

PART 2

SHARIA-BASED LEGISLATION AND THE LEGAL POSITION OF WOMEN AND CHILDREN

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In the closing years of the New Order the Indonesian government made a number of gestures to show that it had the aspirations of the Islamic community at heart. One was the promulgation of the Religious Judicature Act of December 1989, which gave Islamic courts their own well-defined independent place in Indonesia's legal system. Muslims no longer had to worry, as they had done in the past, that the state might aim at dissolving the religious courts, while their decisions could no longer be challenged in secular courts. Their scope was also extended. Until then, the authority of the religious courts had been limited to matters concerning marriage and divorce. From now on, decision-making on inheritance cases was added to their power.¹ As a result, a decision from 1937 to remove inheritance from the competence of Islamic courts operating within the Dutch legal system (which at that time only existed in Java, Madura, and South Kalimantan and had led to much protest amongst Muslims) was overruled. The colonial authorities, obsessed with the study of *adat* (customs) and certainly not with the study of Islam, had decided on this because they had come to the conclusion that inheritance rules in Java were based on customary law, not on Islamic law. A second gesture was to provide the Islamic courts and their judges with a 'Compilation of Islamic Law' in the fields of marriage, inheritance and endowment. Published in 1991 as a Presidential Instruction, it generally came to be referred to as the *Kompilasi*. As Euis Nurlaelawati has argued in her PhD thesis about the *Kompilasi*, it brings together the relevant traditional legal texts and Qur'anic quotations, while the influence of customary law and the wish to bring the Islamic legal system in Indonesia in line with modern times can also be discerned.

1 Reflecting the growing popularity of Islamic economics, in 2006 the authority of the religious courts also came to include certain economic transactions concluded in accordance with Islamic law.

After 1998, when the Reform Era started, the role of the central and regional government in promoting Islam changed. What came to the fore can best be described as an effort to promote decency and morality by stressing religious values. As is pointed out in this section of the book, the resulting stated intentions and regulations are at times vehemently contested by part of the Islamic community (and in a number of instances also by non-Muslims) because of their impact on the lives of Indonesians. At the national level the original draft of the Anti-Pornography Act of 2008, inspired by puritan Islamic moral perceptions, is one example. Its wording led to protests by feminists, artists, Hindus and Christians, fearing that their way of life might be affected. Another is the plan revealed in March 2013 to amend the criminal code, among other things, to make living together outside wedlock punishable by law and to increase the sentences for adultery.

The same intention of creating a society governed by high moral standards is reflected in a specific category of regulations issued by regional representative bodies and heads of administration. All issued after 1999, when the central government allowed greater regional autonomy, they are lumped together as Sharia Regional Regulations because of the religious motivation underlying their drafting. Their promulgation is the result of the interplay between the religious sentiments of local politicians and administrators driven by national and local Islamist pressure groups, the desire for political gain by playing the religious card, and the give and take game of coalition politics; and, not forgetting social pressure and a (wish for a) wider and stricter adherence to Islam and its prescripts and rituals in society. Upholding the byelaws is a matter for the secular authorities. Except for Aceh, there is no Sharia police and the powers of the religious courts, again with the exception of Aceh, do not pertain to matters dealt with in the byelaws.

Some of the regional regulations have come under scrutiny because they limit women's options with regard to dress and restrict their freedom of movement. A number of them, their history and reception, are discussed in this section. Examples include regulations in Cianjur in West Java presented by Euis Nurlaelawati, in Bantul in Yogyakarta, and in Bulukumba in South Sulawesi reported on by respectively Muhammad Latif Fauzi and Stijn van Huis. (Aceh, where such regulations have also been promulgated, has a separate section in this book). All, in one way or another, are an attempt to combat anti-social behaviour inspired by the conviction that Islam and religiosity provide the means to accomplish this.

Some of these byelaws prescribe Islamic dress codes for civil servants (and in an exceptional case non-Muslim civil servants have to conform

as well). In Bulukumba women visiting government offices and the religious court also have to wear a headscarf. A headscarf, which leaves the face visible, has become a widely accepted accessory of female dress in Indonesia, and, as Euis Nurlaelawati's research in Cianjur indicates, not many of the female civil servants concerned seem to mind, but it is striking that female police officers in Cianjur, employed by a national and not a regional institution, refuse to wear one. Other regional regulations issued or announced but never implemented concern the freedom of women to be alone out in the streets in the evening, usually promulgated, it appears, as part of the effort to root out prostitution.² One of these was issued in Tangerang. Because both the stereotyping of women being out on their own in the evening (and using makeup) and probably the various references to traditional Islamic restrictions on women travelling alone influenced its implementation, the byelaw resulted in the arrest of non-prostitutes – and the fear is that this may happen again. Similarly wrongful arrests were made in Bantul.

The reasoning behind such rules, and behind the wider campaign to have women cover their heads and to discourage them from wearing 'revealing' clothes, indicates that (and Indonesia is no exception on this point) conservative or male chauvinist ideas still prevail about the sexual needs of men and their difficulty in controlling their sex drive. Euis Nurlaelawati's analysis shows that they also influence the decisions of the Islamic courts. The failure of a wife to fulfill the high sexual desire of her husband is an important stated reason in pleas of husbands to get the required permission of a religious court to enter a polygamous marriage.

Both Euis Nurlaelawati and Stijn van Huis also investigate access to justice for women provided by religious courts and whether judges are sensitive to their interests. Both are positive about the granting of a divorce to women petitioning the court to do so (though Euis Nurlaelawati notes that in such instances judges tend to follow classical rules not allowing a post-divorce allowance, unlike the *Kompilasi* which does). Both also point to problems arising after a divorce has been granted. From Euis Nurlaelawati's discussion about the courts in Tangerang, Serang and Cianjur it becomes clear that when custody over and alimony for children after divorce are concerned, religious courts lack the power and instruments to enforce their decisions outside court and are unable to take action when the former husband disregards the judgment. In his research about divorce cases in Islamic courts in Bulukumba, Stijn van

2 In Padang in 2001, the local authorities contemplated introducing a regulation which would forbid women not accompanied by a close male relative or husband to leave the house after 21:00 hours, but no regulation was issued.

Huis also touches upon problems women may encounter when it comes to their post-divorce rights with respect to alimony, child support and the division of communal marital property among the former spouses. Besides the lack of a proper follow-up after the court has pronounced its judgment as a result of which divorced women may not get what they are entitled to, he also points to the procedure followed in reaching a decision. Judges prefer to settle complicated matters by an informal out-of-court compromise, which is not mentioned in the final sentence. As Stijn van Huis states, '[t]he Islamic court personnel have a preference for informal agreements, and push claims of women outside the realm of the court. Even when the claim is formally made in the court, the judge will attempt to negotiate an agreement with both parties.' Van Huis identifies the enforcement of court decisions as the weakest element in rulings about child support. There are no formal mechanisms at all in place to force the former husband to fulfill his obligations.

From the contributions presented in this section it can be surmised that traditional Islamic legal doctrines and notions are still prevalent. A telling example of this is provided by Euis Nurlaelawati's analysis of the decisions taken by religious courts in Cianjur, Tangerang and Serang (Banten) regarding polygamy. While existing secular legislation and the section of the Kompilasi limiting the practice are disregarded, the judges give priority to classical religious arguments allowing polygamy. It seems that, to use an Indonesian expression, much 'socialisation' of the Kompilasi still has to be done before judges will base their decisions on those aspects that have been included to further the interests of women and children.

4 Sharia-Based Laws

The Legal Position of Women and Children in Banten and West Java¹

Euis Nurlaelawati

1 Introduction

Since the fall of Suharto in 1998, calls for the introduction of Sharia have become more widespread. This does not mean that prior to 1998 no developments in this area occurred. A well-known example is that of Presidential Instruction No. 1 of 1991, the *Kompilasi Hukum Islam* (Compilation of Islamic Law), henceforth called *Kompilasi*, issued in 1991, which is considered to be a step towards further codification of Islamic law at the national level. Not only at the national level, but also at the local level there are many ongoing developments in this field. Indeed, as an effect of the policy of decentralisation that was implemented in 1999, the ways in which the introduction of Sharia manifests itself at the local level can vary greatly from region to region.

Decentralisation did not concern religious affairs and, apart from in Aceh, which was granted self-government after the Helsinki Agreement of August 2005, regional administrations are not allowed to issue religious regulations. As a consequence, the introduction of Sharia at the local level is limited, in an Islamic sense, to the public sphere and mostly concerns ritual and morality.² This does not mean, however, that the initiatives taken are insignificant. An example is the (demand for) curtailment of the freedom of movement of women under Sharia-based local regulations by, for instance, requiring them to wear a headscarf (*jilbab*) in

1 This is a shortened version of the report submitted to the Islam Research Programme Jakarta. See *Regime Change, Democracy and Islam. The Case of Indonesia*. Final Report Islam Research Programme Jakarta (Leiden, 2013).

