特別寄稿

Islamic Justice in Indonesia: Family Law Reform and Legal Practice in the Religious Courts[1]

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A. Introduction

Although Indonesia has the largest Muslim population in the world with its more than 90 percent Muslims, as many scholars and politician state, it is a constitutionally secular state. As a consequence of state ambivalence toward religion within the state system, demands to institutionalize Islam in politics, education, the justice system and other fields of public life abound. Tensions between the state and revelation implicit in Islam are thus inevitable and have had a profound impact on the development of Islamic law in Indonesia.

In Indonesia, like in other Muslim countries, the area of Islamic law which is most widely and directly applied by Muslims is Islamic family law. Following the lead of a number of other Muslim countries, in 1991 Indonesia began codification of Islamic family law and issued a *Kompilasi Hukum Islam* to complete the unification of legal references and resolve contemporary familial problems, which developed in 1974 when the Marriage Law was promulgated. The *Kompilasi* is a set of regulations that apply specifically to Indonesian

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[1] Some of the data and arguments in this paper have been discussed at greater length in earlier publications by the author; see, for example, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practices of the Indonesian Religious Courts*, Amsterdam: Amsterdam University Press, 2010, (with Abdurahman Rahim), "The Training, Appointment and Supervision of Islamic Judges in Indonesia," *Pacific Rim Law and Policy Journal*, Vol. 21, No. 1, January 2012, and "Shari'a-based Laws: The Legal Position of Women and Children in Indonesia," in *Regime Change, Democracy, and Islam: The Case of Indonesia (A Final Report Islam Research Program)*, 2013, 38-39. at www.hum.leiden.edu.

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Muslims, and legal issues related to the *Kompilasi* are dealt with by judges in religious courts. Through these two sets of laws, the state accommodated its varied interests and local practices, and heeded women's interests, paying special attention to the issues of polygamy, divorce, marital property, and post-divorce rights for women. The legal reforms, however, exist on paper only if judges fail to apply them well. It is essential for judges of Islamic courts to comprehend the legal rules and apply them in the best manner and to the greatest extent possible in order to achieve justice for those seeking it.

This paper discusses the application of Islamic family law in Indonesia. It attempts to look at how Islamic family law is being reformed, applied, and adopted into the national system by looking at the development of substantial and procedural legal rules within the Islamic judiciary. It describes how the state-authored Islamic family law has been interpreted, accepted and treated by Muslim judges and society in general. A number of legal rules are presented as examples to better understand legal practices in the religious courts as well as judges' legal interpretations in resolving cases brought before them. Particular attention will be devoted to women's access to justice in order to see the extent to which Islamic family law has addressed gender issues.

B. Religious Courts: Organization and Profiles

1. Organization: management and supervision

Religious courts in Indonesia have been present since well before Independence. Under colonial rule, they began to evolve when the Dutch colonial government decided that there should be a religious court in every district where a civil court existed.

During the colonial period, Islamic legal institutions were under the administrative auspices of the Ministry of Justice. After independence, authority over the Islamic courts was transferred from the Ministry of Justice to the Ministry of Religion at the suggestion of the Ministry of Religion as soon as it was established. It should be noted that the Ministry of Religion had its roots in a colonial era "Office for Religious (Islamic) Affairs"; as soon as the Japanese

surrendered and independence was proclaimed, the Indonesian Government changed it into the Ministry of Religion (effective January 3, 1946).[3]

There were no significant changes to the religious courts in subsequent years, except that the number of courts increased throughout Indonesia. Significant changes in both the institutional and juridical development of the Islamic courts only began to be introduced in the early 1970s. In 1970, the government issued the Basic Law on Judicial Power (Law No. 14/1970). Article 10 of the act defines the structure of the Indonesian judiciary. The article first states that judicial power is to be exercised by four types of courts: general courts, Islamic courts, military courts, and administrative courts. This clearly acknowledges the existence of religious courts in the Indonesian national legal system.[4] This law also dictates that the Supreme Court is the highest judicial authority in the country and, as such, has the power to review decisions from the highest appellate authority within all four systems. While the Supreme Court began to decide appeals from the Islamic courts in the mid-1970s, after a special chamber to hear cases brought from appellate religious courts was established, budgeting and staffing remained under primary control of the Ministry of Religion.[5] This division of responsibility was formalized in the Religious Court Law No. 7/1989 which assigned administrative responsibility for Islamic courts to the Ministry of Religion and responsibility for "technical juridical matters" to the Supreme Court.

The passing of the Religious Court Law No. 7/1989 was welcomed with enthusiasm by different sections of the Indonesian Muslim community, and was seen as the outcome of a long struggle by the Indonesian Muslims who had been demanding the accommodation of Islamic law by the state. In fact, the act puts the religious courts in the same position as the other courts. In terms of substance, the act is also perceived as marking significant progress in the application of Islamic law, as it is one of the legal spheres constituting the

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[3] See M. B. Hooker, *Islamic Law in South-East Asia*, Oxford: Oxford University Press, 1984, 255.

[4] M. B. Hooker, *Islamic Law in South-East Asia*, 256.

