for corruption and incompetence, taking the lead in efforts to provide decisions that are more accessible, transparent and fair for women and the poor. These courts, we argue, stand as an example of how Islam can be part of Indonesia’s broader institutional reform agenda.

The aim of this paper is to promote a better understanding of the role played by Indonesia’s Religious Courts. Specifically, it will demonstrate that the changing role of the Religious Courts does not suggest the growing Islamisation of the Indonesian judicial system (in fact, quite the opposite). It will also show that the recent reforms to the Religious Courts provide a positive example for the Indonesian legal system more generally, and perhaps also for other Islamic court systems in the Muslim world. Finally, we argue that the Religious Courts and their reforms play a vital role in Indonesia’s broader development and poverty alleviation efforts.

This is not an academic issue for Australia or for other donor countries in Indonesia. Australian institutions have become involved

in supporting the Religious Courts in developing access and equity reforms. The Australian Agency for International Development (AusAID), the Family Court of Australia and the Federal Court of Australia have each supported aspects of post-Soeharto legal system reforms. Although judicial cooperation links between Australian and Indonesian courts have existed for over a decade and a half,<sup>1</sup> this has more recently evolved into practical engagement in the key areas outlined in the Indonesian Supreme Court’s own Blueprint for Reform. The close working relationship that has now developed between the Religious Courts and the Family Court of Australia assists a judicial institution at the forefront of improving client services in Indonesia, and supports broader development goals in Indonesia.

Chapter 1 provides a detailed account of the law governing the Religious Courts, focusing on their jurisdiction, powers and caseload. It shows that despite the neglect these courts have historically suffered, they are as large as any other branch of the Indonesian judiciary and are more closely engaged with individual Indonesians than most other Indonesian courts. It also shows that the bulk of the work of these courts is divorce, that nearly two thirds of applicants are women, and that women are usually successful in these courts. The Religious Courts are thus, we argue, essentially on-demand divorce courts for women, and operate almost entirely by reference to statute, making little, if any, reference to the traditional sources of Islamic legal tradition. This chapter also looks briefly at the exceptional case of Aceh’s *Mahkamah Syariat*, which exercise far broader powers and enjoy a much wider jurisdiction than Religious Courts elsewhere in Indonesia. Finally, this chapter surveys public perceptions of the Religious Courts, showing that they are consistently regarded as performing well, despite the poor reputation of the judicial system generally.

Chapter 2 highlights recent reforms introduced by the Religious Courts and explains why the Religious Courts have been at the forefront of pro-poor judicial reform within Indonesia. This chapter reviews three major changes introduced by the Religious Courts over the last four years: a large-scale survey aimed at receiving feedback from Religious Court clients on their perceptions of the service provided by these

courts; an increase in judicial transparency through the publication of new and more detailed information about the work of the courts; and new measures taken to increase access to the courts for women, the poor, and those living in remote locations.

Chapter 2 also looks at the critical role played by the Religious Courts in Indonesia's development and poverty alleviation programs. It examines how the recent reforms of the Religious Court are consistent with broader access to justice reforms in Indonesia, and have helped women and marginalised groups achieve broader access to public goods and services, particularly, Indonesia's poverty alleviation programs. Indonesia is a country of over 230 million people with approximately 65 million households, 14% (or 9 million) of which are headed by women. When the Religious Courts provide a woman with a divorce certificate they are also formally recognising that the woman is now the head of her household and responsible for its day-to-day needs. The divorce certificate is thus often a key document for access to a range of programs, including free healthcare, subsidised rice, and cash transfers, as well as monthly subsidies designed to encourage children to complete the mandatory nine years of education.

The paper's conclusion argues that by asserting a new role in the post-Soeharto period as champions within the judicial system of social justice and access to justice reform, Indonesia's Religious Courts now stand as models for judicial reform in Indonesia. They may even offer valuable lessons for other Islamic Courts in Southeast Asia, all of which are more socially and religiously conservative than their Indonesian equivalents. The conclusion also considers the implications of the positive role of the Religious Courts for Indonesia's new National Access to Justice Strategy, which is explicitly tied to Indonesia's new poverty alleviation programs, the Millennium Development Goals and Indonesia's new Medium-Term Development Plan 2010-2014. The paper concludes with a brief consideration of the implications of the Religious Court reforms for broader development assistance policy in Indonesia.

# Chapter 1

## Indonesia's courts for Muslims

The Islamic justice system in Indonesia today has three tiers: the *Pengadilan Agama* (Religious Court), the *Pengadilan Tinggi Agama* (High Religious Court), and the *Mahkamah Agung* (Supreme Court). Religious Courts are located at the district/municipality (*kabupaten/kota*) level<sup>2</sup> and there are 343 of these courts of first instance at the regency or city level across Indonesia,<sup>3</sup> including 19 Syariah<sup>4</sup> Courts in Aceh.<sup>5</sup> At the appeal level, Religious High Courts now number 29, including the recently renamed *Mahkamah Syariat* (Syariah Court) in Banda Aceh.<sup>6</sup>

The Religious Courts are the exclusive court of first instance<sup>7</sup> for cases where the parties are Muslim<sup>8</sup> and concern the following issues:

- marriage.<sup>9</sup> Marriage-related cases are understood as matters regulated by the Marriage Law No. 1 of 1974<sup>10</sup> and they are overwhelmingly dominated by divorce. They also, however, include a range of other related matters, including, for example, applications for polygamy, division of property, child custody and guardianship, child maintenance, spousal maintenance, the legal status of children, marriage legalisation, and decisions relating to 'mixed marriages' between Indonesian and non-Indonesian citizens.<sup>11</sup>

- inheritance;<sup>12</sup>
- Muslim wills and testaments;<sup>13</sup>
- charitable bequests (*hibah*);<sup>14</sup>
- *wakaf*;<sup>15</sup>
- Islamic philanthropy — *zakat*,<sup>16</sup> *infaq* and *sadaqah*;<sup>17</sup> and
- ‘shari’ah economy’ issues (*ekonomi syari’ah*).<sup>18</sup>

Despite their restricted jurisdiction the Religious Courts are among the busiest courts in Indonesia. In 2009, for example, litigants brought 257,798 cases to the Religious Courts, compared with 202,754 cases<sup>19</sup> brought to the General Courts (*Pengadilan Umum*). The Religious Courts thus have 27% more cases than the General Courts, despite both the broad civil and criminal jurisdiction of the General Courts and the tightly restricted jurisdiction of the Religious Courts, which, as mentioned, are dominated by divorce trials. These figures will, of course, fluctuate from year to year, but it seems likely that the Religious Courts will continue to have a trial caseload similar to that of the General Courts for the foreseeable future.

The size of the Religious Courts’ caseload also reflects the fact that divorce cases now form the single largest group of cases in the Indonesian judicial system, comprising 50% of all cases, with criminal cases following at only 33%.<sup>20</sup> The domination of the Indonesian judicial system by divorce cases is even more striking in the context of civil litigation. In 2009, for example, there were approximately 310,000 civil cases or matters in the Religious and General Courts combined, of which approximately 230,000 were divorce cases. Divorce cases that year thus represented 74% of all civil cases heard in Indonesian Courts.

As mentioned, the Religious Courts hear divorces for Muslims. Non-Muslim divorces are heard by the General Courts. Of the total of divorces decided in Indonesia, the Religious Courts decide 98%, and the General Courts only 2%.<sup>21</sup> Accordingly, despite suffering decades of neglect by the Indonesian state (and even most foreign donors working in the legal sector),<sup>22</sup> the Religious Courts are today arguably the most active branch of the Indonesian judiciary, and thus the one that has

the broadest engagement with the Indonesian public and, in particular, Indonesian families.

Most of the caseload of the religious judiciary in Indonesia is dealt with by judges at first instance. Fewer than 1% of all cases heard by the Religious Courts are the subject of an appeal to the High Religious Courts.<sup>23</sup> At the Supreme Court level, fewer than one third of 1% (0.3%) of 2009 cases heard by the Religious Courts at first instance were subject to appeal or review. This compares with 4% of criminal cases and 34% of the civil cases heard by the General Courts in 2009 that were appealed or reviewed.<sup>24</sup> This is in itself an indication of the satisfaction of Religious Courts’ clients with the decisions delivered by these courts, although, as will be shown below, it also suggests that many Religious Court users are unable to afford the costs of further litigation.

In district-level Religious Courts, the panels of three judges who hear cases generally apply the version of Islamic law embodied in the state-sanctioned *Kompilasi Hukum Islam* (Compilation of Islamic Law, Presidential Instruction No. 1 of 1991), issued by Soeharto as a ‘guide’ for Religious Court judges. The *Kompilasi* is narrow in scope, covering only marriage, inheritance and *wakaf*, and its provisions allow only a very restricted application of Islamic legal traditions. For nearly two decades, the Religious Court judges have, in fact, relied heavily on the *Kompilasi* (together with the Law on Marriage No. 1 of 1974 and its implementing regulation, Government Regulation No. 9 of 1975) to deal with divorce, property division, spousal maintenance and child custody cases.

As indicated above, appeals from the Religious Court are first made to the High Religious Court (located at the provincial level).<sup>25</sup> The Supreme Court, located in Jakarta, is the final court of appeal on matters within the jurisdiction of the Religious Courts, as it is for most other branches of the Indonesian judicial system.<sup>26</sup> Cassation lies from the High Religious Courts to the Supreme Court<sup>27</sup> solely on grounds of error of law, and cassation decisions can then be reviewed through a further *Peninjauan Kembali* (PK) or reconsideration process, the final level of appeal in the Indonesian system. The Supreme Court is

generally scrupulous in adhering strictly to its 'error of law' jurisdiction in dealing with appeals from the High Religious Courts. In 2009, only 791 cases heard by the Religious Courts were the subject of cassation or PK review by the Indonesian Supreme Court.<sup>28</sup>

Indonesian Religious Court judgments, like the procedures these courts follow, differ little from decisions of the secular courts, and both are influenced heavily by continental European traditions of judicial decision-making. This is unsurprising given that the Religious Courts are supervised by the secular Supreme Court, which today almost never gives detailed attention to Islamic sources of law in its judgments, instead restricting itself to Indonesian state regulation. Further, the Religious Court has no express jurisdiction or power to decide matters according to Islamic legal tradition. It can only consider Islamic sources of law where given the opportunity to do so by national regulations. Even that is usually done obliquely, by reference to the second-hand (and now dated) distillation of state-sanctioned *fiqh* contained in the *Kompilasi*, which now does not cover the entirety of the Religious Court's jurisdiction, as that has expanded since the *Kompilasi* was produced. Accordingly, even when the Religious Courts consider Islamic law, they can never use religious sources of law to contradict or set aside national (non-Islamic) law, and indeed, they virtually never do so. The sources of law the Religious Courts rely on are predominantly national legislation. Islamic sources such as the Qur'an and *hadith* (traditions of the Prophet Muhammad) are referred to only sparingly and, importantly, are never invoked to contravene the rules in the legislation.<sup>29</sup>

This can be clearly seen from the principles applied by the Religious Courts in the overwhelming majority of cases it decides — divorces. Even in this core area of the jurisdiction of Indonesia's courts for Muslims, the applicable law has diverged significantly from classical Islamic legal traditions by reason of the national regulations that now set the jurisprudential boundaries of the Religious Courts. One clear example of this is the absence of extrajudicial *talak* divorces (divorces initiated by the husband). According to most understandings of traditional Islamic jurisprudence, a husband has the right to divorce any of his wives by making the *talak* declaration to her three times. The modern

Indonesian legislation provides, however, that a husband must first make an application to the Religious Court for permission to pronounce *talak* to a wife. Further, permission will only be granted if the court is satisfied of at least one of the six conditions set out in Government Regulation No. 9 of 1975. If the court grants the permission, it will then set a future date for the husband to pronounce *talak* to the wife in court once the decision has binding legal status. This essentially abolishes the husband's unilateral right to *talak* as it stood at classical *fiqh*. In an effort to appear to be still adhering to Islamic legal tradition, at least nominally, the Religious Courts are usually meticulous in only ever granting permission for the husband to pronounce *talak* to his wife, and never actually declaring the parties to be divorced per se. In other words, the parties are only legally divorced after the husband pronounces *talak* to his wife in the Religious Court, and not when the court upholds the husband's application for permission to do so, although this is a legal nicety rather than a meaningful recognition of *fiqh*.

