

THE ROLE OF SHARIA JUDGES IN INDONESIA: BETWEEN THE COMMON LAW AND THE CIVIL LAW SYSTEMS

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Abstract:

This article seeks to analyse the role of Religious Courts' (Pengadilan Agama or PA) Judges in the formation of Islamic law in Indonesia. As part of the civil legal system, PA Judges are bound by legal provisions in handling legal disputes in court. They must apply the applicable legal provisions to decide upon a case. This condition can also be understood from the aspect of appointment of judges in Indonesia, including PA Judges, which is conducted not through professional career path as in the common law system. Thus, they are appointed from a new graduate of law/sharia faculty and then trained, inter alia, to apply and/or interpret applicable laws (legislation); and not to make the law itself. However, on the basis of secondary data analysis, studies on the ijthad of PA Judges reveal that they are no longer only fixated on the provisions of statutes in deciding cases. They also make laws, cases in point are the Compilation of Islamic Law (KHI) and the Compilation of Sharia Economic Law (KHES), do ijthad on the books of fiqh which became the basis for the drafting of Islamic legislation in Indonesia. Some of them even do direct ijthad from Sharia sources, namely the Qur'an and Hadith. This condition is arguably more in accordance with the character of judges (qadis) in Islamic history which on a certain level similar to the role of judges in common law system.

Keywords: Sharia Judges' Role, Legal Profession, Bureaucracy, Common Law System, Civil Law System

Abstrak:

Artikel ini berusaha untuk menganalisis peran hakim Pengadilan Agama dalam pembentukan hukum di Indonesia. Sebagai bagian dari sistem Civil Law, hakim PA terikat dengan ketentuan hukum dalam menangani masalah di pengadilan. Mereka harus menerapkan ketentuan-ketentuan hukum yang berlaku untuk memutus suatu perkara. Kondisi ini bisa dipahami juga dari aspek pengangkatan hakim di Indonesia, termasuk hakim PA, yang dilakukan melalui jalur karir tidak jalur professional seperti di sistem Common Law. Sehingga, mereka diangkat dari lulusan baru fakultas hukum/syariah dan kemudian dilatih, antara lain, untuk menerapkan dan/atau menafsirkan hukum yang berlaku (peraturan perundang-undangan); dan bukan untuk membuat hukum itu sendiri. Meskipun begitu, berdasarkan analisis data sekunder, kajian-kajian terhadap ijthad hakim PA, hakim PA tidak lagi hanya terpaku pada ketentuan peraturan perundang-undangan dalam memutus perkara. Mereka juga membuat hukum, contohnya KHI

dan KHES, melakukan *ijtihad* terhadap kitab-kitab *fiqh* yang menjadi dasar penyusunan peraturan perundang-undangan Islam di Indonesia. Sebagian dari mereka bahkan melakukan *ijtihad* langsung dari sumber Syariah, yaitu *al-Qur'an* dan *Hadis*. Kondisi ini menurut penulis lebih sesuai dengan karakter hakim (*qadi*) dalam sejarah Islam yang pada tataran tertentu mirip dengan peran hakim di sistem *Common Law*.

Kata Kunci: Peran Hakim Pengadilan Agama , Profesi Hukum, Birokrasi, Sistem *Common Law*, Sistem *Civil Law*

A. Introduction

In terms of the process of becoming a judge, a considerable distinction exists between the common law systems and the civil law systems. There is a long process to qualify as a judge in the common law that make the invitation to the Bench or appointment is rarely granted before the age of 40.¹ Before this, one must have a successful career in the legal profession, e.g. as a barrister or a solicitor in Australia, if he/she wants to become a judge.² Hence, being a judge in the common law systems is not a matter of choice per se; rather, it is also about one's capability in the legal field. Conversely, judgeship in civil law countries is subject to career preference. Law graduates can apply via the state recruitment if they prefer to become a judge in their professional careers and serve as a government employee instead of working for a law firm as a lawyer.³

Thus, the judge in the common law system is a highly skilled lawyer who not only knows how to apply the law into a case but also makes the law itself by its verdict.⁴ Meanwhile, judges in the civil law system initially are new graduates of law faculty who are appointed and subsequently trained as judges. In practice, judges in the civil law system apply only the applicable legal provisions to the cases in which they are engaged. Their verdict is not considered a source of law. In deciding cases, judges are not bound by previous judge's decision but they are bound by the laws and regulations made by the state.