2 Arskal Salim, 'Muslim Politics in Indonesia's Democratisations: The Religious Majority and The Rights of Minority in the Post-New Order Era', in R.H. McLeod and A. MacIntyre (eds.), *Indonesia: Democracy and the Promise of Good Governance* (Singapore: Southeast Asian Studies, 2007).

government offices and educational institutions and restricting their freedom to leave the house at night.

In a society biased in favour of men injustice and inequalities are common. Gender prejudice may lead to violence against women and their political and economic marginalisation. Children may be discriminated against by parents or other parties. In courts, these inequalities may manifest themselves in judgments that appear to be unfair, and which emanate from subordination and gender-biased perspectives and decision-making methods.

Generally speaking, continuous efforts have been made in Indonesia with regard to legal improvement and legislation to defend the rights and equal status of women and children. Several articles in the Marriage Law (Law No. 1 of 1974) and in the *Kompilasi*, for example, try to provide protection to women and children. Furthermore, laws ratifying a number of international covenants have strengthened the empowerment and protection of women and children. In addition, judicial system reforms have been introduced by religious courts as a result of close cooperation with international donors. While, to some extent, the position of women has somewhat improved and women now receive more justice in some cases, the expectations and intentions have not entirely been fulfilled, and this has brought about continuous demands for revision and refinement of these legal products in order that they may mould with the many social changes that have occurred and that affect the interests of children and the relations between women and men.

This contribution is based on research that examined court decisions and narratives of hearings, and investigates how laws on familial issues, particularly those that relate to women such as the Law of Marriage and the *Kompilasi*, are applied.³ The cases that were observed include divorce, custody, spousal alimony and alimony for children, and polygamy in three courts: in Cianjur in West Java, and Serang and Tangerang in Banten. The research also looked at the national laws from a practical level by observing women's responses, and their application by judges of religious courts. A number of court hearings were attended, judges – in particular female – and litigants were interviewed and court rulings were analysed. The research was undertaken over six months in three periods in 2010; the first lasted from May to June, the second from August to October, and the last took place in December. In 2011, in order to better

3 I collected 158 decisions issued by the three courts being surveyed. Excluding decisions on inheritance cases, I analysed 42 decisions issued by the court of Tangerang, 49 by that of Serang, and 24 by the court of Cianjur.

understand the legal knowledge and awareness of women in general, I interviewed 12 women and distributed questionnaires to 100 women in three different areas in Tangerang. With regard to women's issues in the public sphere, one regulation was studied in closer detail: the Cianjur Sharia-based local regulation on the requirement for female Muslim civil servants to wear a jilbab. To gain a picture of the response to it I interviewed women, distributed questionnaires and visited the offices of the regional administration, the local police and the local public hospital.

Presenting a number of court cases, this contribution argues that the legal position of women has strengthened in cases only where technical judicial reforms have been introduced. It also suggests that women still face inequalities in court decisions on familial cases and that a number of local regulations have restricted women's freedom of choice in the public sphere.

2 Women in Indonesia's National Statutory and Local Regulations

Women have long been an important topic in legal discourse in Muslim countries. Under Sharia, women are treated differently from men. In light of the fact that many classical Islamic family laws placed women in a subordinate position, the Indonesian government initiated legal reforms and introduced new rules at the national level, included in the 1974 Law of Marriage and the *Kompilasi*, to improve women's standing in family law. This section discusses women and the legal rules that apply to them under Islamic family law and local Sharia regulations.

2.1 PERSONAL OR FAMILY LAWS

Following the trend to codify Islamic family law in a number of Muslim countries, Indonesia issued the so-called *Kompilasi Hukum Islam* in 1991. Keeping pace with the growing demand by society for gender equality, Indonesia has used the *Kompilasi* to take notice of women's interests, paying special attention to polygamy, divorce, marital property and post-divorce rights for women. Here, I will discuss briefly the rules on these issues laid down in the *Kompilasi*. I refer to the *Kompilasi*, but am aware of its low legal standing as it was issued only as a presidential instruction. The *Kompilasi* is a regulation that applies specifically to Indonesian Muslims and legal issues relating to the *Kompilasi* are dealt with by judges in the religious courts.

When looking at legislation on polygamy introduced in Muslim countries, two trends emerge. The first is for polygamy to be entirely abolished and considered a crime; and the second is for it to be permitted but, in order to avoid the abuse of its practice, to be governed by strict regulations.⁴ In the latter case polygamy requires the court's permission and is dependent on husbands meeting certain requirements and conditions. By including these restrictive conditions, Qur'anic standards of 'equal justice' are no longer a matter for the moral conscience of the individual, but rather a legal matter to be decided by the court.

Indonesia has taken the second approach, allowing polygamy. Articles 55, 56 and 57 of the *Kompilasi* thoroughly administer polygamy and list the required conditions and qualifications. These articles insist that a polygamous marriage can be solemnised only if all these conditions are fulfilled, and only if one of the reasons mentioned in the legislation allowing it exists. Failure to fulfill the requirements results in its prohibition. Above all, the approval of the court is absolutely essential and this means that such a marriage can be legally recognised only if it is approved by the court. However, Articles 58(3) and 59 abolish the necessity for the wife's consent. Article 58(3) regulates the condition when wives are absent and their whereabouts are unknown, preventing them from being involved in the case. It states that the consent of a wife or wives does not have to be taken into account if she or they could not be consulted, or if her or their whereabouts have not been known for two years, or if other conditions prevent her or them from being involved in the case that is being reviewed by the judge.⁵ Further, Article 59 lays down rules for situations where husbands have presented grounds for divorce, but wives have refused to give their consent. In such instances, the courts have superior authority. It states that:

In cases where wives are reluctant to give her or their consent and the husbands' proposal for polygamy has met one of the specified reasons as ruled in Art. 55 (2), the religious court has the right to make a decision on the proposal, after they have heard the wives' argument and clarifications in court.⁶

4 For a detailed discussion of the legal reform on polygamy in a number of Muslim countries see Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010). See also John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 1982), 92.

5 Article 58 of the *Kompilasi*.

6 Article 59 of the *Kompilasi*.

Wife and husband can appeal to a higher court.

Polygamy is also regulated by two governmental regulations, i.e. Peraturan Pemerintah (PP) No. 10/1983 and PP No. 45/1990 that apply to civil servants. PP No. 10/1983 regulates the procedure for a male civil servant entering into polygamy. It states that a male civil servant can become polygamous only if permission is obtained from his superior and prohibits female civil servants from being second wives to male civil servants. PP No. 45/1990 lays down stricter rules prohibiting female civil servants from marrying not only married civil servants, but also married non-civil servants.

Concerning divorce, Indonesia, like other Muslim countries, has limited the practice of divorce by requiring both husband and wife to bring a petition for divorce to court. The Kompilasi includes detailed rules on divorce and specifies grounds for it to be permitted. A reform which strengthens the rights of wives in divorce proceedings concerns the wife's petition, which is known in Indonesian as *gugat cerai*. The Kompilasi mentions two varieties of such divorce proceedings, as regulated by Article 148. The article does leave some room for interpretation, but states that in cases where the woman wishes to petition for a *khuluk* divorce – where the woman pays financial compensation to the man – the judges of a religious court must explain to husband and wife the consequences of *khuluk*. After both parties agree on the amount of financial compensation (*iwadl*), the religious court issues a decision granting the husband permission to pronounce the divorce formula. There is no appeal from this decision. However, when no agreement is reached on the amount of compensation, the religious court judges are required to hear and treat the case as a 'common case'. In other words, in that case the divorce cannot proceed as *khuluk*.

From this article, I understand that not all divorces under wives' petitions or *gugat cerai* can be treated as *khuluk*. The Kompilasi has therefore gone beyond *fiqh* or Islamic classical legal doctrines and introduced an important reform, giving wives the right to petition for divorce without always having to pay financial compensation. This means, therefore, that a wife also has a right to spousal alimony if her petition for divorce was made using non-*khuluk* proceedings.

The issue of custody after divorce is regulated by Article 105. It grants custody of children younger than 12 years to their mothers, and gives freedom to those aged 12 years or older to choose either of the parents to be their guardian.

