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Indonesian and German views on the Islamic legal discourse on gender and civil rights

Edited by
Noorhaidi Hasan and Fritz Schulze

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Cover illustration: Mesjid Gedhe Kauman, the royal mosque of Yogyakarta (Photo: Fritz Schulze).

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Table of content

Debating gender, woman, and Islam: Indonesia's Marriage Law of 1974 revisited

Noorhaidi Hasan

Introduction

The relationship between gender, woman and Islam has long been debated in Muslim countries, including Indonesia. Questions are raised concerning the role played by religion and legal institutions in defining the male and female relationship and their rights and obligations when bound together in a marriage contract. Less than one year after her independence, Indonesia issued the Law No. 22 of 1946 requiring Muslims register their marriage, divorce and reconciliation. This law was issued to control arbitrary marriages and divorces among Muslims. After Suharto came to power as the replacement of Sukarno in 1966, more laws on Muslim personal status were enacted. In the early 1970s Suharto's government proposed a marriage law requiring civil registration of marriages and court approval for divorce and polygamy. This bill was proposed as part of the state project of modernizing the practice of Islamic law within the framework of the Indonesian legal system – in response to an increasing awareness among Indonesian women of gender and their equal status with men before the law.

Since it had been perceived as Suharto's New Order project to control Muslim politics, the proposal set off a wave of protests from various spectrums of Muslim forces. They believed that this proposal would offend their religious beliefs, as it incorporated some notions contradicting to Islamic rules in favour of gender and human rights. In fact, the bill's tight regulation of polygamy was strongly opposed by *'ulamā'*, who sought to maintain the practice. The same holds true for legal consequences of child adoption and for the allowance of inter-religious marriage. The issue of inter-religious marriages became highly charged politically mainly as a consequence of the interpretation of article 2(1–2) of the law, which says that "a marriage is legitimate if it has been performed according to the laws of respective religions and beliefs of the parties concerned"[1].

The peak of the Muslims' protest was seen when the Indonesian Parliament discussed the bill. They staged a massive demonstration and occupied the parliament building. No less than 700 demonstrators were involved. In this situation, a lobbying

1 Cf. Noorhaidi Hasan 2011: 136–156.

session was held between Muslim political groups represented by the United Development Party (PPP) and the government represented by the military faction in the parliament.[2] In this lobby, a compromise was reached by agreeing to the removal of some articles pertaining to the issues considered contradictory to Islamic principles. The revised draft was then passed by the parliament on 22 December 1973 and ratified as the Marriage Law No.1 of 1974.

The enactment of the Marriage Law of 1974 served as a catalyst of the dissemination of gender discourse and, although applying to all Indonesian regardless of their religions, of reactualization of Islamic law in Indonesia. Women empowerment and gender equality were considered to be an inherent part of both the Islamic teaching and the national strategy of development aimed at achieving prosperity and justice for all, or what is called *maṣlaḥa mursala* in classical Islamic legal doctrine. During the 1980s the discourse of reactualization of Islamic law resonated loudly and touched on such sensitive issues as inheritance. Munawir Sjadzali, the then Minister of Religious Affairs, proposed an equal proportion in inheritance between men and women, in contradiction to the 1:2 ratio of classical proportion of Islamic jurisprudence.[3]

In tandem with the mounting calls for gender equality, President Suharto issued the Presidential Instruction No. 1/1991 on the Compilation of Islamic Law in Indonesia (KHI), which was expected to strengthen the legal position of the marriage law, serving as the main and standardized reference for judges in religious courts when dealing with Muslim personal legal issues put before them. Compared to the Law of Marriage, the Kompilasi is more comprehensive as it regulates not only marriage and divorce but also inheritance. However, while the Kompilasi has a lower legal standing as it was issued under Presidential Instruction, the Law of Marriage has firm legal binding as it was issued as a law. Although, looking at its call or name, the Law of Marriage does not explicitly reflect the introduction of Islamic law on familial issues. However, when looking at its contents we could clearly see the incorporation of Islamic doctrines in it.