Given these differences, it is interesting to see the role of judges of religious courts in Indonesia. Judges of Religious Courts (hereinafter PA Judges) handle Islamic legal cases. State laws concerning substantive Islamic law in Indonesia are limited in number and mostly related to family law. Indonesia has the Compilation of Islamic law but it is perceived to be problematic in terms of formal legal basis in the hierarchy of Indonesian laws as well as in terms of substance since Muslims in Indonesia still make *fiqh* an Islamic legal reference

¹ Mary Ann Glendon, Paolo Carozza, and Colin Picker, *Comparative Legal Traditions: Text, Materials and Cases on Western Law*, 3 edition (St. Paul, MN: West, 2006), 590.

² Catriona Cook, *Laying down the Law*, 5th ed (Sydney : Butterworths, 2001), 27–29, <http://trove.nla.gov.au/version/45507077>.

³ George E Glos, *Comparative Law* (Littleton, Colo: Fred B. Rothman, 1979), 28.

⁴ Especially in the case of tort or a wrongful act which is committed by a person that unfairly harm other persons who then suffer losses or losses that cause legal liability for the person who committed the wrongful act.

authority instead of Islamic state laws.⁵ With the expansion of religious jurisdiction to solve the sharia economic dispute, there has also been a legal vacuum in the field of sharia economy.⁶ Then, does the role of PA Judges still fit within the framework of the aforementioned comparative legal theory? In the classical period of the development of Islamic law, *qadi* (Arabic: judge) also do not simply apply the laws written by the eponyms of the schools of Islamic law. They also do *ijtihad* to seek a fair ruling on the case being handled. Some of them also reached the highest level in the development of Islamic law as author jurist or juris consult. Given this, what kind of role is more appropriate for judges of religious courts in the Indonesian legal system that embraces civil law system?

To this ends, this article first explain the relationship between the judge to the legal profession and bureaucracy in the common law systems and the civil law systems. It will look at the history of the emergence of legal profession as well as judges' selection as the starting point of difference between the common law and civil law system. Then, the article compares the historical account with the contemporary practice of the judges' appointment in both legal systems. Next, the resultant differences of the practice in both legal systems will be discussed and will be contextualized in the case of judges of religious courts (hereinafter PA judges) in Indonesia. This article adopts a conceptual approach of legal professions in world legal tradition (common law, civil law, and Islamic law) in assessing the role of PA Judges in the civil law system of Indonesia. It uses secondary legal sources, namely results of empirical legal research that have been published in the form of books and journal articles, to substantiate the argument of what role has been and should be played by PA Judges considering the legal system of Indonesia.

B. Judicial Profession and Bureaucracy: Common Law vis-à-vis Civil Law System

Compared to other major legal systems in the world, the common law systems are more recently developed. The period of its formation was dating back between the 12th and 14th centuries,⁷ and originally it was not concerned about substantive law. Instead, the early common law was a product of British royal government administration which, centuries after the Norman Conquest, became more centralised and specialised.⁸

At first, there was no separation power of government affairs in early England. The King, who was advised by Curia Regis, exercised judicial power

⁵ Alfitri, "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia," *Asian Journal of Comparative Law* 10, no. 2 (December 2015): 191–212, doi:10.1017/asjcl.2016.1.

⁶ Alfitri Alfitri, "Whose Authority? Interpreting, Imposing, and Complying with Corporate Zakat Obligations in Indonesia" (Thesis, 2015), <https://digital.lib.washington.edu:443/researchworks/handle/1773/33993>.

⁷ Patrick Parkinson, *Tradition and Change in Australian Law*, 2013, 62; C. G Weeramantry, *An Invitation to the Law* (Pannipitiya: Stamford Lake, 2009), 43.

⁸ S.F.C Milsom, *Historical Foundation of the Common Law* (London: Butterworths, 1981), 11.

and at the same time also acted as the executive as well as the legislature.⁹ The King himself initially went throughout the country to resolve disputes, and later, he sent judges out in his place. There had existed local courts throughout the British Empire at that time, known as the counties and the hundreds.¹⁰

This situation, then, gave rise to the idea of consolidating the existing courts into central administration by the King. This step was taken by Henry II, and it is deemed as the first formation of the common law court.¹¹ Through the General Eyre, Henry II regularly sent the prominent judges in the King's court (the Curia Regis) to dispense the King's justice to the citizens.¹² There were two kinds of matter handled by this itinerant justice: tax disputes between the citizens and the King which were processed in the Court of Exchequer, and common disputes among citizens which were litigated in the Court of Common Pleas.¹³ Since this step was taken by Henry II, judges as the royal servant routinely carried out their task in the General Eyre.

