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# Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia

MARK CAMMACK, ADRIAAN BEDNER, AND STIJN VAN HUIS\*

**Abstract** *This article examines the developments in Indonesian family law in the aftermath of the political transition that occurred in 1998. Its focus is on the position of the Islamic courts and the role of the women's movement as a driver of reform. Combining literature on gender, Islam, and the state in Indonesia with new material such as divorce rates, cases of the Constitutional Court, and law reform initiatives, the authors argue that the family law reform processes already underway before 1998 have not changed much and have continued to lead to more state control of Islamic family law. Yet, even though the reforms since 1998 have not directly targeted family law, they have unleashed processes of liberalization, democratization and decentralization that have emboldened Indonesian women in the exercise of their rights and have invigorated debates over further reform.*

## Introduction

On May 21, 1998, Indonesian President Soeharto resigned from office after more than three decades in power. Popular dissatisfaction with the Soeharto regime had been building for years, but deepened dramatically as a result of hardship caused by the financial crisis that struck the region in 1997. Anti-government protests that began in mid-1997 gradually spread across the country and became more intense. On May 12, 1998 the protests turned violent after police fired on students demonstrating at Trisakti University in West Jakarta, killing six people and injuring twenty. The Trisakti shootings sparked mass demonstrations across the country and the situation rapidly spiraled out of control. Some of the protestors directed their anger at Indonesians of Chinese descent, long scapegoated as a symbol of economic injustice in Indonesia. Soeharto resigned nine days after the shootings, but not before several thousand Indonesians had lost their lives and billions of dollars of property had been destroyed.

The momentous events of 1998 in Indonesia have obvious parallels in the political upheavals that shook the Middle East a decade later. Similar to the other contributions to this series, this article examines developments of Islamic family law in the aftermath of a fundamental political transformation. The Indonesian women's movement, which emerged in the early twentieth century contemporaneously with Indonesian nationalism, has been an important force for reform throughout the country's history. The popular movement that forced Soeharto to resign, known in Indonesia as *Reformasi*, was inspired by the ideals of constitutionalism, democracy, and human rights. Although family law was not specifically targeted, the *Reformasi* movement unleashed processes of liberalization, democratization, and decentralization that have emboldened Indonesian women in the exercise of their divorce rights and have invigorated

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debates over family law reform. Even if these debates tend to be increasingly couched in Islamic terms, the ideal of substantive equality between men and women has remained unchanged.

The discussion that follows is divided into three parts. In the next section, we begin with a discussion of the pre-1998 development of Indonesian Islamic legal institutions, family law, and the Indonesian women's movement. The second section summarizes the changes implemented as a part of the *Reformasi* agenda and the role of women in the *Reformasi* movement. The final section discusses developments in Islamic family law in the post-*Reformasi* period, which arguably started in 2002. We conclude with some brief reflections on the long-term trends and future direction of women's rights and Islamic family law in Indonesia.

## Background

### *Marriage Law, Islamic Courts and the Women's Movement in Indonesia Before Independence*

The basic features of the Indonesian Islamic legal system were put in place during the period of Dutch colonial rule. The legal system created by the Dutch for the colonies in Southeast Asia during their more than 350 year-presence was primarily personal rather than territorial.<sup>1</sup> This meant that one's ethnicity rather than one's place of residence determined which law was applicable. For marriage and divorce of the Indonesian part of the population this was customary and Islamic law.

Historically, the social and legal standing of women in what is now Indonesia was somewhat stronger than in many other parts of the world, including in western countries.<sup>2</sup> This relatively strong position of women in society was reflected in the judicial practices of the Islamic courts. Perhaps the most significant doctrinal development was the incorporation of customary marital property rules into Islamic law that granted a wife a share of all property acquired through the efforts of either spouse during the course of the marriage.<sup>3</sup> Islamic courts in Southeast Asia also developed means for women to obtain a divorce beyond those available to women in most other parts of the Muslim world. One commonly used divorce option for women was the use of the *taklik talak* or suspended repudiation.<sup>4</sup> This involved the pronouncement of a promise by the husband at the time of the marriage that a repudiation would automatically occur should he commit certain stipulated acts. By at least the end of the nineteenth century, the use of the *taklik talak* was pervasive across the archipelago. The conditions that would give rise to a repudiation were subject to negotiation and varied from place to place, but a more or less standard set of stipulations were commonly used.<sup>5</sup>

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<sup>1</sup> Soedargo Gautama, "The Marriage Laws of Indonesia with Special References to Mixed Marriages," in *Essays in Indonesian Law*, ed. Soedargo Gautama (Jakarta: Citra Aditya Bakti, 1991).

<sup>2</sup> See generally Jane Atkinson and Shelly Errington, *Power and Difference: Gender in Island Southeast Asia* (Stanford, Calif.: Stanford University Press, 1990).

<sup>3</sup> R. Michael Feener and Mark E. Cammack, eds., *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard University Press, 2007). The institution of joint marital property was only formally recognized by statute with the passage of the National Marriage Act in 1974, but Islamic tribunals throughout Muslim Southeast Asia had been applying the doctrine at least since the beginning of the twentieth century and in many regions probably longer.

<sup>4</sup> C. Snouck Hurgronje, *The Acehnese*, translated by A.W.S. O'Sullivan (Leiden: E.J. Brill, 1906), 2 vols.

<sup>5</sup> A sampling of *taklik talak* formulas used in various regions can be found in Cora Vreede-de Stuers, *The Indonesian Woman: Struggle and Achievements* (The Hague: Mouton & Co., 1960), Appendices A-D.

Disputes regarding family law could be brought before various types of customary courts or before Islamic courts. The current system of Islamic courts in Indonesia is directly traceable to a system of Islamic tribunals created by the Dutch at the end of the nineteenth century on Java and Madura. A royal decree promulgated in 1882 provided for the establishment of district-level Islamic councils charged with the task to decide disputes concerning matrimonial law and inheritance.<sup>6</sup> The chief religious officer in the district – the *penghulu* – was designated as chair of the court. The council was to include between three and eight religious scholars serving as member judges – including the chair. In the 1930s the Dutch established an appeals tribunal for the courts on Java and Madura, and also created additional first instance courts and an appeals court in the Banjarmasin region of Kalimantan.<sup>7</sup> Elsewhere in the archipelago, the local authorities administered Islamic law through institutions specially created for the adjudication of family law and other matters.<sup>8</sup> These tribunals had the same collegial structure as the courts established by the Dutch and relied on a generally common set of Shafi'i texts as authority for their decisions.

The court reforms and expansion carried out by the Dutch in the 1930s were accompanied by a number of important initiatives relating to the substantive law applied to Muslims in the colony. One such initiative related to matrimonial law. In 1937 the colonial government introduced a draft marriage law entitled “Ordinance Project for the Regulation of Matrimonial Legislation of the Muslim Population.”<sup>9</sup> Among the most important and significant proposals in the draft was a procedure whereby a wife could obtain a judicial decree of divorce should her husband marry another wife. However, this provoked such criticism from a number of Muslim organizations that the proposal was withdrawn. By contrast, the Marriage Ordinance Project had strong support from secular-oriented elements of the women's movement. Since they were also part of the nationalist movement, their alliance with the Dutch authorities was tenuous, but these secular women's organizations were to remain a critical agent for change after independence

### *The Indonesian Women's Movement and Islam*

While the position of women in Islamic marriage law as found in practice and applied by the Islamic courts was much better in the Netherlands Indies than in most contemporary Muslim countries, their inequality in marriage and divorce helped to establish a women's movement. This movement would become the main driver for change in marriage law and the main adversary of the conservative Islamic establishment in this matter.<sup>10</sup> Its roots are usually traced back to the Javanese noblewoman Kartini (1879-1904), whose writings were the first to address the issues that would dominate the agenda of women's rights activists for the century to come: early marriage, polygamy, divorce rights, free choice of spouse, equal rights in education, equal

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<sup>6</sup> Vreede-de Stuers, *The Indonesian Woman: Struggle and Achievements*, 100-101.

<sup>7</sup> Supomo, “The Future of Adat Law in the Reconstruction of Indonesia,” in *Southeast Asia in the Coming World*, ed. Philip W. Thayer (Baltimore: Johns Hopkins University, 1953), 78-79.

<sup>8</sup> Supomo, “The Future of Adat Law,” 73-74.

<sup>9</sup> Vreede-de Stuers, *The Indonesian Woman: Struggle and Achievements*, 108-109.

<sup>10</sup> Following Elizabeth Martyn, *The Women's Movement in Postcolonial Indonesia: Gender and Nation in a New Democracy* (New York: Routledge, 2005), 11, we conceive of the women's movement as individuals, informal groups and formalized associations that “seek to represent women's collective, articulating women's demands and acting to address specific female disadvantage within society.” See also Susan Blackburn, *Women and the State in Indonesia* (Cambridge: Cambridge University Press, 2004), 11-12.

citizenship, and the improvement of women's socio-economic status.<sup>11</sup> The latter three aims may be categorized as "practical gender interests" and have traditionally commanded a high degree of unanimity within the movement. They moreover overlapped with the agenda of the nationalists, who sought to realize similar goals for all Indonesians living under the colonial government.