Polygamy, divorce and marriage registration

Under Islamic marital jurisprudence, a Muslim man is allowed to practice polygamy and he therefore can have more than one wife at the same time, up to a total of four. The Law of 1974 permits polygamy and but limits its practice. To limit it, the Law puts a number of conditions under which polygamous marriages are allowed. Permission for such a marriage has to be obtained from a religious court, and the permission will be based on the consent of the first wife of the petitioner (Art. 3[2]). The court verifies the reasons of why a husband proposes polygamy. The valid rea-

2 For a detailed account on this, see, i.e., Cammack 1996: 45–73 and Bowen 2003.

3 On this issue, see Saimina 1988; Ilyas 2006: 223–240; see also Feener 2007.

sons include three conditions of the husband's existing wife, i.e., that she is unable to perform her duties, that she suffers from some physical defect or incurable disease, or she is unable to bear descendants (Art. 4). The law also stipulates that such a marriage can only be conducted if the husband is financially capable of maintaining co-wives and their descendants and if he is prepared to treat his co-wives equally (Art. 5).

Like polygamy, divorce is also restricted by the Marriage Law of 1974. The law basically allows divorce, but requires it be performed before court. For Muslims, this rule contradicts the classical Islamic marital doctrines which, as understood by Muslims, award husband a superior right and requires no intervention from other parties for exercising this exclusive right. The approval of a court is therefore not needed. The man can exercise his right without having to provide any reason. Before 1974, the rule of divorce was much lighter for men as divorce could be unilaterally effective when a husband uttered the formula of divorce. He was only required to come to the office of religious affairs at a sub-district level (KUA) to register it.[4] A husband remained to have superiority. Meanwhile, a Muslim woman had to appear before a judge and assure the judge that her husband had committed an act violating their marital agreement, called *ta'līq ṭalāq*, in case her husband had refused to divorce her. After the ratification of the law, both a man wanting to repudiate his wife and a woman wishing to file for divorce, known as *khul'*, must appear before a judge and convince the judge about the availibility of one or more sanctioned reasons for divorce. While the rule of divorce remained the same for women, it became stricter for men. Both of them share the same grounds to be presented at court and to be verified by judges. Judges can order a husband to repeat the formula of divorce or grant his wife's request to have the marriage annulled, when they are convinced that a valid ground exists.

In tandem with its attempts to eliminate the practice of polygamy and arbitrary divorce, the Marriage Law of 1974 has a provision of marriage registration. As mentioned before, the article 2 (1) of the law stipulates that a marriage is legitimate if it has been performed according to the laws of respective religions and beliefs of the parties concerned. Both spouses must have the same religion in order to get married legally and they will experience two types of ceremonies. The religious ceremony will be performed first, followed by a civil ceremony, i.e., a registration of the marriage before officials of the local Office of Religious Affairs (Kantor Urusan Agama/KUA) for Muslims or of the Civil Registry Office for non-Muslims. The Office of Religious Affairs or Civil Registry will in turn issue a Marriage Certificate, which is evidence that the couple is legally married.[5] Unregistered marriage of a couple is not considered to be a valid marriage according to the state. This lack of a legal status will affect the resolutions of divorce, division of marital properties, alimony, and child custody.

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4 Bowen 2003. See also Nakamura 1983.

5 Ibid.

It is of interest to note that the Supreme Court of Indonesia tried to overcome the difficulty of the registration of inter-religious marriage by issuing circular letters in 1975 and 1979 instructing the civil registry to conclude and certify inter-religious marriages. The status of interreligious marriages remains problematic, however, since the Ministries of Justice, Religion and the Interior issued a joint decision in 1987 allowing the Religious Affairs Office at the sub-district level only to certify Muslim births, marriages, divorces and deaths, thus implicitly denying the registry of inter-religious marriages.[6]