Likewise, the King was also still itinerant. While he was elsewhere, some judges would stay at the Palace in Westminster.¹⁴ Given this situation, Henry II, thus, developed a central royal court in the 12th century, 'the Bench', and by the beginning of the 14th century, the three courts (the Court of Exchequer, the Court of Common Pleas, and the Bench) sat at Westminster.¹⁵ From this time, the creation of a corps of professional judges was begun in the common law systems.

There were disadvantages, however, that arose from centralisation of courts in Westminster. The litigants who lived in remote areas had difficulties utilizing the court services, either in Westminster or the itinerant King's Bench.¹⁶ Further, the use of juries to resolve matters brought to the courts led to complex problems of combining central justice and local knowledge. The juries had to be people who were familiar with the case, and this meant they had to be called from the area where the case emerged.¹⁷

These problems were resolved by establishing the writs system. The King issued an instruction to the sheriff to investigate the dispute, bring the defendant to the court, empanel the jury and so forth.¹⁸ The function of jury in this writs system was to decide the case whilst the judge would decide whether the case brought by the plaintiff fell within the right writ; failure to do so would cause the plaintiffs' suit to be refuted by the court.¹⁹

The enormous development of the system of writs, the complexity of choosing the correct writ, and the problem of distance for the litigants gave rise to

⁹ Glendon, Carozza, and Picker, *Comparative Legal Traditions*, 440.

¹⁰ Parkinson, *Tradition and Change in Australian Law*, 64–65.

¹¹ Weeramantry, *An Invitation to the Law*, 440–41.

¹² Parkinson, *Tradition and Change in Australian Law*, 65–66; Weeramantry, *An Invitation to the Law*, 43–44.

¹³ Glendon, Carozza, and Picker, *Comparative Legal Traditions*, 440–41.

¹⁴ *Ibid.*, 440; Parkinson, *Tradition and Change in Australian Law*, 66.

¹⁵ Parkinson, *Tradition and Change in Australian Law*, 67.

¹⁶ Cook, *Laying down the Law*, 27.

¹⁷ Parkinson, *Tradition and Change in Australian Law*, 67–68.

¹⁸ H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 2014.

¹⁹ *Ibid.*

the emergence of lawyers who would give professional assistance to the parties. Among the lawyers, there were ‘attorneys’ who represented the litigants before the courts, and ‘serjeants at law’ in the court of common pleas.²⁰ As litigation increased, there appeared ‘barristers’ who specialised in oral pleading.²¹ Initially, judges had to come from the ‘serjeants at law’ before they were appointed to the bench,²² and later they came from the Queen’s or King’s Counsel who were competent lawyers (barristers) that had achieved senior rank within the common law systems.²³ Thus, the close relationship between the judges and the legal profession has occurred since the beginning history of this legal system. This is because the prominent lawyers (serjeant at law and barristers-at-law) would advance their careers in judgeship.

As a matter of history, the judges’ corps in the civil law systems dates back to Roman law, stretching from the Twelve Tables (c. 450 BC) to the Justinian compilations (c. 534 AD).²⁴ The Twelve Tables was a collection of rules, a written text of the Roman customary law. These rules were used personally by the Roman citizens to settle disputes arising among them.²⁵ Initially, should the citizens be unable to settle their disputes, they had to appear before a magistrate;²⁶ later, in the republic era, they would refer to a private citizen or group of private citizens which were chosen by the parties and the magistrate.²⁷ This single jurymen who was called *iudex* would serve as a judge: he investigated the facts, heard both parties’ arguments as well as witnesses’ testimony, and delivered his judgement over the dispute.²⁸

As Rome expanded, there emerged a need for a special magistrate, i.e. the praetor (established in 367 BC) which was exclusively responsible for administration of justice. He did this specifically with respect to matters in the actual trial by issuing a *formula*.²⁹ It was with this *formula*, then, the *iudex* laid down the decision of the dispute since the *formula* was the basis of instructions for the *iudex* to follow in the courts.³⁰

Historically, the judge in the civil law systems was not a person who specialised in law because the *iudex* was an ordinary citizen who was appointed to run an arbitral function by deciding disputes according to the *formula*.³¹ The *iudex*

²⁰ Cook, *Laying down the Law*, 27–28.

²¹ *Ibid.*, 28.

²² Cook, *Laying down the Law*.

