10 Conclusion

This study has approached the Islamic court from various angles in order to illuminate its workings, position and role in Indonesia in new ways. In so doing, I have followed Cotterrell's suggestion that 'a full analysis of law must take account of both its reality as an agency of government […] and its dependence on social and cultural conditions beyond its control' (1986: 72). I believe that this is evident in case of a study about Islamic courts in Indonesia. Islamic court judges in Indonesia are legally required by the 1991 Compilation of Islamic Law to take into account specific social and cultural contexts in their adjudication. Moreover, we have seen how the Islamic courts have generated strong political and religious symbolism from supporters of Muslim organizations in Indonesia, who have viewed the Islamic courts as bastions of Islamic law. In order to explore the governmental, political, social and cultural factors influencing the functioning of the Islamic courts, this study drew from approaches and methods derived from legal and political history, LGD, anthropology, sociology, and law. Through this interdisciplinary approach I have attempted to 'create knowledge which transcends partial perspectives' (Cotterrell 1986: 72).

I have examined four dimensions of the Islamic courts in Indonesia. The first dimension concerned the role the courts play in the protection of women's divorce and post-divorce rights. Women may access Islamic courts in divorce matters because they are legally required so by law, but also because the consequences of a formal or informal divorce for them are more serious than for men and they want to claim spousal support, child support, or their part of the joint marital property. Thus, the Islamic courts potentially have an important function in protecting women from some of the negative consequences of divorce.

The second dimension concerns the adjudication by Islamic court judges. A judge has the responsibility to give judgments in particular cases that not only provide redress from a rule-of-law perspective, but that also will consider the context of the particular case and local feelings of justice in society (Cf. Bedner & Vel 2010). Moreover, distinctive mechanisms are at play in a legal institution that applies norms originating in three legal traditions, i.e. Islamic, civil and customary law,.

Thirdly, I explored the special legal, political and social dynamics Islamic courts have historically generated. They are a dual symbol of the formation of state control over Islamic matters and the Islamization of the state. Local

religious authorities in different regions have reacted differently to those processes. Fourth, through legal interpretations, the Islamic courts transmit and transform the family law norms established in law and religion, which subsequently, through the 'shadow of the law' (Mnookin & Kornhauser 1979), have the potential to transform individual and shared norms and values of members of a society, a local community, a clan, a marital union, and a gender (Peletz 2003). Thus the Islamic courts may be seen as an instrument of the government in its state- and nation-building efforts. In this concluding chapter, I will bring those dimensions together, in an attempt to provide a four-dimensional picture of the Islamic courts' performance in realizing and protecting women's divorce and post-divorce rights.

10.1 Colonial History Revisited

10.1.1 Jurisdictional limitations of the Islamic courts

In the historical component of this study I have assessed the Islamic courts' relative jurisdictional position in the legal systems of the VOC (1609-1800), the Netherlands Indies (1800-1945) and the Republic of Indonesia (1945-present). One of my main suggestions in this historical part of the research is that the jurisdictional conflicts between the colonial courts and the traditional indigenous Javanese priest councils should be given a more prominent position in studies concerning the history of the Islamic courts in Indonesia.

The Dutch take-over of the administration of the bankrupt VOC[1] in 1800 marked the formal birth of the Netherlands Indies as a colonial state, and an official part of the Netherlands (since 1815, the Kingdom of the Netherlands). The Netherlands Indies (and the British during their interregnum from 1811-1816) organized a parallel Dutch and Indigenous government on Java, unified the legal system and established district *landraad* courts, initially without regulating the relative jurisdiction between the *landraad* and the Javanese Islamic courts, which the Dutch called *priesterraden* (priest councils). In 1835 the Supreme Court (*Hoge Raad*) issued a ruling on the issue stating that the priest councils on Java were not part of the colonial judicial system. The colonial government without delay undid this judgment and issued the 1835 Resolution concerning Judgments in Civil Actions Resulting from Disputes among the Javanese (S 1835/58), which plainly established that the priest councils held judicial powers over marriage; divorce; and inheritance disputes concerning the Javanese population. S 1835/58 also ruled that judgments by the priest councils were only enforceable after an *executoirverklaring* had been issued, a statement of the *landraad* that a priest council's judgment should be