2.2 PERDA SHARIA AND WOMEN: MORALITY AND ETHICS

Sharia is not only accommodated by laws at the national level, but it is also taken as a basis for regulations issued at a local level. The second amendment of Indonesia's 1945 Constitution by the People's Consultative Assembly established during the reforms of 1998 prompted the rise of the enactment of Sharia-based local regulations. Article 18 of the Constitution opened up the possibility for a local government to issue such Islamic regulations. The article provides a legal basis for the districts that are endowed with regional autonomy to manage their own regional affairs. Regional autonomy itself is mandated by the Regional Autonomy Laws No. 22/1999 and 25/1999 which were implemented in 2001.⁷

The primary objective of these laws is to offer more authority and power to regions to manage their own affairs. The enactment of local regulations (*Peraturan Daerah/Perda*) has become one of the local government's main tools for developing their respective regions.⁸ It is in this context that Sharia-based byelaws have begun to be enacted. Apart from Aceh, a number of regions and cities have enacted such regulations, including Bulukumba (discussed in this book by Stijn Cornelis van Huis), Bantul (discussed by Muhammad Latif Fauzi), and Cianjur. Although the majority of Sharia-based regulations enacted apply to both men and women, it is the position of women that is most affected.

There are at least two areas in which these regulations may affect women. These two areas, if we follow Salim's categorisation, may fall into either the category of public order and anti-vice regulations, including the banning of prostitution and alcohol, or that of religious symbolism, which includes the obligation to wear Muslim clothing,⁹ and relate primarily to morality and ethics. Such regulations are partly a response to the claim by Islamists that Indonesia faces serious problems as a result of moral decline in society. Such Islamists argue that women are the source of a number of such problems.¹⁰ And they believe that such problems

7 Nur Rifah and Honest Dody Molasy, 'Questioning Women Security in Perda Syariah (Critics to Indonesian District Policies)', a paper presented at the Human Security Conference organized by SEAS in 2010.

8 M.B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008), 244.

9 Salim, 'Muslim Politics in Indonesia's Democratisations', 115–137.

10 Karni, Budiarti, and Barus, 'Batas Niat Baik dan Komoditas Politik', *Nasional*, www.gatra.com, 2006.

would be solved if there were legislation in place which obliged women to amend their attitudes and behaviour.

In Cianjur an association of Muslims called SIMLUI (*Silaturahmi dan Musyawarah Umat Islam*/Good Relationship and Consultation in the Islamic Community) urged the implementation of Sharia, and convinced the people of Cianjur that Sharia is the solution to social ills and could improve the morality of Cianjur society. Members of SIMLUI therefore promoted a number of regulations inspired by Islamic doctrines which called for the adoption of Islamic dress codes, requiring that Muslim women wear a jilbab. To give substance to local byelaw No. 3/2006 on the Movement to Create a Pious Society/Gate to Love and Peace (*Gerakan Pembangunan Masyarakat Berakhlaqul Karimah/Gerbang Marhamah*) the bupati (regent) of Cianjur required Muslim civil servants to conform to Muslim dress codes in government office. However, while the Bulukumba regulation on the jilbab applies to all women, the Cianjur regulation is only in force for Muslim civil servants. Male civil servants are also expected to follow Muslim dress rules and have to wear a so-called *baju koko* when in office.

As is the case also elsewhere in Indonesia, the Cianjur regulation was, according to its proponents, issued to provide security for women and protect their dignity. However, opponents of these regulations argue that the way women are protected has in fact marginalised them and confined them to domestic life; according to them, women have become the victims of these Sharia-based regulations.

3 Women at Religious Courts: Judges' Legal Discretion

This section observes the outcomes for women of legal cases in the courts and the factors contributing to these outcomes. The key points that are investigated relate to how religious court judges regard and position women who are involved in legal disputes and the degree to which women's interests are served in court.

3.1 REMAINING SUBORDINATE: IN WHICH CASE(S) AND WHY?

Despite many reforms, women continue to have a weak position in court in cases of polygamy, custody and post-divorce alimony for their children. There are a number of factors that contribute to this.

3.2 POLYGAMY: LOOSE APPLICATION OF LAW AND TRADITIONAL INTERPRETATION

In the case of polygamy, women are often not able to negotiate or indeed influence the judges' judicial discretion. Although polygamy is regulated in the Kompilasi and in PP No. 10/1983, which was amended in 1990 by the PP No. 45/1990 to make the practice of polygamy more difficult, judges in the three courts observed remain gender-biased and unreceptive to women in this matter.

What does current research say about this matter? Pusat Studi Hukum, Konstitusi dan Hak Asasi Manusia, PUSKUMHAM (the Centre for the Study of Law, Constitution, and Human Rights, State Islamic University, Jakarta), concluded that a number of judges have been sensitive to gender issues, as can be demonstrated by their attitude when resolving cases of divorce, joint property and polygamy. It also reported that some judges in the court of Aceh have been very much concerned with protecting women's rights and are receptive to gender issues.¹¹ Hearings of cases of polygamy during which judges required husbands to reconsider their decision, and reminded husbands of the sanctions in the event of unfair or unequal treatment of co-wives, for example, illustrate that gender sensitivity in courts in Aceh has increased. Another case from Aceh on divorce, in which judges awarded a greater portion of joint property to the wife – the reason for the divorce being the husband's polygamy – also demonstrates that judges can be quite sensitive to gender issues. It must be mentioned, however, that judges only started to become more aware of gender issues following the introduction of a number of training programmes by several centres of women's studies targeted at strengthening gender sensitivity in court. Through these training sessions, principles of equality, justice and fairness were introduced.¹²

The results of my research, however, differ from the findings of PUSKUMHAM. I found that most of the judges in the three courts featured in this research seemed to remain biased or unreceptive in respect of this issue, despite having received training on gender sensitivity. They often refer to the Qur'anic verse that allows polygamy. Although the Qur'an stresses justice and a number of verses – Al Nisa (4) verse 3 and Al Nisa (4) verse 129 – tend to discourage polygamy, many judges are of the view that polygamy is acceptable and does not deviate from the Qur'an.

11 See Arskal Salim (ed.), *Demi Keadilan dan Kesenjangan: Dokumentasi Program Sensitivitas Gender Hakim Agama* (Jakarta: PUSKUMHAM, 2009).

12 For the curricula and materials of the training see Salim, *Demi Keadilan dan Kesenjangan*, 22–26.

One of judges said that polygamy is allowed according to the firm law, the Qur'an, and no law can be made to violate it.¹³ It seems, then, that gender sensitivity training does not always have the desired and full effect, and certainly as a single factor is incapable of changing the minds of judges on these sensitive issues. Indeed, a number of other factors are also relevant: the judge's personality and educational and family background also contribute to whether or not the judge is receptive to training on gender sensitivity.¹⁴ The way training is conducted may also play a role. PUSKUMHAM found that the judges of these three courts were trained by a centre for women's studies (Pusat Studi Wanita, PSW) with an approach and a method quite different from the method employed by centres in Aceh.¹⁵

I collected nine decisions on requests for polygamy in the period 2007–2009 made by the religious court of Cianjur. The court approved of all nine. The reasons for approval vary according to the reasons put forward by the petitioners (husbands), ranging from the inability of their wives to provide descendants or them being serious ill, to a sexually dissatisfied husband. It is worth mentioning that, although this is not always explicitly stated, high sexual desire is the dominant motive for these petitions. Indeed, in four of the nine cases polygamy was requested on the grounds that the wives could not satisfy their husbands' sexual desires. That the requests were granted indicates that judges in this court remain open to polygamy and are not particularly strict about the rules, often accepting invalid reasons presented by husbands as sufficient grounds for polygamy.¹⁶

The court of Cianjur is no exception. Judges in the other two courts in my research made very similar decisions. From the 45 judgments issued by the court of Serang on various cases, six are on polygamy; out of the 72 cases collected from the court of Tangerang, five.¹⁷ Although the reasons

13 Interview with the head of the religious court of Tangerang, May 2011.

14 For a discussion on the influence of these on the gender sensitivity of people, including judges, see Geeta Sarma and Deepa Sonpal, 'Gender Awareness and Sensitivity Applications', Unnati Organisation for Development Education, Gujarat, India, 2008. See also Karen Czapanisky, 'Gender Bias in the Courts: Social Change Strategies', *Journal of Legal Ethics* (4)1, 1990.

15 See Salim, *Demi Keadilan dan Kesetaraan*, 32–35.

16 I have copies of all nine judgments. Some of them are identified as Decisions No. 255/Pdt.G/2008/PA.Cjr, No. 290/Pdt.G/2008/PA.Cjr, No. 393/Pdt.G/2007/PA.Cjr, and No. 358/Pdt.G/2007/PA.Cjr.

