

# MUSLIM FAMILY LAW REFORM IN INDONESIA A Progressive Interpretation of The Qur'an<sup>1</sup>

Siti Musdah Mulia

UIN Syarif Hidayatullah Jakarta, ICRP

Email : m-mulia@indo.net.id

## **Abstract**

*If we look at Muslim Family laws in different countries or communities, we can see how different they are from one another and how more or less option-giving they are for women. There is obviously no such thing as the Sharia as a God given law, eternal and a-historical. The fact is there are many different Muslim Family laws and they are really man-made. One of the subtle but most pervasive areas of discrimination against women in the Muslim world today is the inequality that occurs within the context of the family. Throughout Muslim countries, Muslim women are speaking out about such discrimination and are fighting for reform of family laws to promote justice and equality within the family. This Article outlines key discriminatory provisions within Muslim Family Law in Indonesia which is called The Compilation of Islamic Law (1991) and the efforts being made by progress Indonesian Muslim to advocate for comprehensive reform of the Compilation. This effort includes developing an understanding of why and how reform of Muslim family laws is possible using the principle of justice and equality in Islamic perspective. The last part of this article will introduce a new draft of The Compilation of Islamic Law which is called the Counter Legal Draft of The Compilation of Islamic Law (The CLD) in 2004, that is based on the principle that the Quranic ideal for the Muslim family is founded on the fundamental Islamic values of human equality and freedom. The CLD is constructed on the premise that the realization of the Quranic vision of the family can be achieved only if the values of equality and freedom are reflected in all aspects of the regulation of marriage and family.*

**Keywords :** Family Law, Reform, Indonesia, CLD KHI and Progressive.

## ملخص البحث

تختلف أحكام الأسرة من بلد إسلامي لآخر. وعلى الرغم من ذلك الاختلاف، إلا أن قضية واحدة تثير الجدل في كل تلك القوانين، وهي قضية التمييز ضد المرأة، والتي يعتبرها البعض

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أحد الأسباب الرئيسة في وجود علاقة بعيدة من التوائم في الأسرة المسلمة. تطرح هذه المقالة وجهة نظر مغايرة قوامها أن صياغة قوانين برسم دعم حقوق المرأة هو أمر تمييزي في حد ذاته. وبدلاً من هذا، تقدم المقالة أطروحات قائمة على القيم القرآنية الأصيلة في الحرية والمساواة. وتحاول المقالة تنزيل هاتين القيمتين على أحكام الأسرة التي ضمها 'مجموعة قوانين أحكام الأسرة' الإندونيسي لعام ١٩٩١، بما تسميه المقالة 'طرحاً مضاداً'.

الكلمات الدالة: قانون الأسرة، إندونيسيا، مجموعة الأحكام الإسلامية المضادة، تقديم أو تصاعدي.

## Introduction

Family law<sup>2</sup> is a matter of surpassing importance in Islam, and has been since the time of the Prophet. The law of marriage, divorce and inheritance is treated more thoroughly and in greater detail in the Quran than almost any other subject. One of the signal contributions of Islam to seventh century Arabian society was a dramatic improvement in the status of women within marriage. While Islamic doctrines regarding crimes and civil transactions have been replaced by laws modeled after the west in most of the Muslim world, family law continues to be governed by Islam.

The importance of family law within Islam is most often mentioned in connection with efforts to resist changes to classical era doctrines. Conservative rejection of proposals to limit male divorce and polygamy and to equalize male-female inheritance rights is frequently cited as evidence of the central place of family doctrine within Islamic jurisprudence. But concern with marriage and inheritance is not limited to conservative defenders of the received doctrine; family law is also vitally important to Muslims who are committed to reinterpreting or renewing the legal tradition in response to the needs and realities of contemporary life.

## Family Law Reform in Indonesia

Dutch legal policy for the Indies was based on the principle that the law that governed a particular transaction depended on the ethnic and religious identity of the parties. For purposes of applying this system, the entire population was

<sup>2</sup> The Family Law in Islamic literature always includes marital law and inheritance law. The term family law refers to the phrase Qanun al-Ahwal al-Syakhsiyyah, Qanun al-Usrah, Ahkam al-Zawaj, Qanun Huquq al-Ailah which has always been used in the discussion of Islamic Law on marriage and matters pertaining to inheritance.

divided into three "law groups" namely Europeans, non-indigenous Orientals, and indigenous Indonesians. The determination of the law governing a particular transaction depended on assigning the parties to one of these groups.<sup>3</sup>