1 The VOC' bankruptcy took place in 1798, the Dutch take-over of its assets in 1800.

executed. The jurisdiction of the priest councils was formally retained, but less precisely described in the proto-constitution of the Netherlands Indies (RR of 1854): 'their religious laws, institutions and customs are to remain in force.'

Even after the 1882 Priests Councils Regulation (S 1882/152) made priest councils a formal part of the judicial system, the *landraad* gradually denied the enforceability of the priest council's court orders in cases involving property and ordered a retrial at the *landraad*. In most cases the retrial was endorsed by the Dutch magistrates of the high court and the Supreme Court. This suggests that the idea that property matters should not be part of the priest councils' jurisdiction was already part of legal doctrine at a time when, according to best academic knowledge, the *adat* law school was not yet dominant. Of course, this does not necessarily imply that the priest councils no longer adjudicated property cases, but it does mean that their judgments were not recognized, and could no longer be enforced by the colonial legal system.

Many of the judgments limiting the priest councils' jurisdiction in property cases predate the rise of the *adat* law school in the early twentieth century, let alone the issuance of S 1937/116, which introduced the controversial jurisdictional chapter of the 1931 *Penghulu* Courts Regulation in the Netherlands Indies, formally establishing the *landraad*'s jurisdiction in all property disputes between Muslim Javanese, including those pertaining to family law and inheritance matters. However, from the perspective of legal practice, the introduction of S 1937/116 did not constitute a major legal, doctrinal change, even if the explicit choice of the government to favor *adat* law in property matters was a significant political event.

In fact, well before 1937 case law from the 'Dutch' secular branches of the legal system only recognized the priest council's competence to issue declaratory decisions, or *fatwa* in property cases. Thus, its main judicial task was reduced to giving final judgments in divorce cases petitioned by women, since men could initiate divorce without judicial involvement through the *talak*. Lev has suggested that because *adat* was and remained largely alien to the *landraad* judges, and the *landraad* itself largely foreign to Javanese Muslims, the *adat* argument to legitimize the transfer of the Islamic courts' jurisdiction in property matters to the *landraad* was not very convincing (Lev 1972: 26). This leads to an alternative view that S 1937/116 was last in a long chain of victories for the secular branches of the colonial court over their religious colleagues, the *penghulus* of the priest councils, a process that – unlike the political and legislative debates on the issue – probably had not much to do with a preference for *adat* law, but involved issues such as preference, bias, and ultimately, control.

10.1.2 Van den Berg's and Snouck Hurgronje's similar attitudes towards Islamic law

A secondary, but from a historian's perspective significant finding can be drawn from this assessment of the colonial *adat* vs. Islam debate in the late nineteenth and early twentieth century. From a family law perspective, the differences between Van den Berg, associated with the *receptio in complexu* theory that takes Islamic law as the main source of indigenous law, and his successor Snouck Hurgronje, creator of the reception theory which takes *adat* law as its basis, are much less profound than historians have suggested so far (see Nurlaelawati 2010: 46 and 47, Roff 2010: 456; Dijk 2005: 134 and 135). Van den Berg's stance is a very legalistic or positivist one: sharia applies to the Javanese because they are Muslims. Snouck Hurgronje takes a more empirically-based stance, resembling Ehrlich's concept of 'living law': in Javanese social life, most matters are not governed by Islamic norms but *adat*, therefore *adat* law should apply. Hence, after filtering out their legal ideas from all their differences and antagonisms, a very similar position emerges.

