

Cambridge University Press

978-0-521-11649-7 - Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations

Edited by E Ann Black and Gary F Bell

Excerpt

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Introduction

In 2006, in the Great Hall of the People in Beijing, Chinese Premier Wen Jiabao foreshadowed that the 21st century could become the ‘Asian century’.¹ He was voicing a belief that the world’s economic centre of gravity is shifting to Asia, away from the United States of America and Europe,² and that with this will come greater political, strategic and cultural influence for the nations of the region. Whether one endorses or dismisses such simplifications or generalisations,³ the notion of the Asian century has, at its core, an acceptance both within and outside the region that what happens in Asia does matter in the world and that collectively, and individually, the countries of this region have become, or are becoming, significant global players. This book shares the view that the nations of Asia can no longer be seen as operating at the periphery of global power, with their significance confined to economic and commercial matters.⁴ The importance of Asia means that Asian law and the role of law in Asia have also become important.

We lawyers, especially Western lawyers, tend to overemphasise the role that law plays in development. The early proponents of the ‘law and development’ movement and their predecessors who decades, or even centuries, earlier forced or convinced Asians to ‘modernise’, that is, to Westernise their legal systems, did so with the belief that this would lead to the economic development of Asia. Even though intuitively we know there can indeed be a link between the rule of law and some economic developments, the causal link is hard to prove empirically. Indonesia, which is now more regulated by law than it was under Suharto, has developed less rapidly under the rule of law than it did under Suharto. India, the world’s largest democracy, where the rule of law often prevails, has been developing less rapidly than China where the rule of law is a new and only a developing phenomenon. Obviously, law is not the only factor in development, nor is it necessarily always the most important factor.

¹ Wen Jiabao, ‘Strong China–India Relations to Usher in True Asian Century’ (14 March 2006), <http://news.xinhuanet.com/english/2006-03/14/content_4302492.htm>.

² The corollary is that the 19th century was the European or British century, with the American century the label for the 20th century.

³ M Abramowitz and S Bosworth, ‘America Confronts the Asian Century’, *Current History*, vol. 105, no. 690, p. 147.

⁴ In political terms, the parity of Asian nations with Western nations was evident in the debate at the Copenhagen Conference on climate change.

There is also the fact that the transplantation of Western laws to Asian countries often created a different law altogether – the legal culture in place often reacted quite differently to the Western law than the Western culture did; in other words the local body reacted to the transplant. The lessons from the past have not always been learnt and the recent imposition of Western-style legal reforms by the International Monetary Fund (IMF) following the 1997 Asian financial crisis often simply made matters worse. Transplants work better when the patient requests, fully consents to and then takes care of their transplant. For example, in Indonesia, the importation of a Western-style bill of rights in the *Constitution* was the result of vast pressures by the people of Indonesia who did not want a return to the autocratic past. So this transplant has been much more successful than others.

Notwithstanding the fact that the law has its limits and cannot single-handedly transform societies, nowadays, in all the jurisdictions covered in this book, the governments and the people are convinced that law should be taken seriously and that law and respect for the law do play a role in facilitating progress, whether economical, human or societal, and in ensuring justice and respect for the citizens. And law is indeed taken increasingly seriously by both the citizens and the governments of the jurisdictions under study. There is everywhere debate about what role the law should play, what sources of law should be recognised (indigenous versus foreign laws, secular versus religious laws, local versus national laws) and how law should be implemented and interpreted. This book wants to account for this rising Asian debate about the law and its role in Asian societies.

1 Asia: what's in a name?

The 11 countries and territories selected for this edited volume are on the eastern side of Asia, with borders that meet the Pacific Ocean, in an arc extending from Japan in the north to Indonesia in the south. There is indeed another arc of Asian nations whose shores are on and rivers flow into the Indian Ocean which, together with the nations of the Indochina peninsula (which as the name indicates relate to both Asian spheres), awaits coverage in a later volume.⁵ While there is considerable licence in using the term 'Asia' to cover just 11 countries on the Asian continent, the authors contend that these nations are representative of the diversity, pluralism and reforming spirit that pervades much of Asia and as such are good case studies through which insight into the functioning of law and legal institutions in much of the region could be attained. After all, Asia is both a geographical term and also a construed entity; as McCormack has written, Asia is an 'imposed identity: a fantastic ideological

⁵ Vietnam is covered in this volume but Myanmar (Burma), Thailand, Cambodia, and Laos are not.