Replacement of the colonial legal structure with a national legal system was a major priority of the new government upon achieving independence. This goal applied to all areas of law, but family and inheritance law were regarded as matters of particular urgency. The colonial system of ethnically and religiously based law groups was regarded as incompatible with a modern nation state. Enactment of a national marriage law was also viewed as a means of cultivating an Indonesian national consciousness. In addition to these nation-building goals, women's groups sought changes to Islamic doctrines that permitted child marriage, unilateral male divorce, and polygamy, while some Muslim groups advocated codification of existing Islamic doctrines.<sup>4</sup>

If marriage law reform was considered especially important it was also unusually difficult. A variety of marriage law proposals were put forward during the first quarter century following independence, but none was enacted. Although there were many obstacles to marriage law reform, the principal impediment to passage of a marriage was disagreement over whether there should be a single statute applicable to all Indonesians, or separate statutes for different ethnic or religious communities.

Indonesia's first president, Sukarno, remained in power from 1945 to 1965. His successor, Suharto, was assisted in his rise to power by anti-communist slaughter in which Muslim groups played a leading role. Once he had consolidated control, however, Suharto set about to dismantle the structures of Muslim social and political power. One of the targets of this effort was Islamic law. In July of 1973 the Suharto government introduced a draft marriage law in the Indonesian legislature. The draft proposed a single set of secular marriage and divorce rules applicable to all Indonesians. The critical language stating the requirements for a valid marriage provided: "A marriage is valid when performed in the presence of the state marriage registrar, recorded in the registry of marriages by that official, and carried out in conformity with the requirements of the law and/or the law of the parties, provided not those rules are not in conflict with this statute".

<sup>3</sup> This applied not only to the law governing personal status, but also to commercial transactions and public law.

<sup>4</sup> For a brief general introduction to women and law in Indonesia see T.O. Ihromi *Woman and National Law* (1997); Siti Musdah Mulia, *Woman Position in Indonesia's Marriage Law and Compilation of Islamic Laws* (2001); Sulistyowati Irianto, *Woman Between various Legal Options*. (2003).

Other parts of the draft required that marriage be based on the consent of the parties, established minimum ages of 21 for men and 18 for women, and imposed strict restrictions on male polygamy. The bill also granted equal rights of divorce to men and women. It eliminated the husband's right of unilateral extra-judicial repudiation, and required proof of statutory grounds for divorce. Difference of religion was declared not an impediment to marriage.

The government's proposal thus embraced the model of a unified national marriage law in which religious affiliation is not relevant to matrimonial law. Muslim groups who were committed to state enforcement of Islamic doctrine expressed strong disagreement with the proposal. The statute that was enacted in early 1974 (Marriage Law No.1, 1974) differed fundamentally from the earlier proposal.

The Article that defines the requirements for a valid marriage in the Act states: "A marriage is valid when carried out according to the religious law or beliefs of the parties." (Article 2(a)) The effect of this language is to make the validity of a marriage dependent on compliance with the formalities of religious law. This applies to all of the religions represented in Indonesia, but the principal impact of the Statute's incorporation of religious law is in relation to the country's Muslims.

The stipulation that the validity of a marriage depends on the "religious law" of the parties would appear to mean, at a minimum, that Islamic doctrine regarding the formalities for contracting marriage has the status of state law. But the effect of Article 2 is potentially more far reaching. By making the validity of a marriage dependent on satisfaction of religious requirements, the statute arguably incorporates Islamic doctrine regarding permissible forms of marriage and categories of marriage partners, and even the rules governing divorce. Although the statute includes many of the same requirements contained in the draft, such as registration of marriages, consent to marry, minimum age, and judicial approval for polygamy, non-compliance with these statutory prescriptions does not prevent the formation of a legally binding marriage. A polygamous marriage contracted without judicial approval, for example, is nevertheless valid provided the marriage complies with the formalities of Islamic doctrine.

The final form of the Marriage Act reflects a compromise among competing visions of marriage and the family and the proper role of religion in public life. Those interests seeking limitations on underage marriage, arbitrary divorce and polygamy successfully won inclusion of provisions addressing those matters in the statute. But the efficacy of those restrictions is undermined by the inclusion of language giving overriding effect to religious law. Advocates for state

implementation of Islamic law acceded to government demands for restrictions on underage marriage, divorce, and polygamy, but prevailed in their insistence that those restrictions operate within a framework that does not derogate from standard interpretations of Islamic doctrine.