At traditional *fiqh* a Muslim wife in Indonesia generally has three grounds of divorce, albeit more limited than those available to men: a *taklik* divorce, if she can show her husband breached the marriage contract; a *khuluk* divorce where the wife pays a sum of money to obtain her husband's consent to divorce; or a *fasakh* divorce, which covers several limited circumstances, including where her husband has committed adultery or is impotent. In Indonesia, however, a wife may bring an action for divorce, known as a *cerai gugat* (literally 'divorce complaint'), on the same grounds as a husband, namely those listed in Article 19 of Government Regulation No. 9 of 1975.<sup>30</sup> Of these, the most common ground for divorce relied on is, unsurprisingly, that there is an ongoing conflict and disagreement between husband and wife and there is no hope of any longer living together harmoniously in the one household. While under traditional Islamic law a husband could arguably divorce his wife on such a ground, it would certainly not be sufficient for a wife to obtain a divorce if she did not have her husband's consent to do so.

The result of this regulatory displacement of *fiqh* in the field of divorce is that Indonesia's religious justice system has attracted more female litigants than male. As is demonstrated in more detail later

in this paper, the clear pattern is that women bring twice as many<sup>31</sup> applications for divorce in the Religious Courts as do men, and their applications are usually successful.

Shari'ah in the Indonesian system of courts for Muslims is thus largely symbolic, at least as a formal source of law. The Religious Courts' jurisdiction is limited by statute to only a few aspects of Islamic legal tradition, but even within these restricted areas the substantive law applied by the courts deviates so significantly from the orthodox schools as to make it questionable whether it is particularly Islamic at all. The decisions of Religious Courts are, however, often consistent with the sort of decisions that Indonesia's General Courts make in non-Muslim 'secular' divorces. They are generally of a kind that is usually immediately comprehensible and familiar to divorce court judges from other, purely secular judicial institutions, for example, Australia's Family Court.

These characteristics of the Religious Courts are probably inevitable, given that the court that sits at the apex of the religious justice system, namely the Supreme Court, is a secular, civil law court in the European tradition. The Supreme Court maintains strict control over the lower courts both through its appeal jurisdiction and through training and administration, and, as mentioned, it virtually never refers to Islamic sources in its own decisions, even when deciding appeals from the Religious Courts.

### The Aceh exception

The *Kompilasi* and the laws applicable to the Religious Courts aside, the rest of the content of shari'ah is largely without formal legal force in contemporary Indonesian courts, and that has been the case for most of the history of the Republic. The exception is, as mentioned, the province of Aceh,<sup>32</sup> where legal standing has been granted to both a *Mahkamah Syariat*,<sup>33</sup> or shari'ah court, and *Qanun* (laws for Muslims in Aceh, drawing in part on shari'ah norms) in the form of *Peraturan Daerah* (*PerDa* — regional regulations issued by the local governments).<sup>34</sup>

A range of other Islamic institutions have also been formally

established in Aceh, including the governor's *Dinas Shariat* (Shari'ah Office: *Qanun* No. 33 of 2001) and the *Majelis Permusyawaratan Ulama* (MPU—Ulama Consultative Council),<sup>35</sup> both of which have become vehicles for different groups of *ulama* or Islamic religious scholars to exert varying degrees of (contested) influence on the creation and implementation of the *Qanun*.<sup>36</sup> There are, of course, other *PerDa* seeking to impose Islamic norms in other provinces of Indonesia, for example, West Sumatra, South Sulawesi and, in particular, West Java, but in none of these regions have new Islamic judicial or bureaucratic institutions been formally established by the state specifically to deal with *PerDa Syariah*. Accordingly, outside Aceh few *PerDa* are enforced in any consistent, formal fashion by local government or by the local courts.

In Aceh, however, the Religious Courts that sit at first instance in each *kabupaten* (district) or *kota* (city) have been reconstituted as shari'ah courts specifically authorised to resolve cases arising under the *Qanun*. Appeals are initially heard by a provincial *Mahkamah Syariat*, located in Banda Aceh,<sup>37</sup> and from there cassation (*kasasi*) runs to the *Mahkamah Agung* (Supreme Court) in Jakarta, with the *Peninjauan Kembali* (PK — reconsideration review) as the final rung of appeal, just as for all Religious Court cases in Indonesia.<sup>38</sup> As this suggests, despite being rebadged, Aceh's new *Mahkamah Syariat* remains institutionally part of the national *Pengadilan Agama* (Religious Court) system, and is subject to administrative supervision by the Supreme Court, as are all other Religious Courts in Indonesia. This is confirmed by the provisions of the Law on the Governing of Aceh, the Indonesian statute that confirmed the post-tsunami peace deal that ended secessionist conflict in the province in 2005.<sup>39</sup>

The *Mahkamah Syariat*'s jurisdiction has, however, been expanded by the *Qanun* far beyond the core jurisdiction still exercised by the other Religious Courts. The *Mahkamah Syariat*, relying on the new authority the judges claim from the *Qanun* and, more recently, the Law on the Governing of Aceh,<sup>40</sup> can now accept cases relating to many aspects of criminal law and other areas traditionally quarantined from the Religious Courts in Indonesia. Inevitably, this is leading judges in Aceh

to develop new judicial doctrines through their interpretation of the *Qanun* (which, as Regional Regulations, do not apply outside Aceh).<sup>41</sup> They are, for example, faced with new criminal law and procedure and the application of new penalties, such as caning, that do not apply elsewhere in Indonesia.

In this sense, the conservative *ulama* who have driven the production of the *Qanun* have been able to create a new, emergent body of *fiqh* for Aceh that, while still a product of legislation and bureaucracy, has little connection to national legal codes or national bureaucratic institutions and instead reflects thinking rooted in local Islamic traditions. The *ulama* have done this by preparing drafts of *Qanun*, advising the local government and even by taking part in debate in the Acehnese legislature — the *Dewan Perwakilan Rakyat Aceh* (DPRA) — on their substance.<sup>42</sup>

The shari'ah courts of Aceh, although initially reluctant to exercise the new powers thus conferred on them, began to embrace the new role the *ulama* expected of them after the catastrophic Boxing Day tsunami of 2004. Although it remains to be seen to what extent the Supreme Court in Jakarta will continue to allow them to do so, the Aceh shari'ah courts are already a departure from the pattern of the rest of the Religious Courts. They are thus a potentially revolutionary development for Indonesia's judicial treatment of Islamic legal traditions, but we will not consider them further in this paper, which will focus instead on the operations of the Religious Courts elsewhere in Indonesia.

### **State, not shari'ah**

The modern notion of the nation state is based on the idea of secularism or, at the very least, the notion that the state's authority is independent of religious authority.<sup>43</sup> This means that states with Muslim populations always face the challenge of negotiating a relationship with Islam because it presents an alternative source of authority to the laws and constitutions of nation states, and because there will always be Muslim religious leaders who seek to exercise that authority. This negotiation is also inherently political in modern states with Muslim populations,

such as Indonesia. This is because 'Islam' and, in particular, Islamic legal traditions, are frequently wielded by opposition groups to challenge the legitimacy of the government of the day.

Indonesia, like other nation states in Southeast Asia with significant Muslim populations, has used bureaucratic and legal mechanisms to assert control over the interpretation of Islam by closely controlling Islamic legal traditions and judicial institutions. It has thus historically also been able to assert control over the Muslim communities that constitute around 90 % of its population. This was a strategy the modern Indonesian state inherited from Dutch colonial rule, and it was state policy for much of Soeharto's New Order (*Ordre Baru*) regime from 1966 to 1998, a period when Islam was often construed as a potential political threat to the centralised, authoritarian and secularist state that the military had created.

This control, and the overt repression of political Islam that it involved, has diminished significantly in the decade or so since Soeharto's resignation in May 1998. Many of the New Order restrictions placed on the expression of Muslim identity were lifted soon after his fall, as Indonesia's democratisation led to a new openness. The result was a vigorous burgeoning of Islamic identity in both private and public life, including in politics. A diverse range of Muslim groups (some mainstream, some marginal) began to reassert historical calls for a more Islamic, shari'ah-based society, albeit with very diverse, sometimes even polarised, visions of what that might entail.

Since then, much attention has been paid to the so-called 'Islamic revival' that is seen to have taken place in Indonesia as part of democratisation, as well as to the calls for greater recognition of shari'ah (Islamic law) that are seen as characteristic of this phenomenon, and the challenges these developments have presented for post-Soeharto governments and, indeed, for the Indonesian state itself.<sup>44</sup> It is commonly accepted that, to paraphrase the title of Arskal Salim's recent volume on this theme, the 'Islamization of law in modern Indonesia' constitutes a direct 'challenge to the secular state'.<sup>45</sup> There can be no doubt that the 'hardline' (*garis keras*) proponents of *Syariahisasi* (shari'ah-isation, or 'legal Islamisation') do seek to bring precisely such a challenge. Nor

can there be any doubt that many of those who oppose them see legal Islamisation as threatening to displace Indonesia's plural society and essentially secular state. They see both of these as fundamental to the political bargain struck in 1945 that led to the creation of a united archipelagic republic. For them, a secular government and a religiously plural and diverse society are ideas that have been symbolised in Indonesian political discourse since independence by reference to the Indonesian state ideology, the Pancasila, used by successive presidents to justify rejection of minority demands for an Islamic state.<sup>46</sup>

These tensions have played out in Indonesia's Religious Courts. These have long been the official and decisive forum where the state interprets and applies its tightly bounded interpretation of shari'ah, historically largely restricted to private law and, in particular, divorce. We argue that, Aceh aside, these courts have been largely unaffected by the push for conservative legal Islamisation. Instead, the Religious Courts have consistently maintained support for the state's Pancasila nationalism and an interpretation of shari'ah that is based not on the traditional sources of Islamic law, the Qur'an, *hadith* (traditions of the Prophet Muhammad) and traditional *fiqh* (Islamic jurisprudence), but on state legislation, even if that sometimes conflicts with the traditional sources.

As a result, the Religious Courts of Indonesia today exemplify Sami Zubaida's account of the contemporary circumstances of Islamic laws in most Muslim societies:

*...[I]ncorporation of shari'a into the state has separated shari'a from its religious locations, from the books and traditions of fiqh and into state manuals, from the custody of scholars to that of bureaucrats and legislators ... Legislation and judgment are now subject to bureaucratic and political logic ... The judge rules in accordance with law codes and not the books of fiqh.<sup>47</sup>*

Abdullahi An-Na'im has sought to explain this by arguing that:

*any Shari'a principle that is enforced through the coercive authority of the state ceases to be part of the normative system of Islam and becomes an expression of the political will of the state ... [T]he outcome of the enactment and enforcement of its principles by state institutions is always a matter of secular law and not of shari'ah as the religious normative system of Islam.<sup>48</sup>*

An-Na'im's explanation seems to hold as an account of Indonesia's courts for Muslims. On the one hand, the courts have become agents for a liberalising agenda reflecting the aspirations of the *Reformasi* (reform) movement that has dominated state policy in the post-Soeharto era. On the other hand, the same courts have largely ignored the aspirations of conservative Islamist organisations, which have grown in prominence over the same period.

Conservative proponents of Islamisation are often criticised in Indonesia for apparent hostility to women, for example, in their attempts to impose restrictive dress codes on women, or to restrict their ability to move freely in public on their own. The Religious Courts, by contrast, have led judicial efforts to improve the legal standing of women and their capacity to better exercise their family-law rights, especially the right to a quick and cheap divorce. Indeed, as Daniel Lev has explained, the Religious Courts have for many decades had an institutional culture of sympathy for women litigants. This has, if anything, been strengthened since he wrote the following:

*The Indonesian Islamic family law regime has long been one of the most liberal in the Muslim universe. Contracts of marriage are elaborate and flexible, partly because of pressure and advice by women's organisations in recent decades. In addition, the religious offices and courts have been quietly sympathetic to women in bad marriages. In my own research on the Islamic judiciary, to which initially I brought a few common misconceptions, it gradually dawned on me that in reality the courts were by and large oriented to women, their*

*primary clientele. Seldom did they reject appeals for divorce by women ...*<sup>49</sup>

As some Religious Court judges have asserted in discussions with the authors, their Muslim religiosity is thus often expressed less by reference to *fiqh* and doctrine and more by a desire for what they see as social and gender justice. This is a position that, whatever its merits, is far removed indeed from the religious values expressed by the conservative proponents of Islamisation in Indonesia.