The agreement within the women's movement in pursuing the practical interests of women did not apply to "strategic gender interests,"<sup>12</sup> which had to do with the Islamic marriage law and its implementation through Islamic councils. These interests led to serious public debate, including among women themselves. As early as the 1920s, soon after the first organizations favoring women's emancipation had been established, ideological differences on family law became visible, pitching women's rights activists pursuing a liberal agenda against those inspired by socially conservative readings of Islam. This division has led scholars to make a distinction between Islamic and non-Islamic organizations, the latter usually being referred to as secular.<sup>13</sup>

At the time of Indonesian independence (1945) and for the first several decades afterward, Islam on the populous and politically dominant island of Java conformed to the pattern described by Clifford Geertz in his *Religion of Java*.<sup>14</sup> Geertz described Islam in 1950s Java as consisting of two basic variants: one variant—the *abangan*—was characterized by a syncretic mix of Islamic and indigenous beliefs and practices, and an emphasis on communal social values and religious mysticism. The other variant—the *santri*—was characterized by an emphasis on doctrinal rationalization and purity, a more individualistic social ethic, and a generally legalistic approach toward religious observance. The *santri* group was further divided between "modernists" as represented by *Muhammadiyah* and "traditionalists," represented by *Nahdlatul Ulama*. More importantly for present purposes, the *abangan-santri* divide more or less corresponded with the division of opinion over marriage law. Muslims from *santri* backgrounds generally favored marriage laws based on Islamic doctrine, while *abangan* Muslims preferred customary law (*adat*).

Indonesian Islam changed in fundamental ways over the second half of the twentieth century. The framework proposed by Geertz is of questionable value for understanding Indonesian society today, as the *abangan* have generally moved towards more mainstream doctrinal understandings of Islam. While it no longer conforms to religious orientation, the distinction between groups favoring marriage laws based on Islam and those favoring secular-based marriage laws has been a persistent feature of the debate.

The main controversy both before World War II and long afterwards concerned whether polygamy should be allowed or not.<sup>15</sup> During the first phase of the women's movement, which lasted until the Japanese occupation in 1942, the overarching concern of providing support to the nationalist cause held the movement together, even if at times emotions regarding the question

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<sup>11</sup> See Blackburn, *Women and the State in Indonesia*; Martyn, *The Women's Movement in Postcolonial Indonesia*, 32, 34; Kathryn Robinson, *Gender, Islam and Democracy in Indonesia* (New York: Routledge, 2009), 34.

<sup>12</sup> See on this distinction Maxine Molyneux, "Mobilization Without Emancipation? Women's Interests, the State, and Revolution in Nicaragua," *Feminist Studies*, 11:2 (1985), 227-254.

<sup>13</sup> Blackburn, *Women and the State in Indonesia*, 15. While the word "secular" is perhaps appropriate as a description of the non-Islamic group's approach toward law, the division between those favoring marriage laws based on Islamic doctrine and those who did not generally corresponds with a division existing among different groups of Muslims. This includes organizations on another religious basis, for instance Catholic or Protestant.

<sup>14</sup> Clifford Geertz, *The Religion of Java* (Chicago: University of Chicago Press, 1976).

<sup>15</sup> Saskia Wieringa, *Sexual Politics in Indonesia* (New York: Palgrave/Macmillan, 2002), 67; Martyn, *The Women's Movement in Postcolonial Indonesia*, 35.

whether polygamy should be prohibited ran high.<sup>16</sup> The tensions caused by disagreement over polygamy were lessened by a common commitment to the agenda of promoting “practical gender interests” on education and socio-economic advancement. It was also these practical interests that unified the movement as a whole irrespective of the secular, socialist, Catholic, Islamic or other basis of the particular organizations. Another important unifying factor was that all of these groups, even the most radical, shared a common outlook on women’s emancipation. All elements within the women’s movement subscribed to the decidedly modest view that the primary role and responsibility of women was towards their (nuclear) family. This outlook has continued to be characteristic of Indonesian women’s organizations to the present day.<sup>17</sup>

### *Developments After Independence*

The Japanese abolished all of the existing women’s organizations after their invasion of the Netherlands Indies in 1942.<sup>18</sup> Nevertheless, the women’s movement came to play a crucial role in the fight for independence against the Dutch following the Japanese surrender, and therefore the new Indonesian Republican government could not entirely ignore its demands for reform even if those demands were not fulfilled.<sup>19</sup> The spirit of the revolution and the democratic nature of the Indonesian state opened up new opportunities for social change and led to a flurry of activity. The 1945 Constitution, adopted immediately after the Declaration of Independence on 17 August, generally had a conservative character. Women were granted the right to vote,<sup>20</sup> however, and the existence of broad support for the rights of women was demonstrated by the fact that temporary constitutions adopted in 1949 and 1950 included a complete set of human rights relevant to women’s emancipation. Moreover, all of these constitutions subscribed to the multi-religious nature of Indonesia, denying the wish of important segments of the Islamic movement to make Islam the foundation of the state. The developmental, modernizing agenda of the Indonesian government seemed to open up excellent opportunities for further improvement of the position of women. In the socio-economic sphere some objectives were indeed realized, but, as we shall see, the efforts to effect changes regarding the strategic gender interests in marriage law and Islamic courts (formerly the councils) were to little or no avail.

This lack of change was largely due to the institutionalization of Islam in the post-independence state. Of major importance was the establishment of a Ministry of Religion, which provided the *santri* community with a source of government patronage and therefore soon became a *santri* stronghold.<sup>21</sup> It was to this ministry that during the first year of independence the supervisory authority over the Islamic courts was transferred. This proved vitally important to the survival of the Islamic judiciary and the preservation of a role for Islamic doctrine in Indonesian law. Together with Islamic political parties, the Ministry of Religion provided the

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<sup>16</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 48-49; Martyn, *The Women's Movement in Postcolonial Indonesia*, 30, 42.

<sup>17</sup> It even applied to the post-war radical left organization *Gerwani* (Robinson, *Gender, Islam and Democracy in Indonesia*, 57). See also Martyn, *The Women's Movement in Postcolonial Indonesia*, 98.

<sup>18</sup> The Japanese replaced them by a single organization called *Fujinkai*, which “promoted conservative models of domesticated femininity” (Robinson, *Gender, Islam and Democracy in Indonesia*, 49).

<sup>19</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 50-51; Martyn, *The Women's Movement in Postcolonial Indonesia*, 46-48.

<sup>20</sup> Martyn, *The Women's Movement in Postcolonial Indonesia*, 55.

<sup>21</sup> Lev, *Islamic Courts in Indonesia*, 59-60.

Islamic courts with a base of support without which they would likely not have survived.<sup>22</sup> This also enabled the Islamic courts to successfully resist efforts during the first three decades after independence to incorporate them as a panel of the civil courts or abolish them altogether. The Islamic judiciary not only survived but expanded. With the use of administrative regulations that did not require legislative approval, the Ministry of Religion was able to acquire control over tribunals established by local authorities and create new courts in areas of the country where they did not previously exist.<sup>23</sup>

The influence of women's organizations on these developments was limited. Some leaders of women's organizations were members of parliament and thus in a position to influence the legislative agenda. However, they remained unrepresented in the Ministry of Religion, and very few women entered other segments of the bureaucracy or assumed a position in the government. Ideological positions associated with the political parties, moreover, tended to overshadow the common goals of the women's movement and therefore reduced its effectiveness as a whole. According to Martyn, "women MPs would not necessarily represent women's interests,"<sup>24</sup> and, eventually, the failure of marriage law reforms was a conspicuous result.

In this era, most of the energy of women's activists was directed at reform of marriage law rather than the Islamic courts. Efforts to codify Indonesian marriage law began shortly after independence but foundered over disagreement on the question of whether there should be a single marriage law applicable to all Indonesians—the approach favored by women's groups and *abangan*-oriented nationalists—or separate statutes for each of the country's religious groups—the approach favored by the Ministry of Religion.<sup>25</sup> This situation did not change much after 1959 when Soekarno replaced the system of parliamentary democracy with his authoritarian Guided Democracy. Agenda-building processes for legal reform became much more difficult under the new regime, and Soekarno's government was not particularly interested in women's issues—even if its revolutionary rhetoric in principle promoted gender equality. The limited progress towards this goal that did occur mostly related to customary rather than religious law.<sup>26</sup> One notable exception was the appointment of women to serve as member judges on the Islamic courts. Despite criticism from conservative Muslims, the Ministry of Religion began appointing women to serve as judges in the 1950s, and by the mid-1960s fifteen women were serving as judges in the Islamic courts.<sup>27</sup> This provided a potential inroad for introducing a female perspective into

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<sup>22</sup> Lev, *Islamic Courts in Indonesia*, 63-75.

<sup>23</sup> Lev, *Islamic Courts in Indonesia*, 79-92.

<sup>24</sup> Martyn, *The Women's Movement in Postcolonial Indonesia*, 113.

<sup>25</sup> A statute passed in 1946 provided for registration of Muslim marriage and divorce, but the law did not treat the substance of Muslim matrimonial law. In an effort to promote uniformity in decision-making, the Ministry of Religion designated 13 *fiqh* texts to be used as references by the courts. Minister of Religious Affairs Instruction 4/1947 moreover ordered Islamic registrars not to register child marriages (Robinson, *Gender, Islam and Democracy in Indonesia*, 60). Two competing proposals were debated briefly in 1958, after a female member of parliament named Soemari from the Indonesian Nationalist Party presented a marriage law bill based on the secular-nationalist model. The government responded by introducing a draft Muslim marriage law that had been in preparation by the Ministry of Religion for several years. The two proposals were debated over a period of three days but never put to a vote. Martyn, *The Women's Movement in Postcolonial Indonesia*, 139.

<sup>26</sup> For instance when the Supreme Court ruled that "in line with modern times" men and women should enjoy equal inheritance rights under customary law (Daniel S. Lev, "The Supreme Court and Adat Inheritance Law in Indonesia," *The American Journal of Comparative Law*, 11:2 (1962), 205-224.

<sup>27</sup> Lev, *Islamic Courts in Indonesia*, 110. We are not aware of any source containing information on the number of Islamic court judges in all of Indonesia in the mid-1960s. But because there were about 150 Islamic courts at the time and because the courts typically consisted of one full-time judge and about five "honorary" judges, the total

the courts. Measured against the objectives of the secular women's organizations, however, this amounted to little. The single most influential women's organization, *Gerwani*, rather than maintaining its focus on issues specific to women, found itself drawn further into the communist fight for the general revolutionary cause.<sup>28</sup> As a result, despite repeated efforts to reform Islamic marriage law, none of the many marriage law proposals was acted upon.

