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Summary

Indonesia's legal system includes religious courts for Muslims, in this book referred to as Islamic courts, which have the power to adjudicate disputes between regarding family law, inheritance law, Islamic banking, religious gifts (*shadaqah*, *infaq*) and religious endowments (*waqf*). The Islamic courts are national courts subject to national legislation and administratively they reside under the Supreme Court. There is a possibility for appeal to Islamic high courts and for appeal in cassation to the Supreme Court.

Chapter 2 of this book explains how the nineteenth-century Javanese Islamic courts were incorporated into the legal system of the Netherlands Indies and how the present-day Indonesian Islamic courts developed out of them. Chapters 3 and 4 describe how an Indonesian Islamic judicial tradition developed within the Islamic courts. Just as other legal traditions it is built on traditional norms and only gradually reformed itself through everyday adjudication processes and legislative reforms. The present thesis argues that rather than being the result of reinterpretations of Islamic classical doctrines by progressive *ulamas* present-day Indonesian Muslim family law has been developed within the judicial tradition of the Islamic courts. Moreover, the legislator has only once introduced major substantive legal reforms: in 1974 through the Marriage Law.

Family law is a field which regulates the relationship between the sexes and therefore it is fodder for debates between conservative and reform-minded Muslims. The 1974 Marriage Law introduced a number of important reforms (e.g. obligatory judicial divorce, restrictions on polygamy, minimum age of marriage) that challenge traditional interpretations of classical Islamic law held by conservative *ulamas*. The same Marriage Law, however, left most substantive Muslim family law matters unregulated, and thus allowed for a continuation of the judicial tradition of the Islamic courts. The 1991 Compilation of Islamic Law codified the norms of this tradition. 'Liberal' *ulamas* and so-called 'Muslim feminist' have challenged those traditional interpretations with a counter-discourse consisting of more gender-equal interpretations of the Islamic sources. Other women's rights organizations point at the discrepancies between Indonesian family law and the constitutionally guaranteed equality of men and women. The Islamic judges are confronted with these and other views in the court room, and they must balance them when deciding the cases before them. These everyday judicial processes result in subtle legal changes (Chapter 9).

This study has researched the extent to which Muslims in Indonesia comply with the 1974 Marriage Law and petition their divorce at the Islamic courts, as they are legally required, and how the Islamic courts adjudicate those cases. Many Muslims in Indonesia ignore statutory family law, avoid the Islamic courts and marry and divorce according to local custom, whose contents may be at variance with both state law and classical Islamic norms. The role and functioning of the Islamic courts are negatively affected when most members of a community challenge the statutory requirement of judicial divorce. When, conversely, the majority of members of a community divorce at the Islamic court and implement its judgments this is indicative of the primacy of statutory law over other normative orderings in that community. In either case the judgments of the Islamic courts have the potential to transform local customs by offering the members of local communities the opportunity to settle a dispute outside of the customary normative frameworks.

This especially applies to divorce matters, as women's statutory rights to divorce are much broader than they are in classical Islamic doctrine and in most customary normative orderings in Indonesia, while men's rights are more limited. The 1974 Marriage Law stipulates the obligation for Muslims to file a petition for divorce at the Islamic court. The Islamic court decides in court hearings whether legal grounds for divorce have been met. These divorce grounds are equal for men and women, and both men and women can petition for a divorce. The normative tensions between these provisions and the male absolute right in classical Islamic doctrine to divorce one's wife out-of-court through pronouncement of the *talak* are obvious.

The bulk of the case load of Islamic courts, about 90 percent, consists of divorce cases and another eight percent are requests to establish the validity of an existing marriage (*isbath nikah*). These often also concern divorce, as *isbath nikah* is a requirement for those who want to obtain an official divorce in case of an unregistered marriage (see Chapters 4 and 9). Altogether, women's divorce rights are an apt lens for the study of the Islamic courts.

Through field research in the districts of Cianjur in the province West Java (Chapter 6) and Bulukumba in the province South Sulawesi (Chapter 8) this study has assessed the extent to which the population in these districts gets divorced in compliance with the 1974 Marriage Law and petitions for a divorce at the Islamic court. Again, this compliance figure is an indication of the level of legal awareness within a community concerning statutory family law. Hence, I conducted a divorce survey in both districts among divorced women. In Bulukumba 72.5 percent of the respondents answered that they divorced through the Islamic court, while in Cianjur only 14 percent did so. This enormous difference implies an equal difference in the position of statutory divorce law between both districts.

The continued social relevance of the male out-of-court *talak* in Cianjur is a direct explanation for its low compliance figures. In Bulukumba the out-of-court *talak* has lost much relevance and carries a stigma. In Cianjur it is no

problem for a woman who divorced out of court and wants to remarry to find an Islamic cleric willing to marry her, whereas in Bulukumba divorced women are considered to be marriageable only when they have proper divorce papers. Without a court divorce their status has not yet been 'purified.' A possible cultural explanation is that in Bulukumba many men traditionally migrate to find work elsewhere, leaving their wife behind in the home village. A husband who has not been heard of for years may suddenly return to his home village and still consider himself to be married. Women who consider themselves to be socially divorced in such cases may attempt to get an official divorce certificate in order to avoid complications when the former husband returns.