The compromise embodied in the Marriage Act is not the final statement on the law of marriage or the place of Islamic marriage doctrine within the Indonesian state. Over the 30 years since the Act was passed there has been an on-going process of judicial interpretation and executive and legislative revision and clarification. Under the direction of the Supreme Court and the Department of Religion, the Islamic courts have generally interpreted the Marriage Act in a manner favorable to the rights of women. A 1989 Statute ostensibly dealing with the organization and powers of the Islamic courts includes rules on procedures for divorce that amount to revisions of the substance of the law of marriage and divorce. The most important development, however, has been the promulgation of the Compilation of Islamic law.

The Compilation of Islamic Law (Compilation) is a code of marriage, inheritance, and charitable foundation rules that was promulgated in 1991 as a guide for Indonesia's Islamic courts. The Compilation was drafted by a committee made up of representatives from the Supreme Court and the Department of Religion, and ratified by an assembly of religious leaders convened by the government for that purpose.

When Soeharto took control of the government in 1965, he not only took control of the government but people's freedom of movement as well. Most professional and religious-cultural organizations stayed under government ruling, such as labor organizations, medical-doctors organizations, business organizations, and of course Islamic organizations, thus keeping Muslim people under control, their behavior and the applied rules of law under government guidance.

The Compilation was prepared based on the joint decree of Chief of the Supreme Court and the Minister of Religious Affairs. The compilation lasted for six years and, eventually, on June 10, 1991, pursuant to the Presidential Instruction Number 1 of 1991, was inaugurated and put into practice as the official guideline in the material legal field for all judges in the Courts of Religious Affairs throughout Indonesia. The Compilation has come into being as the Government's response to the prevailing states of discomfort and uneasiness amidst the members of the community due to varied stipulations issued by the Religious Affairs Court for the same case. These extensive differences, to the largest extent, come into effect as a logical consequence of the varied legal sources on which the legal judgments

are based, that is to say, on the various books on *fiqh* (the science of law or jurisprudence) adopted by the said judges in adjudicating a case. Endeavoring to eliminate this widespread restlessness, the government contemplated preparing the said Compilation as terms of reference for all Religious Affairs Judges as well as the springboard for realizing the codification of national law.

The necessity for a code of Islamic marriage rules was justified on the basis of the need for uniformity in the application of Islamic marriage doctrines. As discussed above, the effect of Article 2 of the Marriage Act is to incorporate by reference the Islamic law of marriage as state law. But since the content of Islamic marriage law is nowhere definitively specified, the decisions of Islamic courts on issues not addressed in the Marriage Act referred to Arabic language compendia of Islamic doctrine. It was argued that the lack of uniformity in these sources created an unacceptable level of uncertainty and inconsistency in the application of the law. The Compilation was justified as necessary to remedy this problem.

### The Counter Legal Draft: Empowering Women

In 2002 a group within the Department of Religious Affairs known as the Team for Women's Empowerment began work on revisions to the Compilation of Islamic Law (1991) dealing with the law of marriage, inheritance, and charitable foundation rules. This team was established in 21 April 2001 by the Minister of Religious Affairs as a follow up to Presidential Instruction No. 9, 2000 on Gender Mainstreaming, and charged with carrying forward the goal of integrating women into the mainstream of Indonesian society. The Team finally launched a new draft of The Compilation of Islamic Law which is called The Counter Legal Draft of The Compilation of Islamic Law (The CLD)<sup>5</sup>, and was officially

<sup>5</sup> The name Counter Legal Draft (CLD) was deliberately chosen to steal public attention. This draft, like the Islamic Code of Law (KHI), consists of three law formulas: Marital law, Inheritance law, and Religious donation law. CLD only revises certain KHI articles that are gender biased and patriarchal, and which not accommodate Islamic views that are more pluralistic and humanistic. CLD is the result of two-year (2002-2004) research and analysis from the Islamic Law Reform Team established by the Religious Affairs Ministry's Gender Mainstreaming Working Group (PUG) which was coordinated by the writer. The members of the team were Marzuki Wahid, Lies Marcoes, Abdul Moqsith Ghazali, Mubarak, Anik Farida, Ahmad Suaedy, Marzani Anwar, Abdur Rahman, Shaleh Partaonan, and Asep. CLD was launched officially on Oct. 4, 2004 at Aryaduta Hotel, Jakarta. Religious Affairs Minister Prof. Dr. Said Agil Al-Munawar said in his opening speech at the event that the law reform alternative should be accepted critically. To find out the complete draft of CLD, see Siti Musdah Mulia (Ed.), *Islamic Law Reform: Counter Legal Draft of KHI*, PUG of Religious Affairs Ministry, Jakarta, 2004.

made public in September, 4, 2004. The release of the Draft was followed by an immediate storm of controversy.