[5] Euis Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practices of the Indonesian Religious Court*, Amsterdam: Amsterdam University Press, 2010, 55.

national legal system. By the promulgation of the Religious Court Law No. 7/1989, all the regulations which previously applied in religious courts were abrogated, as stated in article 107.[6]

A significant change in the supervision and administration of religious courts occurred when the Minister of Religious affairs signed a letter transferring full control over the religious courts to the Supreme Court as a final response to the demand for the transfer formalized in a 1999 amendment to the 1970 Basic Law on Judicial Power.[7] Promoting a 'one roof' system of judicial administration, the 1999 Act had mandated the transfer of administrative, structural, and financial authority over the four judiciary domains to the Supreme Court.[8] Having been given a five-year timetable for implementation, in 2004 the Ministry of Religious Affairs transferred administration, structure, and finances of the Islamic courts to the Supreme Court. It is worth noting that the Ministry of Religion initially opposed the proposal to place the Islamic courts under the authority of the Supreme Court when the issue was discussed in the legislature.[9] While some judges and Ministry officials continue to debate the change, many feel that the status of the Islamic courts has been elevated with the implementation of the one-roof system, and that placing the Islamic courts under the Supreme Court has resulted in a more thorough integration of the Islamic courts into the national legal system.[10]

2. The number of courts and judges

According to the data released by the Directorate General of Religious Court Body (Badan Peradilan Agama/Badilag) in 2011 there were 359 first instance

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[6] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 57.

[7] Basic Act on Judicial Power, Act No. 35 of 1999, art. 1 (amending Basic Act on Judicial Power, Act No. 14 of 1970, art. 11).

[8] Mark E. Cammack, 'The Indonesian Islamic Judiciary', in R. Michael Feener and Mark E. Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions,* 146, 2007, 156-57.

[9] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 63.

[10] Euis Nurlaelawati and Abdurahman Rahim, 'The Training, Appointment and Supervision of Islamic Judges in Indonesia', *Pacific Rim Law and Policy Journal*, Vol. 21, No. 1, January 2012, 59.

Islamic courts and 29 appellate Islamic courts throughout the country. This is considered to be adequate, sufficient for the Islamic courts to fulfil their obligations as legal executives within the Islamic judiciary so that Muslim society can find legal justice. Indeed, Islamic courts have the mission to produce just and reliable legal verdicts to ensure peaceful and harmonious life for Muslim society.

The number of judges has increased from time to time. At the end of 2009, the Islamic judiciary had been staffed by 3.408 judges. At that time, first instance Islamic courts employed 3,047 judges and there were 361 judges in the 29 appellate Islamic courts, 342 male judges and 19 female judges.[11] According to a report issued in 2011, available on the Badilag website, there are 3,687 judges in first instance and appellate courts in Indonesia, only 507 being female judges (471 in first instance courts and 36 in appellate courts). There were more than 200 judges appointed from 2009 to 2011.

The judges in the first instance Islamic courts and appellate courts have different educational backgrounds. According to 2009 data, most first instance court judges have bachelor degrees and few have Master or doctoral degrees. Of these, 1,682 male judges held bachelor degrees, 703 held master degrees, and 5 held doctoral degrees. On the other hand, 520 female judges had bachelor degrees, 139 had master degrees, and none had a doctoral degree.[12] Meanwhile, most of the appellate Islamic court judges (195) had obtained master degrees, including 185 men and 10 women. 165 held only bachelor degrees, 56 men and 9 women; only one held a doctoral degree. In 2011, more judges held doctoral degrees.

C. Islamic Family Laws: Reforms by State

1. Substantial Legal Reforms

The existence of the religious courts was strengthened by the enactment of a

[11] Euis Nurlaelawati and Rahim, 'Training, Appointment and Supervision', 57.

[12] Derived from data of the Directorate General of Religious Court Body (Badilag), the Supreme Court's Islamic judiciary section, per August 2009.

Marriage Law in 1974, which was designated Marriage Law No. 1/1974. Applicable to all Indonesian citizens regardless of their religion, this Law gave religious courts the formal authority to deal with Muslim family issues. Under this law, religious courts across Indonesia have had the same jurisdiction over matrimonial issues and the substantive grounds for their settlement since 1 October 1975. There are a number of issues which began to be regulated through this law, including polygamy, divorce by repudiation, settlement of joint property, child custody and alimony, legal status of a child, and determination on the validity of marriages concluded before the promulgation of Marriage Law No. I/1974 and which were carried out in accordance with other regulations.[13]

Despite the fact that the authority of religious courts were not fully recognized, as Article 63 requires religious courts to submit their decisions to the civil courts for confirmation, the Marriage Law No. 1/1974 has to be considered a milestone in substantive changes in the application of Islamic law in Indonesia. As mentioned above, under this law, a new set of Islamic rules was established. By referring to this law, Muslim judges could approve or disapprove a petition for divorce and or a request for permission to enter a polygamous marriage made by a husband.

Admittedly, although a number of reforms had been made, this law still did not address various other marital problems. The common practice of marriage during pregnancy was, for example, not regulated in the law. Named the Marriage Law, this law contains no articles regulating inheritance issues. Consequently, when resolving cases of inheritance, judges of the religious courts had to continue to base their judgments on inheritance on legal doctrines laid down by earlier scholars of Islamic law in *fiqh* books.[14]

As illustrated in the aforementioned inheritance issues, the absence of a uniform legal reference to which their judges could refer in resolving all familial

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[13] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 54-55.