It took another regime change to revive the women's movement's efforts in pursuing the strategic part of their agenda in marriage law reform, such as curbing or eliminating early marriage, unilateral divorce and polygamy. Soeharto's ascent to power and the massacre of communists in 1965 and 1966 drastically changed the landscape of women's organizations. *Gerwani* was vilified and eliminated, but Soeharto initially showed more sympathy for the remaining secular-oriented groups than for those inspired by Islam. This paved the way for another attempt at producing a new marriage bill.

The impasse between *abangan*-oriented nationalists and *santri* supporters of Islamic law that had stalled progress on marriage law reform in the 1950s was broken when President Soeharto tried to bypass the Ministry of Religion and other representatives of *santri* interests and force through a uniform national law in July 1973. The proposal set out a uniform body of marriage and divorce rules applicable to Indonesians of all religions. It required registration for a valid marriage, declared unilateral divorce to be contrary to the equality of men and women within marriage,<sup>29</sup> and made divorce available only by decision of the court and upon a finding of statutory grounds.<sup>30</sup> On the question of polygamy, the most divisive issue, the proposal stated that marriage is in principle between one man and one woman,<sup>31</sup> but allowed for polygamy in some circumstances and with judicial approval.<sup>32</sup> The enforcement of the statute was assigned to the civil courts, which would have eliminated entirely the role of the Islamic courts in the regulation of Muslim marriage and divorce.

Soeharto's gambit backfired; the plan accomplished the very opposite of what was intended. The proposal provoked angry opposition, and Soeharto apparently realized that he had overreached.<sup>33</sup> While the revised bill that was eventually enacted is described as a compromise, it was not one favorable to the position of Soeharto and the secular nationalists. Though the intention of its sponsors was just the opposite, the 1974 Marriage Act laid the foundation for a thorough confessionalization of the law of marriage.

The text of the 1974 Marriage Act is highly ambiguous—deliberately so, in our view. It confirms the primacy of religion as the basis for marriage and ideologically the law reinforces male dominance by labeling husbands as “the head of the household.”<sup>34</sup> On the other hand, the 1974 Marriage Act also was a major step forward for women's rights. While the religious nature of marriage prevailed, polygamy was (and still is) only allowed upon the following conditions: the first wife cannot fulfill her duties as a wife, or she is handicapped or suffering from an

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number of Islamic judges nation-wide was probably somewhere between 1000 and 2000. Women judges therefore comprised about 1 percent of the Islamic judiciary.

<sup>28</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 54.

<sup>29</sup> This was stated in the elucidation that is typically included with Indonesian statutes.

<sup>30</sup> Articles 40, 41, 42.

<sup>31</sup> Article 3(a).

<sup>32</sup> Articles 3(b), 4, 5.

<sup>33</sup> Atho Mudzhar reports that the decision by Soeharto not to press for approval of the proposal was made after he received a visit from two prominent religious leaders from the *Nahdlatul Ulama*. Mohamad Atho Mudzhar, *Fatwa-Fatwa Majelis Ulama Indonesia: Sebuah Studi tentang Pemikiran Hukum Islam di Indonesia, 1975-1988* (1993).

<sup>34</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 71.



incurable illness, or she cannot bear children. Consent of the first wife is moreover mandatory (and if applicable also from the second and/or third wife), while the candidate-polygamist must prove that he can provide for all of them and that he will treat all his wives and children fairly. Only upon the fulfillment of these conditions can the Islamic court grant permission for a polygamous marriage. From a practical perspective, the more important developments included the requirement that a husband could only obtain a divorce in court, while a wife was granted equal rights to petition for a divorce. Yet what was originally intended as a secular law of marriage and divorce came gradually to be interpreted by Islamic scholars and judges as state endorsement of a version of Islamic law.

Steps by the Soeharto government to prevent polygamy among civil servants, instigated by his wife Siti Hartinah and the women's organization of female officials and officials' wives, *Dharma Wanita*,<sup>35</sup> further reinforced the idea that the secular women's organizations had finally achieved a position in which they could realize some of their agenda. This, however, proved to be unwarranted. Ironically, Soeharto's 'New Order' regime supported marriage law reform in favor of women, but at the same time promoted an conservative ideology of what has been called state *ibuism* or "motherhood," emphasizing the primary role of women as loving mothers and wives and supporters of their families, in line with their "biological disposition" (*kodrat*). The regime went much further in this than the secular women's movement had ever done. Such an approach was also decidedly at odds with the differences found in patterns of gender relations throughout Indonesia where women were often involved in agriculture and other economic pursuits.<sup>36</sup> In promoting this ideology the New Order established the previously mentioned *Dharma Wanita*, a counterpart to the civil servants' association (*Korps Pegawai Negeri*), with mandatory membership for both female civil servants and the wives of male civil servants. *Dharma Wanita* was plainly not disposed to become a driver of further reform.<sup>37</sup> Existing women's organizations were abolished or had the scope of their actions seriously curtailed.<sup>38</sup> Although the regime upgraded the Office of Women's Affairs to the status of a full ministry in 1983, and despite the fact that gradually more women came to hold positions in the government and the bureaucracy, they could do little to change the New Order's male hegemony.<sup>39</sup>

Another important development related to Islamic law occurred in the mid-1980s when Soeharto began courting Muslim interests as part of a new political strategy. During the first half of Soeharto's more than thirty years in power, the regime's policies were decidedly not friendly to the interests of *santri* Muslims.<sup>40</sup> That changed during the latter half of the regime when Soeharto began seeking the support of Muslim groups in response to declining support from the military.<sup>41</sup> This new Muslim strategy supported further changes to both substantive marriage law and the Islamic courts. These were in large part a consequence of changes brought about by the

<sup>35</sup> Sonja van Wichelen, *Religion, Politics and Gender in Indonesia: Disputing the Muslim Body* (Routledge, 2010), 74.

<sup>36</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 15-16; Robinson, *Gender, Islam and Democracy in Indonesia*, 31-32, 76-77.

<sup>37</sup> Saraswati Sunindyo, "Murder, Gender and the Media: Sexualizing Politics and Violence," in *Phantasizing the Feminine in Indonesia*, ed. Laurie Jo Sears (Duke University Press, 1996), 124.

<sup>38</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 73.

<sup>39</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 70, 138.

<sup>40</sup> Ruth McVey, "Faith as the Outsider: Islam in Indonesian Politics," in *Islam in the Political Process*, ed. J.P. Piscatori (London: Cambridge University Press, 1983), 199-225.

<sup>41</sup> Robert W. Hefner, "Islam, State, and Civil Society: ICMI and the Struggle for the Indonesian Middle Class," *Indonesia*, 56 (1993), 1-35.

1974 Marriage Law, and they displayed the same irony as noted above: while intended to reinforce the legitimacy of the New Order by strengthening the position of Islam and Islamic institutions, at the same time they promoted a relatively liberal interpretation of Islamic law that boosted women's rights in polygamy and divorce.

The first development along these lines was the enactment in 1989 of a law on the Islamic courts.<sup>42</sup> This law both solidified the legal standing of the Islamic judiciary and made changes to the organization and powers of the courts, which put them on the same footing as the parallel civil courts. The 1989 Islamic Courts Law also expanded the jurisdiction and powers of the courts in a number of ways. The law extended the courts' matrimonial jurisdiction to include child custody disputes, post-divorce support orders, and other matters related to the consequences of divorce.<sup>43</sup> The law also restored the power to decide inheritance disputes that had been eliminated in the 1930s.

The second initiative concerning Islamic law carried out in the latter years of the Soeharto regime was the promulgation of a manual of marriage, inheritance, and *waqf* rules called the "Indonesian Compilation of Islamic Law". The Compilation took the form and style of a code, but it was drafted by a committee of judges and Ministry of Religion officials, and given effect by means of a presidential instruction. The Compilation purports to be based on a variety of classical and contemporary sources of Islamic law. Its marriage law provisions, however, essentially restate the 1974 Marriage Law and the regulation implementing the law, thus contributing to the acceptability of these provisions and to the improvement of the position of women in marriage and divorce.

Altogether, the women's movement had very little influence on these changes, which were driven primarily by the Ministry of Religion and the Islamic judiciary. Nonetheless, several of the early women's organizations, both Islamic and secular, survived and new groups emerged. Their position was reinforced by the fact that the New Order's economic policies had the paradoxical effect that upper middle class women increasingly took up jobs outside of the home. This created a new form of consciousness among these women, but it also presented new challenges as they were required to carry a double burden of working and managing the home. While the large majority of Indonesian women of the poorer classes had always been in such a situation, this was something new for the higher classes.<sup>44</sup> Another development was the alignment of many secular women's organizations with the broader NGO movement that would come to play an important part in the toppling of the Soeharto regime. The end of the 1980s saw the creation of new women's NGOs, such as *Kalyanamitra*, *Solidaritas Perempuan* and the women's Legal Aid Foundation or APIK, which were quite activist in outlook. These groups were funded by Western donors and operated on the basis of a human rights framework, reflecting a global development in women's activism.<sup>45</sup> Yet Islamic women's organizations remained active as well.

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<sup>42</sup> Law No. 7/1989 on Religious Courts.

<sup>43</sup> While the 1974 Marriage Act ostensibly conferred jurisdiction over these matters as part of the courts' authority to decide divorce cases, the Supreme Court had ruled that the Islamic courts were barred from exercising them because the government had not promulgated implementing regulations on those matters. Mark Cammack, "Islamic Law in Indonesia's New Order," 38 *International & Comparative Law Quarterly*, 53 (1989), 65-66.