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construct without racial or cultural meaning . . . paradoxically, the notion of Asia strengthened the farther one moved away from it and receded as one entered into it'.⁶

Given that the legal systems covered in this book are all in jurisdictions on the eastern side of the continent of Asia, there was some exploration of recent terms used in the literature that may better describe these 11 jurisdictions: terms such as East Asia and Asia Pacific or the Asia-Pacific basin or rim. These formulations, however, remain recent constructs, each with its own ideological parameters. In many ways they are the descendants of the old 'Far East', 'Eurasia' and 'Orient', which dominated 19th- and early 20th-century discourses on Asia. The new formulations still come with dimensions of pejorativeness, and the collective groupings may not necessarily coincide with how people do identify. East Asia is a case in point. East Asia was never a geographical expression but is one that developed in the 1970s. It first arose in the organisational thinking of Western foreign ministries⁷ and then was applied more generally to encompass nations that primarily shared a legacy of China's cultural influence and European imperialism. Therein lies the problem. Malays and Indonesians (and other 'Southeast Asians') do not self-identify as East Asians and regard that categorisation to be the preserve of nations to their north where Chinese values and traditions hold greater sway. Again, this would be a contested notion in the North. People in Japan would not necessarily identify with Chinese cultural dominance, which further highlights the limitation and paradoxes inherent in any such constructions. There are similar difficulties with Asia Pacific (hyphenated or not) which is preferred by some writers such as Kaup⁸ who uses it in the narrower sense to mean the 'Eurasian' nations on the Asian side of the Pacific. Others, especially writers and academics in Australia, use the term more broadly to also include the Melanesian and Polynesian nation states of the South Pacific.⁹ Used at its broadest, with an implied 'and' (Asia [and the] Pacific), and seen often in American political and economic discourse, Asia Pacific encompasses all nations that border the Pacific Ocean, including not only Asian countries but also Australia, New Zealand and the nations of North and Latin America.¹⁰ Some formulations also include Russia. Beeson cautions that boundaries and constituent parts of the Asia Pacific are uncertain and unsettled¹¹ and remain open to challenge. So, given this identification minefield, the editors felt comfortable using the simpler term, Asia, while acknowledging that not all possible

⁶ G McCormack, *The Emptiness of Japanese Affluence*, M E Sharpe, New York, 1996, p. 161.

⁷ See also T Terada, 'Constructing an "East Asian" Concept and Growing Regional Identity: From EAEC to ASEAN+3', *The Pacific Review*, vol. 16, no. 2, p. 251.

⁸ K Kaup (ed), *Understanding Contemporary Asia Pacific*, Lynne Rienner, Boulder, 2007.

⁹ C Saunders and G Hassall, *Asia-Pacific Constitutional Systems*, Cambridge University Press, Cambridge, 2002.

¹⁰ As are represented by the 21 member states of the Asia Pacific Economic Cooperation; see M Beeson, *Institutions of the Asia Pacific: ASEAN, APEC and Beyond*, Routledge, New York, 2009. See also D McDougall, *Asia Pacific in World Politics*, Lynne Rienner, Boulder, 2007.

¹¹ *ibid.*, p. 4.

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Asian nations were covered in this book but that those selected would provide a valid and valuable cross-section of the laws and legal institutions in parts of this region.

2 The approach

This book traverses the broad spectrum of legal systems found in Asia as seen through the eyes of each author derived from his or her own experiences, research and reflective analysis. Although the same eight core topics are covered, the individual perspectives shine through, making each chapter authentic, distinctive and vibrant. The authors were not constrained to give equal weight to each section or to traverse the same issues but were to focus their analysis around these key features of the legal system under study. In this way, the eight core components form the skeleton on which each author can describe and evaluate that nation's laws and legal institutions. These core components also provide the foundation for comparative analysis between these nations and also for comparison with other countries outside the region. Each chapter commences with an introduction to set the scene and to highlight key aspects of that nation, before moving to a discussion of the historical development and context of the country's legal system; the sources of law and legal traditions; the key legal institutions including law-making, adjudication and other processes; the legal culture that underpins those institutions and the prevailing attitudes to law and institutions; the key actors in the legal system – the legal professionals; and new directions, initiatives or key themes that have emerged.