### **Islamic courts in a dysfunctional judicial system**

The significance of the Islamic courts system goes beyond the issue of secularism versus religion in Indonesia, however. The Indonesian judiciary as a whole has long had a reputation for corruption, institutional decay and low levels of competence. This view is shared by most Indonesians and has a large literature of its own.<sup>50</sup> It is sufficient here, however, just to cite Lev's damning account of the state of the Indonesian courts when President Soeharto's resignation finally brought his New Order to an end in May 1998:

*Indonesia stands out for the extent to which its state was reduced to institutional shambles over a period of forty years ... In mid-1998, when President Suharto resigned his office, not a single principal institution of the state remained reasonably healthy. Corruption, incompetence, mis-orientation, and organizational breakdown were characteristic. The courts, prosecution, and police were underfunded and self-funded. All had been subjugated by political authority since at least 1960 and allowed substantial leeway, within the terms of their subordination, to fend for themselves. Legal process had little integrity left, as was equally true of public policy.*<sup>51</sup>

In the post-Soeharto era, some progress towards reform of the newly

independent judiciary was made under the leadership of Chief Justice Bagir Manan (2001-2008). This was done pursuant to a series of impressive 'Judicial Reform Blueprints' developed by the *Mahkamah Agung* (Supreme Court) in conjunction with a leading law reform NGO, *Lembaga Independensi Peradilan* (LeIP — Institute for Judicial Independence), led by young NGO lawyers and reform activists. Although these Blueprints are yet to be fully implemented, they remain a key foundation for continuing judicial reform in Indonesia.<sup>52</sup>

Despite this, the national standing of the judiciary remains low. The Indonesian courts are still generally regarded with suspicion as incompetent and inefficient, or even as systemically dishonest and rent-seeking. It is therefore of great significance that the national Religious Court system is typically regarded by many Indonesians as one of the few exceptions to the institutionalised dysfunction of the judicial system. Surprisingly — given often-stated assumptions that Indonesia's courts comprise a 'mafia' of sorts — the Religious Courts are viewed as generally not corrupt and as providing good service to litigants. This perception has been consistent for most of the last decade. A survey in 2001 found, for example, that the Indonesian public regarded the Religious Courts as the most honest and effective government institution in the country.<sup>53</sup> They were rated more highly than the post-Soeharto democratic legislature (DPR),<sup>54</sup> the executive, the police and all other courts and government-sponsored commissions, notwithstanding the poor facilities and low levels of funding then long associated with the Religious Courts. Specifically, the 2001 survey found it 'particularly striking' that the Religious Courts rated highly for the criteria 'does its job well' and 'is trustworthy'.<sup>55</sup>

In 2007 and 2009, the authors were involved in surveys of users of the Religious Courts as part of the Access and Equity Study of the General and Religious Courts funded by AusAID's Indonesia Australia Legal Development Facility (IALDF).<sup>56</sup> The findings echoed many of the those from the 2001 study. It found, for example, that 83.3% of court users felt that the 'judges listened to them'; 88.2% felt that the staff treated them 'with respect at all times'; and that 73% felt that staff were available, and willing, to answer questions and explain procedures.

Seventy-four per cent felt that their case had been heard 'quickly and efficiently' and, surprisingly, 63.2% reported that they had found the 'court process very relaxing'. Perhaps the most significant statistic was, however, the finding that 71.1% of the 1,000 court users surveyed would 'return to the Religious Courts' if they had a 'similar dispute in the future'. This is probably not simply because the jurisdiction of the court is mandatory for Muslims in certain disputes, for example divorce. Many marriages and divorces in Indonesia are, in fact, conducted informally, outside the state system,<sup>57</sup> and so the mandatory nature of the divorce jurisdiction is, in fact, not decisive for many Indonesians. Accordingly, the willingness of many Indonesian Muslims to return to the Religious Courts can be read, to some extent at least, as a statement of choice, and thus of satisfaction with those courts — and perhaps also as a recognition of the importance of these courts as a means of accessing other state services, as we show later in this paper.

From this perspective the Religious Court can be seen as one of the most successful of Indonesia's judicial institutions. This is, in some senses, ironic, as these courts have also historically been neglected by the state and regarded as having relatively lower institutional importance within the national judiciary than the General Courts. This now seems to be beginning to change, largely because of the transfer of the General and Religious Courts from under the authority of the executive (the Department of Justice and the Department of Religious Affairs, respectively) to the judiciary (the Supreme Court). This was a result of the post-Soeharto 'One Roof' (*Satu Atap*) reforms, triggered by constitutional reforms that followed the collapse of the New Order regime, including, in particular, the amendment of Article 24 of the Constitution to at last grant the judiciary institutional independence from the executive branch of government.<sup>58</sup> The One Roof reforms were therefore intended to deliver separation of powers (*trias politika*) in a newly democratising system, fashioning an independent judiciary by freeing the courts from the stifling control of the Ministry of Justice<sup>59</sup> and the Presidency, and, in the case of the Religious Courts, from the Ministry of Religious Affairs as well.<sup>60</sup> These reforms and, in particular, the One Roof Law (No. 35 of 1999), opened up new possibilities for

the courts, enabling them to reconsider almost every aspect of their operations, including how they dealt with court users and, in particular, poor and marginalised Muslims. Indonesia's Religious Courts seized these opportunities with alacrity and have, in many ways, transformed themselves. They are now able to contribute in significant ways to improving access to justice and changing perceptions of judicial institutions in Indonesia as a whole.

## Chapter 2

### Justice, development and the Religious Courts

Indonesia's Religious Courts have embraced post-Soeharto *Reformasi* rhetoric to reinvent themselves over the last decade from being a marginal player in national judicial affairs to become a leader in efforts to create a more modern, transparent, accountable and accessible judicial system. Because of their success in doing so, they have attracted significant additional support from the state, including greatly expanded funding. They are now seen as among the most open, clean and efficient of Indonesia's historically poorly regarded courts, and they have made significant efforts to improve access to justice for poor and marginalised communities and, in particular, women.

This chapter describes three major reform initiatives introduced by the Religious Courts over the past four years and their impact in relation to both the delivery of justice as well as poverty alleviation and development. A key step in the reform process was the large-scale client user survey, mentioned in the previous chapter, that sought feedback from Religious Court clients on their perceptions of the service provided by the courts. The results of this survey have led to greater efforts to increase access to the courts for women, the poor, and those living in remote locations across the Indonesian archipelago. At the same time, the Religious Courts embarked on significant reforms to promote

greater judicial transparency through the publication of extensive and easily accessible online and hard copy information about the work of the courts.

### **Religious Courts Access and Equity Study 2007–2009**

The basic work of any judicial system is to resolve cases in a just manner. Citizens usually have a gut instinct about what justice should look like and what they expect from a court, regardless of whether the case in question is criminal, related to family law, or a commercial matter. The more uncomfortable a person is made to feel at not understanding the judicial process, court forms or judgments, the more they are asked to return to a court where nothing appears to happen, and the more money they are asked to pay in court fees (or, sometimes, in bribes), the less they will feel that justice has been done.

Courts are, however, often perceived as inward-looking institutions that are out of touch with the reality of most people's lives. Of the three branches of government, the judiciary is often the least understood. Citizens do not vote for members of the judiciary, nor do they generally hear or read about the daily activities of judges (except in more sensational cases) in the same way they do about the executive branch of government. In fact, in many countries citizens can spend their lives without coming into contact with courts. To the extent that citizens do interact with courts it is most likely to be in the context of family law issues, and this is certainly the case in Indonesia.

The major Access and Equity Study of the Indonesian General and Religious Courts conducted from 2007 to 2009<sup>61</sup> therefore set out to determine how Indonesians felt they were treated by the courts responsible for their family law matters. The first such survey of any court in Indonesia, this study was a collaborative research project led by the Supreme Court of Indonesia and supported by the Family Court of Australia and the AusAID-funded Indonesia Australia Legal Development Facility (IALDF). It aimed to provide the Supreme Court of Indonesia with empirical data on the quality of service provided to court users in the area of family law by the two largest court jurisdictions

in Indonesia, that is, the General and the Religious Courts.

The study considered the level of satisfaction of those who actually used the Indonesian courts for their family law matters. It also sought to ascertain whether there are sections of the community, particularly those living below the poverty line, who are unable or unwilling to access the services of the Religious and General Courts for their divorce and birth certificate cases, and, if so, to determine why. The study also sought to propose strategic policy responses (both financial and organisational) that the Supreme Court could consider in order to provide greater public access to the Religious and General Courts. It considered these issues with a particular focus on divorce cases (as all divorces must be decided by these courts) and on the provision of birth certificate statements (*Penetapan Akta Kelahiran*) by the General Courts. Lastly, the Access and Equity Study looked at how the lack of a birth certificate can affect an individual's access to broader public services, for example education or healthcare.<sup>62</sup>

Over the last three years, the study surveyed approximately 2,500 Indonesians to obtain their views and perceptions about family law and access to Indonesian Courts, and reviewed and analysed 1,214 divorce and birth certificate court files. Sixty-eight General and Religious Courts across 18 provinces were involved. The key findings of the study were as follows (the complete findings are provided at the Annex):

1. The poorest sections of Indonesian society face significant barriers in bringing their family law cases to the courts. Of the female heads of household living under the Indonesian poverty line surveyed, nine out of ten were unable to access the courts for their divorce cases, as required by Indonesian law. They reported the main barriers to access as being financial, relating mainly to court fees and to transportation costs for travel to court.
2. The average total cost of a Religious Court case among survey respondents was approximately Rp 800,000 (or almost four times the monthly per capita income of those living on or below the Indonesian poverty line: *Badan Pusat Statistik*, 2009).<sup>63</sup> In 2008, the average total cost of a divorce case in the General Court

was approximately Rp 2 million, when a lawyer was not used (around ten times the monthly per capita income on the poverty line), and Rp 10 million with a lawyer (52 times the monthly per capita income on the poverty line).

3. Women bring twice as many divorce cases to the courts as do men. In nine out of ten cases they are successful.
4. Courts usually overestimate the down payment on costs made by clients in civil cases, such as divorce cases, relative to the actual cost of the case. This is a disincentive for justice seekers, particularly the poor. Reimbursement of the balance at the end of the case is important for clients, particularly the poor, but it does not always happen. As surveyed, Religious Court users paid, on average, 24% more as a down payment than the final cost of the case as set out in the judgment. It was 79% more in the General Courts.
5. A cycle of non-legal marriage and divorce exists for many PEKKA<sup>64</sup> female heads of household living below the poverty line. Failure to obtain legal documentation in relation to marriage and divorce is associated with 56% of children from these marriages not obtaining birth certificates.
6. For those Indonesians able to bring their family law cases to the courts, there is a high satisfaction rate among court clients. Seventy-one per cent of Religious Court clients and 69% of General Court clients said they would return to the court in future if they had similar family law issues.

### Justice and development

The study's findings were significant not just because they provided some insight into what Indonesians thought about their legal system. They also showed how seemingly mundane interactions between individuals and the legal system can have a critical impact on both development and poverty alleviation. This is particularly the case when it comes to legalising marriage and divorce and the provision of birth certificates.

In 2010, the *Badan Pusat Statistik* (BPS — Indonesian Central Bureau of Statistics) estimated that there were 65 million households in Indonesia, of which 9 million (14%) were headed by women.<sup>65</sup> In order to be able to access a range of government welfare services, female heads of household need to be able to demonstrate that they are, in fact, the head of their household to the local government officials who issue family cards verifying poverty, health cards, rice subsidies (*Raskin*), and the government's 'direct cash assistance' payments (*Bantuan Langsung Tunai*, or BLT, often described as 'unconditional cash transfers'). Because the divorce certificate is widely used as basic evidence to obtain the new identity or family cards that prove the woman is now the head of her household, access to the Religious Courts for the poor, and in particular for women, is essential if they are to access these services. The data in the Tables 1-3 (summarised from findings of the Access and Equity Study) show that while 94% of surveyed female heads of household living below the Indonesian poverty line were able to access the rice subsidy, obtaining government cash transfer payments and health services was much more difficult.

In Indonesia pro-poor government services, including cash transfers and free health treatment, are distributed through a two-tiered approach:

1. The *Badan Pusat Statistik* (BPS) determines a quota per district for the cash transfer scheme or free health treatment.
2. Each program has a different targeting approach within districts. The cash transfer program (BLT) uses the BPS list of the poor within districts, while under *Askeskin/Jamkesmas* — a health insurance program for the poor — district level officials can determine which households fill the quota.

These services are allocated on a quota basis across districts, with village officials having discretion to determine who among those satisfying the criteria should receive the benefits. The study shows that, on average, 33% of PEKKA members surveyed living below the Indonesian poverty line could not access the 2008 cash transfer program (BLT).

Similarly, 34% of surveyed female heads of household living below the Indonesian poverty line did not receive the card evidencing their entitlement to obtain free medical treatment under the *Jamkesmas* program. This reflects broader targeting problems in these programs, as well as the fact that most of the women heading these households were too poor to be able to access the Religious Courts, and so were not formally divorced from their estranged (effectively former) husbands. They were therefore unable to assert their status as female heads of household for the purposes of these pro-poor programs.