<sup>44</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 94-95.

<sup>45</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 16; Robinson, *Gender, Islam and Democracy in Indonesia*, 149-150. This development was very much supported by the adoption of CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), one of the very few human rights' conventions

The common goal of resisting an authoritarian regime proved to be a uniting force for the women's movement. On the eve of *Reformasi*, the women's movement looked much like the one that existed on the eve of the 1945-1949 revolution, with similar fault lines. At the national level it still consisted of secular-oriented, progressive upper middle class women. The Islamic women's organizations continued to share the practical gender interests promoted by secular-oriented groups, but differed in their view of the strategic agenda. Some organizations supported the further implementation of the strategic agenda, whereas others found that it went much too far in interfering with Islamic doctrine and advocated rolling back changes made by the 1974 Marriage Act. Their position was reinforced by the rise of a Muslim middle class that had hitherto been largely absent.<sup>46</sup> We shall now see how this worked out after the demise of the New Order.

## ***Reformasi and the Role of Women***

### *Resignation of Soeharto and the Reformasi*

On 23 February 1998 a group of women calling themselves the "Voice of Concerned Mothers" (*Suara Ibu Peduli*) took to the streets of Jakarta and Surabaya to protest the cost of milk that had risen to the point that it was no longer affordable for many average Indonesians. Their protests were not the first demonstration of popular dissatisfaction with the Soeharto regime, but they proved to be a turning point in the movement to force Soeharto from office. The way in which the women framed their protests made it difficult for the New Order to respond in a heavy-handed manner and paved the way for the student protests that ultimately convinced Soeharto to step down.<sup>47</sup>

The resignation of Soeharto marked the beginning of a number of processes that completely restructured Indonesia politically, constitutionally and to some extent socially. These processes led to new questions about the position of Islam in the post-Soeharto era, including the question of whether Indonesia should remain a multi-religious/secular state or become an Islamic state.

The first of these processes was democratization. Indonesia saw free elections for the first time since 1955. A staggering 100 political parties participated in the 1999 elections. About one-third of these new parties identified themselves as Islamic, but fears among "secularists" that they would gain a majority proved unwarranted. On the whole the Islamic parties were not very successful. Altogether the parties in favor of turning Indonesia into an Islam-based state received less than 25 percent of the vote. This trend was repeated in the elections of 2004 and 2009, and observers have noted that political Islam as a legislative force has clearly declined when compared to the 1950s.<sup>48</sup> Likewise, the debate that started in 1998 regarding the question of whether Indonesia could have a female president ultimately saw Muslim conservatives

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Indonesia became a party to under the New Order. See also Robinson, *Gender, Islam and Democracy in Indonesia*, 137-138, 144-149.

<sup>46</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 11.

<sup>47</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 1-2; Van Wichelen, *Religion, Politics and Gender in Indonesia*, 13. Some of the leaders of the protest were arrested and interrogated by the police, but they were soon released.

<sup>48</sup> Greg Fealy, "Indonesia's Islamic Parties in Decline," *Inside Indonesia*, May 2009, <http://inside.org.au/indonesia%E2%80%99s-islamic-parties-in-decline>.

unsuccessful in their attempts at preventing Megawati Sukarnoputri from gaining the presidency in 2001.<sup>49</sup>

Secondly, a far-reaching process of political and social liberalization was carried out in the adoption of a full range of human rights, first in the 1999 Human Rights Law and later in the constitution. Just as citizens used their right to congregate for establishing new political parties and civil society organizations, freedom of expression and the press led to establishment of new daily newspapers, journals and other media, leading to a pluriform menu of news coverage that differed greatly from the state-controlled New Order media. The quick rise of Internet use further contributed to this trend, with Indonesia ranked fourth behind the United States, Brazil and India in total number of Facebook users by 2013.<sup>50</sup> Taken together the effects of these changes have produced a degree of openness, public debate and widening horizons that appear to have truly transformed the country. Indonesians' access to all sorts of information, including on Islam, has moreover caused changes to Indonesian women's perceptions of themselves and of their position in the world. On the one hand we see extremist readings of *Syariah* (*shari'a* law) spreading quickly, but on the other the Internet offers Indonesian Muslims—and women in particular—a hitherto unmatched opportunity to inquire into different versions of Islam and how to follow Islam in daily practice. Despite these developments, the traditional Indonesian context has continued to be the dominant framework for debating gender equality, and access to international discourse on gender equality has not had the effect of causing women's NGOs to frame their struggles according to the terms of this discourse (although they may occasionally borrow from it).<sup>51</sup> Finally we should note that the "NGO-ization" of the women's movement that began during the New Order continued during *Reformasi*. This has changed the nature of the movement, as the newly created NGOs were more often focused on single issues than on a broad, comprehensive agenda. What this means for the strength of the movement is still the subject of debate.<sup>52</sup>

In addition to introducing democratic controls on the exercise of power by direct election of the president and legislature,<sup>53</sup> the constitutional amendments (1999-2002) put into place numerous measures designed to provide "watchdog" controls on the exercise of governmental power. The first was a measure to bolster the independence of the judiciary, which had more than any other institution suffered under Guided Democracy and the Soeharto regime. One truly revolutionary change was the creation of a Constitutional Court vested with the power of constitutional review of acts of parliament. This, as we will see, has come to play an extremely important role in determining the limits of state intervention in the lives of its citizens and, in particular, its women. Secondly, the amendments established several institutions charged with the oversight of government actions, most notably the National Human Rights Commission and the National Ombudsman. In addition to these constitutional bodies, the National Commission on

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<sup>49</sup> For an account of this debate, and the position of Islamic women's groups in it, see Van Wichelen *Religion, Politics and Gender in Indonesia*, 22-41. See also Robinson, *Gender, Islam and Democracy in Indonesia*, 167-171.

<sup>50</sup> [http://en.wikipedia.org/wiki/Facebook\\_statistics](http://en.wikipedia.org/wiki/Facebook_statistics), accessed 5 May 2013.

<sup>51</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 31.

<sup>52</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 18.

<sup>53</sup> Of some importance is that the position of women has legally continued to be reinforced, notably by Art. 53 of the current Election Law (8/2012) which includes the obligation for political parties to have at least 30 percent women on their election lists.

Violence against Women, better known as *Komnas Perempuan*, a state body established in 1998, has consistently aligned itself with the secular women's movement.<sup>54</sup>

The third process that gained momentum following *Reformasi* is "Islamization." This refers to the fact that Islam has gained a much more visible presence in Indonesia since the start of *Reformasi*. Indonesians are increasingly understanding their identity in religious terms by referring to Muslim symbols and Muslim virtues.<sup>55</sup> This has also resulted in the emergence of a very diverse array of Islamic women's NGOs, a process promoted by the emergence of a Muslim middle class whose female members seek to actively relate Islamic ideas to societal issues.<sup>56</sup> Some of these groups, such as *Rahima*, seek to translate human rights' issues into an Islamic discourse,<sup>57</sup> but at the same time Islamist women's groups "work toward the reinforcement of male-defined Islamic gender paradigms."<sup>58</sup> Importantly, Islamization has been characterized more by debates about the meaning of Islam for individual Muslims than by its effects on the institutional arrangements of the state.

The fourth process set in motion by *Reformasi* is decentralization. Fearing that democratization would give rise to secessionist movements, Soeharto's immediate successor, B.J. Habibie, pushed through the adoption of a Law on Regional Autonomy (22/1999) that reversed the highly centralized governmental system of the New Order. While the main inspiration for the Regional Autonomy Law was economic, the devolution of governmental power led to differentiation in other social realms as well. In some regions this consisted of the resurgence of *adat*, but in other areas district heads and legislatures sought to shore up their legitimacy by adopting so-called *Syariah* bylaws.<sup>59</sup> While sometimes innocuous and generally enforced only inconsistently, these bylaws have nonetheless restricted women's freedom of movement and dress and have had a symbolically oppressive effect. Despite the fact that many of these measures seem to be in open violation of human rights guarantees now enshrined in the constitution, the central government has been extremely lax in responding to seemingly invalid local laws, and has thus contributed to reinforcing gender inequality. This Islamization is most extreme in the province of Aceh, which enjoys special autonomy status that grants provincial level authorities powers beyond those of other provinces, including with regard to religious affairs. Another effect of decentralization has been that national ministries have more difficulty in implementing their policies at the regional level,<sup>60</sup> including the Ministry of Women's Affairs (now the Ministry for Women's Empowerment and the Protection of Children), which has been

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<sup>54</sup> Another institutionalized protector of women's interests has been the State Minister of Women's Empowerment, in particular under Khofifa Indar Parawansa (Robinson, *Gender, Islam and Democracy in Indonesia*, 142-144; Van Wichelen, *Religion, Politics and Gender in Indonesia*, 17).

<sup>55</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 1.

<sup>56</sup> For a discussion of the changes in the debates on Islamic marriage law, see Euis Nurlaelawati, *Modernization Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), 120-123, cf. Van Wichelen, *Religion, Politics and Gender in Indonesia*, 113.

<sup>57</sup> Pieternella van Doorn-Harder, *Women Shaping Islam: Indonesian Women Reading the Qur'an* (University of Illinois Press, 2006); Van Wichelen, *Religion, Politics and Gender in Indonesia*, 32.

<sup>58</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 19.

<sup>59</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 171-176. In 2009 seven out of thirty-three provinces and fifty-one out of 510 districts have such bylaws (Michael Buehler, "Partainya Sekuler Aturannya Syariah," *Tempo*, 4 September 2011, 71).