Mounting calls for gender equality

Introducing limitations on polygamy and divorce and requiring marriage registration, the Marriage Law of 1974 has debunked the traditional discourse and practice of Islamic law in Indonesia. Many progressive women in Indonesia have long felt injustice in Muslim legal practices pertaining to marriage and divorce. Their voices echoed louder and louder amid the rise of Muslim feminist movements actively voicing gender equality since the 1990s. In fact, several foundations concerned with gender and women issues were established in Yogyakarta in the 1990ss. These include Rifka Anisa and LSPAA (Institute for the Study of Women and Children). The former served as the first woman crisis centre calling for protection of woman rights in Indonesia and the latter focused on disseminating gender discourse and children's rights. In 1994, the Muslim woman organization affiliated to the largest traditionalist Muslim organization Nahdlatul Ulama (NU), Muslimah, in Jakarta set up a study group on women and Islam and published a book on the emancipation of women. In the same year, the Association of Pesantren and Community Development (P3M) launched a programme of *fiqh al-nisā'* (Islamic Jurisprudence of Women). The program aims to strengthen the rights of women and their status in Islam through *ḥalaqa* (training) and the publication of brochures, posters and books.[7] The emergence of such NGOs inspired the establishment of women study centres (PSW) at Indonesian universities, the most prominent of which is the PSW of Sunan Kalijaga State Islamic University (UIN) of Yogyakarta established by Siti Ruhaini Dzuhayatin and her colleagues. Beside these, other centres including Kepak, Kapal Perempuan, have been established recently and shared the same notions with the centres established formerly and observed the rules on the gender issues.

The members of those centres were still unsatisfied with provisions in the law deemed to be in contradiction with the principles of gender equality and women's rights in Islam as well as universal norms. They questioned why in countries like

6 Hooker 2008: 14–15.

7 Ala'i Najib, 'Feminis Muslim Indonesia (Aliran Pemikiran Antara 1990–2000)', http://www.scribd.com/doc/ 41717386/feminisme.

Indonesia where Islam is observed by the majority of its citizens gender equality remains a hindrance. Meanwhile, to their understanding, Islam has a clear idea of gender equality. In more explicit way, they therefore thought that polygamy is to be abolished and women are granted equal rights and obligations with men when bound in a marriage contract. They also called for more explicit legal protections for women as consequences arising out of their marital breakup.[8] Such demands certainly invited fierce reaction from conservative Muslim groups who think the provisions of the law have already deviated too far from the norms of classical Islamic jurisprudence which give privilege to men in their marital relationships.

Despite these challenges, gender and women's right activists in Rahima, Fahmina, Puan Amal Hayati, and LBH APIK (legal aid centre for women), to mention but a few NGOs, have consistently struggled to improve women's legal status. They have addressed relevant issues both at the state level as well as at the grass-roots.[9] They held seminars, workshops and trainings to disseminate gender equality and liberal interpretations of Islamic teaching in favour of women, involving a number of relevant groups including judges, marriage registry officials, and religious authorities. They also opened discussions with a number of female litigants to hear from them their experiences in resolving their familial cases from which the centres learned how their training has or has not affected the judicial discretion of judges that would benefit women. The Centre of Women Studies of State Islamic University, Yogyakarta, for an example, invited female litigants to share their experiences with them and asked them identify the judges that resolved their cases. By working to improve 'gender sensitivity' among their country fellows, they have contributed significantly to public debates and national policy on women.[10] Collaborating with and funded by the Asia Foundation, the centre also organized trainings on the awakening of gender sensitivity among judges. A number of Islamic courts were involved in the trainings and the trainings have to some extent brought about the rise of gender awareness among judges as can be seen in their decisions.[11]

They had also made clear contributions to strengthen the notion of gender equality. Among their contributions that significantly influenced the discourse and debate on women was the so-called Counter Legal Draft of the Compilation of Islamic Law or Kompilasi Hukum Islam (CLD-KHI) proposed by a task force led by Siti Musdah Mulia, the chair of the gender mainstreaming committee in the Ministry of Religious Affairs of Indonesia. As slightly mentioned above, the Kompilasi Hukum Islam is a legal reference to be used, beside the Law of Marriage, by judges of the Islamic courts and therefore only applies to Muslims. Issued under the Presidential Instruction, the Kompilasi Hukum Islam consists of three books on marriage, inheritance and endowment and complements the legal references of judges for the issues of