Even though Van den Berg's and Snouck Hurgronje ideas and starting points seem irreconcilable, in fact they are. As a legal positivist Van den Berg considered that statutory law such as the Criminal Code of 1873, for example, had primacy over all indigenous law, including Islamic law. Much like Snouck Hurgronje, he considered that Article 78(2) of S 1855/2, and its clause 'old institutions and customs' (*oude instellingen en gebruiken*) had primacy over *fiqh* in Muslim family law matters on Java. Ironically, Snouck Hurgronje took a 'scripturalist' stance in those Muslim family law matters he considered to be the realm of Islam, whether they concerned alleged inaccurate interpretations by Van den Berg, or a lax application of *fiqh* norms by the *penghulus*, which leniency he typically condemned. This all suggests that in future research the stereotypes of an Islam-favoring Van den Berg and an *adat*-supporting Snouck Hurgronje require some adjustments.

10.2 The Islamic courts and state formation

In Chapter 1, I adopted Peletz's suggestion that the Islamic courts and their adjudication are essential to the process of state formation, as they potentially penetrate deeply into communities, generating individual rights and obligations based on national citizenship rather than membership of a certain ethnicity, class, kin, or gender. In Chapters 6 and 8 I have analyzed the results of empirical research in Cianjur and Bulukumba about the function and performance of the Islamic courts in those districts. Taking into consideration local cultural and historical contexts, these analyses reveal the extent to which community members in both districts generally speaking act according to their statutory

rights and obligations regarding marriage and divorce, and consider why they act that way.

Starting with Cianjur, I have demonstrated that the Islamic court's authority is challenged by a rival Islamic normative system, leading to a situation in which most couples divorce out-of-court in violation of statutory provisions stipulating a judicial divorce. This situation is a clear negative indicator for state formation. Chapter 5 demonstrates that in order to maintain their standing and religious authority within their community in the face of an increasingly nationally-oriented Islamic court system, local *ulamas* and local KUA officials, most commonly also recruited from the ranks of influential traditional *ulama* and *kyai* families, have created parallel authorities in family law matters. These resemble states within the state and challenge the authority of the state Islamic court. Hence, the *ulamas* and *kyais* of West Java continue to perform their traditional roles in marriage and divorce in violation of statutory law and in competition with the Islamic court. A situation has developed in which those actors, who traditionally most vocally supported the Islamization of the state and a national imposition of sharia, are in actual fact denying the state's authority in the most essential Islamic matters. In this way they work against the state's nation- and state-building projects aimed at creating modern, national citizens who abide by national law.

In comparison, the Islamic court in Bulukumba has a much more entrenched position in society, as in Bulukumba it is generally considered to be the single, rightful institution for divorce. It is likely that these differences with Cianjur are the result of the Islamic court's distinct historical trajectories, as well as the traditionally less autonomous position of Bulukumba's local *ulamas* and *kyais*. Moreover, the growth of the class of *ulamas* and *kyais* in Bulukumba is a recent development. Historically they are more oriented towards the indigenous rulers and the state, as the state is the main vehicle to enhance their role and standing in society.

The Islamic court in Bulukumba is clear about the position of *adat* in its judgments: only when *adat* does not conflict with Indonesian Muslim family law will it be considered in judgments. Through each divorce case in which the Islamic court's legal doctrine is endorsed at the expense of other norms, the court transfers the message that statutory law is superior to other norms that exist in society. We have seen the example of the court's denial of the husband's demand that *mahr* must be returned after divorce, or the court's dismissal of a claim that a wife had been *nusyuz* and therefore had no right to maintenance. In the words of Cotterrell, such invocation of legal norms 'feeds into citizens' perceptions of law' (Cotterrell 1986: 301).