[14] See M. Fadhil Lubis, 1995, *Islamic Justice in Transition: A Socio-Legal Study of The Agama Court Judges in Indonesia,* Ph.D. Dissertation, Los Angeles: UCLA, 1995. See also Euis Nurlaelawati, *Modernization, Tradition and Identity*, 61.

cases brought before them put judges into an unenviable situation. Therefore, they continued to refer to various classical *fiqh* texts of their choice, a practice which resulted in uncertainties about legal transactions among members of Muslim society who sought justice in religious courts. Judges on different panels might give different rulings on cases of the same nature. Although that could be accepted in a kind of sociological perspective, this would undermine confidence within Muslim society when lack of legal rules was seen to be the reason for different rulings.

An attempt to unify substantive laws of the religious courts had been made in 1958 through a circular letter from the Ministry of Religious Affairs that recommend judges limit their legal references to a small number of *fiqh* texts, i.e. thirteen *fiqh* texts.[15] Although the attempt was a move in the right direction, this limitation had not eliminated discrepancies between decisions in cases which were essentially the same. In fact, although referring to only thirteen *fiqh* books after 1958, religious court judges still decided the same sorts of cases on different grounds, so that there were inevitably divergent decisions handed down on a regular basis. The logical conclusion was accordingly to assume that the Ministry's decisions had failed to remove persistent uncertainties in Muslim society.

Moreover, despite that fact the Marriage Law No. 1/1974 and a few clauses of the Religious Court Law No. 7/1989 resulted in substantial reforms and dealt with material laws, many outstanding matters were not addressed. As I noted in another work, Yahya Harahap believed that inevitably there were problematic cases which resulted in conflict and debate among Muslims.[16] Worse yet, many Muslim citizens, *'ulama'*, and even members of elite believe that familial matters are personal matters and should be free of government intervention. In the 1960s there was an attempt to propose the application of a national inheritance system. However, political factors combined with strong

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[15] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 53.

[16] See Yahya Harahap, "Informasi Materi Kompilasi: Mempositifkan Abstraksi Hukum Islam", in Cik Hasan Bisri, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional* (Jakarta: Logos, 1999), 149-156.

opposition by traditionalist *ulama*, and ultimately no Islamic legal codes on inheritance in particular or uniform substantive laws on such issues were issued in Indonesia, let alone in the religious courts.

Fortunately, a new day dawned when the Indonesian president, Soeharto, issued a Presidential Instruction identified as the *Inpres* (*Instruksi Presiden*) No. 1/1991 about the socialization of the *Kompilasi Hukum Islam* (Compilation of Islamic Law). This *kompilasi* was to act as the substantive law compilation to be referred to by religious court judges in making their judgments. By referring to the *kompilasi*, judges have been expected to avoid the problem of disparity in the use of legal references and consequent divergent judgments on similar cases. The *kompilasi* consists of three books covering marriage, inheritance and endowment. It introduces a number of novel rules accommodating *adat*, state interest and women's demands for improvement of their legal position. The inclusion of the rule of joint property that admits the contribution of both spouses to the creation of wealth is one of the examples of how the *kompilasi* accommodates local *adat*. The introduction of the rule of inheritance where daughter could block collaterals is one of proofs that *kompilasi* has reformed the Islamic classical rule where daughter shares estate together with collaterals.

The revision into two separate amended laws on marriage and inheritance which is now under consideration shows that substantial reforms are still being made. While, the draft Marriage Law to be applied within Religious Courts, called *Hukum Materiil Peradilan Agama*／HMPA Bidang Perkawinan*)*, has been already submitted to the Parliament to be discussed at the national level, the draft Inheritance Law (*Hukum Materiil Peradilan Agama*／HMPA Bidang Kewarisan) is still being written and discussed by legal scholars. There are some revisions and additional rules in both two drafts as to address new issues which have arisen within the practice of Islamic family law.

If we look at it from the perspective of legal development, the legal reform or original issuance of this state legislation reflects a long struggle by Muslims for the application of Islamic law in Indonesia, beginning in the 1950s and early 1960s with the proposals of Hazairin and Hasbi al-Shiddieqy for the

formulation of an Indonesian school of Islamic law.[17] The origins of the *Kompilasi* can be found in Hazairin's proposal for the formulating a distinct Indonesian school of Islamic law. A scholar of both Islamic and *adat* law at the University of Indonesia, Hazairin (1905-1975) sought to bridge the gap between the two by advocating the development of a distinctive body of Islamic law. He was convinced that the reform of Islamic law was not an individual matter, but rather a collective task to be completed by representatives of the community, working in close partnership with the state. He wanted to see problems in the Muslim community solved by formal institutions with the authority to act on religious issues.[18] In the 1980s, the same agenda reappeared when Munawir Sjadzali suggested the reactualisation of Islamic law, which developed in the direction of the unification of legal references in the religious courts.[19]

2. Procedural Legal Reforms

Besides the development of substantial legal references, there have been also developments in legal procedural matters which have allowed litigants, particularly female litigants, to have better access to justice. Although a number of procedural reforms were made several years ago to ease the process of litigation, my latest research concluded that more significant and influential procedural legal reforms had been made at the end of the 1990s.[20]

Since 2006, the Ministry of Religious Affairs has offered a special course providing instruction in Islamic law for brides and grooms called the 'Kursus Calon Pengantin' (Suscatin) program, held at the Offices of Religious Affairs (Kantor Urusan Agama). The prospective bride and groom are each awarded certificates for the completion of the Suscatin program. The most significant and influential legal aid is provided by legal aid posts (POSBAKUM) inside

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[17] For a good discussion, see Michael Feener, "Indonesian Movements for the Creation of a National Madhhab", *Islamic Law and Society*, 9:1, 2002. See also Euis Nurlaelawati, *Modernization, Tradition and Identity*, 76-80.