**Table 1: Percentage of female heads of household surveyed (PEKKA members) living below the poverty line who received the government rice subsidy, by province.**

	Aceh	West Java	West Kalimantan	East Nusa Tenggara	Total
Number of PEKKA members who received rice subsidy	79	53	82	97	<b>311</b>
Number of PEKKA members who did not receive rice subsidy	0	2	17	2	<b>21</b>
Number of PEKKA members living below the Indonesian poverty line	79	55	99	99	<b>332</b>
Percentage of PEKKA members living below the Indonesian poverty line who received the rice subsidy	100	96	83	98	<b>94</b>

**Table 2: Percentage of female heads of household surveyed (PEKKA members) living below the poverty line who did not receive government cash transfers, by province.**

	Aceh 2005	Aceh 2008	West Java 2005	West Java 2008	West Kalimantan 2005	West Kalimantan 2008	East Nusa Tenggara 2005	East Nusa Tenggara 2008	Total (2005 and 2008)
Number of PEKKA members who received cash transfers	76	73	30	31	61	61	55	61	<b>448</b>
Number of PEKKA members who did not receive cash transfers	3	6	25	24	38	38	44	38	<b>216</b>
Number of PEKKA members living below the Indonesian poverty line	79	79	55	55	99	99	99	99	<b>664</b>
Percentage of PEKKA members living below the Indonesian poverty line who did not receive cash transfers	4	8	45	44	38	38	44	38	<b>33</b>

**Table 3: Percentage of female heads of household surveyed (PEKKA members) living below the poverty line who were unable to access the free government health insurance program (*Jamkesmas*), by province.**

	Aceh	West Java	West Kalimantan	East Nusa Tenggara	Total
Number of PEKKA members who were able to access free health insurance	72	36	51	59	<b>218</b>
Number of PEKKA members who were unable to access free health insurance	7	19	48	40	<b>114</b>
Number of PEKKA members living below the Indonesian poverty line	79	55	99	99	<b>332</b>
Percentage of PEKKA members living below the Indonesian poverty line who were unable to access free health insurance	9	35	48	40	<b>34</b>

A similar result was obtained in relation to the issuing of birth certificates. The study found that a cycle of non-legal marriage and divorce exists for many female heads of household living under the Indonesian poverty line. It showed that the failure to obtain legal documentation in relation to marriage and divorce is associated with 56% of the children of these marriages not obtaining birth certificates. This is broadly consistent with other surveys of this issue. For example, UNICEF estimates that approximately 60% of Indonesian children under five years of age now

lack birth certificates, with the rate over 80% in poor provinces.<sup>66</sup> This represents one of the lowest birth registration levels of any country in the region.

Without birth certificates, individuals face major obstacles in doing everything from accessing an education and voting to applying for jobs, opening bank accounts or obtaining identity cards. Education is a good example. The government of Indonesia has mandated that all children should complete nine years of education.<sup>67</sup> Despite this, in 2008 only 72% of Indonesian children completed primary school and only 40% completed junior high school (thus achieving the mandatory nine years of education).<sup>68</sup> One reason for this is that in Indonesia birth certificates are increasingly required for children to be registered in public schools and to sit the national examinations. One of the findings of the Access and Equity Study is that completion of the mandatory nine years of education appears to be strongly linked to whether a child has a birth certificate. So, for example, of PEKKA members surveyed in West Java, West Kalimantan and East Nusa Tenggara, 78% of their dependants aged ten to 19 were still at school. Of these, 70% have birth certificates.

Access to public health services is similarly dependent on proof of identity as the case study detailed below demonstrates. The seriousness of this issue was highlighted by a recent Asian Development Bank regional report:

*The intersection of legal identity and health and education services is particularly important. Educational and health services are scarce, and even those resources reserved for the urban poor often only reach the more powerful and connected families. The urban poor might be ineligible to receive various forms of legal documentation for a number of reasons including informal land occupation and service connections, employment in the informal sector or status as illegal immigrants or illegal internal migrants. Obtaining legal documents can also be very time-consuming, complex, and expensive, particularly for those living in slum communities.*

*In the center of Surabaya there are thousands of urban poor, who lack official residences, and are denied legal identity and thus access to public health services provided by the local government. Residents without legal residences cannot receive the legal papers required to access public services. This situation is particularly acute when homeless individuals try to access medical services: they can be turned away from neighborhood hospitals or health centers if they do not have necessary ID cards.<sup>69</sup>*

### **Case study: the elusive health card**

Ibu F is a PEKKA leader from Ile Boleng in East Flores, a remote eastern Indonesian island. In early 2009, Ibu F went for a check at the local health clinic. The doctor advised her that she had a goitre in her neck and suggested that she undergo treatment for three months. The doctor further advised that if there was no change in her condition she would require an operation. Three months of medical treatment passed and there was no change in her condition.

As there was no hospital with full treatment facilities in the sub-district or district capitals, Ibu F travelled to the public hospital in Kupang to have the goitre checked. The journey from her village to Kupang was a long one. In order to get there, she had to cross from Adonara Island to Flores before taking a boat overnight to Kupang. At the public hospital in Kupang Ibu F's goitre was checked, costing her more than Rp 400,000 (A\$50). She then had a medical check that cost more than Rp 200,000 (A\$25). Added to this were administration fees at each clinic of between Rp 12,000 and 20,000 (A\$1.50-2.50). The costs were significant and Ibu F had to pay all fees herself because she did not have a health card.

After the doctor checked lab and ultrasound results she confirmed that Ibu F's goitre required surgery. The doctor estimated

that the operation would cost more than Rp 20 million (A\$2,500), including the operation fee, the fee for the hospital room and the medicine. Added to this was the cost of transportation. This cost was very high for Ibu F, as she is a female head of household with responsibility for one teenage child still at home. It was suggested to Ibu F that she try to obtain a poverty letter (SKTM) to obtain medical cost relief from the Mayor of Kupang. Unfortunately, Ibu F was not a resident of Kupang and therefore did not have an identity card from Kupang. The doctor suggested that she instead obtain a health card.

While Ibu F was in Kupang, one of her friends, a PEKKA leader, telephoned her to advise her that the local health clinic had indicated that a doctor from Australia would come to the health clinic to assist the community. On hearing this information Ibu F felt some hope, but knew that to access this service she would still be required to have a health card and be registered at the health clinic. Ibu F asked her brother-in-law to register her at the health clinic.

Upon returning to Flores from Kupang, Ibu F went to the village office in order to obtain a health card. At the office she was advised that the list of people who would receive a health card had already been sent to the sub-district level. Ibu F then approached the sub-district secretary and obtained clarification that it was already too late to add a new name to this list. He suggested to her that she swap places with a family member or another person who was already on the health card list. Ibu F found someone who was prepared to have their name substituted by Ibu F's on the health card list, as they did not need a health card. The requirements to process the health card were then completed. Six months later, in August 2009, there was, however, still no news concerning the health card that will determine Ibu F's fate. Her goitre remains untreated.

### **Judicial transparency: information and accountability**

The findings of the Access and Equity Study provided an impetus for the reforms to strengthen judicial transparency and access to the courts for the poor that then followed. These were funded by the Supreme Court and led by Badilag, the Directorate-General for the Religious Courts in the Supreme Court.

In 2005, the Directorate-General did not have a website, nor did any of the 372 District and High Religious Courts across Indonesia. In response, the Director-General, Wahyu Widiana, initiated an information technology revolution in the Religious Courts, with almost 300 Religious Court websites now providing online information to the public. The first step was the Badilag website ([www.badilag.net](http://www.badilag.net)), established in 2006, which now provides detailed information on many aspects of the Religious Courts' work, including statistics on cases, judgments of the High Religious Courts, and standard procedures for accessing courts, as well as an intranet for Religious Court judges and staff. What sets the Religious Court website apart from others now emerging in the judicial system is that it has become a forum for information exchange across almost 400 Religious Courts in Indonesia, and between more than 10,000 judges and court staff. Given the significant numbers of judges and court staff involved, it is not surprising that the website has already had more than 13 million hits. In fact, it now averages over 12,000 hits daily.

The Director-General has now created a nationwide culture of information exchange within the Religious Courts whereby Badilag and individual courts across the archipelago post news on a regular basis about their activities and their views regarding articles that appear on the website. Stories include updates by the Supreme Court Chief Justice and other members of his leadership team on the Blueprint for Reform in the Indonesian courts and the implementation of responses to the findings of the Access and Equity Study. The Director-General also posts a wide variety of stories on subjects ranging from his visits to courts across the country, through the reform priorities of the Religious Courts, to recent appointments and practice directions. Other stories from the field may include announcements of new circuit courts in remote

locations. These articles are typically followed by dozens of comments posted from officials within the court, as well as from members of the public. In a country where Facebook is part of life, reinventing a dour and little-used court website as an active, virtual social networking site that can drive reform has been a breakthrough.

So far as accountability is concerned, the public are typically concerned by two issues: the accessibility of judgments (whether the primary work of the courts, deciding cases, is accessible to the public), and the transparency of court fees (whether the courts are transparent in relation to fees charged to individual clients, as well as the total volume of court fees received by the court system). Again, the story here is positive. In 2006, no Religious Court judgments were published on the Internet. Today there are almost 5000. Similarly, information on the court fees collected by Religious Courts was made available for the first time on Religious Court websites<sup>70</sup> and was published in the Supreme Court annual reports for 2008 and 2009.<sup>71</sup>

This progress is a direct consequence of a number of measures taken following the implementation of the One Roof system in 2006, and the opportunities that it created for renewal and innovation in the national judicial system. In 2007, for example, the former Chief Justice of the Supreme Court, Professor Bagir Manan, issued a decision that clarified what information the courts could release to the public either in hard copy or on the Internet (SK144/KMA/SK/VIII/2007). The following year, a Memorandum of Understanding between the Australasian Legal Information Institute (AustLII) and the Supreme Court of Indonesia paved the way for collaboration on the uploading of decisions to the Internet. It was agreed that High Religious Court judgments would be published on the Asian Legal Information Institute website ([www.AsianLII.org](http://www.AsianLII.org)), with a link to the Badilag website. In a country where Facebook is a part of life, reinventing a dour and little-used court website as an active, virtual social networking site that can drive reform has been a breakthrough.

### Access to the Religious Courts for women, the poor and those living in remote areas

The Access and Equity Study also provided new information to Bappenas (the Indonesian National Development Agency), the Ministry of Finance, and the Supreme Court of Indonesia on the inability of the poor to access the courts. As a direct response to the findings, the Religious Courts' budget was increased by Rp 23 billion (approximately A\$3 million) in 2008. This amount was allocated to assist those living in rural and remote areas to access the courts for their family law cases by funding increases both in court fee waivers for the poor (so-called *prodeo* cases), as well as increases in the number of circuit courts that travelled to remote areas.<sup>72</sup> A further Rp 12 billion (A\$1.5 million) was granted to the Religious Courts in the 2009 State Budget for the same purposes, despite an overall Indonesian Supreme Court budget reduction due to the global financial crisis. This represents an 18-fold increase over two years in Religious Court budgets for court fee waiver cases and for circuit courts.

These budget increases were a necessary precondition for providing enhanced access to the Religious Courts for women, the poor and those living in remote locations. Court fees paid by clients of the Religious Courts are mainly used to cover the cost of summoning parties and witnesses to the proceedings, as well as other court processing costs. The additional budget was therefore needed to cover these costs for poor clients whose fees had been waived, as well as to cover transportation and other costs for relocating judges and court staff to remote areas to hear cases on circuit.

In order to assist the Director-General of the Religious Courts to monitor this significant new budget and the administration of the new fee waiver and circuit court systems that it supported, an SMS database was established in 2008. Each of the 372 Religious Courts was asked to report each month on (i) the total budget received to support access to the courts; (ii) the number of court fee waiver cases heard; (iii) the number of circuit court cases heard; and (iv) the balance of funds remaining.<sup>73</sup> By August 2010, data had been received from over 90% of Religious

Courts. Based on projections from this sample, it is estimated that there was an encouraging tenfold increase in poor people accessing court fee waiver programs offered by the Religious Courts. Similarly, there was a fourfold increase in the number of rural and remote Religious Court clients who had their cases heard at a circuit court. For the first time, Indonesian courts were able to report to Bappenas and the Ministry of Finance on how state budget funds were providing increased access to courts for the poor.

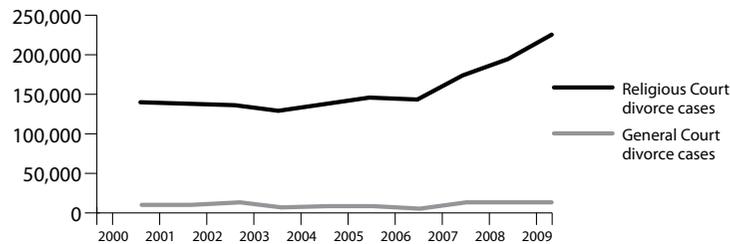
These policies aimed at increasing the ability of the poor to access the Religious Courts have coincided with a 50% rise in the number of divorce cases heard by the Religious Courts in the last three years, as shown in Table 4 and Figure 1.