There is a correlation between the performance of the Islamic courts and state formation. Since in Bulukumba the Islamic court is addressed by a much larger portion of the population than in Cianjur, the effect of its every day adjudication processes on society can also be expected to be more profound. Conversely, the fact that enforcement of post-divorce rights, especially child

support, is unattainable for most women must be considered a negative indicator of state formation. Just as law invocation, enforcement is a mechanism by which legal doctrine and ideology are produced and disseminated and, what is more, imposed onto other normative orderings. Nurlaelawati has blamed the lack of law-abiding behaviour in West Javanese citizens on a lack of enforcement and law invocation by judges of the Islamic court (Nurlaelawati 2010: 224). I would add that the competition posed by autonomous *ulamas* in Cianjur and local KUAs, the operation of which also heavily draws on local *kyais* and *ulamas* complicates, and perhaps even, delays the nation-state formation process.

10.3 Continuities and changes in the development of Indonesian Muslim Family law

In Chapters 3 and 4 I have approached the historical development of Muslim family law in Indonesia as a series of changes and continuities that took place within a judicial tradition of the Islamic courts, meaning that legal changes always build on existing practice, and that legal practice is based on certain origins. In Chapter 3, I have suggested that it is useful to locate the judicial tradition's origins in the traditional adjudication by the Javanese Islamic judges or *penghulus,* and not solely in *syafi'ite fiqh.*

An obvious complication of such an approach is the lack of primary sources, and the consequent reliance on colonial descriptions of the *penghulu* courts and on colonial compilations of indigenous Islamic law, the most notable of which is the 1760 *Compendium Freijer*. I have attempted to overcome this problem by focusing on the reappearances of four concepts that are considered characteristic of Indonesian Muslim family law today: the *taklik al-talak* (conditional divorce), the distinctive *syiqaq* procedure in which the *penghulu* court rather than the husband divorces the couple after reconciliation has failed, a lenient application of the *fasakh* procedure for divorce, and communal marital property. All four concepts appear in eighteenth- and nineteenth-century colonial sources as part of the *penghulus'* administration of justice, and therefore I have argued that their application and codification in the twentieth and twenty-first centuries must be seen as continuity rather than change.

Nonetheless, I have also shown that major reforms with regard to Muslim family law have taken place. This was possible because the legislator retained the religious core of each of the reformed Islamic norms. Such reform process corresponds with Karl Renner's observation that legal concepts can adapt to changed social circumstances without necessarily changing in form or structure, and can even fundamentally change their social function without changing their form (in Cotterrell 1986: 54). In Indonesia far-reaching reforms of the Marriage Law have taken place without secularizing the main concepts of Muslim family law. Islamic concepts were preserved, but made conditional

to other norms which were considered more in line with modern times and government policies. Hence, the *talak* became a judicial divorce, polygamy was made conditional to strict limitations and subjected to a judicial procedure, and the minimum age of marriage was raised for men and women.

Of course, the political context in which the 1974 Marriage Law was adopted also plays a vital role in terms of the possibility of legal change. By 1974, the authoritarian New Order and its initially secular paradigm had pushed political Islam on the defensive, and the substance of the 1974 Marriage Law was probably the best result the supporters of Islamic law could negotiate during that time. When, in the 1980s, the policies of the New Order again became more Islam-oriented, even if still 'on terms set by the State' (Bowen 2003: 254), no more major reforms of Muslim family law took place, at least not through legislative process.

Of course the 1991 Compilation of Islamic law was a major event, as for the first time in Indonesia substantive Muslim family law norms were selected and laid down by the central government. From the perspective of the development of legal doctrine within the Islamic courts, however, the Compilation of Islamic Law is *not* innovative, as it primarily laid down the Islamic courts' doctrine of that time, which includes *fiqh*, *adat* law norms, and the provisions of the 1974 Marriage Law. From the perspective of *syafi'ite fiqh*, however, these codifications appear innovative, as a comparison with *fiqh* unveils these historically grown and sometimes fundamental differences between the Islamic courts' tradition and the tradition of *syafi'ite fiqh* (see Nurlaelawati 2010; Hooker, M.B. 2008).