[18] Hazairin, *Hukum Kekeluargaan Nasional,* Jakarta: Tintamas, 1962, 10.

[19] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 78-79.

[20] See Euis Nurlaelawati, "Shari'a-based Laws in Indonesia."

court buildings, operated extensively since 2011, and by PEKKA (Perempuan Kepala Keluarga, Female Heads of Households), an NGO supporting the empowerment of female-led households in the context of obtaining legal rights.[21] For example, in the first four months of operation following its establishment in 2012, Cianjur's legal aid post provided legal assistance to more than 220 people,[22] the majority of whom were women seeking legal aid. These programs have complemented programs that have already been established by a number of women centres. Funded by and coordinated with national and foreign donors, these women centres organized programs providing advocacy, usually assisting women in dealing with family problems.

Aside from the increase in legal assistance, better court services have been also offered by judges. Supported by the wider international community, including the Australian Family Court, Indonesia's religious courts have been trying to improve their services. The State budget was adjusted in response to research findings on the procedural problems of the judiciary, and the courts received a bigger budget from the State Budget in 2008 and 2009; subsequently, they have run a 'Prodeo' program (courts for the poor/fee waivers) and courts-on-circuit (*sidang keliling*).[23] Although these programs do not target particular litigants, poor women in particular have taken advantage of the programs, allowing them better access to justice.

D. Legal Practices at Religious Courts: Between Classical and State Islamic Law

The *Kompilasi Hukum Islam* of 1991, henceforth called *Kompilasi*, constitutes a substantive law of religious courts which systematizes and compiles in one

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[21] Cate Sumner and Tim Lindsey, *Courting Reform: Justice for the Poor,*' Lowy Institute, 2010, 42-44.

[22] 'Laporan Pelaksanaan Sidang Keliling, Prodeo dan Posbakum Tahun 2012 Bulan Januari s/d April 2012', Pengadilan Agama Cianjur, May 8, 2012.

[23] For further discussion on these programs, see Euis Nurlaelawati, 'Shari'a-based Laws: The Legal Position of Women and Children in Indonesia', in *Regime Change, Democracy, and Islam: The Case of Indonesia (A Final Report Islam Research Program),* 2013, 38-39. at www.hum.leiden.edu.

volume Islamic legal rules, particularly family law derived from various *fiqh* texts. This effort of the Indonesian government is one of the remarkable examples of the trend towards legal codification in the Muslim world. As previously mentioned, it is divided into three books covering marriage, inheritance and endowment. The issuing of the *Kompilasi* by the Indonesian government complemented the reform of the religious judicial system in Indonesia which had previously witnessed the ratification of the Religious Court Law Mo. 7/1989 as the formal law regulating the position of religious courts within the national legal system, plus the composition and jurisdiction of courts and the law on procedure applicable for the courts.

1. Judges' Position of the Kompilasi

Like the other newly codified legal codes, the *Kompilasi* succeeded in introducing numerous changes, such as rules governing obligatory bequest and the representation of heirs. However, not all recommendations were incorporated, nor have all newly inserted reforms been fully accepted by judges. My doctoral research, conducted during 2003-2005, found that, although the judges have demonstrated their concern with the *kompilasi* since its introduction in 1991 by citing its articles as the legal basis for their judgments, it has reaped criticism as many scholars have challenged the issues raised and posed pertinent questions about the Islamic rationale of the rules.[24] As if to satisfy such scholars, the acceptance of the *Kompilasi* did not led judges to completely abandon their practice of quoting legal doctrines from *fiqh* books.

Despite judges being trained to develop a deeper commitment to State law, enshrined in the *Kompilasi*, many continue to adhere to the classical legal doctrines in cases in which the *Kompilasi* takes different stance from such texts. In fact, the *Kompilasi* introduced novel rules that challenged the Islamic rules in *fiqh* texts. In such cases judges have been inclined to quote legal doctrines from the *fiqh* books to such an extent that they abandon the provisions in the *Kompilasi* entirely. Many judges feel that the *Kompilasi* has

[24] Nurlaelawati, *Modernization, Tradition and Identity*, 106-129.

on a number of issues exceeded its mandate in adopting such local practices as the representation of heirs and adoption or in heeding the growing demands among feminists for putting males and females in the same position. They have demonstrated their repudiation by enthusiastically returning to the opinions of *ulama* preserved in the *fiqh* books when making judgements on such issues.[25] According to a number of judges, the legal doctrines expressed in the classical texts still have the upper hand as far as they are concerned.

Additionally, confronted with other reforms, many judges also still feel free to interpret when reaching a decision on the cases before them. This does not always mean that they do not agree with the established rules, but rather they do so to follow their legal thought on creating 'public good.' Therefore, citing public utility, they have often deviated from the *Kompilasi* and looked at *fiqh* texts instead. The cases of custody of under-age children are one of the best examples. The *Kompilasi* rules that the right to custody of under-age children devolves on their mothers. The *Kompilasi* makes no mention at all of the qualifications of or limitations on mothers in acquiring this right. However, when judges have known that a mother had become an apostate and hence consider her religiously deviant, they show no reluctance about deviating from the *kompilasi* and depriving her of this right, transferring it to other parties, such as the father.[26] Rules on *isbat nikah* or legalization of marriage and the minimum age of marriage for girls and boys are other examples which demonstrate that public utility has often led judges to deviate from the *Kompilasi* and turned them again in the direction of the *fiqh* texts for the legal basis of their judgments.