**Table 4: Number of divorce cases received in the General and Religious Courts over the last ten years.**

Year	Religious Court divorce cases	General Court divorce cases
2000	145,609	3,539
2001	144,912	3,877
2002	143,890	3,842
2003	133,306	3,361
2004	141,240	2,514
2005	150,395	2,674
2006	148,890	2,606
2007	175,088	3,645
2008	193,189	4,404
2009	223,371	5,285

**Figure 1**

Number of divorce cases received in the General and Religious Courts over the last ten years.



Through their circuit court program in remote areas and their prodeco fee waiver program, the Religious Courts have also helped to address the problem of birth registration. In 2009, more than 13,000 marriage legalisation (*ishat nikah*) cases were filed with the Religious Courts. In these cases, the court provides the applicant with a document evidencing an earlier marriage. This document can then be used in a civil registry to obtain other important identity documents, including, for example, birth certificates naming both parents.

Recent field work with the PEKKA NGO has found that in just 20 of Indonesia's 440 districts (regencies and cities), the female heads of household surveyed had approximately 2,000 marriage legalisation cases that they needed to bring to the Religious Courts in order to obtain birth certificates for their children. However, to do so they would need support from the Religious Courts in the form of a waiver of court fees. It would also be necessary for cases to be heard in circuit courts close to the often-remote villages where the female heads of household live. It seems clear that as processes of court reform make the Religious Courts more accessible to the public, so interest by the poor in legalising their personal status and that of their children will continue to drive significant increases in judicial workloads.

### Drivers of Religious Court reform

A cynic might say that in a developing country the size of Indonesia the default setting for reform initiatives is failure. The reasons for such low expectations are easily understood, even in the case of the Religious Courts. They include the fact that the religious judiciary comprises 10,000 Religious Court judges and other staff, as well as 372 Religious Court buildings, all spread over an archipelago of more than 17,000 islands. The resulting challenges are complicated further by poor communication skills among central government agency managers, few incentives to introduce reforms benefiting clients, a low risk of being caught when providing shoddy or corrupt services, and so on. This gives rise to the obvious question: why, against these odds, have the Religious Courts been able systematically to introduce successful reforms across almost 400 courts in a relatively short time?

The two most important reasons are strong leadership within the Religious Courts, coupled with a relentless drive to communicate messages (using the Internet) to judges, Religious Court staff and the public regarding the Courts' own reform agenda. Equally important, however, is the Religious Courts' institutional commitment to notions of social justice that derive from a developmentalist, modernising agenda shared in a general sense by many state agencies but rarely actually implemented in a meaningful way to the benefit of the public, let alone the poor. In other agencies this notion of social justice is more often honoured in the breach, but it does seem to be seen as a genuinely religious obligation by many among the current leadership of the Religious Courts and, in particular, its Directorate-General, Badilag.

The Religious Courts have also benefited from having the one Director-General for the last ten years, a person who is trained in management at a postgraduate level and who is not a judge. The General Courts, by contrast, have been led by four different director-generals in the same ten-year period. All of these were judges and all would therefore see the post as temporary, a path to a higher judicial

position. Such judicial appointments to the position of Director-General are, in fact, potentially problematic, as it is a position that often involves unpopular decisions and requires the incumbent to take potentially career-damaging risks if reform is to be achieved within a large and conservative institution. The Religious Courts were the first Indonesian jurisdiction to seek client feedback through the large-scale surveys in 2007 and 2009 that were described earlier in this chapter. This was generally a positive experience for the Religious Courts, with a high level of client satisfaction reported, but it was nonetheless a high-risk project for the Religious Courts Director-General, Wahyu Widiana. When asked by the authors why he was prepared to take such a risk, his answer was a textbook management school response: ‘A reforming institution listens to what clients don’t like and their suggestions for what should be changed.’ This openness to criticism helps explain why the Religious Courts’ reforms have proceeded so quickly over recent years.

Another important driver of reform is that the official means of communication for the Religious Courts is now electronic: email and the Internet. This allows judges to push the stories of their court’s success via the new media. The roll-out of Internet technologies across Indonesia has allowed inexpensive access to the Internet by courts that would have been impossible even five years ago. It has supported a generation of younger judges and court staff who now routinely interact through a range of wireless devices and interfaces. The Badilag website, launched in 2006, has thus revolutionised immediate access to information by Religious Courts across the country. Again, the Director-General has personally led the drive to communicate new events, policies, information, and training packages to all courts via the Internet. This has led to dozens of new information briefs appearing each week, along with hundreds of comments in response from judges and court staff and members of the public. This fundamental change in information culture has occurred within the four years since the Badilag website was established, and it has been pivotal to the rapid reforms that have taken place in the Religious Courts.

### **Next steps**

Over the last three years, the access and equity reforms pioneered in the Religious Courts have led to significant increases in the number of poor people (and, in particular, poor women) able to access the Religious Courts. As mentioned, this has been achieved by waiving court fees and by holding more circuit courts in remote areas, thereby reducing transportation costs for poor people. The increased state budget committed over the next five years for these activities will allow Badilag to build on these reforms. In 2010 Badilag will, for the first time, be responsible for reporting on whether access to justice targets set out in Indonesia’s Medium-Term Development Plan 2010-2014 have been met, and whether the budget allocated to Indonesia’s courts for these purposes has been properly used.

Indonesia’s national poverty rate is 14% with some provinces experiencing rates of rural poverty as high as 47%. If access to justice is to become a reality for all Indonesians regardless of their socio-economic background, then Badilag will need to spread the messages contained in Indonesia’s national policy instruments on access to justice to almost 400 Religious Courts across the country. This is because statutes<sup>74</sup> were passed in 2009 requiring all General Courts and Religious Courts to provide a range of services to increase access to the courts for the poor and the marginalised. New legal aid services will include legal aid posts inside court buildings to provide legal advice and assistance to clients who cannot afford lawyers. Over the next five years, legal aid posts will be established in almost 350 Religious Courts across the country. This will have a profound impact on increasing the understanding of women, the poor and other marginalised groups about how to bring family law cases before the Religious Courts, and how to seek court fee waiver assistance in cases of poverty.

## Conclusion: Policy implications

*Poverty should be understood not only as economic incapacity, but also as the denial of basic rights fulfilment and an unequal ability to live with dignity. ... The National Strategy on Access to Justice examines how problems with the rule of law can contribute to the existence of poverty. The alleviation of poverty is acknowledged to require improvement of the legal system, both in the substantive law and in the institutions for legal enforcement and legal empowerment within the framework of democratic rule of law.*

National Access to Justice Strategy <sup>75</sup>

The fall of Soeharto in 1998 and the strong push among legal reformers to establish an independent judicial system that could check legal abuses of the kind that were routine over the three decades of the New Order created an opportunity for the Religious Courts. Today, they are among the more efficient and well regarded of Indonesia's still controversial courts. Surveys consistently show that court users and the public, who regard the courts in general with contempt, are satisfied with the overall performance of the Religious Courts. Against expectations, the Religious Courts have emerged in the post-Soeharto period as leaders of

reform in the Indonesian judicial system.

The conservative legal Islamisation project, calls for the enforcement of shari'ah, and increased public expression of orthodox piety that have emerged since the end of Soeharto's New Order have not yet had a significant influence on the Religious Courts outside Aceh. This is the key to understanding the post-Soeharto revival of the religious judiciary: outside Aceh it has not occurred by reference to the wider discourse on Islamic identity and the role of Islam in public and political life in Indonesia, but firmly within the bureaucratic structure of the state. The judges of the court and the influential staff of the Directorate-General for the Religious Courts generally show no ambition to reinvent themselves as *qadi* (traditional Islamic judges), or to challenge the supremacy of the secular Supreme Court, with which they now feel institutionally more comfortable than in the past. Rather, they seek greater recognition and improved access to resources within the essentially secular 'Pancasila judiciary' and the wider bureaucracy — and they have done so with some success in recent years.

Indeed, the religious judiciary has been far more concerned over the last half-decade with a broader social welfare agenda and, in particular, with access to justice for women and other marginalised groups. Assisting poor people legally to register births, marriages and divorces is an important step to establishing legal identity and thus creating greater social equity and enforcement of rights. The Religious Courts' impressive fee waiver and circuit court reforms will clearly directly benefit marginalised rural women. Moreover, the work of the Religious Courts to legalise previously unregistered marriages is a critical contribution to raising one of the lowest rates of birth registration in Asia. This is now recognised by the Directorate-General for the Religious Courts and is being slowly addressed within the constraints of a complex and still-emerging newly independent judicial institution now led by the Supreme Court rather than by competing government departments.

Women's agency and the role that it plays in their social and economic development and that of their families is well documented. What is not so well known is that in Indonesia legally documenting

women's identity as female heads of household can play a major role in their being able to access poverty alleviation programs (subsidised rice and cash transfers), free healthcare access, and access to free education programs for themselves, for their children and the households they support. In Indonesia, legal marriage and legal divorce are the building blocks of legal identity for children of these marriages. Cycles of illegal marriage, illegal divorce and lack of birth certificates feed social exclusion and deprivation. Assisting poor people to register births, marriages and divorces legally is thus an important step to establishing legal identity for all in Indonesia, and better enabling them to exercise rights. The Religious Courts have played a critical part in this process.

### **A reform model for Islamic courts?**

Indonesia's Religious Courts have distinguished themselves from most other Indonesian courts in public perceptions. They have also developed in a direction that is proving different from that taken by most other Islamic courts in the region, despite many similarities between them. The Syariah Courts of Singapore, Brunei and Malaysia resemble Indonesia's courts for Muslims in that they too apply practices and procedure that are very like those applied in the secular courts of their respective countries (although that practice and procedure is derived in those countries from British common law traditions, rather than from the Dutch civil law tradition followed in Indonesia). Like the Religious Courts of Indonesia, other Islamic courts in Southeast Asia also largely derive their powers and jurisdiction not from scripture or the *fiqh* but from legislation produced by the state, and they generally conform to it.

The other Southeast Asian Syariah Courts differ, however, from Indonesia's in two important respects. First, the other courts are much more likely to debate issues of *fiqh*, and refer to traditional sources of Islamic law, including *fiqh* textbooks, commentaries and, in some cases, fatwa produced by local *ulama* (religious scholars). They may even use these sources to interpret the legislation and, on occasion, to overrule or circumvent it. This almost never happens in Indonesia's Religious

Courts. Second, and relatedly, the Syariah Courts of Singapore, Brunei and Malaysia are far more conservative and doctrinaire than are the Indonesian courts. They have so far demonstrated little interest in the broad social justice reform agenda that so motivates the Indonesian courts, and have not, for example, taken significant steps to attempt to enhance access for poor women and other marginalised groups in the same way the Indonesian courts have. Rather than leading national judicial access to justice efforts, these courts are often seen as inward-looking, socially and morally conservative, and traditionalist. Rather than being seen as sensitive to the needs of women, these courts are also often criticised for acting in ways that deny women rights, particularly in Malaysia. This most likely reflects the fact that the political renewal and democratisation that took place in Indonesia after Soeharto's fall in 1998 has not occurred in Singapore, Malaysia or Brunei, and thus has not offered the Syariah Courts of the Malay Muslim world the opportunities for reassertion, reinvention and reform available to Indonesia's Religious Courts. It also, however, reflects the greater social conservatism of state Islamic institutions in Malaysia, Singapore and Brunei.<sup>76</sup>

To this extent, Indonesia's Religious Courts may now stand as models for progressive social reform for not just other courts in Indonesia, but also for Islamic judicial systems elsewhere in Southeast Asia.

### **The Religious Courts: access to justice and development policy agendas**

In the eighteen months since Indonesia's National Access to Justice Strategy was launched in May 2009, the Indonesian policy, budget and legislative agendas have aligned to generate a renewed momentum in providing access to justice to disadvantaged groups. Recent reforms within the Religious Courts coincided with the development of a National Access to Justice Strategy that links access to justice with Indonesia's poverty alleviation programs and achievement of national development goals. This has raised the profile of the Religious Courts as an institution critical to broader Indonesian participation in pro-poor

programs by reason of their work on personal status issues (especially legalising marriages and divorces and assisting in the provision of birth certificates for children).

Indonesia's Medium-Term Development Plan 2010-2014<sup>77</sup> also reflects these aspirations. As mentioned, it includes an allocation of approximately Rp 300 billion (approximately A\$40 million) to support access to the Indonesian courts for the poor, including court fee waiver, circuit courts and legal aid. Over a third of this budget is set aside for expenditure by the Religious Courts. For the first time, these funds will be disbursed through the Indonesian Supreme Court's directorates-general responsible for the four court jurisdictions. For the two largest court jurisdictions these directorates-general are, of course, Badilum (for the General Courts) and Badilag (for the Religious Courts).