3 Introductions

The Introduction to each chapter is predicated on the basis that the reader may not be familiar with the nation discussed, and for those who are, reading the author's synopsis of the key aspects may be quite instructive of his or her viewpoint. A survey of the introductory sections reveals a mosaic of geographical, economic, political, religious, ethnic, linguistic, demographic, and historical difference. From this, one cannot fail to appreciate Asia's diversity, making plurality perhaps the most defining feature of the region. We have two of the world's most populous nations, China (1.34 billion) and Indonesia (240 million) alongside two of the smallest, Brunei Darussalam (Brunei) (400 000) and Singapore (4.8 million). In geographical terms there are island states or jurisdictions such as Brunei (on part of a larger island), Singapore and Taiwan; states comprising three of the world's largest archipelagos, Indonesia, Japan and the Philippines; the peninsula state of Korea; and, of course, the vast diverse geographical entity of China. In terms of governance, there are two socialist republics, China and Vietnam, albeit with their 'own characteristics', with Hong Kong as a special

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administrative region of China; five non-socialist republics, Indonesia, Korea, the Philippines, Singapore and Taiwan, all of which are functioning democracies; and three monarchies. Each of the latter are quite distinctive – Japan is a constitutional monarchy, with the Emperor's role largely ceremonial; Malaysia's King (*Yang di Pertuan Agong*) is one of the Sultans who holds the position on a rotating five-year basis but with limited law-making powers; while Brunei is one of the world's few remaining absolute monarchies, with its Sultan enjoying unfettered law-making power. Apart from Malaysia, which is a federation, all other nations are unitary states, although some have decentralised some key powers. There are two countries – Japan and Korea – which are relatively homogenous in terms of ethnicity and language but ethnic, linguistic and cultural diversity is a feature of the other nine nations. Religion too is marked by divergence. In Brunei, Indonesia and Malaysia (Sunni) Islam is the religion of the majority and as such informs the local culture and national identity, while in the Philippines and Singapore Islam is the religion of a significant minority but is accorded formal recognition in each of those legal systems. In the Philippines, Christianity in the form of Roman Catholicism is the faith of the majority and the Roman Catholic Church has for many centuries been a significant force in that country. Japan has its unique indigenous Shinto religion and with its neighbour Korea shares Buddhism and a legacy of Confucian philosophy. In China's and Vietnam's past, Confucianism philosophy dominated but today a secular ideology, socialism, rather than a religion guides those nations. As socialist states, religious adherence is tolerated and monitored rather than encouraged, but in sheer numerical terms religious belief – Buddhism, Christianity, Islam and Taoism – is still significant. In economic terms, China is the world's second largest economy closely followed by Japan, with Indonesia, the Philippines and Vietnam still developing economies.

Although each of the nations can be slotted into the traditional comparative law 'family' classifications – common law, civil (Roman-Germanic) law, religious law, socialist law and Far Eastern law¹² – the limitations in doing this have been widely acknowledged in the literature.¹³ These classifications can be misleading, especially so in Asia, where the plurality of influences has led to systems that are better described as hybrids. So where a comparative family categorisation is used in the book, it is as a form of shorthand, a general guide to the common traits typically identified in such classifications, in the way Friedman acknowledged classifications as helpful 'in many ways' while emphasising the inherent flaws in such classifications.¹⁴ He highlights the vital role of legal culture in any equation, as without it, institutions and laws risk being mere 'lifeless artefacts'.¹⁵

¹² R David and J E C Brierley, *Legal Systems in the World Today*, 3rd ed, Steven and Sons, 1985. Also K Zweigert and H Kotz (T Weir trans), *An Introduction to Comparative Law*, Clarendon Press, Oxford, 1998.

¹³ L Friedman, *Law and Society: An Introduction*, Prentice-Hall, Englewood Cliffs, 1977, p. 76.

¹⁴ *ibid.* The example given by Friedman is that Haiti and France in the standard classification system are family members, whereas France and England are unrelated.