Looking at these practices and the attitude of judges, it seems that, as I said in my book, that as a legislated text, the *Kompilasi* is still considered an 'open' text:

> Even though, as is also the nature of codes enacted elsewhere, the open character once attributed to the *fiqh* texts is curbed in this form and

[25] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 149-160.

[26] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 146.

> change is only possible if it is introduced by legislative amendment, interpretative modification by individual scholars and by the official authors of Islamic law, such as judges, is still envisioned. And while, as codes enacted everywhere, the *kompilasi* also carries the implication of replacing the single authorship of the old *fiqh* texts by a plural legislative voice, the authoritative manual opinion ousted by the authoritative code article, the *fiqh* texts and their legal doctrines, have become so institutionalized in the Indonesian Muslim community it is impossible for this new code to replace it entirely.[27]

2. Society's Legal Awareness: Extra-Judicial Divorce

The fact that, despite the very existence of the *Kompilasi*, the *fiqh* texts remain central to the judicial practice of judges in Indonesian religious courts seems to constitute a reflection of the ambivalence of Indonesian Muslims about accepting the results of the institutionalization of Islamic law initiated by the State. The ambivalence of Indonesian Muslims towards the outcome of the institutionalization of Islamic law by the State can be seen first and foremost in the issue of divorce. Once, I was told by one of the judges of a religious courts in Indonesia, a woman came to a judge saying that she had been divorced by her husband and showed a small piece of cigarette paper on which there was a statement written by her husband that since a certain (mentioned) date she was no longer his wife. She said that, as she considered herself a divorced wife, she had come to the court merely to obtain a certificate of divorce.

Such cases constitute only one of the abundant legal anomalies occurring within religious courts in Indonesia and reflect of the ambivalence of Indonesian Muslims about the institutionalization of Islamic law initiated by the State. On the one hand, Indonesian Muslims believe that Islamic law is a sacred law whose domain is beyond state control and that the authority of the *ulama* in interpretation of Islamic law is exclusive. *Ulama* are regarded as the guardians of Islamic law, the people who should resolve the actual Islamic legal issues

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[27] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 223.

facing society. On the other hand, they are aware that the role of the state in legal relations among its citizens cannot be ignored, and thereby its intervention is needed. In this context, the institutionalization of the Islamic law in the framework of the national legal system is frequently perceived to be a necessity. The case described above illustrates this ambiguous attitude of society toward state law.

Since 1974, all petitions for divorce must be brought to a religious court, and the local KUA (*Kantor Urusan Agama*) receive reports of, or documents pertaining to, divorces from the religious court. The divorce procedure was further clearly refined in the 1989 Islamic Judicature Act and the *Kompilasi*. The latter elaborated the rules by providing more details about the divorce procedure. Plaintiffs have to write their claims and submit them to the court. They are invited to attend a court hearing within thirty days after the claims are registered. The court hearing consists of three sittings, each with a different aim. The first sitting attempts to reconcile the couple; at one point, this required counselling by the *Badan Penasihat Perkawinan, Perselisihan dan Perceraian* (Advisory Board for Marriage, Disputes, and Divorce Settlements, BP4) from whom plaintiff received an advisory note. When I did research in 2003-2005, no questions were asked about whether couples had attended BP4. Therefore, while counselling was still recommended, the BP4 advisory note which formerly had to be brought to court was no longer required.[28] This was because, besides also attempting to reconcile the litigants, religious court judges must work independently of other parties or institutions. Since 2009 reconciliation has become the task of judges and only certified judges can become mediators in court.[29] The second session discusses the results of reconciliation efforts. If the petition for divorce is not retracted, a third hearing is arranged to complete the arrangements for divorce.

The *Kompilasi* stipulates that a couple who wants a divorce should go to

[28] Hisako Nakamura, *Divorce in Java* (Yogyakarta: Gadjah Mada University Press, 1983). See also Euis Nurlaelawati, *Modernization, Tradition and Identity*, 186.

[29] See Euis Nurlaelawati, 'Indonesian Muslim Women at Court; Reform, Strategies and Pronouncement of Divorce', *Islamic Law and Society*, Brill, 20: 3. 2013.

court to ask permission to pronounce the divorce formula, to ask the court to dissolve (*fasakh*) their marriages, or to initiate a *khulu'* divorce for which the financial compensation is to be paid by the wife to the husband. However, in reality many people who want to divorce still follow their own path in seeking a divorce, and thus only summon a religious leader or relative to witness their pronouncements of the divorce formula. Some even simply write letters to or shout at their wives, stating that from that time on they are repudiated. Having spoken the formula, many go to the Offices of Religious Affairs at the sub-district level, where divorces petitions could formerly be submitted, but which since 1974 are no longer competent to legalize their divorces.[30]

Many people in the villages in the countryside consider going to court to obtain a divorce is more a burden than a necessity. This is particularly relevant considering the fact that Indonesia has remote villages with limited access to the closest towns. Located in the regency capitals, Islamic courts are places with which some rural people are not familiar. Going to these courts would require expending large amounts of time and money, as they have to walk to reach the main road where normal public transportation like buses are available, and often have to take another form of public transport, such as o*jeg* (hired motorcycles).[31] It is still worse, however, as there are three hearing sessions which necessitate time and money. Petitioners have to cover costs of not only their own transportation, but also of that of their witnesses.