17 HUKUMONLINE, Indonesia's leading source of legal news, found that of 1,016 applications for permission to marry polygamously lodged in religious courts in 2004 800 were approved, as were 776 out of 1,148 in 2006. Quoting these

given in the decisions issued by the court of Tangerang include religious observance (*ibadah*)¹⁸ in two cases, wives' failure to satisfy the sexual desire of their husbands in two cases, and the husband's high mobility in one case, all five of the petitions, plus two petitions in the court of Serang, were basically approved in order to fulfill the high sexual desire of the petitioners (husbands).¹⁹

To give an example, a housing contractor (with one wife) who had been living in Serang for a year for his work while his wife and four children had stayed behind in Bandung, had asked the court of Serang to allow a polygamous marriage after he had met a woman in Serang and had fallen in love with her. To avoid extra-marital sexual intercourse (*zina*) he wanted to marry her. The reason he advanced was that his wife could not fulfill his sexual needs as she was living far away. The judges agreed on the condition that his wife gave her consent and that the husband had sufficient financial resources. The judgment also stated that it was feared that the husband would be tempted into extra-marital sexual intercourse unless his request were granted. The reason put forward by the husband is not specified in the law. He simply stated that his wife had

figures Butt remarks that, given Indonesia's large population, the numbers seem quite small. Nonetheless, he suggests that the proportion of approvals may support his and other researchers' claims of a relatively permissive approach by judges to polygamy, with which I agree. See Simon Butt, 'Islam, the State and the Constitutional Court in Indonesia', *Pacific Rim Law and Policy Journal*, 19 (2), 2010, 291. For details on the number of polygamy applications and approvals in those years see *Menguak Sisi Gelap Poligami*, HUKUMONLINE, 23 December 2006, www.hukumonline.com/berita/baca/hol15941/menguak-sisi-gelap-poligami (accessed June 2011); *Syarat Poligami akan Diperkuat*, HUKUMONLINE, 19 February 2009, www.hukumonline.com/berita/baca/hol21230/syarat-poligami-akan-diperketat (accessed June 2011).

18 Muhammad Insa, an Indonesian Muslim who considers polygamy a religious observance (*ibadah*) to be upheld by Muslims, challenged the stipulations on polygamy in the Law of Marriage and the Kompilasi. He protested that these were in violation of the right of religious freedom and petitioned for judicial review by the Constitutional Court rather than applying for polygamy at the religious court. He argued that polygamy is a matter of *ibadah* and the state has to allow Muslims to practise it. Arguing that the rules on polygamy do not violate people's rights, the Constitutional Court dismissed Insa's application. For a further discussion on this issue see Faye Yik-Wei Chan, 'Religious Freedom vs. Women's Rights in Indonesia: The Case of Muhammad Insa', *Archipel* 83, Paris, 2012, 113–145. See also Butt, 'Islam, the State, and the Constitutional Court in Indonesia', 2010.

19 Some of these judgments are identified as Decisions No. 280/Pdt.G/2009/PA. Srg, No. 526/Pdt.G/2009/PA.Srg, No. 322/Pdt.G/2009/PA.Srg, No. 211/Pdt.G/2008/PA.Tng, and No. 164/Pdt.G/2008/PA.Tng.

not moved with him to his new place of residence and that he intended to avoid extra-marital sexual intercourse with the other woman. The wife gave her consent, but, according to the law, she should only have done so after the husband had presented a legitimate reason, one specified in the law.

In another case, a woman with four children could not but consent when, after 20 years of marriage, her husband asked the court of Cianjur to allow him to marry a second wife, a widow, on the ground that his wife was no longer able to satisfy his sexual needs. He promised to treat his co-wives justly and declared that he was capable of supporting them financially. Unlike in other cases, the wife appeared in court to announce that she had no objections. The judges gave their permission without making any further statements or requiring evidence to support the husband's claim.

The two cases are striking in view of the comprehensive rules regulating polygamy in Indonesia. The rules should lead to stricter control of polygamy and ensure that arbitrary polygamous marriage cannot legitimately be concluded unless the arguments put forward in such cases are those specified in the laws. These examples suggest that, in fact, the contrary is true: judges do not always seem to adhere to the rules and, in contrast to divorce, polygamy seems difficult to control and to be 'vernacularised' (interpreted according to modern legal discourse). A number of judges believe that polygamy has a clear Islamic legal rationale. Some of them frankly admitted that if they were to reject polygamy, they would be deviating from Sharia.²⁰ These factors combined lead judges to a loose application of the state law.

Such a tendency can also be seen from the judges' argument that they are not required to see whether the consent of the wife is sincere or not. Equally, they are not required to check whether the wife is genuinely unable to satisfy the husband's sexual desire or unable to have children, when husbands present such reasons to support their request for polygamy.²¹ Above all, in their judgments, most of the judges looked at and stressed the qualifications to be met by husbands, rather than the reasons why husbands request a polygamous marriage. Consequently, they can accept any reason the husbands present, even

20 Based on interviews with six judges of the religious courts of Serang and Tangerang, 2011.

21 Interview with judges of Tangerang religious court, July 2011 and based on content analysis of decisions on several petitions for polygamy. See also M.B. Hooker, *Indonesian Syariah: Defining National School of Islamic Law* (Singapore: ISEAS, 2008), 12–13.

those not mentioned in the relevant legislation. Rather than stressing justice in their legal reasoning, the emphasis appears to be on the concept of *maslahat* (public interest). Also, rather than considering the consequences of their decision for the first marriages (judgments in my collection tend to indicate that polygamy is detrimental to first wives and that many first wives petition for a divorce on the grounds of continuous disputes resulting from the husband's polygamy), judges focus on the potential zina of husbands with their new female partner.

Interestingly, many judges interviewed admitted to having received training on gender sensitivity; indeed, many felt that they were receptive to gender issues. In practice, however, they appeared to have misunderstood the issue. This lack of gender sensitivity clearly came to the fore during an academic forum at which I presented a paper and which a number of judges from the three courts attended. The forum discussed access to Islamic justice, and one of the sessions was devoted to women's issues. When the issue of polygamy came up and one of the speakers, Maria Ulfah, expressed her disapproval of this practice, one of the judges present stood up and declared his unwavering support for polygamy, arguing that permission for polygamy is clearly stated in the Qur'an. He was supported in his view by a female judge who offered a more reasonable and practical argument. She admitted that she and other colleagues were often faced with requests to allow polygamy and that she often saw first wives being treated badly by their husbands if they refused to consent. She assumed that if a petition was not approved, a wife might be worse off. Giving permission for polygamy was therefore a way to protect these women.

3.3 CUSTODY AND THE NOTION OF 'BEST INTERESTS OF THE CHILD(REN)'

With regard to custody and post-divorce alimony for children, women are also often in a weak position. In the classical legal doctrines, the rules relating to custody vary according to the different schools of Islamic law. However, they all agree that the age of the children determines who has the right to custody when parents separate.²²

Custody refers to the physical care and control of a minor. In other words, custody is the right to the physical presence of the child. 'Custody' can exist only in relation to the minor's person, not over his or her

22 See Wahbah al-Zuhayli, *Al-Fiqh al-Islamiyy wa Adillatuhu* (Damaskus: Dar al-Fikr, 1984), Vol. 10, 4th edition, 7306. See also Al-Jaziri, *Al-Fiqh 'ala al-Madhahib al-Arba'a*, 596–598; Dimsaqy, *Kifayat al-Akhyar*, Vol. 11, 152, and Bajuri, *Hashiya Kifayat al-Akhyar*, Vol. 11, 198 and 203.

property. The person who is granted this right is called a custodian. Custody differs from guardianship and a custodian has narrower duties than a guardian, who has rights and duties with respect to the care and control of a minor's person or property. With regard to guardianship, which includes financial maintenance for children, fathers and their relatives are given more rights. Decision-making about the persons and property of children under the legal age (21, when a child is not married) is consistently vested in the father and, in cases where he is absent, in one of his relatives.²³ While physical care of the children can be the responsibility of mothers or fathers, mothers have superior rights in terms of the custody of children under the age of puberty (*ghayr mumayyiz*).²⁴

In Indonesia, the rules on custody modify those of the classical legal doctrines (*fiqh*) and do not follow Shafi'ite legal opinion to which Indonesians Muslim adhere for the majority of legal issues. Shafi'ites define the age of puberty as seven.²⁵ In the Kompilasi, it is ruled that custody of children aged 11 and under is to be awarded to their mothers and children aged 12 and above can choose which of the parents they want to stay with.²⁶

In Indonesian religious courts, a custody case can be resolved by filing a separate case or as part of a divorce case. Cases of custody are mostly brought by women. In custodial cases a woman can face two challenges: one is to gain the right to custody, the other actually to be able to exercise that right after it has been awarded to her by the court. In the first instance, problems can arise when the husband argues that the divorce petition is motivated by his wife's behaviour. For example, husbands seeking custody may argue that the wife is not fit to bring up the children because she leaves home for work or because of her religious impiety. After a woman has been given custody, it can happen that the former husband refuses to hand over the children, or that the alimony for children is paid irregularly or not at all.