²³ D. J Gifford, *Understanding the Australian Legal System* (Sydney: Cavendish Pub. (Australia), 1997), 68; Francis Kevin Heathcote Maher, Peter Louis Waller, and David P Derham, *Derham, Maher and Waller an Introduction to the Law*. (Sydney: The Law Book Co., 1991), 46.

²⁴ Glendon, Carozza, and Picker, *Comparative Legal Traditions*, 44.

²⁵ Peter Gonville Stein and Cambridge University Press, *Roman Law in European History* (Cambridge; New York: Cambridge University Press, 2013), 3–4.

²⁶ *Ibid.*

²⁷ *Ibid.*, 4.

²⁸ *Ibid.*, 4–5.

²⁹ *Ibid.*, 8–9.

³⁰ Glenn, *Legal Traditions of the World*, 208.

³¹ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford, Calif.: Stanford University Press, 2007), 35.

had no expertise in law and maintained very limited power because his authority came from the praetor *formula* and his action was circumscribed within its terms.

³² Moreover, in difficult cases, the *iudex* sought legal advice from the *jurisconsults*, a class of men who specialised in law.³³

As the *formula* system became more technical, the advent of *jurisconsults* in ancient Roman law was a solution. The actors in the judicial system (the praetor, the *iudex* and the advocates who represented the parties) were not trained in the law but they needed help in undertaking their functions.³⁴ By the end of the late Republic (c. 1st BC), the *jurisconsults* had monopolized the technical information and legal experience, and they became the first professional lawyers in the civil law systems.³⁵

During the Imperial period, as the government became more bureaucratic, the legal procedure was bureaucratized by replacing the *formula* procedure with *cognitio* procedure which was characterised by appointment of people as state employees who were learned in law (professional judges).³⁶ However, it was the *jurisconsults* who played a significant role in shaping the civil law systems, inasmuch as they laid down the principles, the *Corpus Juris Civilis* of Justinian. The *iudex*, on the other hand, just applied principles into specific cases.³⁷ Hence, there was separation between the judicial profession (judges) and legal profession (*juris consults*) in the history of the civil law systems. Judges were part of bureaucracy who were appointed by the state. They functioned simply to apply the rule of law of the state which were developed by the *juris consults*.

C. Current Judges' Appointment: How Different are PA Judges?

The practice of appointing judges from the people who have endured professional legal careers continues in the common law systems. Usually, judges are appointed from the barristers-at-law.³⁸ Barristers and solicitors are two branches of the legal profession which give legal services but have different functions. As lawyers, solicitors help people with litigation, business transactions, or just to get legal advice.³⁹ If a claim proceeds to court, it is the job of barristers to assist the litigants, as they are the advocates who will argue the case in courts.⁴⁰ Despite this difference, both barristers and solicitors are inter-connected because people can not go directly to barristers. If they want to litigate they have to appear before the solicitor' office first, which then delivers their legal problems to the barrister. Further, barristers are employed and paid by the solicitors inasmuch as it is the solicitors who collect the fees from clients.⁴¹

³² *Ibid*, and Stein, *Roman Law ...*, 9.

³³ Glendon et. al, *Comparative ...*, 44.

³⁴ Stein, *Roman Law ...*, 13.

³⁵ Glendon et. al, *Comparative ...*, 44-45.

³⁶ Stein, *Roman Law ...* 24, and Merryman, *The Civil Law ...*, 35.

³⁷ See *Ibid.*, 35, and Glendon et. al., *Comparative ...*, 45

³⁸ Recently in Victoria (Australia), the County Court and the Supreme Court judges come from among the solicitors as well; see Waller, *Derham ...*, 49.

³⁹ Gifford, *Understanding ...*, 67.

⁴⁰ Waller, *Derham ...*, 46.

⁴¹ See Gifford, *Understanding ...*, 67 and Waller, *Derham ...*, 46.

Barristers are divided into junior barristers and senior barristers. Senior barristers might be invited to the judiciary, the Bench, as the culmination and acknowledgement of their outstanding legal career. For instance, a barrister might be appointed as a judge in the magistrate's court only after at least five or ten years service as a barrister. Upper levels (county courts) require more seniority; and the High Courts and Supreme Courts are exclusively for Queen's Counsels, in honour of their eminence in the Bar (barristers' organization).⁴² All the selections involved in these judges' appointments are made by members of legal professions: i.e. judges in the Bench, the bar and judges' candidate (barristers). Then the selected barristers are formally appointed by the sovereign.⁴³ This, in turn, depicts the inter-relation of judges, the legal professions and bureaucracy in most common law systems.