The problems facing rural residents and the procedures of procuring a divorce in the courts, however, have not prevented people from divorcing. Instead, these problems have encouraged some to avoid courts and conclude a divorce in a way they regard as religiously lawful (*sah*). They therefore present their cases to *ulama* who maintain that according to Islamic law, the pronouncement of divorce by the husband is the essential legal element to effectuate a divorce and therefore are prepared to approve the divorce. It is interesting that some husbands still go to the KUA to deal with divorce, as

[30] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 186.
[31] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 186.

they do not know that the authority over divorce has been removed from the KUA and transferred to the courts.[32] The conflict has intensified as the local KUA have close contact with local society as most of their officials, particularly those serving as *Pembantu Pegawai Pencatat Nikah* (P3N), are recruited from local religious leaders or *ulama* (*tokoh desa* or *tokoh agama*). Most importantly, this institution is established in every district (*kecamatan*), and consequently its officials are firmly rooted in local society. This fact, which enables KUA officials to gain a deeper insight into the marital problems faced by local society, also prompts officials to be more realistic and urge that the authority for resolving divorce cases be returned to the KUA.

This phenomenon has had a great impact on the nature of divorces brought to court and on judges' attitudes. Islamic courts hear not only the cases of divorce that are handled exclusively by courts, but also cases which have already been heard by KUA and local *ulama* or settled by the couple themselves. Many litigants come to the courts merely to obtain letters or certificates of divorce and tell judges that they were divorced before KUA officials or before local *ulama.* They frankly said that that they had come to the court in order to obtain "*kartu kuning,"* meaning a yellow certificate, that is, a certificate of divorce (*akte cerai*).

In hearing such cases, judges often face a dilemma. Litigants' statements that they came to courts to merely legalize their actions often leave the judges with only two choices*;* annul the divorce and re-issue it, or accept it and grant petitioners requests.[33] Some judges are determined to apply state law strictly, and therefore decide such cases by adhering to the regulated divorce procedures and rule that the divorces had not occurred, particularly in cases brought to the courts in recent years, although husbands clearly stated that they had divorced their wives. When a wife still questioned the reason she was divorced or when she did not realize that her husband had actually divorced her, the judges have reheard the cases. Judges have done the same in cases in

[32] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 189.

[33] Euis Nurlaelawati, *Modernization, Tradition and Identity,* 192.

which a husband who was understood by his wife to have divorced her, but denied that he had done so. After determining the facts of the case, they ask the husband to pronounce the divorce formula again or declare that the wife's petition is granted and affirm that the divorce will be absolute after the husband's pronouncement of the divorce in court or after the decision has been given executorial force.[34]

The case addressed in one court hearing which I attended illustrates this well. A husband (DM) petitioned for divorce and admitted to having divorced his wife and even to have married another woman. The wife (SH) rejected this and said that she did not want to be divorced and preferred to share him with the (second) woman. The judges explained to them that the husband has now entered into a polygamous marriage to which the wife has agreed but the husband has not. While the husband kept saying that he came to the court merely to formalize the divorce, the judges required them to reconsider what they have done and reconcile and come to the court again the following week. In adopting such a position, the judges often do not care whether or not the litigants adhere to their decisions in terms of their consequences in relation to other legal matters. Besides demonstrating that the judges are often put into a dilemma, this case also illustrates that there is often disagreement between judges and disputants in terms of the religious validity of a given action.

3. Judges' Legal Discretion and Women's Issues

In judging cases, Islamic court judges refer to the *Kompilasi*. However, although the *Kompilasi* is officially considered as the relevant legal reference, judges often also refer to other sources. Here I shall discuss two cases related to women's issues where judges formally referred to the *Kompilasi*, but their ruling substantially deviated from the *Kompilasi* and instead substantially relied on Qur'anic verses, resulting in women remaining legally subordinate and weak. These two cases involved polygamy and custody of children after divorce. I shall also discuss other issues in which women have benefitted from and have

[34] Euis Nurlaelawati, *Modernization, Tradition and Identity*, 194.

better access to justice. These cases include *iddah* maintenance after divorce under men's petition.

Polygamy constitutes one of the issues that often comes up in legal debates in Indonesia and has gained great deal of attention from legal scholars, researchers and gender activists.[35] Although cases of polygamy do not overload the dockets of Islamic courts, it raises interesting issues in regard to the legal attitude of judges and its relevance to women's fate. In the case of polygamy, most Indonesian Muslim women are not able to negotiate or to influence judges' judicial decisions. Although the issue of polygamy is thoroughly and exclusively regulated in a limited set of laws, mentioned earlier, including the *Kompilasi* and PP No. 10/1983, which was amended in 1990 by PP No. 45/1990 to make the practice of polygamy more difficult, judges in the three courts observed remain gender-biased and unreceptive to women.[36]

Their legal understanding and interpretation is seen clearly in their work. In fact, all the proposals for polygamy brought in 2007-2009 by husbands to Islamic courts of Cianjur, one of the districts in West Java, were accepted. The proposals were based on various reasons, including the inability of existing wives to provide descendants, acute illness of the wives, and a high sexual desire that needs to be fulfilled. It is worth mentioning that, although not explicitly mentioned, high sexual desire is the dominant reason for these petitions. Indeed, four of the nine judgements revealed that the reasons for the polygamy proposals were that their wives could not satisfy their husbands' sexual desires or lust. These judgements clearly indicate that judges in this court remain permissive toward polygamy and not particularly strict about the rules as they often approved non-legal reasons presented by husbands as grounds for polygamy.[37]

My research indicates that proposals on polygamy were mostly met. For example, all twelve proposals on polygamy submitted to courts of Serang and

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[35] See, for example, the study by Nina Nurmila, *Women, Islam, and Everyday Life: Renegotiating Polygamy in Indonesia*, New York: Routledge, 2009.