<sup>60</sup> Robinson, *Gender, Islam and Democracy in Indonesia*, 143.

the main government body working to promote the position of women in all respects, including their position in the work force.<sup>61</sup>

In summary, the changes instituted during the first years of *Reformasi* were not primarily concerned with the position of Islam in the state. Nor were they concerned with the position of women in family law and before the Islamic court. However, some tensions between liberalization and decentralization have been visible from the start, with the latter potentially unleashing conservative forces in many regions that had been tightly controlled under the New Order. Moreover, while there was broad agreement that Islam should neither become the basis of the state nor that Islamic law should be constitutionally imposed on all Indonesian Muslims, the constitution did limit the freedom of religion to some extent. How these changes affected family law during the post-Soeharto era is the subject of the next sections.

### *The Islamic Judiciary in the Post-Reformasi Era and Rising Divorce Numbers*

One element of the Indonesian state most in need of reform at the end of the Soeharto era was the judiciary. Over the course of Soeharto's rule the country's general courts had been rendered thoroughly corrupt and incompetent.<sup>62</sup> Because the degraded state of the courts arose out of thirty years of executive branch interference with the judiciary, it was believed that the problem could be solved by instituting a separation of executive and judicial powers.

The *Reformasi* plan for the judiciary had just one goal: to implement a system of unitary supervision or *satu atap* (one roof). Under the structure that had been in effect since independence, supervisory power over the courts was divided between the executive and the judicial branches. The Supreme Court had authority over strictly legal matters, meaning the law and how it should be applied. The administration of the courts was under the executive—either the Ministry of Justice, which had authority over the general courts, or the Ministry of Religion, which oversaw the Islamic courts. Under the *satu atap* structure, the role of the executive would be eliminated and the Supreme Court would assume authority over all aspects of the courts. Some supporters of the Islamic courts initially resisted including the Islamic courts in the restructuring, but those efforts were unsuccessful, and in 2004 the Supreme Court assumed supervisory authority over both the general and Islamic courts.

Neither the transfer of supervisory authority nor any other legal changes carried out as a part of *Reformasi* has had a significant impact on the character or operation of the Islamic courts. However, there have been a number of important developments regarding the courts' caseload in recent years. Statistics from the Islamic courts show a staggering increase in the number of divorce cases. From 2003 to 2011, the number of divorces decided by the Islamic courts grew at an average rate of 10.3 percent per year, including a 14.1 percent increase between 2007 and 2011. In the nine-year period from 2003 to 2011, the number of divorces decided each year more than doubled, from 133,306 to 276,690.<sup>63</sup>

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<sup>61</sup> See <http://www.indonesia.go.id/en/ministries/ministers/state-minister-for-woment-empowerment/1647-profile/274-kementerian-pemberdayaan-perempuan-dan-perlindungan-anak> for a description of the vision and mission of the ministry. It is the main agency to implement Indonesia's obligations under CEDAW and other international treaties and policies concerned with improving the position of women.

<sup>62</sup> See Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell Southeast Asia Program, 2005).

<sup>63</sup> An increase in the number of divorces processed through the courts does not necessarily mean that there is more divorce. While the 1974 Marriage Act requires that men obtain judicial approval to divorce and pronounce the *talak* in court, many Indonesian Muslims consider themselves to have been divorced on the basis of the pronouncement of

Apart from the overall increase in the number of divorce cases, recent court statistics indicate another intriguing change in Muslim divorce behavior: women are filing for divorce more frequently than men. Divorces initiated by men and women are based on different procedures, and court statistics record divorce filings based on which procedure was used. Court records therefore reveal the relative proportion of divorces filed by men and women. In 1996 and 1997 men and women filed for divorce in approximately equal numbers. In 1998 and in every year thereafter, more divorces in Islamic courts were initiated by women than by men. Furthermore, while divorce filings by both men and women have increased, divorces initiated by women have grown at a much faster rate than divorces by men. Between 1998 and 2011 divorce filings by Muslim men grew at an average annual rate of 3.4 percent. Divorce filings by women grew more than twice as fast at an average annual rate of 8.1 percent. In 1999, women filed 57.5 percent of all divorce cases decided by the Islamic courts. In 2011, filings by women accounted for 69 percent of all cases. Though not solely responsible for the increase in divorce cases, women are asserting their right to leave unwanted marriages in growing numbers.

Recent changes in divorce behavior and the greater willingness of women to assert their rights can be explained only in part by the effects of *Reformasi*. While events occurring in the political realm are not commonly associated with the conduct of family life, a number of studies have shown that the values embodied in the political culture have an influence on the intimate lives of citizens.<sup>64</sup> Though not as well-known as some other cases, one of the best examples of this phenomenon is the dramatic change in marriage and divorce behavior coinciding with Indonesian independence. The institution of marriage in Indonesia was radically transformed in the second half of the twentieth century. During the first half of the century, marriage was generally understood as an economic partnership in which both spouses contributed to the economic support of the family and the marriage system was characterized by early arranged marriages and frequent divorce. By the end of the century marriage came to be understood as predicated on love and companionship, the matter of when and whom to marry was a matter of choice, and marriages were much more stable.

The changes in marriage behavior in Indonesia in the twentieth century cannot be explained by any single factor. Industrialization, modernization, the media, and education all played a role in the transformation of the marriage system and the decline in divorce.<sup>65</sup> But another factor contributing to these changes was the set of ideas embodied in Indonesian nationalism. As Ruth McVey (1996) has shown, the central ideal animating Indonesian nationalism and the independence movement was the concept of *kemerdekaan* (freedom or

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an extra-judicial *talak* in violation of Indonesian law. It is possible that the larger number of divorce cases results not from an increase in the frequency of divorce but from an increase in the proportion of divorces that are processed in court. The dramatic increase in divorce filings probably results at least in part from an increase in the number of court divorces relative to unofficial religious divorces. But there is other evidence apart from the growth in court dockets that divorce in Indonesia is on the increase. An analysis of recent survey data confirms that the long-term trend toward lower levels of divorce has ended, and that divorce rates in Indonesia are now rising. Mark Cammack and Tim Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effect of Political Change," *Asian Journal of Social Science*, 39:6 (2011), 776-796.

<sup>64</sup> Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); Suzanne Desan, *Revolutionary France: The Family on Trial* (Berkeley: University of California Press, 2004); Lynn Hunt, *The Family Romance of the French Revolution* (Berkeley and Los Angeles: University of California Press, 1992); Jacqueline Stevens, *Reproducing the State* (Princeton: Princeton University Press (1999).

<sup>65</sup> Tim B. Heaton, Mark Cammack, and Larry Young, "Why is the Divorce Rate Declining in Indonesia?," *Journal of Marriage and Family*, 63.2 (2001): 480-490.

emancipation). This was understood first and foremost in relation to Dutch colonial political domination, but many Indonesians also felt that the ideal of freedom called for changes to established patterns of social life. The “cognitive restructuring”<sup>66</sup> underlying the shift in divorce behavior was at least in part a result of new ideas about the individual and the state embodied in Indonesian nationalism.<sup>67</sup>

Though not as profound as the impact of Indonesian nationalism, the resignation of Soeharto was also accompanied by a sense of liberation. The collapse of the system of military and bureaucratic controls constructed during the Soeharto era was experienced as an emancipation that resonated throughout Indonesian social life. The social and political upheaval that accompanied the change of regime affected the personal lives of Indonesians, just as the Indonesian nationalist movement affected family behavior half a century earlier. Although *Reformasi* did not produce significant changes to Muslim family law, the changes in divorce behavior in recent years indicate that the political transition has made Indonesian women more assertive in the exercise of their rights.

As several authors have pointed out, the public sphere drastically changed during *Reformasi*. Issues that for thirty years had not been debated publicly suddenly were addressed in all kinds of public spaces. Well-established women’s organizations saw an array of new groups emerge, some of them stable, others of a temporary nature only. This development was supported by Indonesia’s economic recovery, which contributed to the expansion of a middle class. The atmosphere of freedom set the stage for debates about issues revolving around Islamic law in ways that in some respects are reminiscent of the 1950s, but the debates included many more citizens, took place in all kinds of spaces and involved “profound uncertainties not only over the meaning of Islam and religiosity but also over the meaning of family and of cultural, ethnic and gendered identities.”<sup>68</sup>

## Islamic Family Law in the Post-Reformasi Period

### *The Constitutional Court and Islamic Family Law*

One important change made after the fall of Soeharto was the creation of a Constitutional Court with the power to review legislation for its conformity to the constitution. As with other *Reformasi* changes to state institutions, the reasons for creating the Constitutional Court were unrelated to the role or application of Islamic law. Furthermore, the court was given only a limited ability to affect the content of Islamic family law. The court’s constitutional review power extends only to a review of *legislation*; the court does not have the power to review the constitutionality of *regulations* or other types of law created by the executive branch. This means that the court can entertain challenges to the 1974 Marriage Act itself, but it lacks jurisdiction to

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<sup>66</sup> Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* (Chicago: University of Chicago Press, 1989), 194.

<sup>67</sup> This argument was first put forward by McDonald & Abdurahman and Hull & Singarimbun. Peter McDonald and Edeng H. Abdurahman, “Marriage and divorce in West Java: An example of the effective use of marital histories,” Working Paper (Jakarta, Indonesia: Demographic Institute of the Faculty of Economics, University of Indonesia, 1974); Terence H. Hull, and Masri Singarimbun, “The sociocultural determinants of fertility decline in Indonesia 1965–1976,” Working Paper Series No. 31 (Yogyakarta, Indonesia: Population Studies Center, Gajah Mada University, 1989).

<sup>68</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, xix-xx.



rule on the constitutionality of the implementing regulations for the 1974 Marriage Act or of the Compilation of Islamic Law.

In its ten years of existence, the Constitutional Court has decided only a handful of cases dealing with issues related to religion or Islamic law and only two cases that directly related to Islamic family law.<sup>69</sup> These cases are significant because they show how the court has tried to avoid the impression that state law overrides Islamic law in order not to undermine the court's legitimacy.

