Cover Page

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4 The development of an Indonesian Muslim family law after independence

'Whatever the reasons may have been, family law remained the primary aspect of Shari' a that successfully resisted displacement by European codes during the colonial period, and survived and outlasted various degrees or forms of secularization of the state and its institutions in a number of Islamic countries, As such IFL [Islamic Family Law] has become for most Muslims the symbol of their Islamic identity, the hard irreducible core of what it means to be a Muslim.' (An Na'im 2002: 9)

4.1 INTRODUCTION

In this chapter we turn to the development of Muslim family law after the proclamation of independence in 1945. In Chapter 3 we have seen how in the Indonesian Islamic courts a judicial tradition developed which in addition to norms derived from the Islamic tradition adopted *adat* and norms of other origin. In this chapter I will describe how this judicial tradition developed into Indonesian Muslim family law when the legislator codified it. I argue that in order to render reforms legitimate the legislator had to build on and remain within certain boundaries of the existing judicial tradition within the Islamic courts.

This focus on Muslim family law in Indonesia as result of the Islamic courts' judicial tradition which the Indonesian legislator continued and reformed, differs from Hooker's *fiqh*-centered concept of an Indonesian *maddhab* or Islamic school of law (Hooker, M.B. 2003; Hooker, M.B. and Lindsey 2002). Islamic doctrine (*fiqh* is typically developed by *ulamas*) within a *maddhab*, not judges or legislators. Hooker has demonstrated that a distinctive Indonesian school becomes visible when the *fatwas* (legal opinions) of the twentieth century *ulamas* are placed within the great Islamic legal tradition: a creative scholasticism that allows for 'adaptation of classic scholasticism' (Hooker, M.B. 2003: 45). I will demonstrate that rather than being developed by *ulamas*, Indonesian Muslim family law has much more been the result of a double movement: on the one hand the continuation of a judicial tradition developed by Islamic courts' judges, and, on the other hand, a process of reforms that were the result of deliberations within the legislative about the modern family.

4.2 MARRIAGE LAW REFORMS AFTER INDEPENDENCE

The Japanese invasion of the Netherlands Indies in 1942, brought the agenda of Muslim family law reform to a standstill (see 3.3.6). However, in 1946, only a year after the end of the Japanese occupation (1942-1945) and the proclamation of independence on 17 August 1945, the first Indonesian Women's Congress took place. The independence war (1945-1949) was still raging, and in the interest of unity in the independence struggle against the Dutch, the women's organizations decided to put Muslim family law reform on hold.

After the Dutch official transfer of independence in 1950, marriage law reform was once again on the political agenda, but since the religious and political organizations had become rival political parties in the young republic, the ideological differences between the Muslim and non-Muslim parties reemerged. The secular and socialist parties preferred a unified and general administration of justice in Indonesia, whereas the Muslim parties wanted to retain Islamic courts applying Muslim family law for Muslims. As a consequence, the factions in parliament each drafted their own Bill instead of seeking consensus. Under the influence of secular and socialist parties, the debates shifted from whether the character of Muslim family law ought to be traditionalist or reformist to whether Indonesian family law ought to be Muslim at all.

As we will see, in this polarized political situation the Ministry of Religious Affairs appeared as an important player and platform for Muslim organizations to promote their ideas about Muslim family law reform. Moreover, as the traditionalist *Nahdlatul Ulama* (NU) became a political party in 1952, its policies were increasingly formulated by NU-politicians rather than the old-school *ulamas* (Feillard 1999), which made the NU more amenable to Muslim family law reforms.

4.2.1 The Ministry of Religious Affairs and family law reform

As we have seen in Chapter 2, the Ministry of Religious Affairs was established in 1946 to appease Muslim organizations disappointed with the removal of the Jakarta Charter from the Constitution. In the same year, the Ministry was granted administrative control over the *penghulu* courts on Java and *qadi* courts in South Kalimantan, and started to supervise their judgments. As a bastion of traditionalist *Nahdlatul Ulama* supporters, the Ministry was well-rooted in the *syafi'ite* Islamic tradition and one might expect that this traditionalism would be reflected in its policies (Lev 1972: 50-53) However, it effectively started to initiate small scale reforms, which indicates that limited reform was acceptable to the members of the Muslim organizations it sheltered.

A first reform was the issuance of Law 22/1946 on the registration of marriage, *talak* and *rujuk* on Java and Madura, which resulted in an enormous

expansion of the Ministry and enabled it to place a significant number of local *ulamas* and other religious actors under its wings. In the Netherlands Indies Muslim divorce and marriage registration on Java had already been regulated by the 1895 Regulation on Muslim Marriage and Divorce[1] and the 1929 Marriage Ordinance,[2] and Law 22/1946 was a substantive continuation of these colonial regulations. The main difference was the centralization of Muslim marriage and divorce registration, as the Offices for Religious Affairs (*Kantor Urusan Agama*; KUA), responsible in each sub-district for marriage and divorce registration, were placed under the Ministry's centralized control (Huis & Wirastri 2012). As a result of its new powers, the Ministry became simultaneously 'a battleground for Islamic groups' and a 'shelter for a large number of Islamic politicians', mainly from the NU (Lev 1972: 52).

The Ministry in the 1950s introduced a number of small but important regulations to unify the application of substantive Muslim family law norms throughout Indonesia. First, Decree 4/1952 introduced the institution of the *wali hakim* outside Java, a procedure in which an Islamic court judge acts as the wife's custodian in marriage when no other legal custodian is available. Second, Decree 15/1955 stipulated the inclusion of the *taklik al-talak* procedure (see 3.2.3) in all standard Muslim marriage contracts of the Ministry. Four grounds for a wife to divorce her husband were standardized throughout Indonesia: desertion by the husband for six consecutive months; poor maintenance by the husband for three consecutive months; physical abuse by the husband; and neglect of the wife by the husband for six consecutive months. Third, by Circular Letter B/1/735 1958, 13 *shafi'ite fiqh* books were declared the standard legal sources to be applied in the Islamic courts. The three regulations show that the Ministry built on the former Javanese *penghulu* courts to unify the Islamic courts and their legal sources.

The Ministry also introduced the *taklik al-talak* throughout Indonesia, including in regions where this was not necessarily part of the local *adat*. This unification was a break with the former *adat* policy. The support for a wide application of *taklik al-talak* reflected the attitude of NU-affiliated officials within the Directorate of Religious Justice (*Badan Peradilan Agama,* Badilag) of the Ministry, which 'tend[ed] to be far more open even to what seems to be radical change' than the *ulamas* of the NU had been before (Lev 1972: 139). Badilag's relative progressiveness was apparent in the appointment of fifteen female honorary judges and one fully-fledged judge, the first of whom was appointed in 1957. These were the first female Islamic judges in the Muslim world. The Ministry legitimized this step on grounds of emergency caused by a lack of qualified judges. A number of *ulamas* and judges at the Islamic courts protested the move, as they considered female judges to be contrary to *syafi'ite fiqh*, but to no avail (Lev 1972: 110).

1 S 1895/198.
2 S 1929/348.

In 1958 Badilag submitted a Muslim Marriage Bill to parliament which was mostly based on Islamic marriage and divorce norms in the judicial tradition of the Javanese *penghulus*, but which also included a number of reforms resembling those put forward in the agenda of family law reform of 1938. First of all, the *talak* divorce right of the husband was made conditional to six divorce grounds. These were: adultery (*zina*); disobedience (*nusyuz*); alcoholism, gambling, or addiction of the wife; the wife suffers from amnesia; the wife's imprisonment for two years or more; and other strong reasons why the wife would not be able to keep an organized household with her husband (Hanstein 2002: 206-207). Secondly, the husband needed his wife's consent if he wanted to take her back (*rujuk*) during the waiting period (*iddah*). Thirdly, the wife and husband had the option to make an agreement stating that the husband would not enter a polygamous marriage. Fourthly, the division of joint marital property was to be based on the contribution of each spouse, rather than the 2 : 1 ratio.

Perhaps remarkably, the draft was well-received by the Muslim parties. Opposition to the Muslim Marriage Bill from the nationalist and socialist parties, which supported a national Marriage Bill they were preparing themselves, was the reason that these far-reaching reforms did not gain sufficient support (Hanstein 2002: 210). Nonetheless, the proposed reforms illustrate what kind of family law reforms the Ministry had in mind. The draft was temporarily shelved and its revision appeared three years later.

In 1961, a very similar Muslim Marriage Bill was submitted to Parliament by the Ministry of Religious Affairs. The same Maria Ulfah Santosa, who had prepared an agenda of family law reforms in the Indonesian Women's Congress of 1938 (see 3.3.6) was a member of the drafting team. The main changes as compared to the Muslim Marriage Bill of 1958 were that the 1961 Bill adopted the registration requirement in Law 22/1946, stipulating that all marriage, divorce and *rujuk* decisions had to be registered at the KUA. Moreover, polygamy would require 'a compelling reason' and the first wife's permission and all disputes concerning marriage and divorce would have to be brought before the Islamic court unless stated otherwise in the law.