The substantive legal changes in the Islamic courts' doctrine since the 1990s, are not only the consequence of case law of the Supreme Court and the Constitutional Court, but also of every day adjudication processes. As demonstrated in Chapter 9, judges apply the concepts of no-fault divorce and broken marriage consistently, meaning that they must be considered to have become part of the Islamic courts' legal doctrine.[2] The concept of no-fault divorce means that the issue of a wife's disobedience (*nusyuz*) has become less important in divorce and, indeed, it appears that the limits of what the court considers *nusyuz* behaviour have been narrowed. The Islamic courts generally do not act on the husband's accusations of *nusyuz* behaviour of his wife and still grant women their spousal post-divorce rights in *talak* divorces. A new development, but not yet part of legal doctrine, as this concept is seldom applied, is the concept of the husband's disobedience (*nusyuz*) in wife-petitioned *gugat cerai* divorce cases. Islamic courts have argued that, as a consequence of the husband's disobedience, the wife has the same rights on spousal support in *gugat cerai* cases as she has in *talak* divorce cases: the *mut'ah* consola-

2 This also proves the usefulness of differentiating between norms applied by the Islamic court, by using the 'Western' concept of legal doctrine, and *fiqh*, since no legal scholar, *ulama* or Islamic court judges will consider broken marriage and no-fault divorce part of *fiqh*.

tion gift, and maintenance, clothing and housing during the *iddah* waiting period. This may indicate that also regarding the the rights to spousal support the legal doctrine in the Islamic court is 'inching towards equality' (see Cammack 1999).[3]

This is not to say that the Islamic courts are heading towards equality or are becoming less conservative on all issues. Nurlaelawati has described how the Islamic courts have also become more lenient on the issue of polygamy, yet with the opposite result: less equality (Nurlaelawati 2013). Another example of conservatism is the Islamic courts' strict application of the rule that marriages must be concluded according to religious requirements, with the result that marriages that have been concluded many years ago are declared invalid, The Supreme Court has passed a judgment, based on *fiqh*, that a father's obligation to pay maintenance to his children does not imply that non-payment of such maintenance places the father in debt to the mother.

Still, on the whole, most trends in the Islamic courts' adjudication do not indicate that the Islamic courts have lost their relatively liberal character after *Reformasi.* On the contrary, they point at a number of legal changes which will move the Islamic courts' legal doctrine again a bit further from traditional *fiqh.* Nonetheless, legal reform within an Islamic judicial tradition can never be completely rational in Max Weber's sense, since it must always be based on the core Islamic norms and values to maintain an Islamic character. For this reason, it is unlikely that the consistently applied concepts of no-fault divorce and broken marriage will be codified at some point soon, as they would immediately spark controversy because of their non-*fiqh,* Western origins. Hence, there is a subtle difference with Karl Renner's observation in 1949 that law can adapt to changed circumstances without changing its form. In the case of Indonesian Muslim family law, it is the other way around: the form of the core Islamic concepts cannot change too much, regardless of changed social circumstances. The reason for this is that such changes would jeopardize the law's religious character. However, the legislator, by making the core Islamic norms conditional to external norms, and the judge by application or non-application of those norms with due consideration of changed social circumstances, can change their legal and social functions to a large extent.

3 Mark Cammack uses the phrase with regard to inheritance law.

10.4 Women's access to the Islamic courts

10.4.1 Women's rights to divorce

One of the core questions of this study concerned the functioning of the Islamic courts in protecting women's divorce and post-divorce rights. A comparison between Cianjur (Chapter 6) and Bulukumba (Chapter 8) allows me to put forward a number of plausible generalisations about this functioning. The Islamic courts are mainly divorce courts, and women approach them mostly in order to petition a divorce. Moreover, the legal analysis of the Islamic courts' judgments in Chapter 9 demonstrates that Islamic courts in all but very rare cases will grant a divorce, and that they increasingly base their judgments on the concepts of 'no-fault divorce' and 'marriage breakdown', rather than on the statutory legal grounds in the 1974 Marriage Law. The sidelining of the formal divorce grounds are not arbitrary judgments, as their consistent application clearly indicates that they are part of legal doctrine. Although the concepts of no-fault divorce and marriage breakdown are in conflict with statutory norms requiring an at-fault divorce, the outcome of a divorce process at the Islamic courts is very predictable: if reconciliation efforts fail, the courts will grant a divorce. This means that regardless a woman's social position within her local community, clan, or marriage, from a legal perspective she has an equal position in divorce. This means that women living in unhappy marriages who access the Islamic court may do so in order to circumvent traditional, religious or *adat*-based, patriarchal ideas about marriage and divorce.