A principal source of the patriarchal values that inform and legitimate the law is religion.<sup>6</sup> Religious doctrine that has been incorporated in state law is an especially potent force for sustaining social inequality since the discriminatory values embodied in laws are justified and reinforced by religious authority. Groups that have been working to promote gender equality and fair treatment of women have long regarded marriage law both as a source of social problems and the cause of unfairness and inequality in domestic life.

The Team was assigned to address the causes of gender inequality and the means of empowering women in areas falling within the specific jurisdiction of the Department of Religious Affairs. It began the process by undertaking a critical review of the marriage and inheritance provisions of the Compilation of Islamic Law. On the basis of its evaluation the Team identified a number of specific marriage doctrines that have contributed to the continued social subordination of women. Among the features of the Compilation deemed to be in particular need of revision are the absence of a registration requirement in the definition of a valid marriage, the rules regarding minimum age, polygamy, inter-religious marriage, the role and status of husbands and wives, and the rights and the obligations of husbands and wives.

These six doctrinal issues were regarded as matters of particular concern. More fundamentally, however, these and other doctrines that harm women or perpetuate women's subordination to men are reflective of a deeper problem that permeates the Compilation as a whole. The problem with the Compilation is not simply that it incorporates many standard *fiqh* marriage doctrines. At a more basic level, the problem is that the Compilation as a whole is grounded in a *fiqh*-based worldview in which women are presumed to be inferior to men. This outlook has its source in an interpretive methodology that is excessively literal and insufficiently attentive to historical context.

An Islamic marriage law that is faithful to the spirit of Islam must find its source in the first principles of the faith. The first and most fundamental principle of Islam is *tauhid*. The literal meaning of *tauhid* is "making one." At its most basic

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<sup>6</sup> Several studies of religion and gender conclude that one of the important factors which bring about gender inequality is the domination of patriarchal interpretations made by major religions see generally Rosemary R. Ruether, *Sexism and God-Talk: Toward Feminist Theology*, 1983; Mansour Faqih, *Analisis Gender: Transformasi Sosial*, 1997; Siti Musdah Mulia, *Kesetaraan dan Keadilan Gender: Perspektif Islam* (2001).

level, *tauhid* denotes Islam's commitment to monotheism, and finds expression in the *shahadah* or declaration of faith ("there is no god but God and Muhammad is God's messenger"). But the full significance of *tauhid* goes beyond an affirmation of monotheism. "*Tauhid* means that God is Oneness. God is Unity: wholly indivisible, entirely unique, and utterly undefinable. God resembles nothing in either essence or attributes." God is beyond description or comparison wholly other.

The primacy of *tauhid* as the foundation of Islam is universally acknowledged, but the full implications of divine unity are frequently overlooked. *Tauhid* is too often misunderstood as applicable solely to the vertical relationship between humans and their Creator as a doctrine regarding the attributes of God, the pillars of the faith, and similar matters. But the true significance of *tauhid* is inseparable from the everyday concerns of social relations among humans, including the relationship between men and women. This is because a correct understanding of the relationship between God and his human creations has direct implications for the relations among humans.

The conviction that there is only one God, that God is without equal, and that God has neither child nor personification, naturally carries with it the principle of the equality of human beings before God. No human is above any other, but all are essentially equal. Because God alone is Lord, no human may be deified or exalted as an object of awe, worship or unconditional obedience. Kings are not lords of their people, husbands are not lords of their wives, the rich are not lords of the poor. Fear of or unconditional obedience to kings, leaders, superiors, or husbands that exceeds fear and obedience to God is a denial of *tauhid*.<sup>7</sup>

A logical inference from the Prophet's message of the indivisibility of the divine is the fundamental equality of God's creatures. The doctrine of *tauhid* is also the foundation for human freedom. Since the time of Adam mankind has been subject to various forms of human tyranny and oppression. Most of humanity has lived under the domination of others. The rich and powerful have used their wealth and power to repress the weak and the powerless. Slaves, the poor, women, and children have generally been the most oppressed.

In addition to tyranny imposed by others, humanity was also subject to the domination of their own false beliefs, values, and traditions. The worship of idols and the glorification of the tribe and tribal values in the pre-Islamic age of ignorance produced their own forms of subjugation. Discrimination against women, for example, was justified by a patriarchal gender ideology that was

<sup>7</sup> Musdah Mulia, *Muslimah Reformist: Woman as the Religious Reformist*, (Bandung : Mizan, 2005), pp. 7-8

rooted in the tribal value structure. Shame over the birth of daughters led to the murder by parents of completely innocent baby girls.

