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**Counter Legal Draft of the Compilation of Islamic Law
(Review of Marriage Law in Indonesia)**

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COUNTER LEGAL DRAFT OF THE COMPILATION OF ISLAMIC LAW (REVIEW OF MARRIAGE LAW IN INDONESIA)

Introduction

Through out the world, Islamic law and women have never been best friends. The Indonesia's Compilation of Islamic Law case is no exception. Actually, the Compilation of Islamic law in Indonesia is like a Family Law in Islamic countries. It is often released in order to strengthen women's role as an object to guard the traditional family values.

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 While Islamic doctrines regarding crimes and civil transactions have been replaced by laws modeled after the west in most of the Muslim world, family law continues to be governed by Islam.

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

Indonesia is home to about 160 million Muslims, which is approximately 80% of the total population of Indonesia. A number of studies of women and law in Indonesia¹ have come to a unanimous conclusion that women's status in Indonesia is still notoriously low and highly discriminated. This means that conspicuously strong gender imbalance in terms of the relationship between man and woman is still prevailing.² Gender inequality constitutes a delicate social problem that calls for a prompt settlement in an integrative way by analyzing the factors which have contributed to preserving it, including in them the legal factor which is oftentimes justified from the religious point of view.

Gender inequality in terms of legal field³ manifests itself in the three legal aspects in a simultaneous manner, namely the structure of law, the content of law, and the culture of law. In structural aspect, gender imbalance is characterized by the low sensitivity on the part of law enforcing bodies against gender, especially among public prosecutors and judges. This unfavorable condition is worsened by the mere existing legal material as can be observed from

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

2 For a description of the forms of gender inequality in Indonesia see the report of the Office of State Minister for Woman Empowerment of the Republic of Indonesia, *Fakta, Data dan Informasi Kesenjangan Gender di Indonesia* (Fact, Data and Information about Gender Inequality in Indonesia), Jakarta, 2001, pp. 71-93.

3 For a discussion of the cases of gender inequality in legal aspects in Indonesia see Nursyahbani Katjasungkana and Mumtahanah, *Kasus-Kasus Hukum Kekerasan Terhadap Perempuan* (Legal Cases of Violence against Women), LBH APIK, Jakarta, 2002.

the law and regulations such as Indonesia's Marriage Law, and the Compilation of Islamic Law (hereinafter the Compilation). What is more, Indonesia's Marriage Law promulgated 31 years ago and also the Compilation have explicitly put woman as a sexual object and substantiated woman subordinating position in terms of gender relation. To make matter worse, the culture of law is still much influenced by the patriarchal values and fully legitimized by Islamic teachings, as can be found in the Compilation issued by the Indonesian Government in Suharto's era.⁴

This article will specially address the Compilation of Islamic Law: What is the Compilation suppose to mean?; Why the Compilation, especially with regard to marriage law has to be amended?; The process of proposing Counter Legal Draft of the Compilation by adopting gender-based analysis and woman perspective; The new vision of the Compilation; and the burning issues of Marriage Law in the proposed draft which are expected to serve as the foundation of reformed Indonesia's marriage law.

What is the Compilation of Islamic Law?

The Compilation of Islamic Law is a code of marriage (*nikah*), inheritance (*waris*), and charitable foundation rules (*waqaf*) that was promulgated as a guide for Indonesia's Islamic Courts in 1991. It is formulated by Indonesian Ulama and legalized by the Government in the heyday of the Suharto's Regime. When Suharto took control the government in 1965, Suharto not only took control the government but also the freedom of people movement as well. Most of professional and religious-cultural organization stay under government ruling, such as labor organization, medical-doctors organizations, business organizations, and of course Islamic organizations in order to control Muslim people to behave and practices rules of law under government guidance.

The Compilation was prepared based on the joint decree of Chief of the Supreme Court and the Minister of Religious Affairs. The Compilation lasted for six years and, eventually, on June 10, 1991, pursuant to the Presidential Instruction Number 1 of 1991, the Compilation was inaugurated and put into practice as the official guideline in the material legal field for all judges in the Courts of Religious Affairs throughout Indonesia. The Compilation has come into being as the response of the Government to the prevailing states of discomfort and uneasiness amidst the members of the community due to varied stipulations issued by the Religious Affairs Court for the same case. These extensive differences, to the largest extent, come into effect as a logical consequence of the varied legal sources on which the legal judgments are based, that is to say, on the various books on *fiqh* (the science of law or jurisprudence) adopted by the said judges in adjudicating a case. As an endeavor to eliminate that widespread restlessness, the government contemplated to preparing the said Compilation as terms of reference for all Religious Affairs Judges and at the same time serving as the springboard for realizing the codification of national law.