Considering the ties that the Ministry of Religious Affairs had with the main Muslim political parties, there was a considerable chance they would have accepted the 1961 Bill, including restrictions on the traditional male rights of *talak* and polygamy. This means that in the 1950s all parties, Muslim and non-Muslim, agreed that family law reforms were necessary, but that the political situation was such that a large secular nationalist and communist faction in parliament favored a secular-based marriage law, which was unacceptable to Muslim parties. Ironically, by rejecting reforms within an Islamic framework, the secular factions halted any reforms from taking place. It was not until 1974 that family law reforms very similar to the 1961 Bill were finally introduced into the Marriage Law.

4.2.2 The 1974 Marriage Law

As mentioned in Chapter 2, the Ministry of Justice drafted the Marriage Bill of 1973, which if passed by Parliament would have more fundamentally unified and secularized Indonesian family law. In the end it was rigorously revised due to opposition from Muslim organizations. The end result, the 1974 Marriage Law,[3] is still in force today. It is not a Muslim marriage law, but a national and plural marriage law, meaning that different legal regimes apply to persons of different religious backgrounds. It contains general provisions applying to all religious groups, some of which are at variance with *syafi'ite fiqh*, but which – as we will see – remained within the boundaries of the Muslim reform agenda adopted by the Ministry of Religious Affairs in the 1950s. Because a radical unification and secularization of marriage law proved impossible, the reforms that were retained built on the judicial tradition within the Islamic courts, as successor of the Javanese *penghulu* courts.

Hence, to appease Muslim opposition, the most controversial articles of the 1973 Bill were removed (Katz & Katz 1975). The provision concerning interreligious marriage was omitted, and the administrative requirement of the registration of a marriage was made conditional to the religious requirement to marry according to the religion of the spouses. As we have seen, this registration requirement is a continuation of colonial regulations and Law 22/1946 (Huis & Wirastri 2012; Bedner & Huis 2010). Nonetheless, marriage remained primarily a religious act without the legal possibility of a purely civil marriage. Another important continuity is that the Islamic court, rather than the civil court as stipulated in the 1973 Bill, held jurisdiction in matters of Muslim marriage and divorce, including polygamous marriages.

The 1974 Marriage Law included both reforms and codification of the Islamic courts' judicial tradition. A first set of reforms aimed at reducing instances of both child and non-consensual marriages. Before the Marriage Law, a Muslim girl in Indonesia could be married off without her consent by her custodian (*wali*), usually the father, or if he was unavailable another male relative from her father's side. Such arranged marriages were common and, like child marriages, permitted under *syafi'ite fiqh* and recognized by the Islamic courts. The 1974 Marriage Law stipulates that marriage is based on the consent of both parties (Article 6(1)) with the intention to create a happy family (General Elucidation). Moreover, it establishes the minimum age for marriage at 16 for women and 19 for men (Article 7(1)).

A second set of reforms concern grounds for divorce. The introduction of judicial divorce and divorce grounds for men mainly aimed at decreasing the instances of *talak* divorces in order to combat the high divorce rates in Indonesia (Prins 1954). By the 1960s these had reached 40 percent on Java

3 Law 1/1974.

(Jones, G.W. 2001). Such high divorce rates were typically blamed on men, as the vast majority of divorces were male *talak* registered in the KUA offices, whereas a relatively small number concerned judicial divorces by an Islamic court judge. However, as Nakamura demonstrated in research at KUA registers in Yogyakarta prior to 1974, it is likely that more than half the registered *talak divorces* concerned divorces to which the wife had stated her consent or even had been the petitioner (Nakamura 1984). One must realize that the *taklik al-talak* divorce was commonly petitioned by the wife, but registered as a 'male' *talak* divorce.

The 1974 Marriage Law restricts the *talak* rights of men and stipulates that both husband and wife must petition the court for a divorce (Article 39(1)) and both are required to provide sufficient grounds (Article 39(2)). These grounds are listed in the General Elucidation to the Marriage Law later laid down in Article 19 of Government Regulation 9/1975 on the Implementation of the Marriage Law (1975 Government Regulation). They comprise the following: a. one of the spouses commits adultery, or becomes a drunk, addict, gambler or something similar; b. one of the spouses leaves the other party for more than two years, without consent of the spouse and without valid reason; c. one of the spouses is imprisoned for five years or more; d. one of the spouses inflicts severe violence which is life-threatening to the other spouse; e. one of the spouses suffers from a handicap or disease such that he or she cannot fulfill his or her marital duties; and finally; f. continuous discord between the spouses.

Although the divorce grounds constituted a radical reform of the previous absolute male *talak* right, it was acceptable to the Muslim organizations at that time simply because the husband's *talak* pronunciation was still required to effectuate the divorce, and in the words of Mark Cammack:

> '[…] because the statutory rules are viewed as 'administrative' regulations addressed to controlling events rather than meanings, they represent a legitimate exercise of the government's *siyasa* power to prescribe regulations for the administration of *hukum* [law]' (Cammack 1989: 62).

Thus, the divorce grounds were presented as mere administrative regulations, similar to the registration requirement of marriage and divorce, not as secularizing the act of *talak* itself. Moreover, the men's divorce grounds were very similar to those proposed in the Muslim Marriage Bills of 1958 and 1961 drafted by the *Nahdlatul Ulama* and *Muhammadiyah* dominated Ministry of Religious Affairs.

Women's divorce rights in the 1974 Marriage Law were substantively very similar to those that had developed within the judicial tradition of the Javanese Islamic courts. As mentioned in the previous chapter, the *penghulus'* lenient interpretations of *fasakh, taklik al-talak* and *syiqaq* in practice provided relatively broad divorce grounds for women and the more conservative interpretations

had been side-lined by the standardization of a judicial *syiqaq* divorce by the PPDP in 1938, as well as by the standard inclusion of *taklik al-talak* in the marriage contract by the Ministry of Religious Affairs in 1955. Moreover, the 1974 Marriage Law treats consensual divorces the same as non-consensual divorces in requiring that one of the formal divorce grounds is met, limiting both men's and women's possibilities to divorce. Women also lost the opportunity to negotiate a consensual and relatively uncomplicated out-of-court *talak* divorce with their husband, as for each case the Islamic court judge had to establish that a divorce ground of the Marriage Law had been met. In Chapter 9, I will provide an analysis of case law of the Islamic courts on this matter.

A third set of reforms concerned restrictions on men's rights to polygamy, an issue that had typically divided women's organizations in the colonial period. The Muslim Marriage Bill of 1961 drafted by Ministry of Religion already indicated a more reform-minded attitude from the Muslim organizations and included restrictions on polygamy that were very similar to those in the 1974 Marriage Law. According to the Marriage Law, marriage is basically a monogamous institution (Article 3). Polygamous marriage requires prior permission of the Islamic court which may only allow it when the following conditions are met: the wife cannot carry out her conjugal duties; she has become crippled or terminally ill; or she is infertile. In order to obtain the permission of the Islamic court the husband must provide evidence of the first (and second or third) wife's consent to the marriage, sufficient means to support all his wives, and a statement that he will treat all his wives and their children fairly (Article 4-5). Thus, the Marriage Law finally settled the polygamy debate through a similar technique as it used to reform the *talak*: continuing the practice while introducing strict administrative requirements.

Along with these substantive reforms, the 1974 Marriage Law instigated legal changes through codification of the judicial practice within the Islamic courts. This codification process was a next step in the development of an Indonesian Muslim family law. The first example concerns child support. In the *penghulu* courts child support was hardly ever claimed and enforced (Snouck Hurgronje, Gobeé & Adriaanse 1957-1965: 857-915), even if the duty of the father to support his children is a clear *syafi'ite fiqh* norm. According to the 1974 Marriage Law, the father is obliged to support his children financially until they are legal adults or married, irrespective of who holds custody.

Through codification, the traditional right to child support was restated, probably with the intention to stimulate the use of this right, but also to settle the debate about the duration of such child support obligations in order to create more legal certainty. According to the most established interpretation in *syafi'ite fiqh*, childhood ends when a girl has her first menstruation and a boy his first semen discharge. The Marriage Law brought this in line with the age of legal adulthood in the Civil Code and puts an obligation on the father to provide support until the child is 21 years old or gets married. Unfortunate-

ly, as we will see in Chapter 6 and Chapter 8, legislation alone is not enough to stimulate a better implementation of child support rights.