*Tauhid* liberates humanity from these false beliefs and despotisms. The Quran condemns all forms of worship, loyalty, or obedience to any but God, and enjoins believers to forsake everything that distracts from the total submission to God alone. "I created the jinn and humankind only that they might worship Me." Q.S. *al-Dzariyat*, 51: 56. Just as *tauhid* is the foundation of Islam, the denial of *tauhid*, *shirk*, is the greatest evil. The word *shirk* is conventionally translated into English as "polytheism," but the concept of *shirk* is deeper and more complex than the English term suggests. A more accurate definition of *shirk* is the association of anything with God (Aslan, 2005: 151). The worship of other gods is *shirk*, but it is also *shirk* in any way to anthropomorphize God, since identifying God with human qualities implies limits on God's boundless majesty and power. In its broadest sense *shirk* includes anything that in any way detracts from God's absolute oneness or impedes complete devotion to God and God alone.

The Quranic condemnation of *shirk* applies not only to worship but to every facet of human existence. In the context of social relations, the prohibition against *shirk* means that no individual or group may exalt itself over any other individual or group. *Tauhid* requires obedience to God over every other allegiance. Kings and rulers may not dominate or reign over their people; the strong may not oppress the weak; white skinned races may not esteem themselves above people of color; men can no longer consider themselves proprietors of women. Likewise, traditionally disadvantaged groups, like the poor, the weak, and women, may not acquiesce in domination by others, since in doing so the purity of *tauhid* is inevitably tainted.

Thus, a correct understanding of *tauhid* leads to true humanitarian principles and values. *Tauhid* safeguards humanity from subjugation to anything but God, and prevents the domination or oppression of one group by another. This is because *tauhid* situates the Creator as creator and creation as creation.

The Quranic commitment to the values of equality and freedom is total and unqualified. But practical considerations made immediate implementation of those ideals impossible, and necessitated the adoption of a gradualist approach to their full realization. Slavery, for example, is plainly incompatible with the principle that all human beings are free and equal before God. But despite its evident inconsistency with the message of *tauhid*, slavery could not be immediately abolished, since it was accepted as legitimate in many parts of the world. Prudence required that the emancipation of slaves be accomplished in stages. This gradual approach to the eventual complete abolition of slavery is

manifest in, i.a., the admonition to free slaves as compensation for various types of legal infractions, such as unintentional killing,

For the same reasons the full emancipation of women could only be achieved gradually. For thousands of years before Islam women were regarded as not fully human, and for that reason lacked the rights to have their own opinions, to work, and to own property. Women did not even own their own bodies. Islam gradually restored the rights of women as free individuals: to give voice to their own convictions, to work for themselves, and to own property so as to be acknowledged as full members of society. During the time of the Holy Prophet women were pictured as active and free.

The figure of the ideal Muslim woman in the Holy Quran is represented as an individual skilled in the fields of politics (*al-istiqlal al-siyasi*) (Q.S. *al Mumtahanah*, 60: 12), like Queen Bulqis who headed a powerful kingdom (Q.S. *al-Naml*, 27: 23); and also as an individual skilled in the fields of economics (*al-istiqlal al-iqtishadi*) (Q.S. *al-Nahl*, 16: 97); as women in the story of the Prophet Moses in Madyan (Q.S. *al-Qashash*, 28: 23). In the Prophet's time women were free to form their own opinions contrary to the opinions of their fathers or husbands (Q.S. *al-Tahrim*, 66: 11), and free to oppose public opinion. The Quran extols the rights of women to oppose all forms of tyranny in support of truth (Q.S. *al-Taubah*, 9: 17).

The Quranic image of women possessed of broad freedom to participate in all forms of public life contrasts sharply with the actual conditions faced by Muslim women today. Although the Prophet did everything in his power to establish gender equality, the Quranic ideal of a fully emancipated woman was not realized in the Prophet's lifetime. Just as the emancipation of slaves was accomplished in stages, Islam has adopted a gradualist approach to the full liberation of women. A case in point is the treatment of the rights of women to inheritance. In the pre-Islamic era women were regarded as property and were themselves objects of inheritance; with the arrival of Islam they assumed their proper place as subjects having inheritance rights. But to avoid social upheaval and in recognition of the existing social structure in which men bore the full burden of providing for the physical needs of the family, the inheritance portion of women was fixed at half that of men.