8 See Nurlaelawati 2010.
9 White and Anshor 2008: 137–158.
10 Ibid. See also Salim et.al 2009: 23–40; Burhanuddin and Fathurrahman 2004: 113–152..
11 For further account on the trainings, see Salim et.al 2009: 23–60.

inheritance and endowment arising within the Muslim Community. One of the points that the draft law emphasises is the idea of basic equal rights of human beings. This idea is framed within the *maqāṣid al-sharīʿa* or purposes of the sharia, which can be extracted into such basic principles as justice, equality and dignity.[12]

By looking to the *maqāṣid* as an overarching inspiration in proposing the legal reform of the family, they called for husband and wife to be declared equal heads of family. They also mandated mutual obedience of spouses and adherence to the ideas of mutual obligations, duties and respect. In classical jurisprudence, the male can extract obedience from a wife for all sorts of things, and if she doesn't obey she is declared disobedient and can be reprimanded, including being physically admonished (*nushūz*). Another important feature of the LCD-KHI is that both women and men may marry non-Muslims. Because of these progressive provisions, the draft was seen too controversial[13] and thus refused by Muslims from different spectrums, including the Indonesian Council of Ulama (MUI), to be submitted for national discussion.[14]

Feminists movements that have sprung up paid considerable attention not only to the Kompilasi Hukum Islam which, as noted above, applies only to Muslims, but also to the Marriage Law of 1974. As will become clear below, the Law of Marriage has become the object of legal attempts of reviews by some litigants. Some of its articles have also provoked feminists and activists to propose amendments.

Judicial reviews on the Marriage Law: Cases of Machicha and Halimah

The struggle by women's rights activists to improve gender sensitivity has brought about some significant changes in Indonesian women's awareness of their equal legal status and rights vis-a-vis men. In addition to the attempts by groups of feminists and activists to amend the laws, attempts had also been made by private persons. They did these by filing cases to higher courts when they felt they were treated unjustly by lower courts, requesting higher courts to revise the lower courts' rulings. Only few of them filed to the Constitutional Court (Mahkamah Konstitusi) established in 2003 to review rules of laws deemed to contradict or violate the constitution. In fact, even fewer popular women went a step further by applying judicial reviews on articles of the Marriage Law of 1974 to the Constitutional Court.[15]

Halimah, the ex-wife of Bambang Trihatmojo, the son of the former President Suharto, is one of these few women who applied judicial review to the Constitutional Court after she felt that she was treated unjustly. She asked the Court to

12 Nurlaelawati 2010: 125–130.
13 For the detailed points that are considered as controversial, see Yanggo 2005.
14 See Nurlaelawati 2010: 125–130. Cf. White and Anshor 2008: 146.
15 See Nurlaelawati 2013.

review the article 39 (2f) of the law. This article regulates the procedures and grounds for divorce, stipulating that one of the grounds that a petition for divorce may be approved is a protracted or continuous dispute between spouses. Halimah argued that this provision is vague as it does not specify the conditions that result in continuous dispute. In other words, she questioned the type of dispute that the judges might consider to be valid grounds for divorce.[16] She admitted that she had several disputes and arguments with her husband, but insisted that the source of the dispute was the fact that Trihatmojo, her husband, had married a famous singer, Mayangsari.[17] Proposing this article be reviewed, she did not mean to argue against the article. However, since the article has been strictly interpreted by judges she demanded the article be eliminated.