The decisions of Indonesian religious courts relating to custody cases generally emphasise the best interests of the child(ren), as is stressed in the Kompilasi. However, these rulings rest on the perception of individual judges as to what constitutes the 'best interests', which is, as also concluded

23 Asha Bajpai, 'Custody and Guardianship of Children in India', *Family Law Quarterly* 39 (2), 2005, 441–457.

24 Wahbah al-Zuhayli, *Al-Fiqh al-Islamiyy wa Adillatuhu*, 7308. See also Al-Jaziri, *Al-Fiqh 'ala al-Madhahib al-Arba'a*, 597–598.

25 Wahbah al-Zuhayli, *Al-Fiqh al-Islamiyy wa Adillatuhu*, 7322.

26 Art. 105 of the Kompilasi. See also Euis Nurlaelawati, *Modernization, Tradition and Identity*, 144–145.

by Bajpai in his research,²⁷ a highly abstract notion. A number of decisions in the cases I studied indeed stated that they were made in 'the best interests of children.' However, since every case has a different character and nature, it is difficult to draw general conclusions about this underlying reason. Judges do mention a number of factors or reasons for awarding or rejecting custody. However, what is clear is that decisions often favour the party that was able to negotiate or influence and change a judge's decision most effectively and that children lack legal representation in court.

Of the 13 custody cases heard in the courts of Tangerang, Serang and Cianjur whose decisions were either integrated in decisions on divorce cases (petitioned by wives) or separate custody cases, five decisions rejected the former wives' rights to custody. Two of the five women who were refused custody by the judges in the courts of first instance did not negotiate their cases or file an appeal with a higher court. In her divorce petition, one of the women asked for custody of her four-year-old son, but this was refused on account of her working outside the home. Although working mothers have negotiated and been awarded custody in the past, this instance indicates that in custody cases it is not uncommon for a judge to question the women concerned to be the right person to raise the child(ren).²⁸ In this case, the principle of the 'best interests of the children' is not very clear or well-defined. The reason presented in the second case was the 'bad character' of the woman, apparently demonstrated by her husband's accusation that she had cheated on him. The judges agreed with the husband's allegation that she was not a good and pious mother and emphasised that they had taken into account the child's best interests: a custodian should be able to raise a child physically, mentally, spiritually and socially in a 'normal' manner. They assumed that if they awarded custody to the mother, the boy might grow up well physically but not spiritually.²⁹

27 Bajpai, 'Custody and Guardianship of Children in India', 447.

28 Seto Mulyadi, a senior consultant of the National Commission on Children Protection (Komisi Nasional Perlindungan Anak/Komnas Anak) and a former chairman of the Commission, mentioned that the committee received a number of complaints made by women who lost custodial rights over their children under the age of 12 and reported the cases they received to the Judicial Commission. He mentioned that in 2012 it received 12 custody cases in which women (mothers) were deprived of their rights by judges on various grounds. See Cornelus Eko Susanto, 'Kak Seto Adukan Masalah Hak Asuh Anak ke KY', *MICOM*, 31 October 2012, http://article.wn.com/view/2012/10/31/Kak_Seto_Adukan_Masalah_Hak_Asuh_Anak_ke_KY/ (accessed 12 December 2012).

29 Personal interview with YL, Tangerang, 2010. See judgement No. 484. Pdt.G/2010/Tgr.

3.4 ACHIEVING BETTER JUSTICE: IN WHAT CASES AND HOW? LEGAL ASSISTANCE AND BETTER SERVICE

Women's centres have helped Indonesian women to become more aware of their legal position. Funded by and cooperating with national and foreign donors, these centres provide advocacy to society. In addition, the Ministry of Religious Affairs has, since 2006, run a special Course on Islamic Legal Knowledge for Brides and Grooms (Kursus Calon Pengantin/Suscatin) held at the Offices of Religious Affairs (Kantor Urusan Agama). Significant and influential are the legal aid posts (POSBAKUM) operating since 2011 inside court buildings and run by the government, and PEKKA (Perempuan Kepala Keluarga, Female Heads of Households), an NGO supporting the empowerment of female heads of households in respect of gaining their legal rights.³⁰ For example, since its establishment in 2012, in its first four months of operation Cianjur's legal aid post provided legal assistance to more than 220 people,³¹ the majority of whom were women seeking legal aid.

Apart from the increase in legal assistance, better services in court also lead to greater access to justice for women. Supported by the wider international community, including the Australian Family Court, Indonesia's religious courts are trying to develop their services. The courts received an increased budget from the national treasury in 2008 and 2009 and, subsequently, have run 'Prodeo' (courts for the poor/fee waivers) and 'courts on circuit' (*sidang keliling*) programmes, which are largely aimed at helping poor women. 'Prodeo' services have been widely and well utilised by women. In the 'courts on circuit' programme, judges travel to remote areas to collect and hear cases. This programme was initiated due to the fact that Indonesia has many remote areas where transport is a problem, preventing people living there from coming to court. In its annual report for 2012, the court of Cianjur reported that between January and April it had heard 183 fee waiver (prodeo) cases and 133 cases on circuit,³² including cases for divorce and marriage legalisations. In addition, judges in the three courts are often lenient about the hearing schedule, and are often willing to re-open day hearings for late-comers.

30 Cate Sumner and Tim Lindsey, *Courting Reform: Justice for the Poor* (Lowy Institute, 2010), 42–44.

31 'Laporan Pelaksanaan Sidang Keliling, Prodeo dan Posbakum Tahun 2012 Bulan Januari s/d April 2012', Pengadilan Agama Cianjur, 8 May 2012.

32 'Laporan Pelaksanaan Sidang Keliling, Prodeo dan Posbakum Tahun 2012 Bulan Januari s/d April 2012', Pengadilan Agama Cianjur, 8 May 2012.

3.5 GENDER SENSITIVITY AMONG JUDGES: SPOUSAL ALIMONY AFTER *TALAK*

Gender sensitivity among judges constitutes another factor in terms of gaining better access to justice for women. Although I mentioned above that judges have not been receptive towards women in the case of polygamy, partly thanks to training sessions held by a number of centres in cooperation with international donors, such as the Embassy of the Kingdom of the Netherlands and the Asia Foundation, a number of judges from the courts of Serang, Tangerang and Cianjur, have become more sensitive to gender issues, particularly in respect of divorce. Almost all divorce cases initiated by wives heard in these three courts have resulted in approval.

The gender sensitivity of judges can also be seen in their attempts to implement the ruling that wives should receive spousal alimony after divorce. In all 18 cases heard in the courts of Tangerang and Serang, the judges stated that husbands were required to pay to the clerk the spousal alimony for three months and the *mut'ah* (gift of consolation) before they were permitted to pronounce the divorce formula in court.³³ However, judges can also make a different decision and take the financial circumstances of a husband into account, allowing him to pronounce the divorce formula without making the payment into court. This usually comes with a warning from the judge that husbands are expected to fulfill their obligations later. The judges would argue that such a decision prevents wives from waiting for a long period for clear legal status, i.e., being divorced.

The financial circumstances of the husband may also make judges decide on a lesser amount of maintenance than demanded by wives.³⁴ In one case in Tangerang, for instance, spousal alimony was fixed at 700,000 rupiah per month for a period of three months and the *mut'ah* at 500,000 rupiah. There was no agreement on alimony for children as they had none. After the wife and husband had agreed on the sum, during the session in which the husband would pronounce the divorce formula, the court asked the husband if he had the money ready; the husband said he had. Without being asked, he gave the money to the clerk who, after checking that the amount was correct, passed it on to the wife. She received the money in a casual fashion and did not do what the chief judge asked her to do; that is, to check the amount of

33 Based on notes of hearings held in courts of Serang and Tangerang and interviews with judges in Serang and Tangerang, September, October and November 2010.

34 Based on notes of hearings held in courts of Serang and Tangerang and analysis of a number of judgments issued by these two courts.

money received. Consequently, having verified that the wife was not menstruating as demanded by Islamic law, the chief judge permitted the husband to pronounce the divorce formula. The hearing was then closed and the litigants shook the judges' hands and went.³⁵ After two other cases had been heard the ex-wife approached the chief judge. She tried to verify what had been decided on the alimony and admitted that only now did she realise that the amount she had accepted was less than she had originally asked for and that she would only agree to a divorce if her financial request was met. The chief judge responded in a relaxed fashion and said that he indeed remembered the amount requested by her, but had considered it too much and not realistic. The judge had taken into account the financial circumstances of the husband and had decided to lower the amount of alimony that the wife would receive. To stop her complaining, the chief judge said that judges could fulfill either the whole petition or part of it and reminded her of her right to appeal before the final hearing on the declaration of the divorce formula.