In a similar vein, on 21 April 2010, President Susilo Bambang Yudhoyono issued Instruction No. 3 of 2010 concerning a Just Development Program, emphasising the importance of 'justice for all' in achieving Indonesia's broader poverty alleviation objectives, including the Millennium Development Goals. The Presidential Instruction states that the focus of the 'justice for all' program should be, first, justice for children and, secondly, justice for women. One of the programs outlined in the President's instruction therefore aims to increase legal access in family law cases for poor women and other marginalised groups, areas in which the Religious Courts have been particularly active and effective.

It is also significant that Indonesia's Medium-Term Development Plan 2010-2014 includes targets applicable to each court jurisdiction for the numbers of poor and marginalised people who should be given better access to the Indonesian courts through the waiver of court fees, circuit courts, the provision of legal information at legal aid posts within court buildings, and through the grant of aid for legal representation. In response to these provisions of the Development Plan, Bappenas is, as mentioned earlier, now developing a budget framework for the next five years to extend the reforms commenced in the Religious Courts to other Indonesian court jurisdictions. Its objective is to achieve similar levels of access to justice for poor and

marginalised groups across the Indonesian court system to those recently pioneered by the Religious Courts.

The response from the Indonesian judiciary has been quick and generally supportive of the broader Indonesian policy agendas on access to justice. In August 2010, the Chief Justice of the Indonesian Supreme Court issued a practice direction<sup>78</sup> to the almost 800 courts across Indonesia supervised by his court elaborating how judges and staff should facilitate access to Indonesian courts, especially for the poor. This document marks a new phase of collaboration between the Indonesian courts and legal aid providers with the expansion of duty lawyers working in legal aid posts in courts in 2011. In October 2010, the Chief Justice launched the *Indonesian Supreme Court Blueprint for Reform 2010-2035*<sup>79</sup> with access to justice now forming one of the key components of the Indonesian court reform roadmap for the coming decades.

The Religious Courts have announced that from the beginning of 2011 as many as 44 Religious Courts will open legal aid posts to enable duty lawyers to provide legal advice to clients facing hardship. This will be the first time the Religious Courts have received state funding to provide legal aid posts and duty lawyers in courts. The number of legal aid posts will rise as funding increases over the 2010-2014 medium-term budget cycle. In collaboration with NGOs, the Religious Courts have already demonstrated that increased funding for access to justice from the government of Indonesia translates into real benefits for court clients. 2009 data has shown a tenfold increase in the poor being able to access the Religious Courts through the court fee being waived and a fourfold increase in people from remote areas able to access justice through the Religious Courts holding circuit courts outside district capital cities. The standards of service being set in the Religious Courts are now raising expectations that the General Courts will also demonstrate a willingness to deliver similar levels of service for women, the poor and those living in remote areas.

From 2011, it will be possible for the first time to measure the level of client services delivered to disadvantaged groups by both the Religious and General Courts. The next five years of Indonesian court reform could therefore be a turning point in the way courts provide

services to the Indonesian community, and thus how that community views the courts.

### **The Religious Courts and the international community**

The Australian government has supported efforts to increase access and equity within the Religious Courts over the last five years. The Family Court of Australia<sup>80</sup> has engaged with the Religious Courts on the core area of enhancing client service delivery with a particular emphasis on disadvantaged groups, at both judicial and senior court administrator levels. This emphasis on judicial cooperation has in recent years been formalised through a Memorandum of Understanding between the Indonesian Supreme Court, the Family Court of Australia and the Federal Court of Australia, as mentioned. While there had been a significant level of international aid to the Indonesian judicial sector before 2005, the Religious Courts had never before been approached to participate in their own right as a local institutional counterpart in a donor program. To the extent that the Religious Courts had been a beneficiary of international aid programs in the past, it was as one of the four main Indonesian court jurisdictions, without direct attention being paid to the core work of the Religious Courts. To a large extent, the General Courts and the specialised jurisdictions supervised by the Supreme Court (the commercial and anti-corruption courts, for example) had been the central focus of donor-funded judicial reform programs.

When the Family Court of Australia began to work with the Religious Courts on issues of client service and improving access to the courts, the Religious Courts embraced the opportunity to discuss these issues with an Australian court specialising in the area of family law. A dialogue between peers (judges, registrars and court administrators) commenced, focusing on their mutual aspiration to improve client service standards. Meanwhile, the Religious Courts Director-General simultaneously launched a communications campaign through the new website for the Religious Courts that was created in late 2005 and which was modelled on the website of the Family Court of Australia. Dozens of articles were written and posted on the website

concerning the ideas and impact of the judicial cooperation with the Family Court of Australia. Hundreds of judges and registrars across the Religious Courts network posted ‘chats’ on the Religious Courts website strongly endorsing the reform-oriented engagement with the Family Court of Australia.

The Australian government has thus been an innovator through its role as the only donor working with the Religious Courts on its core family law jurisdiction. It has been repaid for its efforts in three key ways. There has been a significant impact in terms of an increased number of women, the poor or those living in remote areas able to access the Religious Courts. At the same time, the Indonesian government’s funding commitment for access to justice initiatives has leveraged the Australian government’s initial modest donor investment by a factor of 70:1.<sup>81</sup> This commitment will be ongoing, and will provide support in five-year blocks according to the Indonesian government’s Medium-Term Development Plan 2010-2014. Funding continuity in the early years of these important, new access to justice initiatives in Indonesia will prove vital as both courts and civil society adjust to new roles in providing access to justice for women, the poor and those living in remote areas.

Finally, the Medium-Term Development Plan 2010-2014 indicates that Bappenas (the National Development Planning Agency) expects that the access to justice reforms implemented in the Religious Courts will be progressively introduced in the General Courts as well. Therefore, a carefully nuanced engagement of judicial peers within the Family Court of Australia and the Religious Courts has, five years later, seen Indonesian agencies, including Bappenas and the Indonesian Supreme Court, emphasise the importance of these access to justice reforms for the Indonesian judiciary as a whole.

Australian government institutions and, in particular, the Family Court of Australia, have committed to a continued engagement with the Religious Courts to support efforts to increase access to justice for women, the poor and those living in remote areas.<sup>82</sup> This engagement will be targeted at assisting the Religious Courts to continue to roll out more services aimed at the poor across its 343 district-level courts. The

legal aid and broader access to justice agenda now being pursued within the Religious Courts over the period 2010-2014 has the potential further to transform the ability of the poor and those lacking formal education to access the courts in key personal status cases.

The work of the Religious Courts over the last five years stands as a demonstration of the potential of Islamic institutions in Indonesia to act as positive agents for reform, development and social justice. It also shows their willingness to engage with government, civil society and non-Muslim foreign institutions to achieve these objectives. Finally, and perhaps most importantly, the support provided by Australian government institutions for courts to enhance access to justice for the poor and marginalised in the world’s most populous Muslim society is a reminder to foreign donors that, contrary to common assumptions, Islamic institutions have great potential as effective partners in development assistance interventions.

## Annex

### Access to justice: empowering female heads of household in Indonesia<sup>83</sup> — key findings

**1. The reported number of female-headed households in Indonesia is underestimated.**

In 2010, the Indonesian Central Bureau of Statistics (BPS) estimated that there were 65 million households, 14% (or 9 million) of which are headed by women. The BPS definition of the head of a household currently allows for two different people to be considered as the head of a household: (i) the person who is actually responsible for the daily needs of a household; or (ii) the person who is considered the head of the household. This definition is confusing, as only one person can be named as the head of household through the BPS national survey process. It is therefore probable that there is an underestimation of the number of female-headed households in Indonesia. This has implications for policy planning and implementation for Indonesia's pro-poor poverty alleviation programs that benefit female heads of household and their families.

**2. Fifty-five per cent of the 601 PEKKA women interviewed live below the Indonesian poverty line.**

Fourteen per cent of the Indonesian population lives below the Indonesian poverty line. More than half of the PEKKA members surveyed fall within this group. If an international poverty line of US\$2 purchasing power parity was applied to this group of women, 79 % of the PEKKA members surveyed would fall under this international poverty line.

**3. One third of those female heads of household who live below the Indonesian poverty line are unable to access cash transfer schemes.**

While most PEKKA members living below the Indonesian poverty line were able to access the rice subsidy program (*Raskin*), the government cash transfer payments (*Bantuan Langsung Tunai*) made in 2005 and 2008 were more difficult for PEKKA members to obtain.

**4. One third of female heads of household living below the Indonesian poverty line were unable to access the free medical treatment program (Jamkesmas).**

This percentage increased to 48 % in West Kalimantan for those PEKKA members surveyed living under the Indonesian poverty line.

**5. Three out of every ten PEKKA members surveyed were married under the age of 16, the legal age of marriage.**

27 % of PEKKA members were married while under the age of 16, which is below the legal age for marriage in Indonesia. This increased to 49 % of PEKKA members surveyed in West Java.

**6. Less than 50 % of PEKKA members surveyed have a legal marriage.**

**7. The poorest sections of Indonesian society face significant barriers to bringing their family law cases to the courts.**

Nine out of ten PEKKA female heads of household surveyed were unable to access the courts for their divorce cases. For the poor, the cost of court fees and transportation to the nearest court is perceived as an overwhelming barrier to accessing the courts. Information and support for disadvantaged groups to navigate their way through court processes are also important, especially when combined with low levels of literacy. However, as demonstrated through the collaboration of PEKKA and the Religious Courts, the information barrier for disadvantaged groups can be overcome through the work of court information desks and collaboration with NGOs.

As mentioned, 14 % of Indonesian people live under the Indonesian poverty line. The average total cost of a Religious Court case for survey respondents was Rp 789,666 (US\$90), almost four times the monthly per capita income of a person living on or below the Indonesian poverty line.

The average total cost of a General Court divorce case in 2008 was Rp 2,050,000 (US\$230) where the party did not use a lawyer, approximately ten times the monthly per capita income of a person living on or below the Indonesian poverty line.

These costs prevent the poor from being able to bring their family law cases to the courts as required by Indonesian law.

**8. Eighty-eight per cent of PEKKA female heads of household would seek to obtain a legal divorce if the court fees were waived.**

The waiver of court fees (*prodeo*) will greatly assist those living under the Indonesian poverty line, as well as other poor clients of the Indonesian courts, who often go into debt or use several months of household income to bring a divorce case to the courts.

**9. High transportation costs are a barrier to accessing the courts, especially for the rural poor who live a greater distance from the courts.**

The cost of transportation to a court varies significantly, depending on where a party lives in relation to the court. The greater the distance to the court, the greater the transportation costs for the party. The average cost of transport for an urban PEKKA member to attend court was Rp 25,000 (US\$2.50) per return trip, while a rural PEKKA member faced an average cost of Rp 92,000 (US\$9) per return trip to the court, representing almost half the monthly income of a household living under the Indonesian poverty line.

**10. Eighty-nine per cent of PEKKA women would be more motivated to obtain a legal divorce if a circuit court was held in a nearby town.**

For the rural poor, the cost of transportation is a significant proportion of the overall cost of bringing a case to court. Transportation costs can represent 70% or more of the total cost of bringing a case to court. Bringing the court to the party would significantly reduce the costs of bringing a case to court and increase access to justice for the poor living in rural and remote areas.

**11. Overestimation of the down payment made to courts for divorce cases is a disincentive to justice seekers bringing their cases to court, particularly the poor.**

On average, clients in the six Religious Courts surveyed made a down payment of 24% more than the final cost of the case set out in the court judgment. Clients in the six General Courts surveyed made a down payment of 79% more than the final cost of the case set out in the court judgment.

The higher the down payment required, the less likely the poor will be able to bring their family law cases to court.

**12. Reimbursement of the down payment made to courts is important for all clients, but particularly for the poor.**

Greater transparency of court fees and the down payments made to courts for divorce cases would assist in building public trust and confidence in the courts.

**13. Seventy-nine per cent of PEKKA members who were able to access the courts were either satisfied or very satisfied with the service provided by the courts.**

**14. In 78% of the 264 divorces, PEKKA members identified domestic violence as a factor.**

**15. Divorce through the courts provides legal certainty for women and the poor.**

Without a legal divorce it is not possible to legally remarry. Children from subsequent marriages where there was no prior legal divorce will be unable to have their father's name on the birth certificate. This is a disincentive for many Indonesian women to obtain birth certificates for their children.

Judges and court staff and PEKKA female heads of household living under the Indonesian poverty line agree that a formal divorce through the Indonesian courts clarifies legal responsibilities for the care and financial support of both former spouses and children of the marriage.

PEKKA women find it difficult obtaining a family card listing them as the head of household without a formal divorce certificate. This document evidences their role as a female head of household and can be important in assisting them to access public services, especially those targeting the poor, such as subsidised rice programs, free health care and cash transfers.