[36] Euis Nurlaelawati, 'Shari'a-based Laws', 22.

[37] For the details of the judgments, see Euis Nurlaelawati, 'Shari'a-based Laws', 32-33.

Tangerang in 2007 and 2008 were approved. Although the justifications presented in decisions issued by the Tangerang court include religious observance (*ibadah*)[38] in two cases, wives' failure to satisfy the sexual desire of their husbands in the other two cases, and the husband's high mobility in one case, all twelve petitions were basically approved in order to fulfil the high sexual desire of the petitioners (husbands),[39] which are notably illegal reasons. What judges demonstrated through their legal judgements in polygamy cases is striking. The issue of polygamy in Indonesia, as mentioned previously, is regulated thoroughly. All the relevant laws clearly stress that one or more reasons should be presented first and the qualifications are to be met afterwards.[40] The above cases suggest that judges in these courts do not always adhere strictly to the rules and that, in contrast to the issue of divorce, polygamy is quite difficult to control and 'vernacularize' (interpret according to modern legal discourse). A number of judges clearly believe that polygamy is a legal practice that has clear Islamic legal rationale. Some of them even frankly admitted that if they were to oppose polygamy, they believed they would be deviating from *Sharia*.[41]

Above all, in their judgements, most judges stressed the qualifications to be met by husbands, rather than the reasons why husbands wanted a polygamous marriage. Consequently, they have accepted any reason presented by husbands, even those not included in established laws. Rather than stressing justice, to which judges should be committed, in their legal reasoning, the emphasis here appears to be on the concept of *maslahah* (public good), which is

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[38] Many Indonesian Muslims consider polygamy as a religious observance (*ibadah*) to be performed by Muslims. The most famous example of this was displayed by Muhammad Insa through his proposal for judicial review on the rule to the Constitutional Court. For further discussion on this issue, see Faye Yik-Wei Chan, 'Religious Freedom vs. Women's Rights in Indonesia: The Case of Muhammad Insa', *Archipel* 83, Paris, 2012, 113-145. See also Simon Butt, 'Islam, The State, and Constitutional Court', *Pacific Rim Law and Policy Journal*, Vol. 19, No. 2, 2010.

[39] Some of these judgements are identified as decisions No. 280/Pdt.G/2009/PA. Srg, No. 526/Pdt. G/2009/PA.Srg, No. 322/Pdt.G/2009/PA.Srg, No. 211/Pdt.G/2008/PA.Tng, and No. 164/Pdt.G/2008/ PA.Tng.

[40] Art 2/PP. No. 10/1983 and art 2/PP. No.45/1990.

[41] Based on interviews with six judges of Religious Court of Serang and Tangerang, 2011.

often highly abstract and unclear. In fact, they rarely checked whether or not the husband genuinely has a high sexual desire, nor to determine whether or not the existing wife is really unable to have children, when husbands present such reasons to support their request for polygamy.[42]

Besides polygamy, women have also not benefitted in custody after divorce. In Indonesian religious courts, custody cases can be either resolved in a separated file or integrated into divorce file. Custody cases are mostly brought by women. In custodial cases, women can face two kinds of problems, i.e., losing their right to custody and failing to execute decisions giving them the right to become custodian. In the first case, the problem arises particularly when the man argues that the divorce petitions are motivated by the wife's behaviour.[43] While they have the right to custody over their children of under age of 12, they are often dismissed. In the second case, they are awarded the right but could not have it in practice.

In resolving custody cases, judges generally stress the best interest of children as emphasized in the *Kompilasi*. Although judges agree with this rule and in general follow it, in practice, judges sometimes conclude that as the choice of giving the right of custody to one of the divorced parties aims to ensure the children's welfare, it is not good to give all mothers this responsibility without due consideration; a small number of mothers of bad character, such as those addicted to drugs, or those planning to marry another man, and those who convert to other religions, could be considered inappropriate, and hence could be deprived of the responsibility. I shall here discuss two conditions that lead women to lose their right to custody. First is religious deviance or conversion of the mother, and second is the career of a mother that takes much of her time.

For the sake of best interest for the children, conversion of the mother

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[42] Interview with judges of Tangerang, July 2011 and based on content analysis of decisions on several petitions for polygamy. For similar findings on this issue, see M.B. Hooker, *Indonesian Syariah: Defining National School of Islamic Law*, Singapore: ISEAS, 2008, 12-13.

[43] Based on content analysis on decisions issued by court' judges and interview with a number of litigants, female in particular in Cianjur, Tangerang and Serang.

to another religion is deemed to be one of reasons that can be used by judges to rob mother of her right to custody. For example, the religious court of Serang gave the right to custody of the children younger than twelve to their father on the grounds that the mother was not pious in her religion and that all the members of her family were non-Muslims. As a basis for its decision, it mentioned a legal doctrine from a *fiqh* text; al-Bajuri's *Hashiya Kifayat al-Akhyar*, Vol. 3, 203, that states that "… there is no right to custody for the mother who is religiously deviant."