The lenient approach towards divorce is the same in both districts and judges consistently and routinely grant divorces to male and female petitioners. However, it appears from the divorce surveys conducted in the framework of this research, that there are major differences in social divorce practices between the districts. In Bulukumba a large majority of the population follows the legal requirement of judicial divorce, whereas in Cianjur only a minority of women were divorced through the district Islamic court. In Chapters 6 and 8 I have found plausible explanations for this difference in divorce behaviour. In Bulukumba a woman can only obtain 'clean' status in the eyes of the community through a judicial divorce at the Islamic court, whereas in Cianjur there is no social stigma attached to an informal divorce, and men and women can easily remarry informally through a local *ulama*, or semi-formally, through an official of the KUA who can arrange a marriage certificate without having received a divorce certificate of the Islamic court first.

Thus, it follows that informal divorce is a viable alternative for women in Cianjur, which has the advantage of not requiring any paperwork and court hearings – in fact, women's access to divorce is not restricted. Elsewhere, Bedner and I have argued that the availability of informal marriage and divorce actually may increase freedom of women to mingle with young men,

since transgressions of the boundaries of proper social conduct can be 'solved' by an informal marriage and easy divorce (Bedner & Huis 2010). The explanation of the existence of competing institutions willing to conclude informal marriages and divorces still leaves us with the question of why such a system is generally accepted in Cianjur, and in Bulukumba much less so.

10.4.2 A historical explanation of the different attitudes towards judicial divorce in Cianjur and Bulukumba

The different historical trajectories of the Islamic courts in West Java and Bulukumba may provide a more structural explanation for this different attitude towards informal divorce. Chapter 5 describes how in mid-nineteenth century West Java a long and symbiotic relationship among the colonial state, the indigenous *priyayi* rulers, and a landowning class of *ulamas* and *kyais* came to an end, when the colonial government tried to get a grip on the autonomous class of *ulamas*. Through regulation, taxation and licensing the colonial government attempted to limit the number of *ulamas* as well as their combined religious, political, economical and educational roles in the country side. This resulted in a tense relationship between autonomous *ulamas* on the one hand, and the colonial government and the *priyayi* elite, including the *penghulus*, on the other. Despite the policies of the colonial government, the *ulamas* managed to maintain their position, by retreating into their local communities in the country side, focussing economically on the rice trade, and religiously on Islamic boarding schools and every day religious issues, including family law issues. As a result, many *ulamas* became autonomous, in the process of minimizing state influence on local communities. After independence the Ministry of Religious Affairs incorporated many *ulamas* into its ranks, but it did not manage to change their autonomous behaviour in everyday religious matters, since many of them still view the Islamic courts as competition to their interests and religious authority.

Chapter 6 describes a quite different trajectory in Bulukumba. Here, *ulamas* were generally part of the traditional nobility-based government who, like the *penghulus* of *priyayi* background on Java, were linked through the local political elites to the colonial government. In South Sulawesi an autonomous *ulama* class did not develop until well into the twentieth century, when the large Muslim organizations gained influence. Thus, I hypothesise that the autonomous *ulamas* in Bulukumba were not defending a traditionally established position, but were involved in a struggle to gain a more influential position, and that the state was viewed as a – or perhaps *the* – instrument to achieve this.