¹⁵ *ibid.*

4 Historical contexts

To understand the present, one must first understand the past.
 –Chinese proverb

In the section reflecting on the historical context underpinning the contemporary legal system, it becomes apparent that traditions from distinct centuries have persisted despite the transformative effects of colonisation and adoption of Western form and process. This includes remnants of ancient practices and attitudes to law that can be glimpsed in today’s legal systems. The legacy of two millennia of China’s rich imperial past, where the role for law and for morality was aligned with Confucian philosophy (also intersecting with legalism), can be seen in today’s preference for law as a supplementary or secondary means for social control. As a consequence, law continues to function as a political and administrative tool, whereby substantive justice prevails over procedural justice.¹⁶ China’s neighbour Korea has an equally ancient history, with its written laws dating back to 2333 BCE, but today’s legacy can be traced especially to the period of the Joseon Dynasty when Korean Confucianism became embedded in the society. It continues to inspire many aspects of current Korean law, in particular family law. Japan too was influenced by China but this influence was adapted and ‘indigenised’ and debate continues today as to the degree to which traditional notions inform today’s legal system.

Brunei, Indonesia and Malaysia have histories that are perhaps among the oldest in the world. Here, the earliest people did develop a normative system for organising relationships with nature (and its spirits and gods), with one another and with outsiders, together with flexible processes for resolving disputes. Although based on oral, not written practices, these customary laws, or *adat*, evolved and devolved down through the centuries to the present and remain a recognised source of law in all three nations. During the centuries that followed, influences from India in the form of Hindu and Buddhist law infused the *adat* but it was the impact of the latest arrived ‘foreign’ religion, Islam, with its comprehensive law and jurisprudence, comprising the Sharia, which transformed the legal landscape of these nations, and also the southern islands of the Philippines. This was not done through colonialism, but through acceptance of Islam, first by the local rulers and in turn by their followers. The process was more gradual than a complete immediate transplantation of law, which meant that the existing customary law was not eliminated but syncretised or applied alongside Islam. Islam informed the notion of governance and sultanates flourished, extending from Sumatra and its Sultanate of Aceh up to the Philippines, across Borneo and Java and to the islands of the Moluccas. Their legal legacy lasts in the Sultanate of Brunei Darussalam and also in the nine Malaysian states, former independent sultanates, which continue under the governance of a sultan within the larger federal entity of Malaysia.

¹⁶ Chapter 1, section 2.1.

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From a historical perspective, the second pervasive transformative feature common to all these nations of Asia is a legacy of Western imperialism. This occurred in two ways: either directly through colonisation by European nations or by Japan, or indirectly where the presence of Europeans was an impetus for a so-called ‘modernisation’ which included legal reform through the adoption of Western models. From the early 1500s Europeans arrived in Asia, with Spain, Holland and Portugal¹⁷ making the first inroads in the region, followed by France, Britain and later America. Spain conquered the Philippines in the 16th century, bringing with it Roman Catholicism which remains significant in the lives and also in the laws of the nation at present. The Portuguese also brought Roman Catholicism to their colonies and its former colony of East Timor remains a devout Catholic nation today. In the early 17th century the Dutch colonised many other islands known then as the East Indies, now Indonesia, first through an incorporated company (VOC) and subsequently directly by Holland. Unlike the Spanish in the Philippines, the Dutch did not impose Christianity on the people, but did transplant Dutch law into these islands particularly for commercial and criminal matters. They did not oust *adat*, preferring instead to create different streams of law and legal avenues for different categories of people. This gave rise to the plurality of law that remains a hallmark of Indonesia’s legal system today.

The British too left a legacy of formal legal pluralism. Although parts of the Malay peninsula were subject to inroads by the Dutch and Portuguese, it was Britain that imposed her colonial control (protectorates, residencies and full colonies) during the 19th century, which also extended to Singapore and to the island of Borneo, where today’s Malaysian states of Sabah and Sarawak are situated, alongside the Sultanate of Brunei. A role for *adat* and Sharia (in Brunei written as ‘Syariah’) was maintained, albeit in limited form, but dissemination of English law, legal institutions and personnel along with British concepts of justice and processes introduced into these countries the common law foundation that has continued to the present. Also introduced was a secular system in which religion or morality was divided and separated from law. It was in the 19th century as well that France colonised Vietnam, bringing into play its foundation as a secular civil law nation.