The first case concerning Islamic law to be heard by the Constitutional Court concerned a challenge to the restrictions on polygamy contained in the 1974 Marriage Act. The petition was filed by a man named Muhammad Insa. In 2001, Insa married a second wife in a ceremony that complied with Islamic requirements but was not formally registered. Six years later, Insa went to the local Office of Religious Affairs (*Kantor Urusan Agama/ KUA*), the sub-district-level office with responsibility for registering Muslim marriages, to have the marriage registered. The KUA officials told Insa that although his marriage was valid it could not be registered because he had not received permission from the Islamic court. Insa also consulted with a judge on the Islamic court, but was told that were he to petition for permission to enter into polygamy the petition would be denied because he did not have the consent of his first wife as required by the 1974 Marriage Act.<sup>70</sup> Insa then sought recourse in the Constitutional Court claiming that the

<sup>69</sup> In addition to the cases discussed in the text, the court also decided two other cases related to Islam or Islamic law not directly pertinent to the subject of this article. In 2007 the court rejected a claim that the jurisdictional provision of the Religious Courts Law abridged the religious freedom of Indonesian Muslims in failing to vest the courts with the power to enforce all aspects of Islamic law, including criminal punishments. The court denied the petition on the grounds both that the requested relief was beyond what the court had the power to grant and that Islamic law is applicable in Indonesia only insofar as it has been adopted as national law. For a discussion of this case and the polygamy case discussed in the text see Simon Butt, "Islam, the State and the Constitutional Court in Indonesia," *Pacific Rim Law & Policy Journal*, 19 (2010), 279. The case that attracted the widest attention was a challenge to a 1960s era law that authorizes administrative action and criminal punishments for promoting "deviant" interpretations of one of the religions that is followed in Indonesia. The petitioners who brought the claim presented a number of arguments for invalidating the law, but the crux of the case concerned two questions. The first question was whether the state should have the power to decide that certain religions are approved and others are not. This issue is of particular significance because inclusion of belief in the One Almighty God as one of the five pillars of the state ideology has come to mean that all Indonesians must adhere to a religion that has the approval of the state. The second question was whether the state should have the power to determine the correct interpretation of those religions that are recognized in Indonesia. The principal argument for recognizing such a power, which was stated by virtually every witness who spoke in favor of its validity and adopted by the court as the primary basis for finding it constitutional, is that the state must suppress deviant belief systems and punish actions that offend religious sensibilities because the failure of the state to take action to defend religious orthodoxy would result in "horizontal violence" that would tear the country apart.

<sup>70</sup> The subject of polygamy is dealt with in Articles 4 and 5 of the 1974 Marriage Act. Those provisions are as follows:

Article 4: (1) In the event that a husband intends to have more than one wife, he is obligated to submit an application to the court of his domicile;

(2) The court shall give the husband permission to have more than one wife only if the following conditions are satisfied:

- a. The wife is unable to perform her obligations as a wife;
- b. The wife has a disability or suffers from an incurable disease;
- c. The wife is incapable of procreation.

Article 5 (1) In order to apply to the court for permission to take another wife the following requirements must be fulfilled:

- a. The man's existing wife/wives consent;
- b. It is certain that the husband is capable of guaranteeing the livelihood of his wives and their children;

restrictions on polygamy contained in the 1974 Marriage Act violated his constitutional right to practice his religion.

The court rejected Insa's petition in 2007. While the restrictions on polygamy in the 1974 Marriage Act were upheld, the decision is notable for its reasoning. In finding the limitations on polygamy to be valid, the court deemed it unnecessary to address the question as to what, if any, restrictions the state can impose on the practice of religion. The court concluded that the requirements for polygamy under the 1974 Marriage Act did not abridge Insa's right to practice his religion because the 1974 Marriage Act is fully in accordance with Islamic teachings. Thus, the essence of the court's decision was that Insa's claim was based on a flawed understanding of Islamic law. The court began by stating that because the petitioner had relied on Islamic teachings in making his claim, it was necessary for the court to consider those matters as well. The court then proceeded to spell out its view of the correct understanding of marriage and polygamy under Islamic law. Quoting *Qur'ānic* texts<sup>71</sup> and the testimony of religious scholars who testified as witnesses at the hearing,<sup>72</sup> the court declared that marriage in Islam is in general monogamous, and that polygamy is permissible only in particular circumstances. Two conditions that must be met before a man may enter into polygamy are that he obtain the opinion and consent of his wife and that the man be just. Acting justly, by which the court meant loving one's wives and children equally, is in fact impossible for mere mortals. In the context of polygamy, therefore, the word just relates to a man's ability to adequately provide the social and material needs of his wives and children. In accordance with the principle of Islamic jurisprudence that "the State shall take care of its people in accordance with the general interest," the state has the authority to specify requirements for entering into polygamy in the interest of the general good, especially as it relates to achieving the objective of marriage, that is, the creation of a happy and lasting family based on the One Almighty God.

The judgment in the polygamy case reads more like the decision of a court reviewing the law for its conformity to Islamic law than a decision on the scope of constitutionally protected religious freedom. The court upheld the restrictions on polygamy based on the belief that the 1974 Marriage Act states the correct understanding of Islamic doctrine. In framing the decision in these terms, the court was able to avoid entirely the question of what limitations may be imposed on the exercise of religion. They did this with good reason, since that question presumes that the state has the power to forbid what Islam permits.

The second case dealing with Islamic family law exemplifies the difficulty of implementing human rights guarantees within a political and religious culture in which the supposed immutability of Islamic law cannot be publicly questioned. At the heart of the matter was the refusal by Soeharto's former Cabinet Secretary, Moerdiono, to recognize his marriage to former starlet Machica Mochtar and his paternity to her son Iqbal. Such recognition would mean that Moerdiono had to pay for Iqbal's maintenance and that Iqbal would be entitled to a share of his father's inheritance. In 2008, the Islamic court for Tiga Raksa in West Java found that Moerdiono and Machica had married in a ceremony satisfying the requirements of Islamic law, but the court refused to order formal recognition of the marriage on the grounds that Moerdiono was already married to another woman at the time of his marriage to Machica and that he had not obtained court permission to take a second wife.

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c. There is assurance that the husband will treat his wives and their children fairly.

<sup>71</sup> The four verses are *Qur'ān* 2:21; 4:1; 4:3; and 4:129.

<sup>72</sup> All of the experts, two presented by the petitioner and two testifying for the government, were religious scholars who testified regarding the rules relating to polygamy in Islam.

In 2011, Machica and her son filed a petition to the Constitutional Court to invalidate two provisions in the 1974 Marriage Act that had the effect of denying the existence of any legal relationship between a child born out of wedlock and the child's father. The first was the article requiring registration of marriage. Article 2(1) of the 1974 Marriage Act states that a marriage is valid when performed in accordance with the religious law of the parties. Article 2(2) requires that all marriages be registered. The question is whether a marriage that satisfies Article 2(1) but was not registered must still be considered valid. This issue has been the subject of debate and uncertainty since the passage of the 1974 Marriage Act. The Compilation of Islamic Law simply perpetuates the uncertainty. It states that a marriage that is not registered does not have "the force of law,"<sup>73</sup> which is arguably different from the marriage not being valid.

The Constitutional Court found that the requirement of marriage registration does not violate the constitution. The court based this conclusion on a single line in the elucidation to the 1974 Marriage Act that likens registration of marriage to registration of other life events, such as births and deaths. The court's invocation of the comparison is presumably intended as an argument that registration of marriage is no more necessary for the existence of the marriage than registration of death is necessary for the reality of the person's death. By this ruling the court perpetuated the uncertainty surrounding the meaning of Article 2(2), as it did not address what the legal consequences of this interpretation are.<sup>74</sup>

However, this question lost much of its importance because of the court's decision about the second provision challenged by the petitioners. The court declared Article 43(1) unconstitutional, which states that a child born outside of a marriage has a legal relation with his or her mother only. On the basis of little more than *ipsa dixit*, the court declared that Article 43 must be read to mean that a child born out of wedlock is legally the offspring of its mother and its biological father. The revolutionary nature of this judgment is evident. The court's decision that children born out of wedlock are legitimate contradicts both Sunni jurisprudence and the Indonesian Compilation of Islamic Law, along with longstanding Indonesian practice. Missing from the court's reasoning is any discussion of the constitution. The court apparently considered it best to leave the premise of the decision unstated—that state law trumps religious doctrine. In stark contrast to the polygamy case discussed above, the court avoided any discussion of Islamic doctrine on the subject of children born outside of marriage. The difficulty of reconciling the court's decision with standard Islamic teachings on the subject probably made the court think twice before trying this.

As could be expected, this decision by the Constitutional Court provoked a harsh reaction from conservative Muslims. In March of 2011, the *Majelis Ulama Indonesia* (MUI), a quasi-governmental body set up during the Soeharto years, issued a *fatwa* contradicting the decision that children's rights automatically flow from a natural blood relationship with the biological father. In its stead, the MUI called upon the government to impose an obligation on fathers to maintain their biological children and grant them an obligatory bequest (*wasiat wajibah*, Arabic: *waṣīya wājib*) not based on their status as fathers but as a penalty (*hukuman ta'zir*, Arabic:

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<sup>73</sup> Article 5 of the Compilation of Islamic Law states that "[i]n order to ensure the proper administration of Muslim marriage, all marriages must be registered." The language in the text is from Article 6 of the Marriage Act (5/1974). That article requires that all marriages be performed under the supervision of an official marriage registrar.

<sup>74</sup> The Constitutional Court has the power to determine whether legislation violates the constitution, but the court does not have the power to provide definitive interpretations of legislative enactments. The court may have meant that the registration requirement must be interpreted as not affecting the validity of the marriage in order for the requirement to be valid, but that is not stated in the decision.