Unfortunately, although she obtained considerable support from various parties, including some scholars and activists such as Sinta Nuriyah Wahid, Siti Musdah Mulia and Bismar Siregar, she could not assure the judges to annul the article. In fact, after several hearings and discussions, the Court rejected her petition, arguing that the article in question was, in principle, issued to legally protect human rights and specifically rights of women within marriage. Mahfud MD., the chairman of the Court argued that the article should be maintained to provide a legal recourse for a couple which, due to continuous disputes, could not realize the sacred purpose of marriage.[18] He seemed to be very consistent with the notion of 'broken marriage', which, according to Bustanul Arifin, is the condition that could be highly considered regardless of the parties that initiate or generate the situation.[19]

Halimah was not the only woman who took this step. In fact, a similar endeavour to review provisions in the Marriage Law of 1974 was also taken by a quite famous Dangdut singer, i.e., Machicha Muchtar. Machicha was the ex-unofficial wife of Murdiono, former State Secretary of Indonesia. For a long time Machicha had been unable to obtain a legal status for her son in relation to Murdiono, his biological father. This case began when in 1993 Machica was unofficially married to Murdiono and few years after bore him a baby, named Muhammad Iqbal Ramadhan. At the time, Murdiono was tied with a valid marriage with his first wife. Having married informally, Machicha was not considered a legitimate spouse and had difficulties obtaining legal documents for her son, including a certificate of birth. Worse still, later Murdiono divorced Machicha according to Islamic law and did not recognize Iqbal as his son nor paid financial support for him. In order to solve these problems, Machicha turned to a religious court in 2008 to ask for *isbat nikah* (a legal and official confirmation of her marriage) and for legalization of the status of her son. She

16 'Halimah Kamil files judicial review', *The Jakarta Post*, July 11, 2011, accessed in 5 May 2013.

17 'Halimah Agustina Kamil gave evidence in judicial review of Act of Marriage', www.mahkamahkonstitusi, go.id, 21 July 2011, accessed in 14 April 2013.

18 'Gugatan ditolak MK, Halimah tak akan rujuk', *Kapanlagi.com*, March 27, 2012, accessed in 12 August 2012.

19 See Ahmad et.al 1996.

was unable to prove her marriage contract with Murdiono, since the latter refused to show up. Hence, she failed to obtain the certificate of marriage confirmation and to obtain a formal recognition of her child's legal relationship with his biological father.[20] The court can only provide an *isbat nikah* if both parties agree, on their own free will, that they have concluded an Islamic marriage and if they have no dispute over the issue.

Having failed to win the case, Machicha filed a petition to the Constitutional Court on article 43 of the Marriage Law of 1974 that according to her interpretation was the source of the problems she was facing. The article stipulates that children born out of wedlock only have a legal relationship with their mothers and their mother's relatives[21], and it has prevented her from obtain the legal confirmation of her marriage with Murdiono and of the legal paternity of their son. Like Halimah, Machicha gained considerable supports from women activists and with the support of a number of legal scholars concerned with the protection of women and children rights she was confident that she won it. After several discussions and hearings and although one female judge objected to meet the petition, the Court decided to approve it and to amend the article. As a result, the rule that children born out of wedlock have a legal relationship to only their mothers and their relatives was amended to the effect that children born out of wedlock have also a legal relationship with their biological fathers if medical technology can convincingly prove their biological paternity.[22] The Court held 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 pregnancy, from financial or custodial responsibilities to their children.

The decision was celebrated by a number of groups such as the institution of the legal aid and the National Commission of Children Protection (Komisi Nasional Perlindungan Anak). The National Commission of Children Protection highly appreciated the Constitutional Court's decision and considered it as a good solution to one of the biggest problems that it regularly has to deal with. It is not an exaggeration if the Commission welcomed the decision with its excitement, as since its establishment it has been consulted by hundreds of mothers that felt injustice of the matter. The chairman of the commission, Arist Merdeka Sirait, informed that in 2011, there were 38 cases on the legal status of children born out of wedlock brought to the commission, in which the private rights and custodial right of the children involved were questioned. He stated that the amendment of the article would decrease such cases and hoped that those cases could now be solved and children would get their basic rights.[23]

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20 See Nurlaelawati 2013: 68.

21 See article 4 of the Marraige Law of 1974.

22 'MK sahkan status anak di luar nikah resmi', *Kompas*, 19 February 2012, accessed on 1 April 2013.

23 'MK sahkan anak lahir di luar nikah resmi', *Kompas*, 19 February 2012, accessed on 1 April 2013.