Unlike the practices in common law systems, the civil law judges enter the judiciary as career judges, and this option has to be made from the earliest stages of the law graduates' professional lives.⁴⁴ There are other legal professions besides judges which can be chosen, such as public prosecutors, government lawyers, advocates or notaries; but once the decision has been taken, the law graduates will live with these careers forever. Mobility is very rare, unless the 'movers' are willing to accept losing seniority and income from their transfer.⁴⁵

The impracticality of career transfer is not only due to the aforementioned reasons, but also because of the different structure of judges' career (as well as public prosecutors' and government lawyers' careers) in the civil law systems. Judges are civil servants, thus, entry to the judiciary is made by following civil servant recruitment in the Ministry of Justice [the Supreme Court in Indonesia].⁴⁶ If the applicants succeed in their testing, they will become junior judges in the lower courts. Prior to being in charge of tribunals, they usually have to undertake a course of judges' training.⁴⁷

The advancement of the junior judges' career will depend on their merits/abilities and seniorities.⁴⁸ Thus, the process of judges' promotions in the civil law system is bureaucratic and separate from other legal professions. Judges, as well as public prosecutors and government lawyers, are civil servants and they have their own scheme and schedule of career promotion which is established by the government. Previous experiences as lawyers, advocates or notaries will not be counted as value-added to judges' career advancement. Besides, as mentioned above, transfer careers are unlikely to happen.⁴⁹ Thus, it can be argued that in the civil law systems judges only have relationships with the bureaucracy.

The Religious Courts in Indonesia are heavily influenced by the civil law system. As in other civil legal systems, religious court judges are mostly recruited

⁴² Glos, *Comparative ...*, 768.

⁴³ *Ibid.*

⁴⁴ Weeramantry, *An Invitation ...*, 51.

⁴⁵ Glos, *Comparative ...*, 768; Weeramantry, *An Invitation ...*, 51

⁴⁶ Merryman, *The Civil Law ...*, 35.

⁴⁷ See *ibid* and Glos, *Comparative ...*, 768.

⁴⁸ Merryman, *The Civil Law ...*, 35, 103.

⁴⁹ *ibid*, 101-108.

from among new Sharia faculty/law graduates. The regular recruitment process is undertaken by the Supreme Court with certain candidate selection criteria (e.g. having maximum GPA out of 4.00 and graduating from accredited A and/or B Sharia/Law school). If applicants pass the recruitment tests, they will follow a judicial training program by the Supreme Court. After enduring the training period, a period of probation, they will formally be appointed to the position of judge by the president. Recruiting judges from new university graduates requires candidates to be trained in the practical skills involved in legal practice. However, while PA judge training is intended to develop and deepen their practical skills and legal knowledge, the pre-service training curriculum does not adequately complement judges to engage in more open regulatory interpretations. Most instruction in pre-designation training only reinforces what is being studied at the university. The number of new subjects newly introduced in the judicial training program is mostly related to court management or other technical issues.⁵⁰ In terms of appointment, hence, PA Judges are not different from their compatriots in the civil law system.

D. Resultant Difference: Are PA Judges Inferior than the Common Law System Judges?

Taken the historical accounts and contemporary practice together, it is apparent that there is a clear-cut division among legal professions in the civil law countries. This is because once law graduates have decided what they would like to be after completing education in law, they will retain the same career in order to be able to attain the highest level of their specialisation. Movement from one profession to another is unlikely because each legal profession in the civil law system requires functioning in the context of a lifetime of specialisation. Additionally, some legal professions – judges, public prosecutor and government lawyers – are part of government bureaucracy which has their own scheme of career advancement that requires early embarkation to the chosen professions.

On the other hand, a close relationship among legal professions – solicitors, barristers, and judges – can be seen in the common law systems. Even though there is a functional distinction between solicitors and barristers, and judges are invited from the senior barrister at law, the solicitors and barristers are interconnected in the process, because a barrister may only be employed by a solicitor to handle the litigation. In addition, in some places such as Victoria, there is a tendency to minimize the different function between solicitors and barristers, and a prominent solicitor can also be invited to be a judge. Hence, as clearly argued by Weeramantry, this situation creates a close and strong relationship of legal professions in the common law systems, as opposed to their counterparts in the civil law systems who are deprived of their collective strength since they are compartmentalised and fragmented.⁵¹

⁵⁰ Euis Nurlaelawati and Abdurrahman Rahim, "The Training, Appointment, and Supervision of Islamic Judges in Indonesia," *Pacific Rim Law and Policy Journal* 21, no. 1 (2012): 63–64.