The 1974 Marriage Law does not explicitly recognize spousal support as a general post-divorce right for women. Post-divorce spousal support rights were traditionally neither recognized by the administration of justice in the *penghulu* court nor in *syafi'ite fiqh*, which holds that the wife's right to maintenance ends after the divorce has become final. Unsurprisingly, the provision concerning spousal support in the Marriage Law is very ambiguously worded, stating that the court can order maintenance (*biaya penghidupan*) or other legal action from the husband towards his former wife, as well as an act of the wife towards her former husband. As we will see, the Islamic courts of Cianjur and Bulukumba do not recognize spousal support outside the three months waiting period (*iddah*) as a post-divorce right in their judgments, as this is not considered to be part of Muslim family law.

A second codification of Muslim family law norms concerned the inclusion of joint marital property into the 1974 Marriage Law. As described earlier, joint marital property was well-rooted in Javanese *adat*. As we have seen in the accounts of Van den Berg and Snouck Hurgronje, the *penghulu* courts generally recognized the concept of joint marital property, but had to base their judgements on local *adat* concerning the question of whether a 2 : 1 or a 1 : 1 ratio applied. In a case that originated in the general court, a Supreme Court judgment of 1956[4] declared that the concept of joint marital property was applicable throughout Indonesia, and that throughout Indonesia a 1 : 1 ratio applied for dividing joint marital property among the spouses (Katz & Katz 1975: 679). The 1974 Marriage Law followed this Supreme Court judgment and stipulates an equal division of joint property between husband and wife.

In summary, some 'reforms' in the Marriage Law can actually be regarded as a codification and thus a continuation of norms traditionally applied by Islamic court judges. However, like all codification processes, it included a selection and restatement of those norms as well as a synchronization process to make the Marriage Law compatible with other laws, such as the Civil Code. Thus codification made significant legal change possible within a traditional paradigm and without changing the essence of the traditional norms. Some reforms went beyond such standard processes of codification and needed a different approach. The reform of *talak* divorce and the polygamy restrictions are illustrative of a rule production technique similar to the one employed in the family law reform agenda of 1938: an unambiguous Islamic norm is formally and symbolically preserved, but made conditional to other provisions to such an extent that a completely new legal situation is created.

In this way, the legal changes with regard to *talak* and polygamy could be presented to conservative Muslims as being in accordance with Islamic law,

4 Supreme Court judgment 51/K/Sip/1956 of 7 November 1956.

and even as a concession by secular-oriented lawmakers to Muslim organizations (see Cammack 1989: 62-63). It is important to note that, as the Muslim Marriage Bills illustrate, prior to 1973 the Ministry of Religious Affairs had already been inclined to reform, which meant that within the *Nahdlatul Ulama* there were voices in support for changes that can be considered far-reaching from the perspective of traditional *syafi'ite fiqh*.

Moreover, to render both reforms legitimate in Islamic terms, the lawmakers built on the judicial tradition within the Islamic courts in general, and three of its characteristics in particular: a lenient application of *syafi'ite fiqh* divorce norms, the recognition of certain *adat* norms, and the application of administrative and procedural regulations of the government concerning marriage, divorce and the judicial process itself. The drafters of the 1974 Marriage Law adopted these three characteristics and stretched them to the very limit.

4.2.3 Case law concerning Marriage Law provisions

Although the focus here is on Muslim family law, we must bear in mind that the 1974 Marriage Law is a law for Indonesians of all religious affiliations, and is pluralistic in nature. Its provisions apply to different legal regimes and therefore often lack legal specificity. Supreme Court judgments[5] play therefore an important role in generating a minimal amount of legal certainty – even in a country in which judges often consider themselves unbound by precedent, hence contributing to legal uncertainty (see Pompe 2005: 425-470). For instance, with regard to relative jurisdiction, in 1979 the Supreme Court ruled in two separate cases[6] that in the absence of presidential implementation of regulations concerning spousal or child support, child custody or division of marital property, such matters remained under the jurisdiction of the regular courts (Cammack 1989: 66).

I will briefly discuss three examples of how, after the 1974 Marriage Law came into force, the Supreme Court's case law has or has not been decisive in creating more consistency in substantive family law matters: first, the issue of *taklik al-talak*; second, the issue of interreligious marriage; and third, the issue of the lawfulness of unregistered Muslim marriages. Of course, since the Marriage Law came into force the Supreme Court has issued many more judgments concerning substantive family law issues (see Bowen 2003 and 2000; Cammack 2007; 1989; Nurlaelawati 2010), and I will discuss a number of recent

5 As we have seen in Chapter 2, in 1970 the Islamic court was formally brought under the aegis of the Supreme Court and from 1978 onwards the Supreme Court took up the task of deciding appeals in cassation.

6 Supreme Court judgments 1/K/Ag/1979 and 14/K/Ag/1979.

cases in Chapter 8. I discuss these three issues here to illustrate how the Islamic courts are influenced by the other branches of Indonesia's legal system.

One of the first cases[7] taken up by the the Supreme Court after it obtained cassation powers over Islamic courts' judgments (see 2.4.2) concerned the conflicting norms of the two year desertion divorce ground adopted in the 1974 Marriage Law and the six-month desertion condition of the in 1955 standardized *taklik al-talak* formula in the marriage certificates of the Ministry of Religious Affairs. The Supreme Court argued that the 1974 Marriage Law provision had invalidated the six-month desertion condition in the *taklik al-talak* – even when the couple had been married on those terms. This judgment is dubious at best, as the 1974 Marriage Law neither formally abolished existing nor regulated new *taklik al-talak* procedures, meaning that its conditions should still have been lawful at that time. In reaction to this decision, the Ministry of Religious Affairs decided to change the standard *taklik al-talak* accordingly, by adopting the two-year desertion condition (Cammack 1989: 74-75).

A second issue was the absence of a stipulation concerning interreligious marriage in the 1974 Marriage Law. Article 66 provides that preceding legislation still applies in all matters not regulated by the Marriage Law, which in case of interreligious marriages should formally mean that the relevant provisions of the 1886 Mixed Marriage Ordinance[8] remained in force. In 1979, the Supreme Court decided a case[9] accordingly, and argued that the interreligious marriage concerned was legally valid. In the following years, however, after in 1980 the Indonesian *Ulama* Council issued a *fatwa* that declared interreligious marriages *haram,* nearly all Muslim marriage registrars halted the registration of interreligious marriages. The only options left to those who wanted to marry interreligiously were civil marriage or marriage abroad. In 1987 the Ministers of the Interior, Justice and Religious Affairs decided in a working meeting that civil marriages were no longer to be concluded by the civil registry (Pompe 1988: 272). As a result, only a minority of marriage registrars were still willing to register interreligious marriages. Clearly the political sensitivity of the issue meant that the Supreme Court judgment was not followed (Otto and Pompe 1990; Pompe 1988). After the 1991 Compilation of Islamic Law prohibited interreligious marriages for Muslims, it became even more complicated for Muslims to marry interreligiously, even if there were still a small number of authorized officials willing to register them (Butt 1999).

A third issue concerned the marriage registration requirement in the 1974 Marriage Law. Article 2(1) stipulates that 'a marriage is valid if concluded according to the religious requirements of the spouses.' The subsequent Article 2(2) imposes the obligation to register the marriage according to the current legislation. The relation between the two stipulations has generated a debate

7 Supreme Court judgment 13/K/Ag/1979.
8 S 1886/98-158
9 Supreme Court judgment 1650/K/Sip/1974 of 13 September 1979.

centering on the following question: is the registration clause a secondary requirement to make a marriage lawful, or is it a separate and purely administrative obligation? In fact, this was an old question that reappeared after the Marriage Law came into force. Under the previous legal regime, the Islamic High Court had argued in 1963 that the registration requirement in Law 22/1946 had no consequences for the lawfulness of an unregistered marriage, on the condition that it was concluded according to the religious requirements (Tan 1976).

Several scholars have pointed at the Supreme Court's inconsistent judgments regarding the marriage registration requirement (Bowen 2003; Butt 1999). In my view, however, the Supreme Court judgments they have analyzed are simply not apt to research the issue. Bowen has looked at complex criminal cases in which the Supreme Court judge had to weigh three norms: criminal provisions concerning legal barriers to a marriage in the Criminal Code, the validity of an unregistered marriage, and the polygamy restrictions of the 1974 Marriage Law. It is important to note that Islamic courts have no jurisdiction in criminal matters and that the polygamy cases originated in the general courts. It follows that these cases concern polygamous marriages which were reported to the police, after which the prosecutor pressed criminal charges.