Some groups however saw the decision with different thought and considered it as having deviated from the classical Islamic legal doctrines. Reactions and criticism arose among Muslim scholars. The MUI, for instance, opposed the decision and reckoned it is to legalize informal (unregistered) marriage and adultery. They also questioned the substance of the decision which to them went beyond what was actually being appealed by the petitioner. They recalled that the petitioner questioned only the legal status of the petitioner's child born out of her unregistered (Islamic) marriage, and therefore the Court was not to deal with broader issues, that would include the legal status of children born out of wedlock.[24] They reminded the MK of having to be very careful and assertive about the ruling.

Having felt that the discursive reaction had been not enough to articulate their thinking that the decision by the Court violates Islamic legal doctrine, the MUI decided to issue a fatwa on the rights of children born out of wedlock. The fatwa offered the basic references of the Qur'an, Hadith, and *fiqh* doctrines and affirms the absence of legal relationship of children with their biological fathers. Nevertheless, although it affirms the established rule, it introduced a new interpretation to accommodate children interests. In detail, the fatwa asserts that children born out of wedlock have a legal relationship with only their mothers. They therefore do not have a legal relationship to their biological fathers, do not inherit from, and would not be financially supported by their biological fathers. It also states that children born out of wedlock are not to bear the sin of the adultery committed by their parents and requires the adulterer be sentenced to *ḥadd* (stoning) to keep legal genealogy. As to protect the children' rights, it urges the government to force male adulterers to provide proper financial support for their children, to award property or estate through *wasīya wājiba* (obligatory bequest) after their death. In the end, it avows that the sanction specified above is not intended to legalize relationship between children and their biological fathers, but merely to protect the rights of children.[25]

Proposal for amendment of the Marriage Law of 1974

In response to recurrent problems arising from ambiguous positions of the Marriage Law of 1974 on women and children and mounting demands for protection of women and children's rights, women rights activists affiliated to LBH-APIK called for an amendment of several provisions in the law.[26] On the basis of the principle of non-discrimination, protection of human rights and gender equality, they demanded rules on the registration of marriages be amended so that all Indonesian citizens are treated equally without any distinction based on religion. Therefore, according to

24 'Keputusan MK kebablasan', *Kompas*, 9 April 2012, accessed on 5 April 2013.
25 See Fatwa MUI No. 11/ 2012 .
26 LBH-APIK, 'Pokok-pokok pikiran usulan amandemen UU Perkawinan', at http://www.lbh-apik.or.id/amandemen_uu_pokok2_pikiran.htm, accessed on 20 May 2013.

them, article 2 (2) instructing that "every marriage is to be recorded in accordance with the existing legal rules" is to be amended. They propose it to read that 'every marriage must be recorded in certain registry units of the Ministry of Religious Affairs in accordance with the religion of respective parties in question'. The reason for this change is that article 2 (1) stipulates that every marriage is contingent on respective parties' religion, then the proper registration of marriages is arranged and conducted by different religious units that exist under the auspices of the Ministry of Religious Affairs.

Polygamy also became the object of their projects of amendment. They demanded the abolition of Articles 3, 4 and 5 of the Marriage Law of 1974 based on a reason that polygamy is an act that clearly subordinates and discriminates women. These articles are deemed contradictory to the principles of gender equality, anti-discrimination and anti-violence adopted by the Indonesian Constitution, which is in line with the principles adopted in international norms, especially the Universal Declaration of Human Rights (UDHR) and Covenant on Elimination against All Forms of Discrimination against Women (CEDAW). Polygamy is even considered to be one of the factors behind domestic problems experienced by women and children, who have suffered from physical, psychological, sexual and economic violence. Polygamy itself is believed to be a domestic violence legitimized by law and belief systems that exist in society.[27]