**16. Nine out of ten court survey respondents did not consider the Indonesian legal requirement to bring divorce cases to court as the primary motivating factor for bringing their case.**

Only 11 % of Religious Court and 8 % of General Court clients surveyed chose to use the courts because it is a requirement of Indonesian law.

Of the 1,655 clients surveyed, 89 % of Religious Court and 91 % of General Court clients registered their cases in court because other non-court resolution mechanisms, such as family conciliation, had failed or because their partner had chosen to take the case to the courts.

**17. Fifty-six per cent of children of PEKKA women surveyed did not have a birth certificate. This percentage increased to 87 % of PEKKA women surveyed in Aceh.**

A cycle of non-legal marriage and divorce exists for many PEKKA female heads of household. The failure to obtain legal documentation in relation to marriage and divorce is associated with the low rate of birth certificates for children. If parents are unable to bring their birth certificate cases to the General Courts, their child's basic human right to a legal identity, as well as access to a range of social services, such as health and education, will be denied or diminished.

The government of Indonesia has placed a high priority on every Indonesian child's birth being registered by 2011. The requirement of Law 23 of 2006 that parents bring a birth certificate matter to the General Courts if they do not obtain a birth certificate for their child within one year of its birth is a significant disincentive for the poor and those living far from civil registries.

**18. Of the 601 PEKKA members surveyed, 24 % never went to school and 34 % never completed primary school.**

Forty-two per cent of PEKKA members completed primary school compared with the national average of 72 %. Fourteen per cent of PEKKA members completed junior high school compared with the national average of 41 %.

Twenty-seven per cent of PEKKA members surveyed were married under the legal age of 16. In most cases, under-age marriage prevents girls from completing the national requirement of nine years of education, as schools generally do not permit girls to continue their education once they are married.

**19. The educational attainment of dependants of PEKKA women falls well below national standards.**

- 28 % of PEKKA dependants never attend school compared with the national average of 8 %;
- 63 % of PEKKA dependants finished primary school compared with the national average of 72 %;
- 34 % of PEKKA dependants finished junior high school compared with the national average of 41 %; and
- 13 % of PEKKA dependants finished senior high school compared with the national average of 23 %.

**20. Whether a child is able to complete the mandatory nine years of education appears to be strongly linked to whether a child has a birth certificate.**

For the dependants aged ten to 19 of PEKKA members surveyed in West Java, West Kalimantan and East Nusa Tenggara, 78 % are still at school. Of these dependants who are still at school, 70 % of them have birth certificates.

**21. The cost of educating one child represents a significant proportion of a PEKKA member's average annual per capita income.**

- Educating one primary school child at a state school takes 51 % of the PEKKA member's annual per capita income.
- Educating one junior high school child at a state school takes 140 % of the PEKKA member's annual per capita income.
- Educating one senior high school child at a state school takes 178 % of a PEKKA member's annual per capita income.

These figures demonstrate that the total cost of educating a child at junior and senior high school exceeds the average per capita income in a PEKKA household that would notionally be allocated to meet the day-to-day needs of that child. For children of female heads of household, the completion of the mandated nine years of education is far from a reality.

**22. PEKKA members will educate their sons over their daughters by a factor of 3:1 if forced to make a choice because of household income constraints.**

## Notes

- <sup>1</sup> A formal Memorandum of Understanding on Judicial Cooperation exists between the Indonesian Supreme Court, the Family Court of Australia and the Federal Court of Australia: <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/international/indonesia/>
- <sup>2</sup> Art. 4(1) of Law No. 7 of 1989.
- <sup>3</sup> These figures are drawn from Directorate-General of the Religious Courts, *Buku Kerja Panitera 2008 Mahkamah Agung RI Direktor Jenderal Peradilan Agama*. Unpublished paper on file with author, 2008.
- <sup>4</sup> The terms used in Indonesia for the Arabic *shari'ah* vary greatly but the most common variant is *syariah*. Other variants include *shariat*, *syariat*, etc.
- <sup>5</sup> As a result of the creation of more regencies (*kabupaten*) and cities (*kota*) since decentralisation began a decade ago, there are now at least 75 regencies or cities without Religious Courts.
- <sup>6</sup> Law No. 6 of 2005.
- <sup>7</sup> Art. 6(1) of Law No. 7 of 1989.
- <sup>8</sup> Arts. 1(1), 49(1) of Law No. 7 of 1989.
- <sup>9</sup> Art. 49(a) of Law No. 7 of 1989 on the Religious Courts, as amended by Art. 37 of Law No. 3 of 2006.
- <sup>10</sup> Elucidation to Art. 49(2) of Law No. 7 of 1989 on Religious Justice; and Elucidation to Art. 49(a) of Law No. 3 of 2006, Section 37.
- <sup>11</sup> For more complete descriptions of these areas of jurisdiction, see also the Elucidation to Art. 49(2) of Law No. 7 of 1989 on Religious Justice, and the Elucidation to Art. 49(a) of Law No. 3 of 2006, Section 37.

- <sup>12</sup> Art. 49(b) of Law No. 7 of 1989 on Religious Justice.
- <sup>13</sup> Ibid. (Art. 49(c)).
- <sup>14</sup> Ibid. (Art. 49(d)).
- <sup>15</sup> Ibid. (Art. 49(e)). Wakaf (Arabic *waqf*): the permanent dedication by a Muslim of property, usually land, for purposes recognised by Islamic law as pious, religious or charitable.
- <sup>16</sup> Arabic *zaka* or *zakat*: charitable contribution required to be made by a Muslim in accordance with Islamic law.
- <sup>17</sup> Art. 49(f), (g) and (h) of Law No. 7 of 1989 on Religious Justice. Arabic *sadaqah* and *infaq*: voluntary charity.
- <sup>18</sup> Ibid. (Art. 49(i)). The Elucidation (or explanatory memorandum) to Art. 37 of Law No. 3 of 2006 provides that this category includes Islamic banking, Islamic microfinance, Islamic insurance, Islamic contracts, Islamic securities, Islamic pawnbroking (*penggadaian*) and 'Islamic business'.
- <sup>19</sup> These data are taken from the Supreme Court annual report for 2009, and from subsequent data provided by the statistical units of the directorates-general for the General Courts (Badilum) and Religious Courts (Badilag). Our case numbers for the General Courts exclude summary or short cases (such as traffic fines) that are heard in an expedited way by the General Courts. Heard by only one judge, these are essentially bureaucratic proceedings rather than trials. They thus require a much lower commitment of time and resources. However, uncontested cases (*permohonan*) are included in the calculation of cases to enable a more direct comparison of the caseload between the General and Religious Courts, as both jurisdictions deal with this kind of case. Until the 2007 annual report of the Supreme Court, the number of General Court cases was obscured by several million summary traffic offences that are processed in an expedited way. Traffic and other summary cases are now presented separately in the Supreme Court annual report, resulting in a clearer picture of the judicial workloads of the General and Religious Courts.
- <sup>20</sup> See Direktorat Jenderal Badan Peradilan Agama, *Himpunan Data Statistik Perkara di Lingkungan Peradilan Agama Seluruh Indonesia Tahun 2005*. Jakarta, Mahkamah Agung, Direktorat Jenderal Badan Agama, 2006, pp. 3, 269. See also e-profile documents for the Religious Courts for the years 2004, 2006 and 2007 available on the Badilag website, www.badilag.net

- <sup>21</sup> This is despite the fact that Indonesia's non-Muslim population (comprising Christians, Hindus, Buddhists and Confucians) is approximately 15% of the total population of 235 million.
- <sup>22</sup> There have been very few attempts by development assistance programs to engage with the Religious Courts. As mentioned, the Family Court of Australia has a program of cooperation with the Religious Courts under a tripartite memorandum of understanding between the Family Court, the Federal Court of Australia and the Supreme Court of Indonesia. This cooperation was funded by AusAID and facilitated by successive AusAID legal sector facilities, the Indonesia Australia Legal Reform Program, and the Indonesia Australia Legal Development Facility (IALDF). The authors were involved with these facilities in different capacities (Sumner in IALDF, Lindsey in both).
- <sup>23</sup> E-profile, Religious Courts of Indonesia 2009, Badilag, 2010.
- <sup>24</sup> The Indonesian Supreme Court received 4,974 civil cases from the General Courts in 2009, of 14,259 civil cases received by the General Courts at first instance. These figures are taken from Mahkamah Agung, *Annual Report 2009*. Jakarta, Mahkamah Agung, 2010.
- <sup>25</sup> These appeals made be made on wide-ranging grounds, pursuant to Arts. 6(2), 51(1), 6(1) of Law No. 7 of 1989 on Religious Justice. Art. 4(2) of Law No. 7 of 1989 allows the High Religious Court to send the case back to the first instance Religious Court for further examination if it thinks necessary, uphold the original decision in full or in part, or quash the decision, re-decide the case itself and alter orders as it sees fit.
- <sup>26</sup> Excluding the Constitutional Court (*Mahkamah Konstitusi*).
- <sup>27</sup> Art. 63 of Law No. 7 of 1989.
- <sup>28</sup> 703 cassation cases and 88 PK cases from over 257,000 cases received by the Religious Courts in 2009. See Mahkamah Agung, *Annual Report 2009*, p. 47.
- <sup>29</sup> This view is based on the authors' attendance at hundreds of hearings in Religious Courts across Indonesia over the last decade, and our reading of hundreds of judgments from different Religious Courts. For a different view, however, see Euis Nurlaelawati, *Modernisation, Tradition and Identity: the Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. Amsterdam, Amsterdam University Press, 2010. Nurlaelawati sees the courts as increasingly influenced more by *fiqh* and less by the *Kompilasi*.

- <sup>30</sup> The grounds of divorce listed in Art. 19 are as follows:
- (a) One party commits adultery, becomes an alcoholic, addict, gambler, or other such thing that is hard to cure;
  - (b) One party leaves the other party for 2 (two) years consecutively without the leave of that other party and without a valid reason or any other circumstance outside their control;
  - (c) One party receives a prison sentence of 5 (five) years or greater punishment subsequent to the marriage;
  - (d) One party commits an act of severe abuse or brutality that endangers the other party;
  - (e) One party incurs a physical disability or sickness that results in them being unable to fulfil their obligations as a husband/wife;
  - (f) Between husband and wife there is an ongoing conflict and disagreement and there is no more hope of living together harmoniously in the one household.
- <sup>31</sup> This can be seen, for example, from the divorce cases in the Religious Courts in 2009, of which 67% were initiated by wives. E-profile for the Religious Courts 2009. Mahkamah Agung Badilag, 2010.
- <sup>32</sup> The province was known as Daerah Istimewa Aceh (Aceh Special Region) from 1975 until the promulgation of Law on the Special Region of Aceh No. 18 of 2001, when it became known as Nanggroe Aceh Darussalam. After the promulgation of the Law on the Governing of Aceh in 2006 it reverted to 'Aceh'.
- <sup>33</sup> The spelling of 'shari'ah' in this court's name varies considerably in the literature. In the Law on the Governing of Aceh No. 11 of 2006, for example, it appears as 'Syari'yah'. The court itself, however, seems to prefer 'Syariat', although it too is not always consistent.
- <sup>34</sup> Law on the Governing of Aceh No. 11 of 2006, see especially Arts. 1.2, 1.15, 125, 128.
- <sup>35</sup> Qanun No. 3 of 2000, Qanun No. 9 of 2003; Art. 1 of Law on the Governing of Aceh No. 11 of 2006.
- <sup>36</sup> See Art. 1.15 of Law on the Governing of Aceh No. 11 of 2006.
- <sup>37</sup> Art. 4 of Qanun No. 10 of 2002; Art. 1.15 of Law on the Governing of Aceh.
- <sup>38</sup> Art. 131 of Law on the Governing of Aceh.