It would be a mistake, however, if the rule declaring a 2:1 division of inheritance between men and women were to be interpreted as justifying discrimination against women. The moral message of the 2:1 division is the principle of justice and fairness, and not a pronouncement on the worth of women as half of that of men. Like other specific rulings rendered during the

founding era of Islam, the Quranic inheritance rulings are properly understood as the application of timeless and universal moral values adapted to the needs and understanding of seventh century Arab society. The ruling that grants males a double share in inheritance is not an end in itself but a means toward the eventual realization of full equality between men and women.

The foundational texts of Islam, especially those pertaining to women's issues, have generally been interpreted in a highly ahistorical manner. As the foregoing examples illustrate, however, the purpose and goal of Quranic texts that relate to the conduct of social life is the eventual emancipation of humanity from all forms of bondage and oppression. For that reason, adoption of a literal or textualist approach to these texts can only lead to erroneous interpretations. It is only through the application of a contextual interpretive methodology that is sensitive to the background and social circumstances in which the text was revealed that the universal moral message of the text can be discerned.

### **The Substance of the Counter Legal Draft**

The CLD puts forward a number of humanist interpretations of Islamic law of marriage and divorce. The proposed changes, however, are greater than the sum of the parts. Taken together the proposals contained in the CLD reflect a fundamentally different conception of marriage and the rights of men and women within marriage those embodied in the Compilation.

Article 2 of the CLD characterizes marriage as *"a powerful bond between a man and a woman entered into with understanding for the purpose of creating a family and based on the assent and agreement of the parties."* This emphasis on marriage as an institution founded on awareness and choice is in conscious contrast to the analogous provision of the Compilation, which stresses that marriage is commanded by God and its performance a religious obligation. The values of autonomy and choice in marriage are also reflected in other aspects of the CLD. The traditional requirement that the marriage be contracted through an offer by the male guardian of the bride and an acceptance by the prospective husband, which is also contained in the Compilation, is not recognized in the CLD.

Whereas the Compilation lists the "marriage guardian" for the bride as one of five requirements for marriage, the CLD requires the use of a guardian only if the bride lacks legal capacity to marry because she is not of age, not of sound mind, and not mature. Under the CLD each party contracts his or her own marriage personally. In contrast to *fiqh* doctrine, in which the prospective

wife is always in the role of the offering party and the prospective husband the accepting party, the CLD authorizes either party to act in either role.

The most notable feature of the CLD that sets it apart from standard interpretations of the law of marriage in Islam is its uncompromising commitment to the principle that women and men are equal within marriage. The principle of equality of the sexes is stated unequivocally in Article 47, which provides: “*The status, rights, and responsibilities of husband and wife are equal, both in family life and in their life together in society.*” This affirmation of the equality of husbands and wives contrasts sharply with the gender ideology of the Compilation. The Compilation defines the role of the husband as “the head of the family” and that of the wife just only as “homemaker” (Article 79(1)); it declares the rights and status of husbands and wives to be “equivalent” (literally, “balanced”) see Article 79(2). Moreover, the role and duties of men and women within marriage are defined in the Compilation in highly paternalistic terms.<sup>8</sup>

The principle that women are full equals within marriage permeates the entire code and is the basis for a variety of specific doctrines. With respect to the minimum age to marry, for example, the CLD establishes a single standard applicable to both sexes. While the Compilation specifies minimum marriage ages of 16 for girls and 19 for boys, the CLD makes 19 the minimum marriage age for both parties. According to traditional practice, the prospective husband is obliged to give a dower or marriage gift (*mahar*) to the prospective wife. The Compilation preserves the traditional doctrine intact, but the CLD makes payment of *mahar* an equal obligation of both parties (Article 16).

The CLD also departs from the Compilation and traditional doctrine with respect to the doctrine of disobedience (*nusyuz*). As mentioned, the Compilation preserves the traditional rule that a disobedient wife is not entitled to the financial (see article 80(4)(a)(b)) support of her husband. A wife is *nusyuz* if she refuses to perform her obligations [under Article 83(1)] without valid reason. The CLD states that *either* spouse: husband or wife, can be considered *nusyuz* for failing to perform his or her obligations to the marriage or for violating the rights of the other party. If the matter cannot be resolved by the parties and their families, the wronged party is entitled to file a claim in court.

<sup>8</sup> The husband is designated as the “leader” of his wife, though important household decisions are to be made jointly by both parties. It is the obligation of the husband “to provide his wife with religious instruction and the opportunity to study and gain knowledge useful and profitable for religion and the homeland.” The husband bears the responsibility to provide his wife and the household with material support. This obligation arises only after the wife submits to her husband sexually, and lapses if the wife is disobedient (*nusyuz*).