Demands for change are also addressed concerning the articles 7 and 11 of the Marriage Law of 1974. Article 7 stipulates that marriage is only permitted if a bridegroom has reached the age of 19 years (nineteen) years and a bride has reached the age of 16 (sixteen) years. According to the framers of the draft amendment, marriage is allowed if both parties are over the age of 18 (eighteen) years. The age distinction between men and women is believed to imply a gender bias subordinating women. The age of 18 years as that of maturity is proposed in reference to the law of child protection that administers that a person is considered as a child before he or she reaches at the age of 18. Meanwhile, article 11 stipulates that when a marriage dissolves women are subject to *'idda*, i.e., a period of waiting of 3 months for those not menstruating, of three times of being clean for those menstruating and of 4 months for those whose husbands die, during which they may not marry another man. Derived from the classical Islamic jurisprudence this rule is considered to be discriminative against women and, therefore, requires removal. In the draft amendment, the period of waiting is imposed for both parties and this is considered more appropriate because it ensures an equal treatment between men and women.[28]

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27 LBH-APIK, 'Usulan amandemen UU Perkawinan No. 1/1974 berikut argumen-argumennya', at http://www.lbh-apik.or.id/amandemen_UUP-usulan.htm, accessed on 20 May 2013. See also Amrie Hakim, 'Poligami masalah krusial dalam revisi UU Perkawinan', at http://www.hukumonline.com/berita/baca/hol9232/poligami-masalah-krusial-dalam-revisi-undangundang-perkawinan.

28 LBH-Apik, 'Usulan UU Perkawinan No.1/1974 berikut argumen-argumennya', at

More significant change is proposed to articles 31 and 34 of the Marriage Law of 1974 on the rights and status of husband and wife deemed to be discriminatory against women. The draft amendment requires that the rights and position of a wife is equal to those of her husband in both domestic and public spheres. Each party has the same right to take legal actions in public sphere and bear the same role and responsibility in their households. Article 34 of the law stipulates that a husband is obligated to protect his wife and bear all spousal alimony arrangements (*nafka*) in accordance with his ability, while a wife is responsible for managing domestic affairs of their household. This article is deemed responsible for the standardization of a stereotypical role division between men and women. Men are placed as the superior responsible for social and economic affairs for his family while women only have to deal with domestic affairs. Such a role division is one factor behind the impoverishment of women: making one party (the wife) economically dependent on the other party (the husband). In many cases of domestic violence, the victim (women) can not easily get out of the environment of violence as a result of economic dependency. While the ex-husband is required to pay alimony to his ex-wife, this provision has never been effective in forcing the ex-husband to pay the alimony and this remains contingent on the willingness of the ex-husband.

Attention is also given to article 43 of the Marriage Law of 1974 on children. This article stipulates that a child born out of wedlock has only a civil and legal relationship with his mother, as mentioned before. The draft amendment proposed that such a child has a civil and legal relationship with both his/her biological father and mother and family and it can lay claim at Court to obtain a recognition from the biological father through his/her biological mother. They also proposed that a child born as a result of an in vitro fertilization programme undertaken by a legitimate couple is the legitimate child of the couple and that the baby whose seeds deposited on the tube of another woman is a legitimate child of the couple. The main reason put forward by the framers of the draft amendment is that all children are entitled to gain recognition and protection of both father and mother in accordance with article 7 (1) of the Law No. 23 of 2002 on children protection. Another reason for this is the article 16 of CEDAW – by which Indonesia abides – that requires that a couple has the same rights and responsibilities in all matters relating to marriage, including guardianship, maintenance, supervision and adoption.

The National Commission for Women (Komnas Perempuan), which was born as a reform result in 1998, supported the effort made by women's rights activists to amend the Marriage Law 1974. In a seminar on 22 September 2011, for instance, this commission highlighted the urgency of the amendment of the law. The main argument put forward by Komnas Perempuan is that so many marriages have caused misery for women as a result of the vagueness of the articles in the law. In 2009 alone, for example, the agency received as much as 49 complaint cases related to unregistered marriages. Registration of marriage is believed to be a guarantee for a

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http://www.lbh-apik.or.id/amandemen_UUP-usulan.htm, accessed on 20 May 2013.