Moreover, the colonial government had not recognized the jurisdiction of the Islamic courts in South Sulawesi over divorce, and considered this a matter for the *adat* courts. After independence Muslim organizations urged

the government to establish Islamic courts in South Sulawesi. Thus, whereas many *ulamas* in Cianjur perceive the court as a symbol of state control over Islam, working against their interests and their strong local position in religious affairs, in Bulukumba it is likely that they perceived the Islamic court as a state-sanctioned Islamic institution working in their interests against *adat* and nobility rule. In short, historically the starting points in both districts were quite the opposite: in Cianjur autonomous *ulamas* and the Islamic court were competing institutions, whereas in Bulukumba both were new, with a relationship of mutual support.

10.4.3 The Islamic courts and post-divorce rights

Post-divorce rights are different in nature than divorce rights, since no legal requirement exists to bring post-divorce claims to the court. Thus, post-divorce rights mostly appear in a divorce petition when one of the spouses decides to claim them. Bearing this obvious but significant truth in mind, a number of generalisations can be made concerning the Islamic courts' role in realizing women's post-divorce rights.

First, a small minority of women in Cianjur and Bulukumba claim post-divorce rights during the divorce process. The divorce surveys in both districts indicate that women know that they are entitled to them, so lack of knowledge is not the issue. Spousal support rights in *talak* divorces, consisting of the consolation gift of *mut'ah* and the husband's continued obligation to provide maintenance, housing, and clothing during the three months waiting period (*iddah*) after a *talak* divorce, are the post-divorce rights that women claim most. Claims for child support and joint marital property are relatively rare. In Bulukumba women often make claims for the dowr (*mahr*) whereas such claims are almost absent in Cianjur. This is related to the custom in South Sulawesi of giving land, trees or other standing crops as *mahr*, often without fulfilling the legal formality of a property transfer. In such cases the Islamic court issues a statement on the *mahr* properties and orders the ex-husband to hand it over to his ex-wife.

The non-claiming practice by divorced women is related to economic realities, local custom and practices regarding divorce and post-divorce rights, as well as the availability of alternative support. I have argued that in claiming post-divorce rights women are influenced by complex factors: a cultural preference toward resolving matters privately; the tendency to view payment of child support as a religious matter, not so much a legal obligation; psychological barriers to facing the husband; empathy with a former husband who is poor himself; the desire and ability to take care of their family alone; but also to the attitude of the court itself encouraging couples to arrange their matters informally.

In a cost-benefit analysis, women would weigh the chance of successful redress with the level of agency and costs involved, but also with the socio-economical realities and psychological, cultural and personal considerations above. If women expect that too much effort would be needed for too few benefits, they naturally refrain from claiming their rights. The expected costs, effort and success of an enforcement process play a significant role too. Women will not put much effort into claiming monthly child support if it is public knowledge that one can easily ignore court orders concerning child support, because enforcement mechanisms are difficult to access. The spousal support court orders are enforced as the Islamic courts in Cianjur and Bulukumba order the husband to pay the three months sum, prior to pronouncing the *talak*. However, enforcement of child support orders is non-existent, and enforcement of marital property matters relatively expensive.

Expectations of the efforts needed for, and the outcome and benefits of, a judicial process were not the only factors women in Cianjur and Bulukumba took into account in their decisions. A woman's decision not to claim post-divorce rights is often also motivated by the wish to live a life independent of her former husband, or by empathy with the former husband's difficult economical situation. One of the remarkable findings of the divorce surveys is that many women have the opportunity to remain independent from the ex-husband's support. A majority of respondents in Cianjur and Bulukumba stated that, in their perception, divorce had not negatively affected their economic situation. Interviews with divorcees revealed that in both districts women can fall back on family for support and, moreover, that divorce made them available for the labor market again. Of course, the situation can be quite different for women who cannot fall back on their family for support. Nonetheless, one must be careful not to overstate the role of the Islamic court in society as regards post-divorce matters, and one must also be careful not to overstate the role of post-divorce rights in poverty reduction, as many lower-class women have their own income and are furthermore supported by their parents or other family members.