There is also a historical explanation for the differences in compliance in both districts, which relates to a different development of the relations between the central (colonial) government, the indigenous elite, the Islamic courts and *ulamas*. In nineteenth-century West Java an influential class of autonomous *ulamas* developed, which opposed the government's interference into the Islamic affairs of local communities. Ever since the formal incorporation of the Islamic courts into the colonial legal system (in 1882) many *ulamas* in West Java have viewed the Islamic courts as mouthpieces of the central government instead of a genuine Islamic institution. By contrast, in South Sulawesi it was not until well into the twentieth century that an influential class of autonomous *ulamas* developed. This class did not oppose the government but attempted to increase its influence by participating in the state. Moreover, the Islamic courts that existed in South Sulawesi during the colonial era were never formally incorporated into the colonial legal system. When in the 1950s the national government decided to establish Islamic courts in every district outside Java, the *ulamas* in South Sulawesi were in full support. Because of their different historic trajectories, the Islamic court in Bulukumba is more entrenched and has generated more popular support than the Islamic court in Cianjur (see Chapters 5, 7 and 10).

In addition to an assessment of the use of the courts and an analysis of their position in their local communities, this book looks into the development of Muslim family law through its application by the Islamic judges. As has been said before, the Islamic court applies many gendered family law provisions, whose meaning and implications are contested – not only by divorcing spouses, but also by politicians, *ulamas*, Muslim organizations, NGOs and others. Since the 1974 Marriage Law was enacted, no major Muslim family law reforms took place at the national level, as every attempt to do so met fierce resistance from the major national Muslim organizations (Chapter 4).

This book demonstrates that in comparison to the legislator, the Islamic courts have more room to bring about legal changes through reinterpretations of Islamic concepts in everyday adjudication processes. An example of such legal change is the reinterpretation of the concept *nusyuz*, which can be defined as 'neglect of marital duties' but more commonly is translated with 'dis-

obedience.' A wife who has been proven to be *nusyuz* loses her right to maintenance from her husband. Husbands frequently consider their wife *nusyuz* because she performs activities for which they think she needs his permission; e.g. going to the market, or visiting friends. The Islamic courts in Indonesia, however, do not apply such a broad definition and only in exceptional cases declare a wife to be *nusyuz*. Recently, the Islamic court even judged that in cases of domestic violence and gross negligence men can be declared *nusyuz*; with the legal consequence that the wife who petitioned the divorce keeps her maintenance rights during the waiting period following the divorce (see Chapter 9).

Other examples provided in Chapter 9 also illustrate that judgments of the Islamic court may differ substantially from provisions in national legislation, traditional Islamic doctrines, and local customs and traditions. Nonetheless, because they also issue conservative judgments on other issues, the general development of doctrine within the Islamic courts cannot be characterized as fully reform-minded or moving towards gender-equality (Chapter 9).

Finally, this study looks into the role of the Islamic courts in protecting women and children from the negative effects of a divorce. There is consensus among policy makers, donor organizations, and activists that the Islamic courts should protect women and children from adverse economic consequences of a divorce. The case studies of Cianjur and Bulukumba have explored the vulnerability of women and children in this regard and the extent to which Islamic courts are able to provide protection against possible negative financial effects of a divorce (Chapters 6 and 8).

The 1974 Marriage Law does not specifically regulate post-divorce spousal support and in practice the rules concerned are still based on Islamic doctrine. The wife has only a right to spousal support, or better, the husband is obliged to provide maintenance, during the waiting period for a non-final divorce (*talak raji'i*). When the waiting period of three months ends without reconciliation of the spouses, the divorce becomes final and the husband is no longer responsible for the maintenance of his former wife. The 1974 Marriage Law does mention the obligation of the father to provide maintenance for his children, but does not provide a more specific child support regulation.

Both in Cianjur and Bulukumba the number of post-divorce support claims are limited and only 3 percent of the total number of divorce petitions include spousal support claims. One reason for the low number of spousal support claims is that divorces petitioned by the wife are automatically final divorces for which the husband has no maintenance obligation during the three-month waiting period. The figure for child support claims in Cianjur is similar (3 percent) and it is even lower in Bulukumba (1.5-2 percent). An explanation for these low numbers is the Islamic courts' lack of enforcement mechanisms regarding post-divorce support cases. An ex-wife can only pray that her former husband actually pays the amount of child support established by court order. An additional explanation is that the Islamic courts tend to discourage women

from filing support claims and appeal to the cultural preference to make out-of-court agreements.

Moreover, the financial consequences of divorce are not as dire as many think, at least not in the perception of divorced women themselves. A large majority of respondents in Cianjur (66 percent) and Bulukumba (94 percent) answered that divorce did not affect them financially. Most women can rely on family support after a divorce and most of them commonly return to their parents' house at least temporarily. Many women who were housewives during their marriage find a job after divorce, while family members take over the (day) care of their children. Finally, even if divorced women are not entirely without stigma, they remain desirable marriage candidates. In both districts women generally remarry not long after a divorce, which means that for most women the adverse economic consequences of divorce are only of a temporary nature. Thus, the Islamic courts' role in providing financial protection for women and children is not only limited due to a lack of enforcement mechanisms, but also because most women can rely on non-state social safety nets.