legal status and right of women when bound together in a marriage contract. Unregistered marriage is deemed to be one of the most focal causes behind the spread of polygamy. It is also believed to be the main factor behind the high rate of domestic violence that reached 143,586 registered cases in 2009.[29]

As in the case of Kompilasi Hukum Islam, the draft amendment of the marriage law spurred criticism from various spectrums of conservative Muslims. Hard-liners in the Hizb al-Tahrir Indonesia (HTI), for instance, assumed that the framework of the amendment cannot be dissociated with the ambition of liberal Muslim activists to undermine Islam and the Muslim Umma in Indonesia. This is considered to be their second step to achieve their goals after their failure in proposing the Counter Legal Draft of the Compilation of Islamic Law (CLD-KHI). In their opinion, the CLD-KHI openly attacked Islam, and therefore the draft amendment of the marriage law – as a continuation of the CLD-KHI – should be confronted at all costs as well. According to HTI, the reason to refuse the draft amendment is that the liberal activists standing behind it lost no courage to realize their dream of secularizing the country: They have attempted to infuse their liberal thoughts as reflected in the CLD-KHI into various legal products, including the Law on the Elimination of Domestic Violence (UU KDRT) and the Law on Children Protection (UU Perlindungan Anak).[30] Both laws are deemed to have deviated too far from Islam. HTI believes that the women's rights activists behind the laws are Zionist collaborators who also tried to legalize mixed marriages through the enactment of the citizenship law.[31]

HTI alleged that the initiators of the draft amendment were not satisfied with what they have achieved so far and went a step further by proposing the amendment aiming at annuling polygamy granted by the Qur'an. Their arguments associating polygamy with domestic violence are considered implausible since polygamy is believed to be an important mechanism to meet women's need for protection. In addition to these, HTI pinpointed that other provisions proposed in the draft amendment have also deviated too far from the sharia, including article 7 that reads "Marriage is permitted if a bridegroom has reached the age of 19 years and a bride has reached the age of 16 years" is to be replaced with "marriage is only allowed if both parties are over the age of 18 years". In addition to the above article, HTI also questioned the provision on the period of waiting for divorced women.[32]

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29 Http://www.komnasperempuan.or.id/wp-content/uploads/2011/09/Kertas-Konsep-Perubahan-Atas-Undang-Undang-Nomor-1-Tahun-1974-Tentang-Perkawinan-Disampaikan-Kunthi-Tridewiyanti-Komnas-Perempuan.pdf.

30 Kholda Naahiyah, 'Penghancuran keluarga melalui Amandemen Hukum Perkawinan', at http://hizbut-tahrir.or.id/2007/06/26/m accessed in 20 May 2013.

31 See 'UU Perkawinan (Mewaspadai kritik kaum liberal)', at http://hizbut-tahrir.or.id/2011/10/28/uu-perkawinan-mewaspadai-kritik-kaum-liberal/.

32 Ibid.

Conclusion

The discussions above demonstrate that questions about the legal status and rights of women in Indonesia are not fully settled yet. Pros and cons are still working between those aspiring for fundamental changes in various regulations concerning the personal status of women vis-a-vis men, especially the Marriage Law of 1974, and those wanting to maintain the status quo. For the latter, the law is even too progressive and its many provisions contradict the provisions in classical Muslim jurisprudence. Even though the end of this debate cannot be predicted, these pro-cons clearly show the dynamics of gender discourse, Islam, and legal thought in Indonesia.

The dynamics are not only clear among gender activists, but also within female litigants, particularly those who have the chance to be close to elite people. With the support of feminists and gender activists, few female litigants not only filed their cases to higher courts when they felt that the applied laws have not benefited them or when justice had not been achieved to overrule the rulings issued by lower courts. They also proposed judicial reviews to a recently established court, the Constitutional Court, on the applied laws. Although the petitions have not always been approved, the attempts of these few female litigants have demonstrated that women remained unhappy with the Law of Marriage and that the Law of Marriage remains worth revisiting. The actors of the reform of family law and the participants of the debate of the notion of gender and Islam therefore include not only state, *'ulamā'*, and legal scholars, but also women in person or in institutions.

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