The Compilation bears two things. On the one hand, it complicates the task of religious affairs judges and other quarters wishing to search for references on legal matters, yet on the other hand, it will mean trimming creativities and reasoning power in terms of family law. New problems have come up following the dynamics of the society, such as the case of domestic

⁴ Several studies of religion and gender conclude that one of the important factors which bring about gender inequality is the domination of patriarchal interpretations made by major religions see generally Rosemary R. Ruether, *Sexism and God-Talk: Toward Feminist Theology*, 1983; Mansour Faqih, *Analisis Gender: Transformasi Sosial*, 1997; Siti Musdah Mulia, *Kesetaraan dan Keadilan Gender: Perspektif Islam* (2001).

violence, while the legal references remain in status quo. This in turn has posed new problems to the judges themselves in implementing their on-the-field tasks.

Why the Compilation of Islamic Law has to be amended?

There are at least six reasons why critical analysis of the Compilation is deemed of great necessity. *First*, in 2001 the Indonesian Government through The Ministry for Women's Empowerment issued a national policy, known as Zero Tolerance Policy, formulated to eliminate all forms of violence against women in the form of the National Action Plan for the Elimination of Violence Against Women, which in essence, reaffirms the government's commitment not to put up with any violence whatsoever and even at the smallest possible degree. In reality, the data on violence against women in Indonesia indicates a growing and spreading trend. The Policy was one of the implementations of Law Number 7 of 1984 on the Ratification of the International Convention on the Elimination of All Forms of Discriminations against Women (CEDAW) and at the same time served as the response to the UN's Declaration of the Elimination of Violence against Women, on December 20, 1994. One of the important points in the National Action Plan is the elimination of violence against women in the socio-cultural aspects through the amendment of the Compilation, for the reason that the Compilation contains in it some provisions which are identified to be the root from which the weeds of violence against women have sprung up and allegedly accounted for the emergence of the acts of violence, especially domestic violence.

Second, the strong demand for the implementation or formalization of Islamic Law (*Sharia*) in a number of regions. Unfortunately, in an endeavor to formalize the said *sharia*, the above-mentioned regions are not yet well prepared and have not yet had any well-defined and clear-cut concepts concerning the *sharia* to be adopted. To answer the need, one of the alternatives that can be provided are to offer the use of amended or reformed Compilation, which is adjusted and well suited to the need and the cultural wisdom of the respective region.

Third, the Ministry of Religious Affairs Issues Judicature has proposed the change in the legal status of the Compilation from that bearing the level of Presidential Instruction into Applied Bill on Marriage. In addition to proposing the Compilation's legal status, the Ministry also puts forward additional articles stipulating the sanctions to any violation, for example, one related to the failure to have their marriage registered. Those who fail to register their marriage in the authorized agencies or institutions shall be subject to sanctions in the form of imprisonment and fine.

Fourth, a number of researches both in form of thesis or dissertation have come to a unanimous conclusion that the Compilation contains in it serious defects and problems, among others, some of its articles contradict the national legal products, such as Law Number 7 of 1984 on the Elimination of All Forms of Discriminations Against Women, Law on Children Rights, Law Number 39 of 1991 on Human Rights, and even the amended Constitution of 1945. The Compilation also runs against the Law Number 22 of 1999 on Regional Government Administration, which underscores the principles of decentralization which is characterized by public participation without differentiating man and woman, and Law Number 23 of 2004 on the Abolition of Violence against Women in the Domestic Domains.

At the international level, a number of instruments for the enforcement and protection of Human Rights have been agreed on which certainly will bind the countries signing the treaty, including Indonesia. Among those instruments is the Universal Declaration on Human Rights (1948). At the regional level of Muslim countries assembled under the organization of Islamic

Organization Conference (ICO), Cairo Declaration was signed and put into effect in 1990. Besides, we have also ratified several International Conventions on Human Rights, which well comply with the Compilation, among others, the Convention of the Rights of Children (1990), which was ratified pursuant to the Presidential Decree of 2000 on Human Rights, which emphasizes that the age limit of childhood is set up at 18 years old, and Convention on Anti-racial Discrimination (1999). Those conventions have given emphasis on the importance of the elimination of race, nation, gender, children status, and religion-based discriminations.