*ḥukman ta'zīr*) for their adulterous behavior. Thus, the MUI attempted to preserve clear Islamic law prescriptions concerning blood relationships whilst considering the rights and welfare of children born out of wedlock.<sup>75</sup> More recently, an Indonesian newspaper reported that the Ministry of Religion is preparing regulations to deal with the issue.<sup>76</sup> In the meantime, the Supreme Court has instructed judges serving on Islamic courts that children born out of wedlock could be declared legitimate based on a judicial decree that the child's parents were married in accordance with Islamic law.<sup>77</sup> This would enable children born in an unregistered marriage to seek enforcement of support and inheritance rights from their biological fathers. While reliable estimates of the number of unregistered marriages are not available, it is believed that such marriages are common. The Supreme Court circular on the subject does not address the much thornier situation of children born to parents who never married.

In conclusion, the number of Islamic family law cases submitted to the Constitutional Court may be small, but the court has certainly demonstrated its capability to promote breakthroughs in legal interpretation.

### *Post-Reformasi Law Reform Initiatives*

Since the fall of Soeharto, both liberal and orthodox Muslim voices have pressed their agendas freely and vigorously. Against the background of this debate, the administration of Megawati Sukarnoputri (president from 2001-2004) decided in 2002 to raise the legal status of the Compilation of Islamic Law from an executive order promulgated through a presidential decree to that of a statute passed by the legislature. In the years since 2002, three different bills on substantive family law have been drafted and presented to the public. Each of the proposals provoked substantial controversy, and none of the bills have been enacted.

The first proposal, called the Bill on Substantive Law for the Islamic Court (*Rancangan Undang-Undang Hukum Terapan Peradilan Agama*), was presented to parliament in 2003 by the Ministry of Religion. The committee that drafted the bill was comprised of representatives from the Supreme Court, the Ministry of Religion, and the Ministry of Law and Human Rights. Several of these representatives had played leading roles in the creation of the Compilation. The stated goal of the bill was to raise the status of the Compilation from presidential decree to statutory law. The core members of the drafting committee came from career Islamic courts officials. It is not surprising, therefore, that the bill proposed by the committee did not include substantial changes to the law. This disappointed more liberal Muslims who felt the bill should better reflect the developments within Indonesian Islam, both before and after the Compilation was introduced. Indonesian Muslim scholars had produced a wealth of scholarship that paved the way for reinterpretations of traditional Islamic doctrines,<sup>78</sup> and women's rights activists within the main Muslim organizations of *Nahdlatul Ulama* and *Muhammadiyah* had long promoted

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<sup>75</sup> See "MUI Tak Akan Cabut Fatwa Kedudukan Anak Luar Nikah" [The MUI will not Rescind its Fatwa on Children Born Out of Marriage], *Kompas Online*, 27 March 2012, <http://www.tempo.co/read/news/2012/03/27/063392913/MUI-Tak-Akan-Cabut-Fatwa-Kedudukan-Anak-Luar-Nikah>. The MUI considers this penalty for adulterous fathers as part of the duty of the government to protect *anak zina* (unlawful children). See MUI Fatwa No 11 of 2012, Provision 2 (5 and 6) and Provision 3 (3).

<sup>76</sup> *Pemerintah Siapkan Aturan Anak Luar Nikah*, 7 April 2012, <http://www.hukumonline.com/berita/baca/lt4f806d79c77d5/pemerintah-siapkan-aturan-anak-luar-nikah>.

<sup>77</sup> Supreme Court Circular No. 7, 2012 (September 12, 2012).

<sup>78</sup> For an overview of this scholarship see R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

gender-sensitive reinterpretations of Islamic law.<sup>79</sup> Thus, protests came from both women's rights groups and moderate Muslim organizations. In the face of this criticism further consideration of the 2003 Bill was put on hold.

Although it was never acted on by the legislature, the 2003 Bill was the impetus for the creation of a radically different alternative to the Compilation of Islamic Law called the Counter Legal Draft (CLD). The CLD was prepared by a committee under the leadership of Siti Musdah Mulia, a lecturer at the Islamic University Syarif Hidayatullah and a well-known women's rights activist. During the period that the CLD was drafted, Musdah Mulia held the position of special advisor to the Minister of Religion charged with implementing a policy of "gender-mainstreaming" and promoting women's interests across the full range of government institutions and programs that had been established in 2000 by the administration of President Abdurrahman Wahid. The drafters aimed at producing a radical revision of the Compilation of Islamic Law, and approached Islamic norms from a democratic, pluralistic, human rights, and gender-sensitive perspective. In explaining the CLD, Musdah Mulia wrote that the Compilation was not adapted to the needs of Indonesia in the light of the dynamic social changes taking place in the country:

The existence of a single uniform reference [the Compilation] has stymied creativity and adaptation within the law. Because the answers to legal issues are readily available in the Compilation, judges no longer feel the need to engage with the rich literature of the Islamic legal tradition. This in turn has stultified the exercise of independent reasoning (*ijtihad*) and effectively imprisoned Muslims in a legal straightjacket.<sup>80</sup>

The CLD was presented to parliament in October 2004. It proposed a range of reforms that would have significantly increased the level of gender-equality in Indonesian family law. The proposed marriage law reforms included changing the minimum age of marriage to nineteen for both husband and wife (at the time, and at present, the minimum age of marriage is nineteen years for the husband and sixteen years for the wife); eliminating the requirement of a marriage guardian for women who have reached the age of twenty-one and thereby giving them more autonomy in choosing a spouse; making the payment of *mahr* (dowry) obligatory on both spouses rather than a gift by the husband's family to the wife (often conceived as payment for the wife's obedience); extending the principle of *nusyuz* (Arabic: *nushūz*), a term often translated as "disobedience" of the wife, to both spouses and thereby making marital duties and obligations fully equal and mutual; and imposing a waiting period (*idda*, Arabic: *idda*) on a husband as well as a wife following divorce. Finally, the CLD proposed eliminating the inequality between men and women under the law of inheritance granting daughters the same share as sons, a clear break with prescriptions in the *Qur'ān*.

In addition to the reforms aiming at increasing gender-equality, the CLD proposed four other changes that might be considered as conflicting with traditional Muslim norms. First, all marriages would have to be registered to be valid (*sah*, Arabic: *ṣaḥ*). As discussed earlier, this has long been the subject of controversy in Indonesia, and making registration a requirement for a marriage to be valid could be seen as secularizing the institution of marriage. Indeed, at present Indonesian Islamic courts generally regard compliance with religious stipulations to be sufficient

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<sup>79</sup> See Van Doorn-Harder, *Women Shaping Islam*.

<sup>80</sup> Siti Musdah Mulia and Mark Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women through a Counter Legal Draft to the Indonesian Compilation of Islamic law," *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (2007), 131.

for a marriage to be recognized by the state.<sup>81</sup> The second change was that the CLD would prohibit polygamy entirely. The third was that the CLD would eliminate difference of religion as a bar to marriage, which was in direct contrast to the Compilation of Islamic Law which prohibited inter-religious marriage more broadly than traditional doctrine in prohibiting all Muslims from marrying a non-Muslim. Finally, the CLD would have also eliminated religious difference as an impediment to inheritance by stipulating that heirs of any religion are equally entitled to inherit from a Muslim.

Considering the number and the scope of proposed reforms, it is hardly surprising that the CLD was not well received. Criticism of the CLD was not limited to conservative Muslims; representatives of moderate Muslim organizations were quick to voice their disapproval as well. The *Majelis Ulama Indonesia*, which has become increasingly conservative in recent years, issued a statement calling for the withdrawal of the CLD and the resignation of the committee's vice-chair. Ali Mustafa Yaqub declared it the work of the devil (*hukum iblis*). Din Syamsuddin, the Chair of the Central Board of *Muhammadiyah*, deemed the proposed reforms absurd, and Huzaemah Tahido Yanggo of the *Syariah* council of the NU stated that the CLD had damaged Islamic teachings.<sup>82</sup>

The polygamy provisions of the CLD became a focus of particular controversy. Previous efforts to limit or prohibit polygamy had been supported by many Muslim women's organizations. However, the *Reformasi* era witnessed the emergence of a pro-polygamy discourse with a broader base of support than the usual voices expressing resistance to prohibiting the practice. This included well-known public figures such as businessman Puspo Wardoyo and *dangdut* pop star Rhoma Irama, as well as a group of "hip" young preachers unwilling to condemn the practice. This change in discourse was further facilitated by the adoption of an attitude of resignation by upper middle class women involved in polygamous marriages. This acceptance of polygamy stood in stark contrast to the response of women from an earlier era, such as Soekarno's first wife, Fatmawati, who left the palace after Soekarno took a second wife.<sup>83</sup>

As a result of the controversy over the CLD, the Ministry of Religion formally withdrew the proposal from consideration within a few weeks of its presentation. In 2005, the gender-mainstreaming team in the Ministry of Religion was abolished. This reaction is hardly surprising considering the breadth and depth of opposition to the proposal and the generally conservative character of the Ministry of Religion. From a purely legal perspective, the CLD is not only acceptable but compulsory since it simply harmonized Muslim family law with constitutionally

<sup>81</sup> This is true, however, only insofar as there are no legal impediments to the marriage, such as contracting a polygamous marriage without permission of the Islamic court. See Stijn van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws," *Australian Journal of Asian Law*, 13.1 (2012).

<sup>82</sup> Marzuki Wahid, *Legal Draft Kompilasi Hukum Islam dalam Perspektif Politik Hukum di Indonesia*, unpublished paper presented at the 4th Annual Islamic Studies Postgraduate Conference, presented by CILS and the National Centre of Excellence for Islamic Studies (NCEIS), (University of Melbourne, 17 November 2008); Siti Musdah Mulia with Mark E. Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women Through a Counter Legal Draft to the Indonesian Compilation of Islamic Law," in R. Michael Feener & Mark E. Cammack eds., *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge: Harvard University Press, 2007), 128-45; Nurlaelawati, *Modernization Tradition and Identity*.