Through wars with European nations, China did lose territory, including Hong Kong,¹⁸ but neither China nor Japan were colonised. They were, however, cognisant of European commercial and military dominance in the region and aware of the colonisation risks. As well, they were sensitive to the extraterritoriality provisions that European traders in turn demanded. So at the turn of the century, both took the initiative to reform and ‘modernise’ their legal systems on their own terms, which to a large extent meant to voluntarily Westernise the law so as to avoid the threat of colonisation or compete with the more economically advanced West. The fall of the Tokugawa Shogunate in

17 The bastion of Portuguese colonisation was East Timor, *Timor-Leste*, which attained independence from Indonesia in 2002 and remains a predominantly Catholic nation.

18 First Opium War (1839–42)

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1868 marked the end of feudalism and Japan entered an era of widespread reform, which included drawing on European legal and constitutional models, notably from Prussia, to become the first Asian nation to modernise its legal system.

China followed Japan's path. The fall of the Qing Dynasty paved the way for a legal reform drawing on both the Japanese model which served as an inspiration to many Asian countries embarking on Westernisation of their legal systems, but also directly drew on civil systems in Europe. The *Six Codes* that were enacted at that time are an interesting fusion of Western and indigenous Chinese concepts, and these remain today as the touchstone of the Taiwanese legal system. Modernisation of Taiwan's legal system, however, commenced during the era of Japanese colonisation from 1895, which was the outcome of China's loss to Japan in the Sino-Japanese war. Korea too was colonised by Japan after annexation in 1910, which again saw the transplantation into Korea of significant parts of Japan's already Westernised legal system. The legacy of Japanese colonisation remains not only in civil law structure and in certain laws, but also in attitudes towards law.

The third dimension in the analysis of the historical context of Asian legal systems is the aftermath of World War II. For all countries, new Constitutions would be required. Vanquished Japan was subjected to American (and allied) occupation in which legal reform was guided by, and in conformity with, American democratic objectives. While Japanese invasion and occupation of Asia did have horrendous cost in human terms, there was no lasting direct impact on local legal systems, except that it was a catalyst for change. Japan broke the colonial continuum and in the aftermath, the crystallisation of national identities occurred. As each of the nations of Asia strived for independence and self-governance, nationalistic fervour soared and in the search for new directions, powerful ideological forces competed. The Nationalists and Communists waged civil war in China, which saw the Nationalists defeated on the mainland but able to form a government in Taiwan.

A similar ideological war occurred in Korea which resulted in the nation being divided in 1948 at the 38th parallel into North Korea¹⁹ where a nationalistic form of Stalinism²⁰ was adopted under Russian patronage, and the South²¹ which, with Allied support, assumed a capitalist and democratic system. The proximity of both South Korea and Taiwan to communist states and the invasion of South Korea by the North and resulting civil war (1950–53)²² heightened tensions in the region and was used as a justification for autocratic and martial law in both South Korea and Taiwan for several decades.

¹⁹ Democratic People's Republic of Korea (DPRK).

²⁰ Officially North Korea practises a form of socialism under the one Worker's Party in line with 'Juche' philosophy.

²¹ Republic of Korea (ROC).

²² As an armistice was signed in 1953 technically the nations are still at war. In 2009 North Korea withdrew from the armistice.

For Indonesia and Vietnam the road to independence was marred by their former colonial masters' unwillingness to relinquish control of their colonies. Although the leaders of both nations, Sukarno in Indonesia and Ho Chi Minh in Vietnam, proclaimed their nation's independence in 1945, the Dutch fought against this until 1949, while the war waged by the French in Vietnam continued until 1954. The lack of support from Western democracies for a self-determination process to occur in Vietnam undoubtedly contributed to the attraction of communism in Vietnam.

The colonies of Britain – Singapore, Malaysia and Brunei – were allowed to gradually work towards independence under the oversight of Britain. While there were some ideological conflicts and tensions, especially along ethnic lines during these decades leading to independence, the British colonies, like the Philippines which was granted independence by America in 1946, were spared the violence that marked other movements for independence. Hong Kong is the exception to the post-World War II independence pattern recurring throughout Asia. The people of Hong Kong were not given an opportunity for self-determination as British sovereignty was transferred to China in 1997 as a result of negotiations between the British and Chinese Governments in the preceding decade.