Another case involved a woman who was being divorced by her husband and aware of her post-divorce rights. One of her demands was dismissed, as it was, according to the judges, excessive, illogical and unlawful, i.e. *uang sakit hati* (financial compensation for a broken heart). However, the judges met her other demands on spousal alimony and a gift of consolation and asked the husband to make the payments in the courtroom, which he did. Given these cases, there is some evidence that, although many husbands do not fulfill their financial obligations due to insufficient financial means, changes in judges' attitudes in this area have helped to improve justice for women to some degree.

4 Sharia-Based Local Regulations: Jilbab Requirement in Cianjur

The requirement in Cianjur for civil servants to conform to Islamic dress codes when at work constituted a further implementation of the local byelaw of 2006 on the intention to establish a pious society. It is an example of the effort to control the conduct of women in public areas, and has – like other such efforts elsewhere in Indonesia – led to widespread debate and criticism. Both those who support the obligation to wear a jilbab and those who oppose it base their arguments on the concept of '*maslahat*' (general well-being) of women, understood as women's security and the protection of dignity.

35 Based on notes of a hearing held in a court of Tangerang, 5 October 2010.

The measures taken in Cianjur, also known as *Kota Santri* (City of Devout Muslims), were presented as a response by the local administration to tackle moral hazards confronting young men and women. To promote moral behaviour, the Cianjur administration, on the initiative of the bupati, Warsidi, formulated a number of intentions, starting with the *Gerbang Marhamah* programme, to revive Islamic norms.³⁶ The programme is promoted all over Cianjur and is therefore well-known. A large gate as you enter the city of Cianjur has the words 'Gerbang Marhamah' written on it.

A number of regulations were issued to support its implementation, one of which is the regulation on clothing. Although only female civil servants have to wear a jilbab, the main Gerbang Marhamah project aims at all Muslim women. The word *akhlak*, meaning 'good conduct', is frequently used in official documents and regulations. It is mentioned in the overall 'vision' of Cianjur city – Cianjur Healthier, Smarter, More Prosperous, and Better Behaved – and in its 'missions', one of which is to intensify 'the building of a better morality in society, the nation, and the state'. Akhlak is also used in a number of slogans. One, displayed on large billboards in the city, urges the people in Cianjur to improve their moral conduct and become model Muslims: '[i]mprove your morality, and your faith becomes perfect'. While such slogans are directed at Cianjur citizens of both sexes, one slogan on another giant billboard specifically urges Muslim women to cover their heads, as this is considered to be a sign of piety. The slogan reads, 'Veiling is a distinguishing mark of pious Muslim women'.

Earlier research by Komnas Perempuan (Women's National Commission), the Centre for the Study of Religion and Culture (CSRC) and the Wahid Institute has drawn attention to three cases in which three non-Muslim women, working at a post office, as a school teacher, and teaching at the State Senior High School, were forced to wear a jilbab. It was claimed that while a non-Muslim student does not have to cover her head, a non-Muslim teacher has no choice but to follow the regulation, as teachers should set an example for their students.

In fact, there does not seem to be much opposition to the jilbab rule. An increasing number of women see covering the head as a religious obligation. Most of the Muslim women in Cianjur I interviewed appear to regard the jilbab policy as positive, while in government offices,

36 Jaih Mubarak, 'Gerakan Pelaksanaan Syariah Islam di Cianjur', a paper presented at the Annual Conference (Konferensi Tahunan) Pascasarjana PTAIN se-Indonesia, held by the Graduate School of IAIN Ar-Raniry Banda Aceh and the Ministry of Religious Affairs, 1–4 December 2004, Banda Aceh NAD.

such as that of the local administration and the Regional House of Representatives, and in police stations and the public hospital, the regulation is widely accepted. Of the 14 female officials of the regional administration I interviewed, only four did not agree with the regulation. At the hospital the four senior staff members I talked to all agreed with the jilbab policy. According to one of them all Muslim female employees, including nurses and doctors, wear a jilbab.³⁷ At the police station it was the same, but with one important difference. All female civil servants who worked there wore a jilbab, but the majority of female police officers did not. They are employed by the national police, not by the Cianjur administration and said they were therefore not bound by Cianjur's local regulations. Public servants treated all women coming to their office equally, whether they wore a headdress or not, but women who did not cover their heads were reminded of the Gerbang Marhamah programme and asked to wear a jilbab on a next visit.

The religious court is another state institution in Cianjur where the female staff have to wear a jilbab. They treat female litigants coming to court without one well, but often recommend wearing a jilbab upon their next attendance.³⁸ Only a few judges appear to be aware of the regulation. One reason could be that many of them come from outside Cianjur. Judges are selected and are consequently placed at courts where there is a vacancy and are often transferred from one court to another.³⁹ That said, all female judges wear a headdress.

5 The Relevance of Sharia-Based Laws in Indonesia to International Treaties: Some Voices and a Critical Analysis

In this section the *Kompilasi* and the local Sharia-based regulations will be analysed from two perspectives. The first takes into account a number of international covenants that Indonesia has ratified: the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),

37 Interview with DK, the head of the Department of Information and Public Relations Department of the public hospital of Cianjur, Cianjur, 17 December 2011.

38 This differs from the court of Ciamis which, according to one of my correspondents, has spare jilbabs in the office for female litigants who arrive at hearings without one.

39 See Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practices of the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

the International Convention on Civil and Political Rights (ICCPR), and the International Convention on the Rights of the Child (CRC).⁴⁰ CRC is an international treaty that affirms the basic rights of children.⁴¹ CEDAW first came into force in 1981 and requires all state signatories to eliminate discrimination on the basis of gender in public and private spheres.⁴² The ICCPR stresses that men and women should enjoy equal access to all civil and political rights⁴³ and it requires the settlement of principles of legal certainty for any legal action.⁴⁴ The second perspective concerns the opinions of gender activists and other women's voices.

5.1 POLYGAMY: RULES AND ACTUAL PRACTICE

Right to Legal Certainty

Indonesia has made a serious legal attempt to restrict polygamy. However, most Islamic court judges basically accept the practice and allow that the disapproval of wives can be ignored in certain instances. The fact that local ulama continue to help husbands to practise polygamy also demonstrates that the state has so far failed to create legal certainty. Moreover, judges often rule that polygamy is better than leaving husbands vulnerable to committing zina. The continued acceptance and approval of polygamy by judges and by local ulama in Indonesia violates international regulations. The laws and regulations on polygamy and their application, therefore, must be reviewed, as they have prevented women from obtaining legal certainty, a right that is and should be protected by CEDAW and the Indonesian state. Such a review should address the question whether proponents of polygamy consider it a religious right or doctrine or a legal right of men. This question needs an exact answer in order to establish legal certainty, as many women in Indonesia are uncertain about whether or not they have a right to speak out against polygamy. The review should also focus on the protection of the first wife's standard of living. It is not uncommon for first wives to be forced to accept a lower standard of living or to end their marriage because of their husband's polygamy.

40 CEDAW was adopted on 18 December 1979, entered into force on 3 September 1981, and Indonesia ratified it in 1984. The ICCPR was adopted on 16 December 1966, entered into force on 23 March 1976, and was ratified by Indonesia in 2006.

41 The CRC was adopted on 20 November 1989, entered into force on 2 September 1990, and was ratified by Indonesia in 1990.

42 CEDAW Article 2.

43 ICCPR Article 3.

44 ICCPR Article 15.

Right to Equality

The laws and regulations on and the practice of polygamy also violate the articles of CEDAW regarding equality. CEDAW affirms equality to all people, men and women, within marriage. Article 16 of CEDAW states that:

Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.

Article 59 of the Kompilasi states that the consent of a wife can be dispensed with when certain conditions, which often do not concern the wife, are met. Moreover, even in the case of the absence of any stated criteria, judges are not required to see whether or not the consent of the wife is given sincerely. Although almost all of the women interviewed said that they agreed with the laws that allow polygamy, they also stated that if their own husband wanted to marry an additional wife they would object. This suggests that although not many wives would sincerely consent to their husband's proposal for polygamy, husbands can in court still obtain the required consent from their wives. This illustrates an inequality. In practice, polygamy seems to be considered as a man's right, leaving women little choice but to agree. Saying 'no' can mean the end of the marriage on which they are often financially dependent.