Fifth, more importantly is that as an Islamic Law, the Compilation shall be compared with the family laws of Modern Muslim States, such as Tunisia, Jordan, Egypt, Iraq, and Syria. Those Muslim Countries have repeatedly amended and reformed their family laws. At least, there are two things worth noting from the comparative study of those family laws. First, the spirit of the re-actualization of the Islamic Laws in terms of the family laws is always intended to protect the rights of women and to enhance the position of woman as well as to safeguard the children. Second, the reformed way of thinking on Islamic Law stipulated in the form of family laws are in many ways have departed from the classical *fiqh* literature. (E.G. Tunisia). From so many amendments made on the Tunisia's Family Law, one of which (1959) promulgated that the compulsion of divorce proceeding was to be carried out through Court proceedings and polygamy was strongly prohibited.

The Syrian Family Law had been in force for 22 years (enacted in 1953) before it was amended into the Law Number 34 of 1975, intended to ensure the rights of woman from the perspective of Islamic Law. As regards polygamy, for example, it can only be carried out in so far as there is the permission given by the Court, and the later can reject the issuance of the permission for polygamy provided that there is legal justification and proven capacity to finance two wives. To first procure the pre-requisites from the Court of Law has to a certain extent hampered the execution of polygamy.

The law reform of Egypt families among others is related to the polygamy matters, obligatory statement, matters pertaining in inheritance, and taking care of child. The law Number 100 Year 1985 stipulated that when a man decided to marry he must states his marriage status in the form of marriage registration. For the one who has married he must write down the name and addresses of his wife or wives. The registrar shall inform the wife of the man to marry, about the plan of the marriage. The wife whose husband got another wife, she was entitled to ask for divorce with the reason of economic disadvantage caused by the polygamy act of her husband. For those violates this law shall be subject to either maximum three moths in prison or fining £ 200 Egypt or both.

Jordan family legal reforms among other are related to the age of marriage, marriage swears, marriage between different religion adherent, marriage registration, divorce, and obligatory statement. If any girl has grown up to be 18 year old, and her guardian disapproves her marriage without satisfactory reason, the court is entitled to legalize the marriage.

At last the Iraqi family legal reforms among others are related to guardian status, giving dowry, obligatory testament, and child rearing. Article 19-22 provides on dowry giving. These articles state that woman is entitled to get dowry, which is specially predetermined in the agreement of marriage. If the dowry is not specially stipulated, woman is entitled to take appropriate dowry. If other party deters the marriage or passes away, the wealth given must be returned thoroughly. The above short description more and less has made contribution significantly to the reformation of family law in Indonesia.

Sixth, based on the result of survey conducted in the five regions: Aceh, West Java, West Sumatra, South Sulawesi, and West Nusa Tenggara we found that most respondents consisting of the judges of Religious Affairs, the Heads of the Office of Religious Affairs (KUA), and religion well-known figures, desire that there is a change in the Compilation. The reasons in supporting the changes requirement are; 1) the Compilation has been stipulated for 13 years without any critical evaluation; 2) the Compilation must have binding legal force, which can be used as legal codification; and 3) It is necessary that legal matters existing in the Compilation be completed and finished to match practical requirements for Indonesia people which are getting complicated.

Furthermore, as an input for the amendment of Compilation, particularly in the marriage sector, respondents almost unanimously agree to the followings; 1) Marriage registration must be one of the requirements in the validation of marriage; 2) the minimum age of woman to marry is increased to 19 years similar to that of man; 3) *Nusyuz* (disobedient or disruption of marital harmony) can be applied to both husband and wife; 4) Remarriage to the former wife may be conducted after the prior approval from her. Besides that, the subject of Compilation must also be added and completed. Among the legal matters to be taken for the additional is the regulation of allowance giving in the period of *idda* (the waiting period of wife after being divorced or death of her husband wherein she is not allowed to remarry) to the wife being divorced by the husband. According to the prevailing regulation, the wife in the period of *idda* is entitled to the money allowance given by her husband. But as a matter of fact, the allowance is never been given to the wife without the insistence of the wife. In the future Compilation must stipulate the husband's obligation to keep on giving livelihood to the wife in the period of *idda* either being asked for or not. The husband may not decide of being divorce before the wife's right has been completed. The same situation was similar in the matter of *khulu'* (judicial dissolution of marriage available to women on her providing compensation to the husband of after having offered to return or renounce her dower). *Khulu'* can only be materialized when the wife wants to divorce from her husband without any coherent reason. Demanding of divorce of wife without coherent reason must be accompanied with the obligation to pay *iwadz* (substitution of dowry given to wife) to her husband. But when the demand of divorce is rational the obligation to pay *iwadh* is completely disappear.