We have established that most women do not claim child support rights. However, when they do so the Islamic court mostly endorses the claims, with the proviso that the courts' decision tends to follow the husband's rather than the wife's description of his financial situation and ability to pay. According to judges I interviewed this is in order to increase the chance that the husband executes the court order, in view of the absence of an adequate enforcement mechanism. Hence, not only is the petitioners' behaviour influenced by the problem of enforceability of court judgments, but also the substance of Islamic courts' judgments themselves.

Forcible execution orders are relatively expensive as they involve informal payments to the police. The stronger the expected resistance, the more expensive enforcement becomes. This means that only in cases in which sufficient property or money is at stake are people willing to set the machinery of the

legal system in motion by taking legal action to enforce their rights. It also indicates that resistance to court orders can be an effective means to frustrate the end goal of a legal process, protection against the financial consequences of a divorce. For most women 'real legal certainty' (Otto 2002) is beyond their reach.

The Islamic court in Bulukumba has attempted to improve the enforcement situation by involving the military, who, to be sure, are always placed under the supervision of the police to ensure compliance with the formal procedures. Thus, deterrence is used in order to curb resistance. The Islamic court claims that the threat of military force has been mainly persuasive, actually resulting in less use of physical force during forcible executions. The use of the military does not change the accessibility of enforcement: they too must be paid, but the threat of military coercion, combined with the fact that the military are generally more respected than the police in Indonesia, seems to have increased the effectiveness of enforcement.

To summarize, the Islamic courts' performance in post-divorce matters is much less positive than in divorce cases. One may explain the situation purely in rule-of-law terms, by stressing the problem of inadequate enforceability of those rights. Indeed, enforceability is an important factor, which women take into account when they decide whether or not to make a claim, and which influences the behaviour and advice of court personnel towards court clients – and even the content of court judgments. However, an inadequate enforcement mechanism is not the only reason women do not claim post-divorce rights: cultural, financial and personal considerations also play a role, and moreover many women cope well without post-divorce rights.

10.5 The Islamic courts, the prospects of family law reforms and women's rights

This leaves us with the question what the prospects of family law reforms are. As the rejection of the proposed reforms in the 2004 Counter Legal Draft has indicated, it is very unlikely that international norms regarding women's equal rights, such as those formulated in CEDAW (which Indonesia formally adopted in 1984), will actually be adopted in a new Muslim marriage law any time soon. However, it is also safe to state that the political changes during the *Reformasi* have not caused a backslide with regard to the Islamic courts' relatively liberal interpretations of women's rights in marriage and divorce. There is much continuity in legal practice.

That of course does not answer the question whether there are any indications of future family law reforms. In this study I have argued that history has taught us that past successful reforms had to remain within certain boundaries of the judicial tradition of the Islamic courts to be acceptable. Most

profound family law reforms date back to the 1974 Marriage Law when the New Order regime had put Muslim parties on the defense. The rather conservative 1991 Compilation of Islamic Law was not to passed through Parliament by the New Order regime because of fears for controversies. For the same reasons the three Muslim family law Bills have been shelved by Indonesian governments during and after *Reformasi.* It seems that the prospects for reforms are bleak.

However, this study has demonstrated that, while proposals concerning legislative reforms always spark controversy, significant legal change does take place through the Islamic courts' every day adjudication processes. In fact, as many of those legal changes go rather unnoticed, the potential for legal change is larger within the Islamic courts than within Indonesia's Parliament. Yet, the doctrinal changes in Indonesia's Islamic courts' tradition are ambiguous, as a rebalancing of the main forces that exist within the courts is taking place: one inching towards more equality, the other towards a more Islamic identity. These forces are not necessarily countervailing as convergence between the two does take place. Only time will tell whether the Islamic courts' tradition is lenient enough to unite them.