In this context, the Law on the Elimination of Domestic Violence (UU Penghapusan Kekerasan dalam Rumah Tangga No. 23/2004) needs to be mentioned. It provides detailed rules in relation to domestic violence and categorises violence into four types: physical, mental, sexual and neglect (*penelantaran*) of financial support and childcare.⁴⁵ A polygamous marriage that results in a wife suffering can be considered as a form of mental violence. Researchers such as Nurmila and Brenner have pointed to polygamy having such effects on existing marriages.⁴⁶ Nonetheless, it

45 See Arts. 5, 6, 7, and 8 of UU PKDRT. See also Ratna Batara Munti, *Advokasi Kebijakan Pro Perempuan: Agenda Politik untuk Kesetaraan dan Demokrasi*, (Jakarta: Yayasan TIFA dan PSKW Pasca Sarjana UI, 2008).

46 See, for example, Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (London and New York: Routledge, 2009); Syzanne Brenner, 'Holy Matrimony? The Print of Politics of Polygamy in Indonesia', in Andrew N. Weintraub, *Islam and Popular Culture in Indonesia and Malaysia* (London

seems that rather than referring to and considering such conventions and Law No. 23 and viewing polygamy as a form of domestic violence, judges in the cases I studied tend to consult fiqh doctrines and Qur'anic verses, and apply the rules in the Kompilasi loosely.⁴⁷

5.2 THE REQUIREMENT TO WEAR A JILBAB

If we refer to CEDAW and ICCPR, the requirement by the state to wear a jilbab may violate human rights. The violated rights include, at the very least, the right to freedom of religion and the right to freedom of expression and equality.

Right to Freedom of Religion

The ICCPR, which was ratified by Indonesia in 2006, states that no one shall be subject to coercion which would impair his (or her) freedom to have or adopt a religion or belief of his (or her) choice (ICCPR Art. 18).⁴⁸ The UN HRC's (Human Rights Committee) general comment No. 22 was issued to clarify the article and states that governments can limit the right of freedom of religion only when it is necessary to protect public safety, public order, health or the fundamental rights and freedom of others. Any restriction must be non-discriminatory and proportionate.⁴⁹ The requirement to wear a jilbab violates the right of freedom to religion, as the state has limited the right to freedom of one's religious conviction. In this respect I agree with Asma Jahangir, who argues that in Aceh the state has forced its citizens to conform to one religious interpretation of proper attire without the freedom to choose.⁵⁰ However, even within Islam opinions differ about the obligation to wear a jilbab because the Qur'anic

and New York: Routledge, 2011), 212–234; and, Naoko Yamada, 'Intertwining Norms and Laws in the Discourse of Polygamy in Early Twentieth Century West Sumatera', in Yoko Hayami (ed.), *The Family in Flux in Southeast Asia: Institution, Ideology, Practice* (Japan: Kyoto University Press, 2012), 63–86.

47 See Euis Nurlaelawati, *Modernization, Tradition and Identity*, 178–179.

48 ICCPR Article 18.

49 General Comment No. 22, UN HRC.

50 As quoted in Human Rights Watch's report on the application of Sharia in Aceh, the UN special rapporteur on freedom of religion and belief, Asma Jahangir, is of the opinion that the state has violated international human law when handing out religious sanctions to people that do not abide by religious doctrines. He stated that 'the use of coercive methods and sanctions applied to individuals who do not wish to wear a religious dress of a specific symbol seen as sanctioned by religion is generally in violation of international human law'. See Human Rights Watch, *Policing Morality* (2010), 64–65.

verses regarding the requirement to wear a jilbab can be interpreted in different ways.⁵¹ Muslim women, therefore, should be able to choose what to wear according to their own religious beliefs. The state has an obligation to protect women's right to choose.⁵²

Right to Freedom of Expression and Equality

Article 3 of the ICCPR states that men and women should enjoy equal access to all civil and political rights.⁵³ It affirms the equality of all people. It also protects freedom of expression through symbolic signs, including through clothes, and the freedom to appear in public without fear. CEDAW also deals with these matters and states that the state must 'refrain from engaging in any act or practice of discrimination against women.'⁵⁴

Even though, and in contrast to cases in Aceh, the regulation on wearing a jilbab in Cianjur applies only to civil servants and its application is not as strict as that in Aceh, controlling the ways women dress is a violation of human rights. The state should protect every citizen's behaviour as long as it does not harm public life. The view that 'inappropriate' women's dress constitutes a moral hazard is weak and lacks evidence; it cannot be taken as a basis for controlling the bodies of citizens, i.e. women. The state requiring women to hide their bodies constitutes female oppression, discrimination and gender inequality, and disadvantages those who do not abide by the rules. Furthermore, although there is no clear evidence of resistance from women in Cianjur, the state controlling ways people dress is a violation of their right of expression in the public sphere. Mulia, for example, highlights this and states that Sharia-influenced local regulations 'strengthen the subordination of women, limit their right to choose how they dress, limit their room to move freely and mobility, and limit their activities at night'.⁵⁵

51 For the discussion of different views on the jilbab see generally Jamal A. Badawi, 'The Muslim Woman's Dress According to the Qur'an and Sunnah', Islamic Propagation Centre International, 1998. See also S. Mutawalli ad-Darsh, *Hijab or Niqab: Muslim Women's Dress*, Islamic Book Trust, 1997. In Indonesia, different views also exist among Muslim scholars. Quraish Shihab, for example, is of the opinion that the jilbab is not an obligation. See Quraish Shihab, *Tafsir al-Misbah* (Jakarta: Lentera Hati, 2002), 32, and *Wawasan al-Qur'an* (Bandung: PT. Mizan Pustaka), 228.

52 ICCPR Article 18(1). For a good discussion of this see C. Evans, *The Right to Freedom of Religion under International Law* (Oxford: Oxford University Press, 2001).

53 ICCPR Article 3.

54 CEDAW Article 2.

55 See Musdah Mulia, 'Perda Shariat dan Peminggiran Perempuan', a paper presented

5.3 RECENT LEGAL DEVELOPMENTS, HUMAN RIGHTS AND GENDER NOTIONS: JUDICIAL REVIEW TO PROTECT THE RIGHTS OF WOMEN AND CHILDREN

Gender and women's rights activists affiliated to a number of institutions and NGOs, such as Rahima, Fahmina, Puan Amal Hayati, the Komnas Perempuan (Women's National Commission), and the LBH APIK (Legal Aid Centre for Women), have struggled to improve women's legal status. They have directed their activism not just at the state, but also at their own Islamic communities. As White notes, they have sought to change gender attitudes at both the intellectual and the grassroots level.⁵⁶ They hold seminars to disseminate ideas on gender equality and to challenge traditional interpretations of Islamic teaching, and they train men and women to be 'gender sensitive' in their actions and ideals.⁵⁷ With the same aim, they also publish journals focusing on gender issues. In doing so, they attempt to contribute to the public debate and public policy on women and gender issues.

Among the significant attempts made by these women's rights activists were the proposal for a Counter Legal Draft of the Kompilasi and a proposal for a law on the elimination of domestic violence. Unfortunately the Counter Legal Draft was dismissed. Its provisions were too controversial.⁵⁸ The draft on the elimination of domestic violence was issued in 2004 as Law No. 23/2004.

Recently two well-known Indonesian women have sought judicial review in response to what they consider to be a gender bias and the subordination of women in the decisions of judges. One judicial review is sought by Halimah, the ex-wife of Bambang Trihatmojo, one of the sons of former President Suharto. She felt that she had been treated unfairly in court after she rejected her husband's petition to divorce her on the grounds of continuous dispute. She believed that the decision made by the religious court to approve her husband's petition had no appropriate legal basis and had harmed and subordinated her. She therefore appealed.

at an Indonesian Conference on Religion and Peace, dated 11 August 2006, www.icrp-online.org (accessed 25 October 2012).

56 Sally White and Maria Ulfah Anshor, 'Islam and Gender in Contemporary Indonesia', 139.

57 See *ibid.* See also Arskal Salim, *Demi Keadilan dan Kesetaraan*, 23–40, and Burhanuddin and Oman Fathurrahman, *Tentang Perempuan Islam: Wacana dan Gerakan* (Jakarta: Gramedia Pustaka/ PPIM, 2004), 113–152. See also a number of policy reports written by The Asia Foundation on the programme of women's empowerment at <http://asiafoundation.org/>.

58 See Euis Nurlaelawati, *Modernization, Tradition, and Identity*, 125–130. See also White and Anshor, 'Islam and Gender in Contemporary Indonesia', 146.