Women are increasingly becoming aware of how the law can affect their lives either negatively or positively. Such awareness is important because it makes the law suddenly come alive to its women clients. What does this mean? It means that the substantive provisions that refer to matters affecting women will be strongly tested as to how they can answer issues brought to court for judicial rulings. The study of the Compilation concludes that there are some provisions in the Compilation which can be made more amenable to women's requirements. The study also underlines the gaps that need to be addressed, not only in the substantive provisions but also in the structure of the courts.

The Marriage Law in the Compilation is regarded as one of the factors which have triggered various social problems such as domestic violence, as well as imbalance and inequality in the relationship between man and woman, especially that which occurs in the domestic life.⁵

⁵On the need of revising UUP see generally Khoiruddin Nasution, *Status Wanita di Asia Tenggara*, Leiden-Jakarta, 2002; Yayuk Afianah, *Pola Penyelesaian Hukum Tindak Kekerasan Dalam Rumah Tangga*, (Tesis Magister), IAIN Jakarta, 2003; Iskandar Ritonga, *Hak-Hak Wanita Dalam Putusan-Putusan Peradilan Agama DKI Jakarta 1990-1995*, (Disertasi Doktor) IAIN Jakarta, 2003; Widayarsi, *Meninjau Undang-Undang*

There are five crucial issues with Marriage Law that are: the definition of marriage, minimum marriage age, polygamous marriage, husband and wife position, and husband and wife rights.

Firstly, the definition of valid marriage. The Marriage Law does not explicitly places registration as a requisite to valid marriage. Consequently, many marriages (more than 40%) are not registered. Lack of people's awareness to register their marriage is influence, among others, by the fiqh outlook which perceives the validity of marriage in terms of the fulfillment of the obligatory requirements, *ijab kabul* (pronouncement of marriage contract), the presence of bride and bridegroom to be united in marriage, guardian for the bride, qualified witnesses, and offer. Registration is not included in the requirement for marriage to be valid. In addition to being influenced by religious point of view, other factors which has contributed to the reluctance on the part of the married people to register the marriage, are high cost, complexity, and out of the reach of the government service.

In Sociological context, unregistered marriage has always resulted in negative impact on women and children, for the reason that without possessing marriage certificate, wife and children are not equipped with legal foundation to claim their rights for inheritance, rights for basic necessity of life, and other rights. Ambiguity arises as regards the validity of marriage. To ordinary people in general, validity of a marriage is marked by the fulfillment of those above mentioned requirements, although the marriage is not registered at the marriage registrar office. Meanwhile, to the law-enforcing institutions, such as religious court, for a marriage to be valid, in addition to meeting those requirements, it must be registered as evidenced by the State's issuance of Marriage Certificate.

To protect the rights and interest of wife and child, it is proposed that marriage registration be included as one of the requirements for a marriage to be valid drawing an analogy from the Qur'an which stipulates the importance of registration of every important transaction made, such as the transaction of *lending and borrowing*. Marriage is essentially an important transaction, so even much more important than any kind of transaction in the life of mankind. If a certain transaction must be registered, isn't a marriage a more crucial deal to be registered?

Secondly, on the issue of imposed minimum marriage age. One of the factors which serve the background why the Marriage Law was formulated is widespread child marriage (underage marriage). Other factor which is the frequent occurrence of polygamy and high rate of arbitrary divorce which has cause wife (ex wife) and children to suffer and to be neglected. As regards the minimum marriage age, The Indonesia's Marriage Law imposes the minimum marriage age of 19 for boys and 16 for girls. The imposition of minimum marriage age of 16 for girls, three years lower than that for boys, has indirectly substantiated the subordinating position of woman (wife) to man (husband). Why should there be different minimum age set forth between girls and boys? Besides, the determination of the minimum age of 16 violates the substance of International Convention on Child Rights, which was also ratified by Indonesia in 1990. The Convention underscored that the child age limit is 18 years. To legalize a marriage of a girl at the age of 16 means that the government legitimates child marriage and this undoubtedly violates child's rights.