- <sup>39</sup> Arts. 135, 136 and 137.
- <sup>40</sup> On the current jurisdiction of the *Mahkamah Syariat* see Arts. 136(3) and (4).
- <sup>41</sup> See, for example, Art. 129 of the Law on the Governing of Aceh, which makes it clear that the new shari'ah jurisdiction is confined to the territorial boundaries of Aceh. It cannot, for example, apply to Acehnese who travel outside Aceh.
- <sup>42</sup> Pursuant to Art. 1.16 of the Law on the Governing of Aceh.
- <sup>43</sup> Abullahi Ahmed An-Na'im, Shari'a in the Secular State: A Paradox of Separation and Conflation, in *The Law Applied: Contextualizing the Islamic Shari'a, A Volume in Honor of Frank E Vogel* ed. Wolfhart Heinrichs and Bernard G. Weiss Peri Bearman. London and New York, IB Tauris, 2008 p. 322.
- <sup>44</sup> See, for example, Arskal Salim, *Challenging the secular state: the Islamization of law in modern Indonesia*. Honolulu, University of Hawai'i Press, 2008; and Marcus Mietzner, *Military politics, Islam and the state in Indonesia*. Singapore, Institute of Southeast Asian Studies, 2009.
- <sup>45</sup> Salim, *Challenging the secular state: the Islamization of law in modern Indonesia*.
- <sup>46</sup> Admittedly, the first principle or *sila* of the Pancasila is 'belief in an Almighty God', but, following An-Na'im, we see the Indonesian state as essentially secular in practice. This is true even though Indonesian politics has often been preoccupied by debate over the significance of this *sila* and extent of the state's responsibility to regulate religious belief. This debate is largely beyond the scope of this paper, but see Arskal Salim and Azyumardi Azra (eds), *Sharia and politics in modern Indonesia*. Singapore, Institute of Southeast Asian Studies, 2003; Salim, *Challenging the secular state: the Islamization of law in modern Indonesia*; Michael Feener, *Muslim legal thought in modern Indonesia*. Cambridge, Cambridge University Press, 2007; and M B Hooker and Tim Lindsey, 'Public faces of shari'ah in contemporary Indonesia: towards a national madhhab'. *Studia Islamika*, 10, 2003.
- <sup>47</sup> Sami Zubaida, *Law and Power in the Islamic World* London and New York, I.B. Tauris, 2003 p. 221.
- <sup>48</sup> An-Na'im, Shari'a in the Secular State: A Paradox of Separation and Conflation, p. 322.

- <sup>49</sup> Daniel S Lev, On the other hand, in *Fantasizing the Feminine in Indonesia*, ed. Laurie J Sears. Durham and London, Duke University Press, 1996 p. 193.
- <sup>50</sup> A small selection from this literature includes: Ibrahim Assegaf, 'Legends of the fall: an institutional analysis of Indonesian law enforcement agencies combating corruption', in *Corruption in Asia: rethinking the governance paradigm*. Tim Lindsey and Howard W Dick (eds), Annandale, NSW, Federation Press, 2002; Simon Butt, 'The Constitutional Court's decision in the dispute between the Supreme Court and the Judicial Commission: banishing judicial accountability?', in *Indonesia: democracy and the promise of good governance*. R H McLeod and A J MacIntyre (eds), Indonesia Update Series, Singapore, Institute of Southeast Asian Studies, 2007; Stewart Fenwick, 'Measuring up? Indonesia's Anti-Corruption Commission and the new corruption agenda', in *Indonesia: law and society*. Tim Lindsey (ed), Annandale, NSW, Federation Press, 2008; Gary Goodpaster, 'Reflections on corruption in Indonesia', in *Corruption in Asia: rethinking the governance paradigm*. Tim Lindsey and Howard W Dick (eds), Annandale, NSW, Federation Press, 2002; Indonesian Corruption Watch, *Menyingkap Tabir Mafia Peradilan (Hasil Monitoring Peradilan ICW)*. Jakarta, Indonesian Corruption Watch, 2001; Daniel S Lev, 'Judicial authority and the struggle for an Indonesian Rechtsstaat'. *Law & Society Review*, 13, 1978; Daniel S Lev, 'Between state and society: professional lawyers and reform in Indonesia', in *Indonesia: law and society*. Tim Lindsey (ed), Leichhardt, NSW, Federation Press, 2008; and Sebastiaan Pompe, *The Indonesian Supreme Court: a study of institutional collapse*. Ithaca NY, Southeast Asia Program, Cornell University, 2005.
- <sup>51</sup> Daniel S. Lev. *Comments on the judicial reform program in Indonesia*. Prepared for the 2004 Seminar on Current Developments in Monetary and Financial Law, International Monetary Fund, Washington, D.C., 3 June 2004: <http://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/lev.pdf>. p. 2.
- <sup>52</sup> For more information on the early blueprints, see Rifqi S Assegaf, 'Judicial reform in Indonesia, 1998-2006', in *Reforming laws and institutions in Indonesia: an assessment*. Naoyuki Sakumoto and Hikmahanto Juwana (eds), ASEDIP (Joint Studies on Economic Development Policies in ASEAN and Neighboring Countries), Ciba, Japan, Institute of Developing Economies/ Japan External Trade Organization, 2007. For more recent blueprints, see

- [www.mahkamahagung.go.id/rnews.asp?bid=1712](http://www.mahkamahagung.go.id/rnews.asp?bid=1712)
- <sup>53</sup> Asia Foundation and A C Neilson. *Survey report on citizen's perceptions of the Indonesian justice sector: preliminary findings and recommendations* Asia Foundation and A C Neilson, 2001
- <sup>54</sup> *Dewan Perwakilan Rakyat*, People's Representative Assembly.
- <sup>55</sup> Specifically, it rated 22 for this criterion, while the General Courts were rated 13.
- <sup>56</sup> Conduct of research for this survey involved the Family Court of Australia, as well as a number of other institutions and individuals in Australia and Indonesia. These are listed in full in Cate Sumner, *Providing justice to the justice seeker: a report on the Indonesian Religious Courts Access and Equity Study 2007-2009: summary of research findings*. Jakarta, Mahkamah Agung and AusAID (IALDF), 2010.
- <sup>57</sup> M. Cammack, Young, L. and Heaton, T., The State, Religion and the Family in Indonesia, in *Family, Religion and Social Change in Diverse Societies* ed. Sharon K. Houseknecht and Jerry G. Pankhurst. New York, Oxford University Press, 2000.
- <sup>58</sup> Art. 24 (as amended): '1. The judicial power is the independent power to maintain a system of courts with the objective of upholding law and justice. 2. The judicial power is exercised by a Supreme Court and the courts below it in the respective jurisdictions of general courts, religious courts, military courts, administrative courts and by a Constitutional Court'
- <sup>59</sup> In fact, this ministry's Indonesian name was the Ministry for Judicial Affairs (*Kehakiman*) rather than 'Justice' (*Keadilan*).
- <sup>60</sup> See Art. 24, 1945 Constitution; Law No. 35 of 1999 (the *Satu Atap* or 'One Roof Law'); Law No. 5 of 2004 on the Supreme Court; and Law No. 3 of 2006 Amending the Religious Judiciary Law No. 7 of 1987. On the constitutional amendment process and the creation of a *trias politika* ('political triad') or separation of powers system, see, for example, Denny Indrayana, *Indonesian constitutional reform 1999-2002: an evaluation of constitution-making in transition*. Jakarta, Kompas Book Publishing, 2008; Bivitri Susanti, Neoliberalism and its resistance in Indonesia's constitution reform: 1999-2002. Unpublished Master of Law Thesis, University of Warwick, 2002; and Tim Lindsey, 'Indonesian constitutional reform: muddling towards democracy'. *Singapore Journal of International and Comparative Law*, 6 (1), 2002.

- <sup>61</sup> Cate Sumner, *Providing justice to the justice seeker: a report on the Indonesian Religious Courts Access and Equity Study – 2007: summary of research findings*. Jakarta, Mahkamah Agung and AusAID (IALDF), 2008 ([www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/international/indonesia/](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/international/indonesia/)); Cate Sumner, *Providing justice to the justice seeker: a report on the Indonesian Religious Courts Access and Equity Study – 2007-2009: summary of research findings*. Jakarta, Mahkamah Agung and AusAID (IALDF) 2010; and Cate Sumner, *Access to justice: empowering female heads of household in Indonesia*. PEKKA and AusAID, 2010 ([www.pekka.or.id](http://www.pekka.or.id)).
- <sup>62</sup> To achieve these research objectives it was necessary to look at the question of access and equity in the Indonesian courts from four different perspectives, as follows: (i) clients accessing the courts were asked for their perceptions of the level of service received when bringing their cases to the court; (ii) members of the legal profession were asked for their perception of the level of service provided to their clients and themselves; (iii) case files kept by courts in family law cases were reviewed to gather data relating to key client service issues, such as the cost of court fees and the average number of times parties were required to come to court for their cases; and (iv) female heads of household in the PEKKA NGO (most of whom live below the Indonesian poverty line) were interviewed to test whether disadvantaged groups in Indonesia were able to access the courts for their family law and birth certificate cases.
- <sup>63</sup> The poverty line for urban dwellers is Rp 222,123 (US\$25). For those living in villages it is Rp 179,835 (US\$20). In March 2009, 32.5 million people or 14% of the Indonesian population lived below the Indonesian poverty line.
- <sup>64</sup> Members of *Pemberdayaan Perempuan Kepala Keluarga* (PEKKA), an NGO supporting the empowerment of female heads of household in Indonesia and a partner in the Access and Equity Study (see footnote 53).
- <sup>65</sup> BPS defines the head of household as a person who is responsible for the daily needs of a household or the person who is considered the head of the household. A head of a household can be either a man or a woman who is single, married, divorced or widowed. It is likely that there is an underestimation of the number of female-headed households in Indonesia. Badan Pusat Statistik (BPS) *Women and Men in Indonesia 2008*, Jakarta,

- BPS 2009 p 19; Wendy Hartanto *The 2010 Indonesia Population Census*, Jakarta, Statistics Indonesia/BPS, 2010
- <sup>66</sup> UNICEF, Overview – Birth Registration for all, [www.unicef.org/indonesia/protection\\_2931.html](http://www.unicef.org/indonesia/protection_2931.html)
- <sup>67</sup> See Art. 6(1) of the Law on the National Education System No. 20 of 2003. Badan Pusat Statistik (BPS) *Survei Sosial dan Ekonomi Nasional (Susenas) 2008* Jakarta, BPS, 2008
- <sup>68</sup> Badan Pusat Statistik (BPS) *Survei Sosial dan Ekonomi Nasional (Susenas) 2008* Jakarta, BPS, 2008.
- <sup>69</sup> Asian Development Bank, *Enhancing the Fight Against Poverty in Asia and the Pacific: The Poverty Reduction Strategy of the Asian Development Bank*. Asian Development Bank, 2004 pp. 12, 42.
- <sup>70</sup> For an example of an individual Religious Court website, see PA Kendari at [http://pa-kendal.net/index.php?option=com\\_content&task=view&id=112&Itemid=56](http://pa-kendal.net/index.php?option=com_content&task=view&id=112&Itemid=56)
- <sup>71</sup> At pp. 42 and 210 respectively.
- <sup>72</sup> The Religious Courts' budget to waive court fees and hold circuit courts was less than Rp 1 billion in 2007 and increased to Rp 24 billion in 2008.
- <sup>73</sup> The Religious Courts reported this data via SMS and it was then transmitted to a database that compiled reports for the Religious Court system as a whole. SMS has the benefit of being both an inexpensive and appropriate technology for use across the country and it avoids some of the difficulties of internet access in remote Indonesian provinces.
- <sup>74</sup> Law No. 48 of 2009 on Judicial Authority, Arts. 56 and 57; Law No. 49 of 2009 on Amendment of Law No. 2 of 1986 on the General Courts (Art. 68); and Law No. 50 of 2009 on Amendment of Law No. 7 of 1989 on the Religious Courts (Art. 60).
- <sup>75</sup> Bappenas, *National Access to Justice Strategy*. (Jakarta: Bappenas, 2009). pp. 2-3.
- <sup>76</sup> On this see, for example, Noor Aisha Abdul-Rahman, 'Traditionalism and its impact on the administration of justice: the case of the Syariah Court of Singapore'. *Inter-Asia Cultural Studies*, 5(3), 2004. Abdul-Rahman describes the Singapore Syariah Court as 'traditionalist', 'rigid', 'dogmatic' and generally unconcerned with the effects of its decisions. She says it considers reform 'irrelevant'.

- <sup>77</sup> Enacted through Presidential Regulation No. 5 of 2010, concerning the National Medium-Term Development Plan (RPJMN) 2010–2014.
- <sup>78</sup> Supreme Court Circular Letter No. 10 of 2010 on Guidance for the Provision of Legal Aid.
- <sup>79</sup> [www.mahkamahagung.go.id/rnews.asp?bid=1712](http://www.mahkamahagung.go.id/rnews.asp?bid=1712)
- <sup>80</sup> Supported by Australia Indonesia Partnership funding through the Australian Agency for International Development (AusAID).
- <sup>81</sup> Funding for the AusAID research and judicial cooperation activities totalled less than half a million dollars over five years. The government of Indonesia committed funds in 2008–2009 for the Religious Courts and for 2010–2014 for both the General and Religious Courts that total Rp 335 billion (US\$37 million).
- <sup>82</sup> ‘Australia supports access to justice in Indonesia’, AusAID website: [www.ausaid.gov.au/hottopics/topic.cfm?ID=3404\\_1753\\_8918\\_3872\\_7130](http://www.ausaid.gov.au/hottopics/topic.cfm?ID=3404_1753_8918_3872_7130) (accessed 6 October 2010).
- <sup>83</sup> The full report can be accessed at [www.pekka.go.id](http://www.pekka.go.id) and [www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/international/](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/international/)

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