The first case is Supreme Court judgment 2147/K/Pid/1988, decided in 1991, in which a man married a second wife without asking his first wife's permission (Bowen 2003: 184). The first marriage had been registered, whilst the second marriage had been concluded according to the religious requirements but remained unregistered. The first wife reported the case to the police. The prosecutor pressed charges based on Article 279 of the Criminal Code which stipulates that anyone entering a new marriage whilst an existing marriage constitutes a legal obstacle to it shall be punished with a maximum of five years imprisonment. The Supreme Court found the husband guilty based on the following legal justifications: first, the husband should have known that the second polygamous marriage required the permission of an Islamic court, and second, the fact that the marriage had not been registered did not mean that no marriage had been concluded. In short, the Supreme Court viewed the second, unregistered marriage as a new marriage in the sense of Article 279.

O'Shaughnessy argues that in this case 'the issue at stake for the court was not so much the legality of what constituted a valid marriage, as the symbolic significance of citizens who failed to conform to the state's ideological prescriptions' (O'Shaughnessy 2009: 68). In other words, the Supreme Court punished the intention to circumvent the stipulations of the 1974 Marriage Law. I agree with O'Shaughnessy that the Supreme Court wanted to uphold the state's ideological prescriptions, but disagree that the validity question was secondary to the symbolic value of the punishment. After all, it was a criminal case in which the Supreme Court had to establish whether the defendant *in a specific case* had committed a criminal act under Article 279 of

the Criminal Code. The two issues at stake were, first, whether a lawful first marriage existed which formed a legal barrier to a second marriage and, second, whether a second marriage in the sense of *Article 279* had been concluded. Because there was convincing legal proof of the first marriage in the form of a marriage certificate, the whole case evolved around the Supreme Court's interpretation of *a marriage in the sense of Article 279.*

It is likely that in this specific case the Supreme Court considered the confession of the defendant that he had married religiously without registering it to be sufficient proof of such a marriage in the sense of Article 279. One must realize that the Supreme Court only verified whether the application of the law of the first-instance general court in the criminal case had been correct. Hence, the husband was incarcerated because the Supreme Court considered that the first instance general court had provided sufficient reasons to justify that the act of marrying for a second time constituted a criminal act and was thus illegal. Since the general court had no jurisdiction over civil Muslim family matters, it established neither that the marriage had been lawful, nor valid. Such questions are part of the Islamic courts' jurisdiction.

In the second case, decided in 1993, the Supreme Court argued that the unregistered marriage could not be considered lawful because it lacked a marriage certificate as legal proof.[10] Bowen claimed that this second case 'presented precisely the same set of facts as the first case' (Bowen 2003: 184), but in fact there is an essential difference between the two. Contrary to the first case, here it was the second marriage that was registered and the first marriage that was not. Thus, while sufficient legal proof had been provided for the defendant's marriage, the prosecutor built a case based on a first marriage, whose status was unclear. In this case, the act of marrying alone was considered insufficient to constitute a legal barrier to a new marriage – the current status of the marriage had to be proven first, as its validity was uncertain. It is likely that the Supreme Court also took into consideration that the prosecutor, before pressing criminal charges, could have advised the first wife to establish the status of the first marriage beforehand through a civil procedure at the Islamic court.

In short, the two cases are fundamentally different. In the first case the act of marrying for a second time is a criminal offence as it did not take account of the provisions of the 1974 Marriage Law, whereas in the second case the act of marrying alone is not a legal barrier: it only becomes one when the first marriage has ongoing civil law consequences. In the first case current validity and lawfulness of the marriage do not matter, whereas in the second case they are essential.

This automatically brings us to the next point: in my view the cases that Bowen analyzed are too complex and dissimilar to draw any conclusions about

10 Bowen states that this case originated from a lower court in Aceh in 1990, but he does not provide a case number.

the validity of unregistered Muslim marriages in general. By contrast, these cases are very useful in analyzing the Supreme Court's stance on the validity of *polygamous* unregistered marriages between Muslims. Elsewhere, I have discussed a recent Supreme Court judgment[11] in the light of Bowen's analyses and have formulated two hypotheses (Huis & Wirastri 2012). First, unregistered polygamous marriages are not regarded as valid by the Supreme Court, since they lack the legally required court permission. Second, the non-recognition of an informal polygamous marriage still makes the deliberate intention to enter an unregistered marital union in order to circumvent the legal barriers to an official polygamous marriage a criminal offence. Article 279 of the Criminal Code still applies (Huis & Wirastri 2012: 14).

With regard to the Islamic courts' general stance on unregistered marriages, I believe it makes more sense to look at uncomplicated cases than at those very specific and complex cases that involve polygamy and criminal charges. Today, the large number of marriage registration (*isbath nikah*) requests approved by the Islamic courts every year indicate that an unregistered marriage is still considered valid when the marriage is concluded according to religious requirements (Huis & Wirastri 2012; Nurlaelawati 2010; Bedner & Huis 2010). As a result of an *isbath nikah* judgment, the marriage can be registered on the date that it actually took place, *not* the date of the court's judgment. This is important for the legal status of children and other legal consequences resulting from the marriage.

It is also vital to look at the Islamic courts' treatment of unregistered marriages in marriage annulment cases on the ground of informal polygamy. Article 24 of the Marriage Law clearly offers women the legal possibility to annul their husband's second marriage: 'Anyone who is bound through marriage to one of the spouses, can request an annulment of the new marriage, based on the ground of the existence of an ongoing marriage, without invalidating [the official conditions for polygamy in] Article 3(2) and Article 4 of this law.' Thus, in all polygamous marriages described earlier, besides reporting her husband's marriage to the police the first wife could also have requested that the Islamic court annul her husband's second marriage. Based on the *isbath nikah* practice, Marriage Law Article 24 and the complex criminal cases described above, a second condition to the general rule can be added: *an unregistered marriage is valid, but only on condition that the marriage is concluded according to the religious requirements and that a previous, lawful marriage forms no legal barrier to this marriage.*

The analysis in this section has shown that, even if in Indonesia's legal system lower courts do not necessarily follow precedents, Supreme Court

11 Judgment 2156 K/Pid/2008 of 12 April 2009. Like in Bowen's first case above, the marriage of the first wife was registered and that of the second wife not. The Supreme Court – as in Bowen's case – considered an unregistered second marriage to be a marriage in the sense of Article 279. The Supreme Court sentenced the husband to six months' incarceration.

judgments have the potential to change the legal doctrine within the Islamic courts. The *taklik al-talak* case, in which the six months desertion divorce ground was replaced by a two year desertion, illustrates that a Supreme Court decision can change the content of substantive norms that used to be standard practice, without abolishing the essence of the norm itself. However, when it concerns sensitive issues like interreligious marriage, political resistance from *ulamas* and Muslim organizations can effectively reduce the value of a Supreme Court judgment. Secondly, regarding the issue of the lawfulness of unregistered marriages, I have demonstrated that some plain, uncomplicated cases originating in the Islamic courts are almost never appealed in cassation. Those cases that have reached the Supreme Court were criminal cases originating in the general courts, and not civil cases to establish the legality of a marriage.

Put into the perspective of the development of substantive Muslim family law in Indonesia, the analyses above provide two insights. First, Supreme Court judgments did provide a number of interpretations of open norms in the 1974 Marriage Law, potentially resulting in more consistency in the Islamic courts' adjudication. I have argued that only research into their application by first-instance judges can establish whether the Islamic courts generally followed those interpretations. In Chapter 9, therefore, I will assess the value of Supreme Court judgments as part of my analysis of their application by the Islamic courts of Cianjur and Bulukumba.

Second, these cases have shown that Muslim family law norms do not operate in isolation, as the Indonesian Islamic court is very much part of, and increasingly interacts with, the other branches of the legal system. In complex cases involving family law issues, such as criminal prosecution based on Article 279 of the Criminal Code in polygamous marriages, it can be prudent for the Prosecutor to let the local Islamic court establish the lawfulness of a first marriage first, before starting a criminal suit at the general court. Conversely, criminal prosecution of informal polygamy, rather than a civil suit, may influence the legal position, attitudes and strategies of women whose husbands intend to engage in a polygamous marriage.[12]

The next section provides yet another example of the interaction and overlap of state regulations with the judicial tradition of the Islamic courts. In 1983, a special regulation was introduced for civil servants concerning marriage and divorce, the provisions of which apply to Muslim civil servants. The actors behind the law were the wives of civil servants who wanted to be protected from the threats of divorce and polygamy.

12 In the next chapters I have limited myself to the relation between polygamy and divorce. More comprehensive research about informal polygamy and its social consequences would be very welcome.