With respect to the person having right to custody, the *kompilasi* rules that custody of children should be first passed to women on the mother's side if the mother is deemed incapable. However, in the case of divorce, the first person having rights if the mother is considered inappropriate is the father. This might be due to a consideration that giving it to, for example, an aunt or grandparent on the mother's side can mean in effect still giving it to the mother. Moreover, the fact that familial relationships are so close in Indonesia provides a better justification for giving custody rights directly to the father. It seems that such a decision is taken to ensure that the custody of the children, particularly in cases where the mother and her family have become religiously deviant (*fasiq*) or apostate, lies in the right hands, and that the demands of the best interest have been satisfied.[44] In this respect, it should be noted that the *Kompilasi* indeed rules that to guarantee the safety of the children physically and spiritually, a religious court can transfer the right of custody from one nominee to others. Although it is not clear whether the spiritual aspects to be guaranteed also include (Islamic) religion, religious court judges interpret it in that way, and spiritual safety of the children emphasized in these rules also has a bearing on religious interests of the children.[45]

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[44] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. Amsterdam: Amsterdam University Press, 2010, 145.

[45] The same holds true in the case of *mumayyiz* children (those who have reached maturity or age twelve or old in accordance with the *Kompilasi*). For further discussion on this issue, see Euis Nurlaelawati, *Modernization, Tradition, and Identity,* 145-146.

The career of the mother or even the mother's working outside the home can become an additional reason for her to lose rights to custody. Many cases from the three courts observed proved this. I collected more than one hundred decisions, including on cases of custody. Of the 13 cases of custody from courts of Tangerang, Serang and Cianjur whose decisions were either integrated in decisions on divorce cases under wives petitions or issued separately, five eliminated wives' custody rights.[46] Although this is a small number given that eight decisions awarded wives custody rights, these cases demonstrated judges' imbalanced or unequal approach to the issue, leaving many wives remain aggrieved. Two of the five wives in cases handled by the courts of Serang and Tangerang were not awarded custody by judges in the first instance courts and they did not negotiate or appeal the rulings to higher courts. The reason for dismissing the wife in the first case was that she works. In her divorce petition, she also petitioned for custody of her 4 years-aged son. Although working mothers could be awarded custody in other cases, their capability to undertake the task of raising their children was often questioned, as this case demonstrates. On these grounds, the mother was robbed of her rights, although the husband worked too.[47] The principle of the best interest of children is not very clear and largely determined by judges' assumptions that the mother had to have more time for her child, although they were also not sure whether the working husband has sufficient time to raise the child.

There are some cases however where women receive better justice. As mentioned above, women are entitled to some rights after divorce. These include custody over their children, financial maintenance during the waiting period (*iddah*), and financial support for children under their custody. Although rules related to these rights have not been well implemented, there have been significant attempts by judges to protect women's right to property after divorce and to *iddah* maintenance in particular. If we look at the decisions on divorce cases petitioned by husbands, we could assume that wives' right to

[46] Euis Nurlaelawati, 'Sharia-Based Laws', 27.

[47] Euis Nurlaelawati, 'Sharia-Based Laws', 27.

iddah maintenance have been granted. As mentioned above, wives have rights to spousal alimony after divorce initiated by husbands and most wives interviewed are aware of this right. In fact, in all eighteen cases heard in the courts of Tangerang and Serang where I did research for the Islam Research Program, judges required husbands to pay and submit to the clerk the spousal alimony and *mut'ah* (gift of consolation). Even better, judges of this court, as in those of courts in Aceh, Padang, and Makassar[48] demanded husbands make the payments before they are permitted to pronounce the divorce formula in court.[49]

Judges, however, have not always acted in such a strict manner. In fact, judges are very realistic and often adapt to the circumstances faced by husbands. Problems of finance for many husbands have made judges lax, and they therefore would allow the husband to pronounce the divorce formula in court without husbands making payments in advance, and instead warning the husbands to perform their obligations afterword. In so doing, judges avoid leaving wives with an unclear legal status. Judges also often adapt to the financial condition of husbands and therefore ignore the amount demanded by wives, and instead determined a different amount to be paid by husbands.[50] Therefore, although changes in judges' attitudes have to some extent helped improve justice for women, a number of issues, including economic and procedural issues, still result in many husbands not fulfilling their legal obligations.[51]

Moreover, although husbands are aware that the obligations are mentioned in court decisions, they could still avoid the payments, assuming that

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[48] Arskal Salim, *Demi Keadilan dan Kesetaraan*,

[49] Based on notes on hearings held in courts of Serang and Tangerang and interviews with a number of judges, Serang and Tangerang, September, October and November, 2010.

[50] Based on notes on hearings held in courts of Serang and Tangerang and analysis on a number of judgements issued by these two courts.

[51] Euis Nurlaelawati, 'Sharia-Based laws in Indonesia', 45-46 and Stijn van Huis, 'Akses terhadap Hak-hak Pascaperceraian bagi Perempuan Bercerai di Cianjur', in Ward Berenschot (eds.), *Akses terhadap Keadilan: Perjuangan Masyarakat Miskin dan Kurang Beruntung untuk Menuntut Hak di Indonesia,* Jakarta: HuMA, 233-253.

the payments constitute religious obligations. They are also aware of the punishment, when they fail to make them. Nonetheless, although in many cases the threat of punishment in the hereafter is a much greater motive for complying. In this case, their view that the sanction was religious and would come in the hereafter led them to ignore the payments and excuse themselves as poor people and contributed to the lenient implementation of the rulings by husbands. The absence of any instrument or mechanism to enforce the execution of rulings has encouraged judges' negligence in implementation.

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