⁵¹ *Ibid*, 51.

Likewise, the existence of a different judicial tradition, historically, causes further differences in the status of judges between the common law systems and the civil law systems. In the common law systems, judges are leading figures who gain public reputation through great cases which they have decided.⁵² The original creation and the development of common law tradition through legal reasoning and the doctrine of binding precedent lies entirely in the judges' hands.⁵³ Judges in the civil law systems, on the other hand, keep a 'low profile.' Unlike the common law systems, it is the jurisconsults who laid down the legal principles upon which judges in the civil law systems make their decisions.⁵⁴

Today, this different status also stems from the trial process which is employed by each legal system, adversarial versus inquisitorial. Adversarial judges become more authoritarian and remote than inquisitorial judges.⁵⁵ The former write an elaborate judgement under their names while the latter tend to produce collective judgements of the whole court which, in turn, keep them at a low profile.⁵⁶

Given these differences, however, it can not be said that in terms of qualification judges in the civil law systems are inferior to judges in the common law systems. Considering the career advancement, in fact, both systems are concerned about choosing the right person to the right position. In the common law systems, the career advancement of judges is based on a principle that eligibility for appointment to higher tribunals is only for judges of lower courts, and judges must have risen through the entire court hierarchy before they can sit on the highest court.⁵⁷ Similarly, in the civil law system, young judges who sit in the limited jurisdiction in their first careers will get promotion to a judgeship in a general jurisdiction court, and they may occupy a position in the appellate and final resort courts as their merits and seniorities increase.⁵⁸ Thus, these systems ensure that only qualified and experienced judges will ascend to high and important judicial posts in the common law systems and the civil law systems.⁵⁹

With regards to PA Judges in Indonesia, Nurlaelawati and Rahim argue that their quality has also improved. Many PA Judges now hold a master of laws degree, and even doctoral degree in law or sharia, and most judges who hold only an undergraduate law degree are pursuing post-graduate education. As per data of the Directorate of Religious Courts in 2009, there were 842 first instance judges, or 28%, who had master's degrees and five had doctorates; more than half of all appeals court judges—196, or 54%, had earned advanced degrees.⁶⁰ The quality of PA Judges are also further strengthened through in-service training programs organized by the Supreme Court or other bodies and foundations concerned with the development of the Islamic judiciary in Indonesia in order to developed the

⁵² *Ibid*, 50.

⁵³ Merryman, *The Civil Law ...*, 34.

⁵⁴ Weeramantry, *An Invitation ...*, 50.

⁵⁵ *Ibid*, 186.

⁵⁶ *Ibid*.

⁵⁷ Glos, *Comparative ...*, 768.

⁵⁸ *Ibid*, 28.

⁵⁹ *Ibid*, 28, 768.

⁶⁰ Nurlaelawati Rahim, "The Training ...," 50.

capacity of judges and equip the courts to address contemporary problems.⁶¹ A case in point is the program on gender sensitivity held by the Asia Foundation which collaborated with a number of non-governmental institutions and women's groups, and with the full cooperation and support of the Supreme Court. This program designed to enhance judges' sensitivity to the impact of the law on women, and therefore, produce judgments that provide justice to both male and female litigants.⁶² The impact of this program can be seen in PA Judges' verdicts which are no longer limited to the provision of law; they also consider such principles of Sharia as *maslaha* (consideration of public welfare) which deduced from the Islamic jurisprudence (*fiqh*) and, even, from al-Qur'an and Hadith.

E. Current PA Judges' Role: Finding the rule or Making the law?

There are four legal profession in Islamic legal history, namely: *musannif* (author jurists), *mufti* (juris consults), professor of shari'a, and *qadi* (judges). In his study on the role of these four legal professions from the formative period to pre-modern period (7th C. – 18th C.), Hallaq finds that it was the juris consults and the author-jurists who adapted Islamic law to meet the demand of new circumstances. Professors, and the sharia judges alike, was not involved in legal change because this was not part of their roles, namely to teach law students and/or write condensed works for their students' benefit. When they engaged in articulating a legal reaction to social changes, they did not carry out this task in their capacity as a professor qua professor but more as an author-jurist or jurist consult.⁶³ Hallaq also argues that the roles of these four legal professions rarely stood independently of each other because an Islamic jurist might become a sharia judge but at the same time also a juris consult and/or an author-jurist and/or a professor at sharia. After the eight century, a complete Islamic jurist career was determined by the success of fulfilling all these roles. Ability to reach the level of author jurist, followed by a juris consult, is deemed as the highest achievement; meanwhile, being a sharia judge was not regarded as a prerequisite for crowning success.⁶⁴