4.2.4 The 1983 Governmental Regulation concerning Marriage and Divorce for Civil Servants[13]

Because of their alleged affiliation with socialist ideology, the New Order regime of Suharto had disbanded Indonesia's most vocal and feminist women's organization the Indonesian Women's Movement (*Gerakan Wanita Indonesia*, *Gerwani*). In its stead, the New Order promoted a female citizenship centering on women's wifely and motherly duties. Hence, it attempted to replace the women's organizations with 'the wife's organizations' (Robinson 2008: 25). The main ones were the Family Welfare Movement (*Pembinaan Kesejahteraan Keluarga*, PKK), and the *Dharma Wanita*, nation-wide bodies in which wives of civil servants were organized in line with their husband's position in the government institution concerned and to which membership was compulsory. Through the PKK and *Dharma Wanita,* the New Order's ideology of *ibuism* or motherhood was promoted (Suryakusuma 1996). The organizations were also utilized to promote development policies, especially the family planning program. Ironically, many women used these organizations that were primarily established to promote the ideology of women as obedient wives, mothers, and citizens, to discuss and even resist the (im)moral behavior of their husbands. In order to ensure their husbands' good behavior, some felt it was necessary to regulate marriage and divorce in a stricter way. They managed to get the support of *ibu* Tien, the wife of President Suharto and, eventually, of President Suharto himself (Wichelen 2010: 74). The end result of their lobby was the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (the 1983 Civil Servants Regulation).

The 1983 Civil Servants Regulation stipulates that the private matters of marriage and divorce of civil servants require permission from their superior. The permission requirement is in line with the New Order's family-based ideology, in which civil servants were expected to be role models for society at large and divorce was discouraged. As a consequence, polygamy also requires a superior's permission. The superior is only allowed to give permission for the polygamous marriage when the first wife has stated her agreement and after the civil servant concerned can show legal proof, in the form of a doctor's statement that the condition of the wife is such that she cannot perform her marital duties or is infertile. It is important to note that after the superior gives permission the Islamic court once again has to establish whether a polygamous marriage is permissible.

A major difference between the 1983 Civil Servants Regulation and the 1974 Marriage Law concerns the consequences of divorce. The 1983 Civil Servants Regulation contains a much stronger protection of wives against the financial consequences of divorce, but only if it is petitioned by the husband.

13 GR 10/1983 Jo. 45/1990. Similar regulations had been issued by the Ministry of Defense for Military Personnel (KEP/01/I/1980) and the Police (JUKNIS/01/I/1981).

In male-petitioned divorces concerning civil servants, the wife has the right to one third of her husband's salary as spousal support until she remarries. In comparison, the Marriage Law neither specifies the procedure nor the amount of spousal support, whereas in the Islamic courts' judicial tradition, the *fiqh*-based rule applied that the wife has maintenance rights during the *iddah* waiting period of three months.[14] When a female civil servant or a civil servant's wife petitions the divorce, she loses her right to spousal support altogether, unless she proves that her husband committed adultery.

Thus, both male civil servants and their wives are discouraged to divorce under the 1983 Civil Servants Regulation through negative financial incentives: husbands lose a third of their salary, and wives their right to maintenance. Moreover, if the couple has children, another third of the husband's salary will be designated to child support, no matter who petitions the divorce. In comparison, the 1974 Marriage Law only establishes the father's obligation to provide support for his children, but does not specify the amount. As we will see in Chapters 6 and 8, the Islamic court generally does not order high amounts of child support in non-civil servant cases, and at one third of a salary the standard for civil servants is set relatively very high.

Although on paper state control of marriage and divorce of civil servants is strict, in practice the implementation of the 1983 Civil Servants Regulation has been lax. Many civil servants have concluded unregistered marriages to which their superior often turned a blind eye when the marriage was discovered (Suryakusuma 1996). In addition, as we will see in Chapter 6 and Chapter 8, many civil servants, both male and female, petition for divorce. In Chapter 9, I will demonstrate that many judges in the Islamic courts are reluctant to implement the provisions of the 1983 Civil Servants Regulation. All matters concerning Muslim marriage and divorce fall under the jurisdiction of the Islamic courts. However, in the specific case that the disputes concern the action or inaction of a civil servant's superior, the jurisdiction lies with the administrative courts (Bedner 2001: 141-144). Islamic courts' judges interpret this overlap to mean that in divorce cases that involve civil servants the Islamic courts lack competence to establish post-divorce rights on the basis of the 1983 Civil Servants Regulation and apply the provisions in the 1991 Compilation of Islamic Law in its stead.

4.2.5 The 1991 Compilation of Islamic Law

The 1974 Marriage Law, as a law for all religious entities, left substantive Muslim family law issues unregulated. For instance, it did not specify detailed requirements for a Muslim marriage, let alone Muslim engagement, and was

14 This *fiqh* norm is adopted in the Compilation of Islamic Law of 1991.

not specific concerning spousal and child support rights after a divorce. As early as 1976 a commission of the Supreme Court and the Ministry of Religious Affairs prepared a plan to compile Islamic substantive family and inheritance law to be applied nationally by Islamic courts (Hanstein 2002: 377-378), with the intention of codifying and unifying the family and inheritance law that applied to Muslims in Indonesia.

I have discussed the background and development of the combined drafting process of the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law in the previous chapter, so I will only provide a summary here. Key to the drafting process was the cooperation between Busthanul Arifin, judge at the Supreme Court and advocate of a strong position for Islamic family law in Indonesia, and Munawir Syadzali, Minister of Religious Affairs. In 1984 they succeeded in convincing Suharto to implement their plan, which was illustrative of a more general shift in the New Order policies. The secular-oriented *Pancasila* state of the 1970s and early 1980s gradually turned into a *Pancasila* state which allowed for Islamic expressions such as the veil (Wichelen 2010: 54-55; Brenner 1996), and in which the state incorporated Islamic norms and put them under state control (Otto 2010; Wichelen 2010: 9-10; Hefner 2002; Bruinessen 1996). With regard to Muslim family law, a discourse shift took place: the secular-Muslim debate of the 1950s – 1970s changed into a debate between reformists and traditionalists, and was cast in Islamic terms only .

To provide the Compilation of Islamic Law with Islamic legitimacy it was set up as a process of attaining *ijma*, which means a consensus among the main Muslim scholars. This is one of the five traditional sources of Islamic law.[15] Sources for the Compilation were *syafi'ite fiqh* works,[16] interviews with judges, Muslim scholars and 166 *ulamas* and Islamic court judges,[17] case law, national legislation, foreign codes, conferences and public debates. The variety of sources consulted demonstrates that the Compilation's aim was to codify a substantive Muslim family law that was in compliance with national legislation, and acceptable to Islamic court judges, Indonesian *ulamas* and Indonesia's civil society. In 1988, after the drafting process had been finalized, the draft Compilation was submitted to the president. Through a semantic exercise, by which it turned the provisions of the Compilation into *fiqh*, the Indonesian government claimed that because the selected *ulamas* had stated their agreement to the Compilation – a national consensus of Indonesian *ulamas,* or *ijma*,

15 Islamic doctrine (*fiqh*) is developed by *ulama*, rather than judges who (according to the majority of Sunni *maddhab*, including the *syafi'i maddhab*) apply the sources of law in the following order: the Qur'an, the Sunna and Hadith, *qiyas* (analogy), *ijma* (consensus) and *ijtihad* (independent reasoning).

16 For a thorough discussion of the *fiqh* books consulted, see Nurlaelawati (2010).

17 Technically speaking the 166 interviewed Muslim scholars were not all *ulamas*; some were judges of Islamic courts, three female judges (Hanstein 2002: 385).

had been reached. Hence, the Compilation was formally presented as the 'living *fiqh* of Indonesia'[18] and thus as a unique Indonesian Islamic doctrine.

The drafting commission's claim that the Compilation reflected 'a living *fiqh* of Indonesia' points to two of its characteristics: first, '*fiqh*' points to codification of traditional Islamic norms, and, second, the labels 'Indonesian' and 'living' point to codification of current social practices different from *fiqh*. Bowen argues that the use of the term 'living *fiqh*' must be seen as a symbolic Islamization of the concept of 'living law' and thus of '*adat*' (Bowen 2003: 190). It was probably used to conceal the difficult fact that a substantial number of 'living' norms in the Compilation actually had their origin in *adat* and the 1974 Marriage Law. In the Compilation's official commentaries those *adat* norms, which were part of the Islamic courts' judicial tradition, but not of *syafi'ite fiqh*, were symbolically restated, explained and framed as *fiqh*. However, as appears from Nurlalelawati's study about the legal sources of the Compilation, this was not done very convincingly. As a result, many Indonesian *ulamas* (and Nurlaelawati herself) do not agree with the claim that such *adat* norms are part of *fiqh*, which does not necessarily mean they object to the application of certain *adat* norms by Islamic courts. Disagreement among *ulamas* especially appears when *adat* norms are clearly at variance with Qu'ranic rules (Nurlaelawati 2010: 110-117). Such disagreement eventually may undermine the government's claim of a consensus as well as the legitimacy of the *adat* -based norms.