Thirdly, on issue of Polygamous Marriage. The Marriage Law contains in itself an internal inconsistency because the paragraph one, stipulates that the principle of marriage is

Perkawinan NO. 1 Tahun 1974, Dalam Perspektif Feminisme dan Hukum Islam, (Tesis Magister), IAIN Jakarta, 2004; dan Leli Nurrohmah, Pengalaman Perempuan Dalam Menjalani Perkawinan Poligami, (Tesis Magister) Kajian Wanita UI Jakarta, 2003.

monogamous,⁶ but the next paragraph gives ample room for a man to carry out polygamous marriage although the number of wives as specified here are limited to as many as four. What is worth noting is that one of the requirements to be met by a husband to marry a second wife is the knowledge and consent of his first wife. What has often happened in reality is that the consent of a wife has often been manipulated and made up in various ways. Even in the event that the first wife does not give her consent, the Islamic Religious Court can take over the provision of such consent. The reasons of the Court for giving permit to the husband to contract polygamous marriage as follows: the wife cannot perform her duty as a wife; the wife is physically disabled or suffers incurable diseases; and the wife cannot bear him a child. The three reasons as contained in the Marriage Law do not at all accommodate the divine indictment of Allah the Almighty in Q.S. *al-Nisa*, 4:19.

The sociological reality circulating in the community has evidenced that all polygamous marriage contracts made do not originate from those three reasons above. What should be questioned: What is the percentage of men who practice polygamy because their wives are not able to perform their duties as wives, or because their wives are physically disabled, or because their wives are sterile. In spite of lack of reliable data of such cases, it is evident that the practices of polygamous marriage are generally driven by mere fulfillment of men's sexual lust and biological need, not for the reasons as described in the Indonesia's Marriage Law .

Furthermore, all the arguments that permit man to practice polygamy is only seen from the perspective of the interest of the husbands, not at all putting into account the interest of women. Will the Islamic Religious Court give the same permit to woman to marry another man when similar unfortunate condition befalls him? For example, when a husband is incapable of performing his duties as a husband, or he is physically disabled due to accident or something, or he is sterile. The stipulations set forth by The Marriage Law certainly weaken the position of woman before man.

Therefore, the law strictly prohibiting polygamy must be proposed for the reason that practicing polygamy is committing a crime against humanity. Polygamy has been officially prohibited in the Islamic State of Tunisia. The reformed Laws on Tunisian Family have given birth to the official prohibition of polygamy.⁷ There are two reasons why the Tunisian Government forbids polygamy. First, the institution of polygamy and slavery was only allowed at the development period or transitional period of Islamic community, but was strictly prohibited when the community has become a civilized society. Second, the absolute requisite to perform polygamy is the husband's capacity to treat his wives in a fair way, meanwhile the fact from historical perspective proved that it was only Prophets who could treat their wives fairly and justly.⁸ Before Tunisia, Turkey was the first Muslim country to absolutely prohibit polygamy through the issuance of Turkish Civil Law in 1926.

In Indonesia's context, the arguments that can be adopted to strictly prohibit polygamy are the frequent occurrence of *sirri* (unrecorded marriage), high rate of child marriage, increasing intensity of domestic violence, and rampant violation against Human Rights, especially violence against woman and child abuse. Pursuant to the principle of *fiqh*: when a human action is conceived as producing more *mudharah* or even *mafsadah* (harm) than *mashlahah*, the *hukum*

6 In line with the research results which assert that monogamy is the firm and main principle in Islamic marriage see Siti Musdah Mulia, *Poligami Dalam Pandangan Islam*, Jakarta , 2000.

7 See Tahir Mahmood, *Family Law Reform in the Muslim World*, NM Tripathi PVT. LTD, Bombay, 1972, p. 27.

8 See Anderson, *Law Reform in the Muslim World*, The Athlone Press, London, p. 268.

(Islamic law's judgment) is *haram* (forbidden). It is for this reason that polygamy must be forbidden due to the facts its more *mudharah* than *mashlahah*.