The arena in which application of the principle of equality within marriage has arguably had the greatest impact is in the law of divorce. Common interpretations of Islamic law grant husbands significantly greater rights of divorce than is available to wives. Muslim men can terminate their marriages at any time and without grounds or judicial approval by simply reciting the formula of repudiation. The law with respect to the circumstances in which wives can obtain a divorce varies significantly, but the divorce rights of women are far narrower than those of men, and women generally require court action to divorce.

Over the decades Indonesian judicial practice had come to recognize comparatively broad divorce rights for Muslim women. But while Muslim men possessed the power to terminate their marriages on their own, all divorce options available to women required the intervention of the court. A principal objective of the marriage reforms initiated in the mid-1970s was to limit arbitrary divorce by Muslim men. Conservative Muslim interests, however, objected to any legislation perceived as derogating from Islamic law or impairing the *talaq*. The Marriage Act accommodated these seemingly contradictory demands by preserving the husband's *talaq* as the mechanism for terminating the marriage, but requiring that repudiations receive prior judicial approval and be pronounced in the presence of the court.

The Compilation follows the approach to divorce contained in the Marriage Act in prescribing a judicially supervised *talaq*. A man wishing to divorce his wife is instructed to file a "petition" in the court accompanied by a statement of the petitioner's "reason" or "reasons" for the divorce. The Code includes an apparently exhaustive list of eight reasons that justify divorce.<sup>9</sup>

Upon receipt of the husband's petition the court is charged to summon both parties for the purpose of obtaining an explanation of the matter. If the court finds there are sufficient reasons for the divorce and that the couple is unable to live together harmoniously, the court issues its decision authorizing the husband to repudiate his wife. The *talaq* is not pronounced immediately, but the wife is first given an opportunity to appeal the court's determination that grounds exist for divorce. Once any appeals have been competed and the court's decision

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<sup>9</sup> The grounds for divorce listed in the statute include: one of the spouses has committed adultery or suffers from drunkenness, addiction to gambling, or other condition not easily remedied; desertion by one spouse for a period of two years; a prison sentence of five or more years; severe cruelty or abuse endangering the other party; disability or illness that prevents one of the spouses from performance of her or his responsibilities; differences that prevent the couple from living harmoniously together; violation by the husband of the terms of the conditional repudiation; and change of religion or apostasy that causes disharmony in the home.

becomes final, the court convenes for the purpose of witnessing the husband's pronouncement of the *talaq*.

This procedure was devised as a means of placing limits on male divorce while at the same time preserving Islamic doctrine. Conservative Muslim groups found the scheme acceptable because it recognizes the Islamic *talaq* as the mechanism by which the marriage is dissolved.

The Compilation treats divorces initiated by wives under a separate set of rules. A divorce action by a Muslim woman is filed as a complaint rather than a petition. A complaint divorce is governed by the same set of statutory grounds as a petition divorce, but differs from a petition divorce in that technical mechanism that serves to dissolve the marriage is the decision of the judges on the wife's claim. Although this technical difference seems insignificant initially, the fact that divorces by men are accomplished through the recitation of a *talaq* assumes importance in that extra-judicial *talaq* are given effect.

The CLD departs from both the Marriage Act and the Compilation in prescribing a single divorce procedure applicable to both men and women. The procedures that govern all divorces under the CLD resemble the *talaq* procedure under the Compilation in that once the divorce petition is granted the petitioner is authorized "to pronounce the divorce in open court and in the presence of the other party." This approach, wherein the act of the parties is decisive in terminating the marriage, reflects the essentially contractual character of the marriage bond under Islamic law and the fundamental value of human autonomy exercised within the parameters of the divine law.

Although the CLD divorce procedures are patterned after the Compilation *talaq* divorce, the recognized grounds for divorce in the CLD differ from the Compilation. The illness or disability of a spouse is not recognized as grounds for divorce under the CLD, and a spouse who changes religion or leaves Islam cannot for that reason be divorced. The CLD provision regarding divorce for abuse or cruelty is also broader than the analogous Compilation provision; the Compilation requirement that the abuse or cruelty be severe is eliminated, and language is added to recognize other types of violence that do not qualify as abuse or cruelty as grounds for divorce.

Under generally recognized Islamic doctrine a husband has a limited right to reconciliation with his wife and reinstate his marriage following a repudiation. A man exercises this right and reinstates his marriage by simply declaring reconciliation. The right of reconciliation is limited in two ways. First, a man begins a marriage with a reserve of three repudiations. Reconciliation

is permitted after a first or second repudiation, but a third repudiation is irrevocable. The second limitation on reconciliation relates to the timing of the pronouncement of reconciliation. In order to protect a wife against her marriage being reinstated months or even years after the divorce, the law requires that any reconciliation be pronounced within a limited waiting period following the *talaq*. The waiting period (*iddah*), whose other purpose is to determine the paternity of unborn children, is measured as three menstrual cycles following divorce or the term of the wife's pregnancy at the time of the divorce. Because the wife is subject to her husband's unilateral reconciliation during her waiting period she is not permitted to marry another man until the term is complete.