As a codification of Indonesian Muslim family law the 1991 Compilation of Islamic Law consists of books, chapters, articles, and paragraphs. Nonetheless, formally it is not an Act, as it has never been passed by Parliament. Initially, its introduction was postponed because the 1989 Islamic Judiciary Law had to be passed by Parliament first. As we have seen (see 2.4.6), the original Islamic Judiciary Bill met opposition from the secular-oriented PDI party and was protested outside Parliament by secular and non-Muslim religious organizations. Only with the interference of the military faction in Parliament was a compromise reached. To preclude discord in Parliament, which would destroy the carefully created image of a consensus or *ijma* among Indonesian Muslims, the government in 1991 eventually chose to issue the Compilation of Islamic Law as part of a presidential instruction.[19]

This, of course, had consequences for the legal status of the Compilation. It is clearly designed as a statute, but from a formal legal perspective it does not have such status. In practice, however, Islamic court judges apply the

18 The terminology used seems inspired by the Supreme Court ruling of 1960 – infamous from a conservative *ulama* point of view but well-known – in which it first used the term 'the living *adat* law throughout Indonesia' to justify a ruling contrary to *fiqh* that a widow has the right to inherit from her husband's estate (so *not* joint marital property). See Lev 2000: 115.

19 *Instruksi Presiden* 1/1991.

Compilation as if it were a statutory law, even if they frequently make reference to additional *syafi'ite fiqh* sources and justify some judgments solely through *fiqh* (Nurlaelawati 2010: 135-142; Lubis 1994: 321-322). The Minister of Religious Affairs in Decision 154/1991 was very clear on the application of the Compilation: all institutions falling under his powers, including the Islamic courts,[20] should to the largest extent possible rely on the Compilation as the primary legal source.

The Compilation's main intention was to unify Muslim family law norms throughout Indonesia. An analysis of the Compilation's substantive norms reveal their hybrid origin. If one reads the substance of the Compilation carefully, it in fact for a large part constitutes a continuation of the existing judicial practice within the Islamic courts including their applicatition of the reforms in the 1974 Marriage Law. However, as a consequence of the new jurisdiction of the Islamic courts under the 1989 Islamic Judiciary Law, new substantive norms had to be included as well.

The Compilation adopted all relevant stipulations in the 1974 Marriage Law, often reformulated or 'vernacularized' into more Islamic language, with the intention of making them more acceptable to *ulamas*.[21] The Compilation adopted the polygamy conditions and specified post-divorce rights of women and children on the basis of *syafi'ite fiqh*. Thus, in case of a non-final divorce, the husband has the obligation to provide a consolation gift (*mut'ah)*. In final divorces the *mut'ah* gift is only a recommended act (*sunnah)* and thus voluntary. Only ex-wives in non-final divorces petitioned by the husband have a right to maintenance during the waiting period (*iddah*), provided that the divorce is not caused by their disobedience (*nusyuz*). There are no spousal support rights when the divorce is final.

The Compilation has also specified joint marital property rules, and rules concerning child support and child custody. The Compilation provides that the father has the legal obligation to financially support his children until they reach the age of 21 years, or are married. Custody for infants under the age of 12 years in principle will be designated to the mother, above 12 years the child's preference will be the main consideration in custody designation. The codification of custody and child support terminated a situation in which unclarity existed regarding the age of maturity and the age a child is considered dependent on the mother. In that sense it greatly improved legal certainty and the custody rights of mothers.

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20 Until 2004, when the administration and supervision of the Islamic court was brought under the Supreme Court (see Chapter 2).

21 Sally Engle Merry (2006) has argued that human rights need to be 'vernacularized' or adapted to local understandings and conditions in order to become meaningful at local levels. In the same manner, Indonesian reforms often are linked to Islamic doctrine in order to make them acceptable to local power holders. For examples of the latter practices on the local level, see Van Doorn-Harder 2007.

The Compilation adopted traditional divorce norms, which the 1974 Marriage Law did not regulate, but had not annuled either (see Article 66 of the 1974 Marriage Law). Two divorce grounds and one divorce procedure were added to those listed in the 1974 Marriage Law: the *taklik al-talak* and apostasy (*murtad*) as divorce grounds and the *khul* as divorce procedure. As we have seen in the previous chapters, *taklik al-talak* and *khul* were the procedures that women used most in order to obtain a divorce. *Khul* in principle is a consensual divorce in which women offer their husband to return part of their dower (*mahr*) in return for a divorce. The 1974 Marriage Law and the Compilation of Islamic Law do not allow for a consensual divorce and require a judicial divorce in which divorce grounds are being met. The inclusion of *khul* in the Compilation shows that although the practice *khul* perhaps has lost its legal relevance in social practice it may very well be the only socially acceptable way for women to divorce. The inclusion of apostasy as divorce ground reflects the growing opposition to interreligious marriages within the Ministry of Religious Affairs and follows the position of the Indonesian *Ulama* Council on the matter. The prohibition against men marrying non-Muslim women, even Christians and Jews, must be seen in the same light (Manan 2006a; Butt 1999; Pompe 1991).

In areas where the Islamic courts held new jurisdiction, the Compilation generally codified rather conservative *syafi'ite* norms. Those include the provisions that stipulate unequal inheritance shares for male and female heirs (ratio 2 : 1), the prohibition against Muslim women marrying non-Muslim men and the different treatment of adopted children.[22]

Some significant observations can be made if we consider the substantive norms of the 1991 Compilation of Islamic Law and the 1974 Marriage Law in their respective historical contexts and compare the results. While the Marriage Law included some far-reaching reforms, all reforms of the Compilation fell neatly within the limits of the current Islamic courts' judicial practice. The innovative aspect of the Compilation was not its substantive law but its drafting process, which, in an attempt to create consensus (*ijma*), included the vernacularization of *adat* norms into a traditional Islamic language. Ironically, those *ulamas* and other *fiqh* experts who opposed a number of provisions in the Compilation did *not* necessarily do so because *adat* and secular norms were applied in the Islamic courts, but because *adat* norms had been restated as *fiqh* when in their eyes they were clearly not part of it (Nurlaelawati 2010: 110-118). According to this conservative view, *adat* norms and state law can never become *fiqh*. However, they *can* become part of substantive Muslim family

22 Contrary to *syafi'ite fiqh,* adopted children have been granted inheritance right in the Compilation of Islamic Law, yet unlike biological children they can only inherit a maximum of one third of an estate (Article 209). However, this must not been seen as a reform, since in many areas in Indonesia, especially on Java, adopted children are traditionally treated as biological children by their parents. See for instance Nurlaelawati 2010 and Lukito 2012.

law so long as they do not fundamentally affect the essence of those interpretations of rules in the Qur'an and Sunna that are traditionally considered unambiguous.

4.3 Three Bills on substantive Muslim family law after *Reformasi*

Since the fall of Suharto and the beginning of the *Reformasi*, both liberal and orthodox Muslim voices have pressed their agendas freely and vigorously. The period saw the political success of a new conservative Muslim party, the Welfare and Justice Party (*Partai Keadilan Sejahtera*; PKS), as well as the advancement of a Liberal Islam Network (*Jaringan Islam Liberal*; JIL) promoting Muslim feminist ideas based on *ijtihad* (individual interpretation) of the sources of Islamic law. Against the background of the greater advancement of orthodox and liberal interpretations of Islamic law, the administration of *Megawati Sukarnoputri* decided in 2002 that it was essential to raise the legal status of the 1991 Compilation of Islamic Law from an executive order promulgated through a presidential instruction to that of a statute passed by the legislature. As a result of this perceived necessity, three bills on substantive Muslim family law were drafted and presented to the public: the Bill on Substantive Muslim Family Law of 2003, the Counter Legal Draft [to the Compilation of Islamic Law] (CLD) of 2004 and the Bill on Substantive Muslim Family Law of 2010.

4.3.1 The first Bill on Substantive Muslim Family Law of 2003

In 2003, the Ministry of Religion presented the Bill on Substantive Muslim Family Law (the 2003 Bill) to parliament. The committee that drafted the bill was chaired by Taufik Kamil of the Ministry of Religious Affairs, with the former head of the Office of the Religious Courts, Mochtar Zarkasyi, and Supreme Court Judge Rifyal Ka'bah as vice-chairs. The committee also included retired Supreme Court Judge Bustanul Arifin, who in the 1980s had played a leading role in the creation of both the 1991 Compilation of Islamic Law and the 1989 Islamic Judiciary Law, and Abdul Gani Abdullah of the Department of Law and Human Rights who had also taken part in the drafting of the Compilation.

The stated goal of the Bill was to raise the status of the Compilation from a presidential instruction to statutory law. The core members of the drafting committee had been involved in producing the Compilation and therefore it is not surprising 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. Indonesian Muslim scholars had produced a wealth of scholarship that paved the way for reinterpretations of traditional Islamic doctrines (Feener 2010),

and women's rights activists within the main Muslim organizations of NU and *Muhammadiyah* had long promoted gender-sensitive reinterpretations of Islamic law (Doorn-Harder 2007). 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.