Hallaq's finding on the overlapping roles of the Islamic legal professions is relevant to the contemporary context of Indonesia. An Islamic jurist in Indonesia may also be a sharia judge, a professor of shari'a, a juris consult, and/or an author-jurist (whose level of *ijtihad* less than the four eponyms and their disciples). In the process of codification of Islamic law, however, PA judges, who happen also professor at sharia or collaborate with professors at sharia from sharia faculties, have engaged more actively than the juris consults or author-jurists in articulating legal change to meet social demands.⁶⁵

Cases in point are the promulgation of the Compilation of Sharia Economy Law (Kompilasi Hukum Ekonomi Syariah or KHES) and the Compilation of

⁶¹ *Ibid.*, 64.

⁶² *Ibid.*, 56-57.

⁶³ Wael B Hallaq and Inc Ebrary, *Authority, Continuity, and Change in Islamic Law* (Cambridge, UK [u.a.: Cambridge University Press, 2001), 167, 173, 233–35.

⁶⁴ *Ibid.*, 167, 233-235.

⁶⁵ Alfitri, "Whose Authority? Contesting ...",

Islamic Law (*Kompilasi Hukum Islam* or KHI). The KHES was enacted to fill the legal vacuum in the Islamic finance regulatory regime which is created by the absence of *fiqh* in the substance of the laws in Indonesia.⁶⁶ The idea of codifying the substance of sharia economy laws came from the Supreme Court's Chief Justice, Professor Bagir Mannan, who began the drafting process in October 2006. The drafting team was led by Professor Abdul Mannan, one of the Supreme Court Judges of Islamic Law Chamber. The KHES was finally enacted in 2008 as the Supreme Court Regulation which instructs PA Judges to use it as a guide in resolving Islamic law disputes in sharia economy. The KHES has been welcomed in general by PA Judges;⁶⁷ so its case is not as relevant as the KHI to be discussed here in order to substantiate this article argument on the shifting role of PA Judges towards the common law system judges.

The KHI is intended as the first codification of Islamic family law in Indonesia. The KHI was drafted as an initiative of Judge Bustanul Arifin, the Chief of Islamic Law Chamber of the Supreme Court. There was a problem of legal indeterminacy of the Religious Courts' decision as a result of lack of a unified Islamic code. In addition, there was an issue of the suitability of classical texts referred to by the judges, for applying to the conditions then prevailing in Indonesia.⁶⁸ Judge Bustanul Arifin then proposed the project of KHI to the President Soeharto, who then sanctioned this project to be implemented by cooperative work between the Supreme Court and the Ministry of Religious Affairs in 1985. He then was appointed as the project leader comprising of sixteen committee members: one from the Council of Indonesian Ulama (MUI), eight from the Supreme Court and seven from the Ministry of Religious Affairs.⁶⁹

The KHI was finally promulgated in 1991 as a Presidential Instruction to PA Judges to use it as a guide in adjudicating Islamic family law disputes. However, not all PA Judges feel bound with the provisions of KHI. An empirical study conducted by Nurlaelawati on the application of the KHI in the Religious Courts of West Java province reveals that some PA Judges continue to adhere to the traditional legal doctrines of *fiqh* in resolving cases. These judges disregarded the KHI provisions on inheritance, children's custody rights (*hadlana*), the minimum age of marriage for girls and boys, as well as *ithbat nikah* (legalization of unregistered marriage), and applied the relevant principle drawn from *fiqh*, instead. In one *hadlana* case, judges transferred the right of custody to the father, even though the KHI rule says that it pass on mothers, as long as the children are under age. The Court declined to apply the KHI rule knowing that the mother has

⁶⁶ Timothy Lindsey and Kerstin Steiner, *Islam, Law and the State in Southeast Asia. Volume 1, Volume 1*, (London: I.B. Tauris, 2011), 94.

⁶⁷ *Ibid.*, 95-96.

⁶⁸ Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), 218.