Fourthly, on the issue of husband and wife position. The Indonesia's Marriage Law places husband as the head of the family while wife as housewife. The use of the word "head" connotes domination and gives an impression of authoritarian. It is quite understandable that ordinary people will regard husband's position as being identically to a ruler. The implication brought about by this understanding is that a husband may rule in an authoritarian way in his family kingdom, including ordering his wife about with all household activities, and providing her husband with wide array of services, both physically and mentally. Generally speaking, the husband's stereotyped outlook into his family is based on too literal and textual an interpretation made into Qur'anic verse of *al-Nisa*, 4 :34 :*arr-rijal qawwamuuna 'ala an-nisaa'*, which is always interpreted that a man is a woman's leader.⁹

Fifthly, on the issue of the rights of husband and wife. The Marriage Law has obviously strengthened the standardized role of a wife based on sex and at the same time substantiates her as a domesticated creature. This domestication is geared to man's effort to domesticate a woman, and segregate her freedom and room. In the community, the obligation of a wife towards her husband is understood as unlimited, as evidenced by the emergence of a cliché : "wife's obligations and duties are to serve her husband starting from the time he sets his eyes open (wakes up) until he set his eyes down (falls asleep)." The stipulation that wife is obliged to arrange her household duties well justifies the community's stereotyped idea that the place of a woman is home.

Those five subjects under discussion have underlined the necessity for revision of the Compilation of Islamic Law, especially its Marriage Law.¹⁰ The Islamic teachings, particularly those pertaining to woman issues have generally been read with the understanding which has transcended the text comprehension of the holy books so that they are out of their historical and anthropological contexts. The ummah, therefore, says Syatibi, has long been absorbed in the textual understanding so that they neglect the consideration of *mashlahah* which nota bene is the purpose of the syariah (*maqashid al-syariah*).¹¹ The same thing is also expressed by Nasr Hamid Abu Zayd that the religious texts-reading done by the Islamic Community have given more emphasis on *talwin* instead of *takwil*, therefore it not surprising that their reading is mostly influenced with certain ideology or biases.¹² The logical consequence of such understanding is that many of the ummah view all realities about women which have been lasting for centuries are natural or something given or something which has been taken for granted, and not as something which is socially constructed, let alone it has been labeled as religious teachings.

The Process of Proposing the Counter Legal Draft

9 Among others are QS. al-Baqarah, 2:187; al-Hujurat, 49:13; an-Nisa, 4:19.

10 The Proposal for revising the COMPILATION has been initiated by the Team of Woman Empowerment of the Department of Religious Affairs, of which the writer is the chairperson. Basically this team was established to promote gender mainstream in the circle of the Department of Religious Affairs, as a follow up to the Presidential Instruction Number 9 Year 2000 on Gender Mainstreaming. At present the Team is embarking on a critical study to compose the counter legal draft on the amendment of the KHI. This effort is predicted to encounter strong resistance, especially from a number of ulamas who are generally still very conservative, and even from internal circle of the Department of Religious Affairs itself. However, the Tim is very convinced that whatever obstacles they are going to face, the efforts must be initiated.

11 See Syatibi, 1975, p.10

12 See generally Hamid Abu Zayd, 2003

The Counter Legal Draft of the Compilation is an amendment draft of the Compilation. The draft was composed by a committee of Islamic legal scholars led by the Senior Advisor of the Minister of Religious Affairs. It was prepared under the authority of the Minister of Religious Affairs with the intention of submitting the draft for consideration by the legislature. The draft is based on the principle that the Quranic ideal for the Muslim family is founded on the fundamental values of human dignity and equality. It differs from the Compilation in that the draft embraces the implication of the Qur`anic commitment to dignity and equality in a thoroughgoing and uncompromising way. The draft is also constructed on the premise that the realization of the Qur`anic vision of the family can be realized only if the values of dignity and equality are reflected in all aspect of the formation and regulation of marriage and family. The draft should be understood as a contribution and invitation to the ongoing quest to discover the true meaning of Islamic family law for contemporary Indonesian Muslims.