<sup>83</sup> Van Wichelen, *Religion, Politics and Gender in Indonesia*, 75-91. This author also offers the example of some business women who argue that entering into a polygamous marriage enables them to have a career outside of the household. She further draws attention to the fact that it is really difficult for the secular women's organizations to take on conservative interpretations of Islam, because they have no authority on this matter.

guaranteed equality for women. But the fact that the CLD was formulated in an Islamic idiom and applied Islamic sources and modes of deduction did not prevent its rejection by most representatives of moderate Islam. Hooker has argued that from the perspective of traditional *fiqh* the broad rejection of the CLD was “wholly understandable.”<sup>84</sup> But perhaps it is more accurate to state that the CLD did not fit in the tradition of Islamic law and the Islamic courts in Indonesia, as many *Reformasi* or Dutch civil law norms in the 1974 Marriage Act and the Compilation of Islamic Marriage are also in direct conflict with traditional *fiqh*, let alone procedural law. Those reforms have been accepted by most of the Indonesian ‘*ulamā*’ for decades if not centuries.<sup>85</sup> The CLD, however, was a bridge too far in the gradual development of family law in Indonesia, even if it was justified in Islamic terms and presented its changes as logical outcomes of this development.

The withdrawal of the CLD from consideration did not put an end to the effort to regulate the matrimonial law to be applied in the Islamic courts. In 2010, a new revision of the Compilation of Islamic Law, entitled the Bill on Substantive Law in the Islamic Court (Bill of 2010), was presented to the public by the government. The Bill of 2010’s objective was to upgrade the Compilation to a statutory law. Unlike the CLD, the Bill of 2010 for the most part is a copy of the current Compilation. Even so, the Bill of 2010 proposed a number of controversial reforms. The reforms that have attracted the most attention from the media are those that would criminalize unregistered marriages, informal polygamous marriages, and temporary marriages (*nikah mut’ah*, Arabic: *nikāḥ al-mut’a*), as well as unauthorized *talak* divorces. Initially, it seemed that the Indonesian women’s organizations applauded the proposed criminalization of unregistered marriage when the National Commission on Violence against Women (*Komnas Perempuan*) stated its support,<sup>86</sup> but soon a coalition of women’s organizations pointed at the gender-neutral character of the provisions. The coalition realized that the wives in informal marriages would face the same legal consequences as the husband, and, in order not to jeopardize the wives as “victims” of such detrimental marriages, *Komnas Perempuan* changed their stance and opposed the bill.<sup>87</sup> Surprisingly, there has been no debate about the more fundamental question of whether the Islamic court should be given jurisdiction in criminal cases. The Bill of 2010 stipulates that the Islamic court adjudicates the criminal cases involving illegal Muslim marriage and divorce only after the prosecutor has taken up a case based on a police investigation. Were this change to be enacted, the entry of the police and the prosecutor into the Islamic court would mean a significant change to the traditional civil character of the Islamic court.

Another reform in the Bill of 2010 that attracted media attention was a provision not contained in the Compilation of Islamic Law. This provision required that a foreign man wishing to marry an Indonesian woman must deposit Rp 500 million (approximately € 35.000) at a *shari’a* bank account as a financial guarantee for the wife. The stipulation was criticized because it would impinge on the freedom to choose a spouse and because of the negative image that it

<sup>84</sup> Michael Barry Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Institute of SEA Studies, 2008), 48.

<sup>85</sup> Mark Cammack, “Indonesia’s 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?,” *Indonesia*, 63 (1997), 143-168; Nurlaelawati, *Modernization Tradition and Identity*.

<sup>86</sup> “Ayo Sosialisasikan Pidana Kawin Siri” [Let’s socialize the criminal character of unregistered marriage], *Kompas Online*, 15 February 2010; “Nikah Siri: Perempuan Lebih Banyak yang Rugi” [Unregistered marriage: women bear the negative consequences], *Kompas Online*, 16 February 2010.

<sup>87</sup> Van Huis & Wirastri, “Muslim Marriage Registration in Indonesia.”

might create of Indonesian Muslim brides constituting a commodity.<sup>88</sup> A third large reform in the bill (also not contained in the Compilation) concerns marriage after pregnancies out of wedlock. When a woman is found pregnant as a result of an extramarital sexual relationship (*zina*, Arabic: *zinā*), she can be married to (*dapat dikawinkan dengan*) the man who impregnated her provided the marriage is carried out during the early stages of the pregnancy. If the husband refuses the marriage, he faces three months imprisonment. The provision was intended to protect the interests of the child. If the child is born within 180 days of the marriage, it would be considered to have been born to a valid marriage and thus have the same legal status as a child conceived during a valid marriage. In the case of pregnancy after rape, a woman is allowed to marry a man other than the rapist during the pregnancy in order to prevent the child being born out of wedlock.

Other revisions to the Compilation of Islamic Law include the proposed increase of the marriage age from sixteen to eighteen years for women and from eighteen to twenty-one years for men. The Explanatory Memorandum to the Bill justified this by arguing that the minimum age of marriage should be raised in order to ensure that the spouses are mature enough to marry. Many Indonesian women marry below the age of eighteen<sup>89</sup> and the reforms thus constitute a significant deviation from social practice. A second revision proposes that both men and women can be declared disobedient or *nusyuz* (Arabic: *nushūz*) when they fail to fulfill their marital duties, and that a woman is entitled to divorce on these grounds. A third states that when the wife is pregnant at the time of divorce, the husband is required to provide support during the waiting period regardless of whether the divorce is final and even if the wife has been found to be *nusyuz*. A fourth addition concerns a change in the polygamy procedures. The Bill of 2010 eliminates the right of a wife to appeal a decision granting the husband permission to enter a polygamous marriage, even if she did not consent to the marriage. This provision might effectively nullify the requirement that the wife give permission for her husband's polygamy as it would provide the judge with broader discretion in polygamy cases.

The fate of the Bill of 2010 is uncertain. Following its presentation, it attracted extensive media attention and heated debates. At present, the bill is surrounded with silence, but deliberation is still ongoing. The CLD had proposed major reforms and a totally gender-equal Muslim marriage law. The drafters had based all of its provisions on reinterpretations of Islamic law, but the scope of the reforms proved unacceptable to even moderate Muslim organizations, and consequently formal deliberation of the CLD was almost immediately halted. The explanation for the different treatment of both bills might be that the substantive norms of the CLD, although framed in an Islamic discourse, clearly transgressed the parameters of what is acceptable practice in the Islamic court. Conversely, the Bills on Substantive Muslim Family Law were built on the existing legal framework of the Compilation of Islamic Law. Only the new criminal provisions on informal marriages in the Bill of 2010, depart from the civil law character of the Indonesian Islamic court tradition and would entail greater state intervention in (and thus a further secularization of) Muslim marriage. Predictably, those provisions proved controversial, whereas the other reforms in the Bill of 2010, important as they might be, have been largely overlooked.

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<sup>88</sup> E.g. "Perkawinan Seharga Rp 500 Juta" [A marriage for the price of 500 million], *Kompas Online*, 24 February 2010.

<sup>89</sup> G.W. Jones, "Which Indonesian Women Marry Youngest and Why?," *Journal of Southeast Asian Studies*, 32:1 (2001), 67-78.



## Conclusion

The *Reformasi* movement in Indonesia was inspired by the ideals of constitutionalism, democracy, and human rights, and while the movement resulted in major changes to the structure of the Indonesian state it did not significantly influence developments in the field of family law. Viewed from a long-term perspective, we see a gradual process of improvement of the position of women in Islamic family law over the course of the past hundred years. The Indonesian women's movement, which developed simultaneously with the Indonesian nationalist project in the early part of the twentieth century, has been a key player in this process both before and after *Reformasi*. The character and sphere of action of women's organizations has changed with changing social and political circumstances, but throughout the period the women's movement has been the most consistent force for reform of the law governing family relations.

*Reformasi* may not have had a revolutionary impact on Islamic family law or the institutions that apply it, but it seems likely that the socially liberating effect of *Reformasi* is in part responsible for the increase in divorce filings by women. While the political changes following the fall of Soeharto did not result in changes to the law, the affirmation of human rights did have the effect of empowering women to be more assertive in exercising their existing rights to divorce. The effects of *Reformasi* are also apparent in the decision by the Constitutional Court regarding the status of children born out of wedlock. Muslims committed to conservative interpretations of Islamic family law are a powerful force in Indonesian society, and changes to the law will probably be cautious and incremental. Nevertheless, the trajectory of developments since *Reformasi* indicates that in the future human rights norms will play an increasing role in the interpretation of Indonesian Islamic law.

Whether that debate will be conducted in human rights terms is another matter, however. The post-Soeharto debates over family law legislation reveal an important change in the Indonesian women's movement that is more a result of changes in society than an effect of *Reformasi*. The divide between those advocating for equal rights for women and those supporting the assignment of differential rights and responsibilities according to gender is still present today, yet the terms of the debate have changed. In the past the advocates for the rights of women framed their arguments in terms of the values of secular nationalism. As evidenced by the CLD, the current debate primarily revolves around differing interpretations of Islamic law. In this regard we believe that developments in Indonesia may prove to be a portent for developments elsewhere in the Muslim world. The debate over women's rights in Indonesia has largely shifted from a debate over whether Islamic law should be applied to Muslims to a debate over the content of Islamic family law. The issue has come to be framed in this manner because circumstances there have allowed for a more open debate about Islamic law than in most other Muslim countries and this debate has been promoted by the broader changes in the public debate after *Reformasi*. While narrow literalist interpretations of Islamic law continue to have supporters in Indonesia and elsewhere, the values of freedom and equality have a powerful appeal to people regardless of their religion.