4.3.2 The Counter Legal Draft of 2004

Although it was never acted on by the legislature, the 2003 Bill proved to be important in another way. In 2000 the administration of President Abdurrahman Wahid established a program of gender mainstreaming to promote women's interests across the full range of government institutions and programs. In response to the proposal to solidify the status of the 1991 Compilation of Islamic Law, the gender mainstreaming team within the Ministry of Religious Affairs initiated a project to produce an alternative to the Compilation, which it labeled the Counter Legal Draft (CLD). The drafters aimed at producing a radical revision of the Compilation, and approached Islamic norms from a democratic, pluralistic, human rights and gender-sensitive perspective (Wahid 2008).

The drafting team was headed by Siti Musdah Mulia, who was special advisor to the Minister of Religious Affairs for gender-mainstreaming. She was also a lecturer at the Islamic University Syarif Hidayatullah and a well-known women's rights activist. In explaining the CLD she 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 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. (Mulia 2007: 131)

The CLD, which was presented to Parliament in October 2004, proposed a range of reforms that would have significantly increased the gender equality of Indonesian personal status law. The proposed marriage law reforms included changing the minimum age of marriage to 19 for both husband and wife (at present the minimum age of marriage is 19 years for the husband and 16 years for the wife); eliminating the requirement of a marriage guardian for women who have reached the age of 21 and thereby giving them more autonomy in choosing a spouse; making the payment of *mahr* (dower) a marriage requirement for both spouses instead of limiting it to a gift by the husband's family to the wife, which is often conceived of as payment for the wife's obedience; extending the principle of *nusyuz*, a term often translated as disobedience of

the wife, to both spouses thus creating more equal and mutual marital duties and obligations; and imposing a waiting period (*iddah*) on husbands as well as wives following divorce. Finally, the CLD proposed eliminating the inequality between men and women under the law of inheritance, by granting daughters the same share as sons, a clear break with prescriptions in the Qur'an.

In addition to the reforms aiming at increasing gender equality, the CLD proposed four other changes that might be considered in conflict with traditional Muslim norms. First, all marriages would have to be registered to be valid (*sah*). 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. At present, Indonesian Islamic courts generally regard compliance with religious stipulations to be sufficient for a marriage to be recognized by the state. 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 religious court (Huis & Wirastri 2012). This brings us to the second change commonly regarded as contrary to Muslim norms: the CLD would prohibit polygamy entirely. Lastly, the CLD would eliminate difference of religion as a bar to marriage. Likewise, 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 scope of the 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 Indonesian *Ulama* Council issued a statement calling for the withdrawal of the CLD and the Council'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 'damaged Islamic teachings' (Wahid 2008; Mulia 2007; see also Nurlaelawati 2010: 125-129).

The polygamy provisions of the CLD became the 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 than usual base of support, expressing strong resistance to prohibiting the practice. This included well-known public figures such as businessman Puspo Wardoyo and *dangdut* 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, (and as we will see in the next chapters, of most lower and lower middle-class women

today) such as Soekarno's first wife, Fatmawati, who left the palace after Soekarno took a second wife (Wichelen 2010: 75-91).[23]

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, due to the breadth and depth of opposition to the proposal and opposition from conservative forces within the Ministry.[24] From a purely formal-legal perspective the CLD is not only acceptable but legally required, since it harmonized Muslim family law with constitutionally 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 even most representatives of the so-called 'moderate Islam.'

Hooker has argued that from the perspective of traditional *fiqh*, the broad rejection of the CLD was 'wholly understandable' (Hooker, M.B. 2008: 48). But perhaps it is more accurate to state that the CLD did not fit in the tradition of Islamic law and Islamic courts in Indonesia, as many substantive *adat* and Dutch civil law norms that are adopted in the Marriage Law and the 1991 Compilation of Islamic Law are also in direct conflict with traditional *fiqh*, let alone procedural norms. Those reforms have been accepted by most of the Indonesian *ulamas* for decades, if not centuries. The CLD, however, was a bridge too far in the gradual development of Muslim family law in Indonesia, even if it waged the struggle in Islamic terms and presented its changes as logical outcomes of this development.

4.3.3 The third Bill on Substantive Muslim Family Law of 2010[25]

The fact that the CLD project had been halted by the Ministry of Religious Affairs did not discontinue the project to further regulate substantive family law as applied in the Islamic courts. In 2010 a new revision of the 1991 Compilation of Islamic Law, the Bill on Substantive Muslim Family Law (Bill of 2010), was presented to the public. The Bill of 2010 reflects the original objective to upgrade the Compilation to become a statute. Unlike the CLD, and much like the 2003 Bill, the 2010 Bill for the most part is a copy of the current Compila-

23 Van Wichelen also offers the example of some businesswomen 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 very difficult for secular women's organizations to take on conservative interpretations of Islam, because they have no authority in this matter.

24 For a description of the conservatism within the Ministry of Religion, see Federspiel 1998.

25 I base this argument on the text of *Rancangan Undang Undang Hukum Materiil Peradilan Agama bidang Perkawinan* 2008.

tion. However, other than the 2003 Bill it also proposes a number of controversial reforms.

The reforms that have attracted most attention in the media are those that would turn unregistered marriages, informal polygamous marriages and temporary marriages (*nikah mut'ah*), as well as unauthorized *talak* divorces, into a felony. Initially, it seemed that Indonesian women's organizations applauded the proposed criminalization of unregistered marriage when The National Commission against Violence Against Women (*Komisi Nasional anti-kekerasan terhadap Perempuan, Komnas Perempuan*) stated its support,[26] but soon a coalition of women's organizations pointed to the gender-neutral character of the provisions. The coalition realized that wives in informal marriages would face the same legal consequences as the husband, and in order not to jeopardize the wives' status as 'victims' of such detrimental marriages, *Komnas Perempuan* changed its stance and came to oppose the 2010 Bill (Huis & Wirastri 2012).[27] The second reform that attracted media attention was the stipulation that a foreign man who wants to marry an Indonesian woman would have to deposit Rp 500 million at a sharia bank account as a financial guarantee for the wife. The stipulation was criticized as it would infringe on the freedom to choose a spouse, and because of the negative image it might create of Indonesian Muslim brides as commodities.[28]

A third large reform in the Bill, not treated in the Compilation at all, did not attract media attention even though it concerns a 'sexy' and controversial subject: forced marriage in the case of extramarital pregnancy. When a woman is found pregnant as a result of an extramarital sexual relationship (*zina*), she can be married to (*dapat dikawinkan dengan*) the man who impregnated her. If he refuses the marriage, he can be punished with a maximum sentence of three months' imprisonment. The provision is intended to protect the child's interests as the marriage is to be held in the early stages of pregnancy. If the child is born more than 180 days after the day of marriage, it will be considered a child born in wedlock and thus will automatically have a civil legal relationship with his father in addition to the mother. In case of pregnancy after a rape, a woman is allowed to marry a man other than the rapist during the pregnancy in order to prevent the child from being born out of wedlock.

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26 'Ayo Sosialisasikan Pidana Kawin Siri' [Let's socialize the criminal character of unregistered marriage], Kompas online, 15-2-2010; 'Nikah Siri: Perempuan Lebih Banyak yang Rugi' [Unregistered marriage: women bear the negative consequences], Kompas online, 16-2-2010.

27 The more fundamental question whether the Islamic court should have jurisdiction in criminal cases at all, is absent from the debate. The Bill of 2010 provides 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. The entry of the police and the prosecutor into the Islamic court would mean a significant change to the traditional civil law character of the Islamic court.

28 E.g. 'Perkawinan Seharga Rp 500 Juta' [A marriage for the price of 500 million] Kompas online, 24-2-2010.

The Bill does not establish whether the girl has to give her consent to the marriage in a 'normal' *zina* case, but the wordings of the rape clause indicate that marrying someone else is allowed as an exception only, and, hence, that these marriages are in fact forced marriages. This would be a strong transgression of the principle of marriage by consent of both spouses as stipulated in Article 6(1) of the Marriage Law.