The Compilation follows conventional doctrine in granting the husband the privilege of reconciliation during the wife's waiting period after a first or second repudiation. The CLD departs from traditional practice in requiring that the wife agree to the reconciliation. A husband wishing to exercise his right of reconciliation is required to appear before the marriage registrar *accompanied by his wife*. After the husband pronounces the reconciliation, both parties are required to sign the reconciliation registry. A reconciliation recorded over the wife's objection can be declared invalid by a court.

The CLD *rujuk* provisions go beyond the reforms contained in the Compilation by making both the right of reconciliation and the requirement of a waiting period reciprocal. Both parties to the marriage observe a waiting period following divorce during which they may not marry or receive offers of marriage. The waiting period for the wife is measured as three menstrual periods or until the birth of the child she is carrying at the time of the divorce; the divorced husband's waiting period is declared to be equal to the waiting period of his former wife. Reconciliation is available to either spouse during the waiting period. As in the Compilation, the right of reconciliation must be exercised in the presence of the marriage registrar and two witnesses. The CLD includes an added protection against unwanted reconciliations by requiring an express statement of agreement at the time the reconciliation is pronounced.

One of the most controversial features of the Compilation and a point on which the Compilation takes an approach that is narrower than the majority opinion within Islamic jurisprudence is the rule regarding marriages across religious lines.

The generally accepted view within the schools of Islamic law permitted a Muslim man to marry a Christian or a Jewish woman, but disallowed marriages between Muslim men and other non-Muslims, as well as all marriages between Muslim women and non-Muslim men. The Compilation takes the restriction

on inter-religious marriage a step further, prohibiting all marriages between Muslims and non-Muslims.

The CLD, by contrast, rejects all religious restrictions on interreligious-marriage. Article 52 of the draft states that “*the marriage of Muslims and non-Muslims is permitted,*” and that such marriages are “*based on the principles of mutual respect and esteem for the right of free exercise of religion and belief.*”

In this case I will observe attentively the word of Ibn al-Qayyim al-Jawziyah, an expert in law of Hambali's school of Islamic law: that Islamic law (*syariah*) is built for the interest and universal cause of humanity, namely *al-mashalahat*, *al 'adl*, *al-rahmat*, and *al-hikmah*. Everything which contradicts such an essential and underlying purpose is not part of *syariah*, in spite of being organized in a systematic way.<sup>10</sup>

## Conclusion

Social inequality and gender discrimination are not the result of any single cause, but arise from and are sustained by a variety of structural and ideological forces. One factor that has contributed to the preservation of gender inequality in Indonesian society is the law. Gender-based discrimination in the legal sphere operates on three dimensions simultaneously. First, on a structural level, insensitivity on issues of gender by officials with responsibility for enforcement of the law, especially among public prosecutors and judges, stimulates and reinforces gender inequality. Second, gender discrimination on the structural level is buttressed by unequal treatment of women under the substantive law. Finally, both the structures and the substance of the law are sustained by a legal culture that is suffused with patriarchal values.

Family law reform in the form of the Counter Legal Draft (the CLD) seeks to offer a just and democratic marital law based on Islamic teachings that upholding humanitarian values. The purpose is to establish a marriage filled with love and affection (*mawaddah wa rahmah*), and encourage upright behavior of the husband and wife (*mu'asharah bil ma'rif*), and mutual respect and understanding. They may also complete with each other to obtain happiness in family life.

The CLD has to be seen as an *ijtihad* to promote the Islamic teachings which emphasize love and respect for all human being and strives to eliminate all forms of domination, discrimination, exploitation and violence, particularly in domestic life (marriage life). It is actually an effort to seek solution for a number of contemporary social problems faced by Indonesian's society.

<sup>10</sup> Ibn Qoyim, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, (Riyadh : Dār Ibn Jauzī, 1423 H), p. 3.

Lastly, the CLD aims at empowering women and giving full protection to women as human being, as explained in the *Al-Qur'an and Sunnah* and also as stipulated in the Indonesian's Constitution. I do believe that with the CLD, the Indonesian Muslim community will be able to promote Islamic teachings that are humanist and women friendly as a blessing for the whole universe (*rahmatan li al-'alamin*).

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