The appellate court accepted her arguments and overruled the decision of the first instance court. After Halimah had won her case in the appellate court, Bambang filed a case with the Supreme Court, which rejected his appeal. He did not give up and asked the Supreme Court to review the decision. Consequently, the Supreme Court decided to revise its decision and approved the petition to divorce Halimah. Yet, Halimah did not give up either. She scrutinised the legal arguments used by the judges and decided to appeal to the Constitutional Court. She referred to Article 39(2f) of the Marriage Law No. 1/1974, which is in accordance with Article 116 of the *Kompilasi*. Both regulate the procedures and grounds for divorce and stipulate that one of the grounds on which a petition for divorce may be approved is a protracted or continuous dispute between spouses. Halimah argued that nowhere is it specified in detail what the conditions for a continuous dispute are. In other words, she questioned the type of dispute that the judges might consider to be valid grounds for divorce.⁵⁹ Halimah admitted that she had had several disputes and arguments with her husband, but insisted that the source of their discord was the fact that her husband had married another woman, Mayangsari, a famous singer.⁶⁰ She requested the annulment of the article that laid down protracted or continuous dispute as a valid basis for divorce. However, Halimah's attempts were unsuccessful as, after several hearings and discussions, the Constitutional Court rejected her request.⁶¹ According to Mahfud MD, the chairman of the Constitutional Court, the article should be retained to provide a legal recourse for couples who, due to continuous disputes, cannot achieve the sacred purpose of marriage.⁶²

The other judicial review was sought by Machicha Muchtar, the unofficial ex-wife of Murdiono, a former state secretary (*Sekretaris Negara*). The intention of her request was to protect, besides the rights of women, the rights of children. For a long time Machicha had not been able, despite many attempts, to obtain legal documents for her son, born during her unofficial marriage with Murdiono, that stated a legal relationship to his biological father. She was married to Murdiono in 1993 without registration and bore him a baby, named Muhammad Iqbal Ramadhan. At the time, Murdiono was tied by the marriage to his first wife. Having married informally, Machicha was not considered a

59 'Halimah Kamil Files Judicial Review', *The Jakarta Post*, 11 July 2011.

60 'Halimah Agustina Kamil Gave Evidence in Judicial Review of Act of Marriage', www.mahkamahkonstitusi, 21 July 2011 (accessed 7 August 2012).

61 Ibid. See also 'Gugatan Ditolak MK, Halimah tak Akan Rujuk', *Kapanlagi.com*, 27 March 2012 (accessed 12 August 2012).

62 'Gugatan Ditolak MK, Halimah tak Akan Rujuk', 27 March 2012.

legitimate spouse and had difficulty obtaining legal documents for her son, including a birth certificate. Worse still, later Murdiono divorced Machicha according to Islamic law and refused to recognise Iqbal as his son. He paid no financial support for Iqbal. Machicha turned to a religious court in 2008 to ask for an *isbat nikah* (a legal and official confirmation of her marriage) and for legalisation of the status of her son. She was not able to prove the existence of the marriage contract, since Murdiono refused to appear. Hence, she failed to obtain the certificate of marriage confirmation and to obtain formal recognition of her child's legal relation with his biological father.⁶³ The court can provide an *isbat nikah* only if both parties agree of their own free will that they have concluded an Islamic marriage.

Machicha decided to turn to the Constitutional Court for judicial review of Article 43 of the Marriage Law that, according to her, harmed her and her son's interest, and which regulates the legal status of children and their relations to their mother and father. It states that children born out of wedlock only have a legal relationship with their mother and their mother's relatives. In relation to this issue, Article 4 should also be mentioned, which states that a legal child is a child born during the existence of an official marriage, has been conceived during such a marriage even if the birth takes place after the dissolution of the marriage, or if he or she is born as a result of technological reproduction such as in vitro fertilization. Machicha won her case. The Constitutional Court decided to amend Article 43 to the effect that children born out of wedlock also have a legal relation to their biological father if medical technology can convincingly prove his biological paternity.⁶⁴ The court took the position that it is not fair and proper to pronounce or decree that children born out of wedlock have a legal private relationship with only their mothers and thus to free men, who have had sexual intercourse that resulted in a pregnancy, from financial or custodial responsibilities to their children.

This decision gave rise to many negative reactions, since it was considered to deviate from classical Islamic jurisprudence. Machicha's legal expert, Nurul Irfan, who is a lecturer at the Faculty of Sharia and Law of the State Islamic University, Jakarta, was criticised by his senior colleagues, who accused him of having gone far beyond *fiqh*.⁶⁵ Muslim organisations such as the MUI (Indonesian Council of Religious Scholars)

63 Interview with Nurul Irfan, Jakarta, May 2012.

64 'MK Sahkan Status Anak di Luar Nikah Resmi', *Kompas*, 19 February 2012 (accessed 11 July 2012).

65 Interview with Nurul Irfan, Jakarta, May 2012.

also opposed the decision. The commission of law and legislation of the MUI claimed that adultery was being legalised because of the Constitutional Court's decision, which stressed that the words 'out of marriage' not only referred to unregistered Islamic marriages but also to adultery. It also asserted that the court had gone beyond Sharia and beyond what was actually being appealed by the petitioner. While Machicha had asked for recognition of the legal status of her son born out of her unregistered marriage, the Constitutional Court had dealt with a broader issue, the legal status of all children born out of wedlock.⁶⁶

The MUI decided to issue a fatwa. Although the basic references of the fatwa are the Qur'an, Hadith, and fiqh doctrines, and the fatwa affirms the absence of a legal relationship between children and their biological fathers, it introduced a new element to accommodate the interests of the child. The fatwa mentions that the government is entitled to force male adulterers to provide proper financial support for their children, and to award property or estate through a *wasiat wajibah* (obligatory bequest) after their death. The MUI took care to add that this did not mean the legalisation of relations between children and their biological fathers, but that the provision was merely intended to protect the rights of children.⁶⁷

In contrast, the National Commission of Child Protection (Komisi Nasional Perlindungan Anak or Komnas Anak) applauded the decision and considered it to be a good solution to one of the biggest problems it regularly had to deal with. Its chairman, Arist Merdeka Sirait, stated that 'in 2011, there were 38 cases on the legal status of children born out of wedlock brought to us [Komnas Anak], in which the private rights and custodial right of the children involved were questioned'. He hoped that those cases could now be resolved and children would get their basic rights.⁶⁸

What Halimah and Machicha did, in my view, constitutes the seed of legal development and demonstrates the awakening of Muslim women's legal awareness in general. It also shows how notions of human rights and gender have gradually started to spread. Their cases demonstrate that there is a public debate on gender issues in Indonesia. They also send the message that, following international standards on the principles of equality and justice, women's empowerment results in stronger legal positions.

66 'Keputusan MK Kebablasan', *Kompas*, 9 April 2012 (accessed 23 July 2012).

67 See Fatwa MUI No. 11/ 2012.

68 'MK Sahkan Anak Lahir di Luar Nikah Resmi', *Kompas*, 19 February 2012 (accessed 11 July 2012).



Circuit court hearing conducted by the Islamic court of Tangerang (by courtesy of Islamic court of Tangerang)

6 Conclusion

To address women's subordinate position as prescribed by classical Islamic family law, the Indonesian government initiated legal reforms and introduced new rules at the national level, such as the 1974 Law of Marriage and the 1991 *Kompilasi Hukum Islam*, to improve women's standing in family law. For example, a husband's right to unilateral divorce was limited, polygamy was restricted, and women's rights to property were strengthened through the rule of joint property within the marital bond. There are, therefore, cases related to divorce, post-divorce spousal alimony and *isbat nikah* where women have benefited, although these remain few and far between. The increase in women's legal knowledge and better services provided by courts, influenced by both national concerns and international conventions, have brought women better access to justice. Almost all their divorce petitions end in approval and they are now better able to deal with their divorce proceedings because of recently developed programmes of 'prodeo' and circuit courts. Due to the awakening of judges' gender sensitivity they can also obtain their rights to spousal alimony.

However, despite the reforms, this research on proceedings at three religious courts in Cianjur and Banten has shown that women continue to remain subordinate and weak in cases of polygamy, custody and post-divorce alimony for their children. In the case of polygamy, the strict interpretation of the Qur'an by the judges of religious courts and the lenient application of Islamic law interpreted by the state often result in decisions which go against the interests of Muslim women. The ambiguous legal conception of *maslahat* (public interest) and the absence of a proper mechanism to enforce judges' decisions can have the same negative consequences for women in court cases concerning their right to custody or right to alimony for their children.

The new local Sharia regulations can worsen gender injustice and substantially harm women in the public sphere. Moreover, from the perspective of international legal standards, they do not conform to rights of equality, freedom of religion and expression, protected by the international covenants that have been ratified by Indonesia. Such regulations need to be reviewed because they curb women's freedom to act and violate the protection of human rights in general.