In addition to the three innovations above, the 2010 Bill contains a number of reforms which are less spectacular but which constitute important revisions of Muslim family law provisions. Worth mentioning is the proposed increase of the marriage age from 16 to 18 years for women and from 18 to 21 for men. The General Elucidation explains that this is intended to ensure the spouses are mature enough to enter a marriage. In Indonesia many women still marry below the age of eighteen (Jones, G.W. 2001; see also Chapters 6 and 8) and potentially the reforms could have significant social consequences. Second, the 2010 Bill proposes that both men and women can be *nusyuz* (disobedient) when they fail to fulfill their marital duties. Women can file a divorce on the basis of their husband's *nusyuz*. This would provide a new ground for divorce in addition to those included in the 1991 Compilation of Islamic Law. Thirdly, if the wife is pregnant during a divorce the husband still has to provide for her during the waiting period, no matter whether it is a final divorce or whether she had been disobedient. A third addition to existing regulations concerns a change in the polygamy procedures. The Bill provides that a wife would not have the right to appeal if a judge has decided to grant the husband permission for a polygamous marriage, even if she had not approved it. This provision might undermine the legally required permission of the wife to the husband's polygamy, as it would provide the judge with a broader discretion in polygamy cases.

The fate of the Bill of 2010 is uncertain. Following its presentation it attracted a lot of media attention with heated debates as a result, but at present the Bill is surrounded by silence. The CLD had proposed major reforms and a totally gender-equal Muslim marriage law. The drafters had based all provisions on reinterpretations of Islamic law, but the scope of the reforms proved unacceptable to even the moderate Muslim organization and consequently formal deliberation of the CLD was almost immediately halted. The 2010 Bill, in contrast, is for the most part a restatement of the 1991 Compilation of Islamic Law and its formal deliberation process is still ongoing. The long deliberation process again show how difficult it is to reform Muslim family law in Indonesia and because of the controversies typically attached to such reforms it is not unlikely that the 2010 Bill will be shelved again.

4.4 CONCLUSION

In this chapter I have outlined the development of a substantive Muslim family law in Indonesia after its proclamation of independence in 1945. In Independent Indonesia, major family law reforms primarily took place through the Marriage Law (1974). Those reforms in turn were adopted in the 1991 Compilation of Islamic Law. Even though the Compilation of Islamic Law was presented as a consensus among the Indonesian *ulamas*, and indeed the *ulamas* voted in favor of it, *ulamas* were not the main actors who had developed its content. The Compilation of Islamic Law (1991) was formost a codification of the current judicial practice in the Islamic courts, which by that time applied the reforms of the Marriage Law rather consistently.

My focus on the judicial tradition within the Islamic courts has enabled me to shed new light on the law-making process that took place after independence. The protests surrounding the Marriage Bill of 1973 indicate that in order to render the in marriage law reforms legitimate the legislator could not simply replace the Muslim family law norms with a secular family law, even if the majority in Parliament was in favor of it. The Marriage Law had to build on the traditional application of law by the Islamic courts' judges.

Thus, I have taken a different starting point from Hooker (Hooker, M.B. 2008, 2003) and Nurlaelawati (2010), who each took traditional *fiqh* as main point of reference in their analyses of the development of Islamic law and its legal practice in Indonesia, in their impressive studies of Indonesian Islam (or Indonesian sharia) and the Compilation of Islamic Law. Hooker identifies a unique Indonesian Islamic doctrine through this *fiqh* framework, whilst Nurlaelawati provides a convincing analysis of the many discrepancies between the Compilation and *syafi'ite fiqh* and their impact on the behavior of *ulamas*, conservative judges and society at large in West Java and Banten. While I recognize the significance of the findings of both authors, I believe that in this study, the choice of traditional *fiqh* as a benchmark would have put too much emphasis on differences between *fiqh* and the judicial practice. A focus on Indonesian Muslim family law as part of a judicial tradition depicts continuity, as within a judicial tradition the rule is that all legal change will build on the current legal practice, and all reforms must remain within the limits of the judicial tradition. Thus, I have been able to explain how continuity and change took place and what the possibilities of change were.

Different bench marks produce quite different findings. Nurlaelawati argues that the 1991 Compilation of Islamic Law has an innovative character because of the incorporation of substantive reforms based on *adat* norms, rules that stress government control, and rules that increase women's rights. However, according to her the most innovative and thus controversial aspect of the Compilation is its method of rule production: the application of such broad

Islamic principles as *ijtihad* and *maslahat*.[29] On the contrary, I argue that generally speaking the Compilation is *not* innovative. My analysis demonstrates great continuity. In the areas in which the Islamic courts already held jurisdiction prior to the 1989 Islamic judiciary Law, the Compilation continued the amalgam of relatively progressive norms that were applied by the Islamic court judge at that point in time. In this light we must see the adoption, reformulation and further specification of the 1974 Marriage Law's provisions, and the inclusion of *syafi'ite fiqh* and *adat* norms in areas which the Marriage Law had not regulated. The Compilation was a product of normal legal change within the Islamic courts' judicial tradition and even 'conservative' if compared to the changes that the 1974 Marriage Law had introduced. Almost all of its reforms took existing judicial practice as a legal base and as such were rather codifications of judicial practices.

Especially the 1974 Marriage Law introduced far-reaching reforms. The provisions that limited polygamy and the husband's absolute *talak* rights, and those that established the minimum age of marriage and the requirement of consent of the wife to the marriage, are all major reforms from a *fiqh* perspective. However, these reforms all followed a certain technique of rule production already noticeable during the 1938 Women's Congress agenda of Muslim family law reform. Reforms pertaining to unambiguous *fiqh* norms symbolically preserve their essence, but subsequently make them conditional to several strict legal provisions, thus severely limiting their legal applicability. Viewed in this way even the reforms of *talak* divorce remained within the limits of the Muslim family law tradition, as the husband still divorces his wife in a traditional Islamic way by uttering the *talak*, albeit before the judge. The *talak* is symbolically and technically preserved in name (*cerai talak*) and procedure, even if a *talak* divorce is limited by the same divorce grounds and more or less the same procedures that also apply to women.

The *ulamas* had a much harder job to legitimize the provisions in the 1991 Compilation of Islamic Law than the Islamic court judges, since *fiqh* and the Islamic courts' judicial tradition had diverged over time. As I have argued in the previous chapter, the Islamic courts' judicial tradition originates in the pre-colonial Islamic courts. The *penghulus* already applied legal norms based in *adat* and *siyasa* (state regulation). Over the years, and in the context of shifting paradigms as a result of changing ideologies, government policies and changing social norms, colonial regulations, Ministerial Decrees, state legislation, case law of the Supreme Court, interaction of judges with the civil courts and legal scholars, have all influenced this judicial tradition. Codification of these norms, which created an Indonesian substantive Muslim family law, inevitably unveiled and exposed these historically grown and sometimes

29 See Feener 2010 and Hooker, M.B. 2003, 2008 for a thorough account of the development of Islamic doctrines in Indonesia.

fundamental differences between the norms that Islamic judges apply in judicial practice and traditional *syafi'ite fiqh* norms in the books.

I argue that many of the substantive legal 'reforms' in Muslim family law that required innovative and controversial rule production methods by the *ulamas* actually concerned a mix of traditional uncodified Muslim family law norms already applied by Islamic court judges, as well as norms already laid down in the Marriage Law. I do not challenge the argument that the method of rule production by the Indonesian *ulamas* has been innovative, other scholars have also pointed at the innovative methods of rule production by the Indonesian *ulamas* (Feener 2010), or even hinted at the development of an Indonesian Islamic school of law (*maddhab*) in this regard (Hooker, M.B. 2008; Lindsey and Hooker, M.B. 2002). I do argue, however, that what is a reform from a traditional Islamic doctrinal perspective is for the large part in line with the traditional application of law by the Islamic courts' judges.

Codification of the legal practice in the Islamic court through the 1991 Compilation of Islamic Law may have frozen substantive legal norms and limited the possibilities of legal change within the judicial tradition, as Siti Musdah Mulia has complained. However, the negative consequences must not be overstated. The selection and consequent temporary freezing of legal norms is not necessarily a bad thing and is inherent to codification processes. The Compilation may have limited innovative interpretations of *fiqh* by judges, but at the same time its codification constrains judges who prefer more conservative *fiqh* interpretations in issues such as the age of marriage, the wife's consent to marriage or joint marital property. Codification of substantive family law has the theoretical advantage that legislators can introduce reforms that go beyond traditional Islamic doctrines. However, this historical overview has demonstrated that respect for the Islamic courts' tradition has been key to successful reform and, as the debate surrounding the Counter Legal Draft has demonstrated, that radical changes which depart from tradition have proven infeasible. Many issues that had been controversial at the time of the *penghulu* courts have remained controversial ever since. Hence, I have demonstrated that although important legal changes have taken place, and Muslim family law is far from frozen, the balance between Islamic law, state law and *adat* law has not – and can not be – fundamentally altered in the Indonesian context.

The next chapter provides a historical and cultural context for the Islamic court in Cianjur. As the court is located in the province of West-Java, its historical legal trajectory was the same as that of the *penghulu* courts described in the previous chapters. However, I suggest that because of the particular position of the *Preanger* region in the colonial history of West Java, the region developed a unique political economy in which *ulamas* operate rather independently from the central state, including its Islamic courts.