⁶⁹ see Imam Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia," in *Shari'a and Politics in Modern Indonesia*, in Arskal Salim and Azyumardi Azra (eds) (Singapore: Institute of Southeast Asian Studies, 2003); M.B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008); Nurlaelawati, *Modernization, Tradition and Identity*.

renounced Islam as her religion. The judges cited the opinion of the majority of jurists (Hanafi, Maliki, Shafii and Hanbali), that being Muslim is one of the qualifications for a person to be a guardian. These PA Judges employed a public utility argument (*maslaha*) when they based their reasoning on classical *fiqh* rather than the KHI.⁷⁰

Similar situation has been observed by Mark Cammack on the judicial activism of female PA Judges on divorce cases. Changes have been made to the Islamic courts to bring justice to traditionally vulnerable women on divorce cases. According to Cammack, this is as result of gender sensitivity trainings (see above) to help Islamic judges understand how much impact their court decisions have on the lives of women. Cammack note that one of the most memorable female PA Judge figures is Judge Hanafi of PA Yogyakarta; in one divorce case, she insisted that only after the husband provided the wife with a significant divorce settlement (*mut`ah*) would she permit the man to pronounce the divorce.⁷¹

Last but not the least is the case of *Isbat nikah* (retroactive marriage registration). Based on their study, Bedner and Huis find that PA Judges have demonstrated pragmatism necessary to deal with the complex situation of registering marriage in the interest of the weakest party instead of maintaining the provision of (Islamic) marriage law in Indonesia. *Isbat nikah* allow Muslims – in practice always Muslim women – to have their marriage recognized retroactively by the Religious Courts if they have failed to register it and if they are not in a situation to follow the normal path to do marriage.⁷² Meanwhile, the provisions of marriage law in Indonesia (Law No. 1/1974 concerning Marriage, Law No. 7/1989 concerning Religious Courts, and Presidential Decree No. 1/1991 concerning the Compilation of Islamic Law) mean *Isbat nikah* to be transitional provisions for those who had not yet registered their marriage according to the marriage law at the time of enactment of Law No. 1/1974. The practice of granting *Isbat nikah* application by PA Judges to marriages that took place post Law No. 1/1974 most likely happen across parts of Indonesia which consider the interests of women and children (*maslaha*) to have the marriages documented for their welfare.⁷³⁷⁴

⁷⁰ Nurlaelawati, *Modernization, Tradition and Identity*.

⁷¹ Mark Cammack, "On RI's Islamic Judiciary," *The Jakarta Post*, accessed December 23, 2011, www.thejakartapost.com/news/2011/12/23/mark-cammack-on-ri-s-islamic-judiciary0.html; see also Mark Cammack, "Inching Toward Equality: Recent Developments in Indonesian Inheritance Law," *Indonesian Law and Administration Review* 5, no. 1 (1999); and see also Mark Cammack, Lawrence A Young, and Tim Heaton, "Legislating Social Change in an Islamic Society – Indonesia's Marriage Law," *American Journal of Comparative Law* 44 (1996).

⁷² Adriaan Bedner and Stijn Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism," *Utrecht Law Review* 6, no. 2 (2010): 187.

⁷³ See *ibid*, p. 188.

⁷⁴ Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism," 188.

F. Conclusion

The Judges of civil law system, including PA Judges in Indonesia, have been seen as no more than people who apply the law. They are expected to find the ruling of particular case from effective law of the land made by the state. This portrayed role the judges of civil law system can be understood from the historical perspective of close relationship between legal profession and bureaucracy in the civil law system which affect the process of judges' appointment to the bench. The judges of civil law system, including PA Judges, are appointed from new graduates of sharia/law schools, and they have to undergo pre-service trainings which taught them, *inter alia*, on how to find a rule out of the law and apply it to a case. Meanwhile, the judges of common law system are invited to the bench from experienced lawyers who are used to legal reasoning and, then, make the law itself through their verdicts.

Current development in Indonesia, PA Judges' role is no longer divisional between common law and system law. In practice some judges in the Islamic Courts in Indonesia, for example, make the law in order to fill the legal vacuum in the substance of Islamic family law and sharia economy law. Some of them have departed from the provision of law when resolving a case and feel able to draw on classical *fiqh* as a primary resource in order to interpret, expand, or distinguish the statutory rules. This process of looking beyond the text of the statute to support or validate judicial reasoning for public policy or public utility reasons is one that is well-known and routinely used in most modern legal systems. This development, to some extent, resembles the Islamic legal profession development in Islamic legal history. Hence, Sharia Judges are potential to follow the suit of their counterpart in the common law system where they can go beyond the text of law or, even make the law, to deal with contemporary legal problems faced by Muslim society in Indonesia.

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