5 Sources of law and legal traditions

Given the distinctive features of each of these nations and the powerful historical forces that have shaped them, it is axiomatic that the sources of law will reflect this background. All, of course, have legislation as a primary source of law and a hierarchy of laws commencing with a Constitution as the *Grundnorm*, then codes and statutes enacted by national legislative bodies, followed by regional or state laws enacted by provincial or state legislatures or councils. Executive bodies can also act as a source of laws in some nations, especially in the civil law tradition. In China, for example, the State Council's administrative regulations are one of the most important sources of law. In Japan, these can take the form of cabinet orders, ministerial ordinances, and administrative guidance, while in Indonesia there are presidential, ministerial, governmental and regional regulations which have resulted in the need for a piece of legislation to set out and resolve the competing status between the different sources of law. Similarly in Vietnam, its 12 different legal instruments can result in inconsistencies, overlap and contradictions, so to reduce ambiguity and uncertainty Vietnam enacted its *Law on Promulgation of Legal Instruments*. In the same vein China promulgated its *Legislation Law*.

The role for judicial decisions does vary depending on whether there is a common law foundation as a legacy of British colonisation, in which the operation of binding precedent (*stare decisis*) is required and in which judges in appellate courts can assume a law-making role. Brunei, Malaysia and Singapore operate under *stare decisis*. Where the nation employs a civil or socialist system, judicial decisions may be allotted degrees of persuasiveness. In China, cases which

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have been decided and published by the Supreme People's Court are considered 'authoritative', with judgments rendered as collective opinions of the collegiate panel. Similarly, in Japan, Korea and Taiwan judicial decisions of their Supreme Courts may be accorded a *de facto* binding status in systems where career judges may defer to the reasoning of higher courts, even to aid career prospects. While this pattern reveals convergence between the civil and common law methodology, the authors writing on Japan note that without a formal practice of *stare decisis*, case precedent is less certain, giving rise to examples of 'lower courts flouting the precedent of higher courts'²³ and making the status of cases more contested than in common law systems. In the socialist systems of China and Vietnam, the role of legal interpretation is reserved for the Standing Committees of the National People's Congress; however in China its Standing Committee has allowed the Supreme People's Court to issue various forms of judicial interpretations to assist in the application of law by provincial courts. This may include replies to questions submitted by a lower court on which law and interpretation thereof should be applied in a case before the lower court. This would be impossible in a common law system.

Academic writing or commentary has a role as a source of law in the nations operating within a civil law tradition. In Japan, for example, academic commentary is particularly strong, while in China it is an indirect source, in the sense that prominent scholars may be consulted when disputes are being adjudicated or legislation is drafted.

Custom, as norms that formed naturally in a culture over time, is also a recognised source of law, particularly for commercial and civil disputes in China, Hong Kong, Korea and Taiwan (in the latter country it is expressly excluded from criminal cases), whereas in Brunei, Malaysia and Singapore custom acquires the force of law only when incorporated through statute. In Indonesia, *adat* has continued as an independent and separate source of law which has been influenced by all the religious traditions, including animism, that have had a role over the last two millenniums.

In the nations with significant Muslim populations, Islamic laws and courts have Sharia as a source of law. Although the Sharia has the Quran and the Sunnah as its primary sources of law, which is extended by *fiqh* (Islamic jurisprudence and legal methodology) to comprise its secondary legal sources, several countries, including Brunei and Malaysia, have these condensed into statutory form so that the personal, religious, evidentiary and commercial laws applicable to Muslims are now statutory-based. In Indonesia the applicable parts of Sharia (referred to in that country as 'Syari'ah') have been put into, or collated into, a *kompilasi* (compilation) which was adopted as a Presidential Instruction (that is, not as a statute, as the Quran and the Sunnah remain the authoritative sources). The *kompilasi* is to be used for the guidance of judges in Indonesia's Islamic courts. The enacted law is to be supplemented by *fatawa*, legal rulings made by

23 Chapter 4, section 3.3.