The draft itself was prepared through several stages as follows:

1. Conducting Literary Study by collecting outcomes of previous researches on the Compilation, either in terms of theses or other scientific reports. Different from the commonly-practiced approach (the mainstream of thought), the one adopted in this study is legal-based approach with woman in its perspective. This is an approach which is grounded itself in the woman's own experiences, seeing how she can enjoy her basic rights and secure legal protection. In this context, cases as experienced by women are used as units of analysis to highlight the relation of power as regards the relationships between man and woman.¹³ This approach is of great importance, in view of the fact that woman issues as far as legal aspect is concerned are often disclosed without putting into consideration woman's own experiences so that a number of legal concepts have come to surface so as to have woman marginalized.
2. Conducting on-the-field surveys in five regions which have been striving for the formalization of Islamic Law (*Sharia*).
3. Undertaking comparative studies on Islamic Laws on Families adopted by Muslim countries.
4. Embarking on critical studies on the classical *fiqh* literature concerning marriage, inheritance, and *wakaf* (*property donated for religious or community use*).
5. Formulating research conclusions into legal languages which come up in the form of counter legal draft. The choice of such format is intended to enable the research findings to be issued to immediately attract the public attention.
6. Holding three workshops to verify the preliminary draft, especially as regards theological, legal, sociological, and political argumentations. The workshops have involved a number of experts and resource people in religion (Islam), law, sociology, and politics.
7. Undertaking revision of the initial draft based on the input and feedback from the workshops. And finally, launching initial draft to the public at large for wider cognizance, aimed at providing adequate reservoir of knowledge and enlightening the public in order that they can encourage and accelerate the change of the Compilation.

Making the New Vision of the Marriage Law

¹³ See generally Brenda Cossman, *What is Feminist Legal Theory?*, 1990 and Catherine Mack Kinnon, *A Toward a Feminist Theory of the State*, 1991.

The Counter Legal Draft puts forward a variety of novel interpretations of Islamic marriage and divorce law. Taken together the proposals contained in the draft reflect a fundamentally different conception of marriage and the rights of men and women within marriage than that embodied in the Compilation.

The new vision of the marriage law as described in the Counter Legal Draft is referred to the following principles.

1. The Principle of Benefit (*al-maslahat*)

Islamic legal system actually has no any objectives except materializing universal human goodness and hindering all kind of detriment. Ibn Al-Qayyim Al Jauziah, a prominent Islamic figures following Hambali point of view, concluded that the Islamic legal system was established for the sake of human being and the universal humanitarian objectives which among others are; for goodness, justice, clemency, and wisdom. These principles must become fundamental and substance of the whole problem of Islamic legal system. They must always exist in the minds of Islamic Legal system scholars when they decide a kind of Islamic legal case. The defiance against these principles means being disobedience to the Islamic vision.

2. The Principle of Gender Equity (*al-musaawah al-jinsiyyah*).

The biological difference between man and woman must not be discussed anymore. It does not matter that the woman by virtue of her nature must give birth, breast feed, must take care of child and so on. The problem appears when the sex difference breeds imbalance social treatment between man and woman. For example, woman is positioned to the work in domestic sector and not in public sector for the public sector is belong to man. Woman has no authoritativeness to be a leader both in the family level and in community level. Here is the position of the importance of sex and gender proportional differentiation. From the gender point of view, relationship between man and woman must be positioned in equity and justice basis. Because, gender inequity not is only against Islamic principles but it also marginalize and dehumanize woman. Frankly Islam states that man and woman has equal degree. The matter differentiate them are only their compliance to God. Al-Qur'an does not put the accent on gender superiority and inferiority.

3. The Principle of Pluralism (*al-ta`addudiyyah*)

It is a fact that Indonesia is a plural and multicultural country. The plurality is not only in the term of ethnic, race, culture, and language but also in the term of religion, so that, this plurality of Indonesia is unavoidable. The plurality involves various living aspect. Every body is always in the plurality, not only in the scope of nation but also in the scope of family the plurality binds us. Dealing with the plurality, the thing we need is not the way to take apart our self from the plurality but how to stand before it. The antipathy to the plurality, instead of being the appropriate act, it will generate contra productive impact to the living arrangement of peaceful human life.

4. The Principle Nationalism (*al-muwaathanah*)

We realize that as an independent country, Indonesia was established not simply to accommodate a specific group of religious community. The country recruits its citizens not at all based on religious criteria, but more on nationalism criteria. In contrast, Indonesian people are united based on the spirit of nationalism instead of religious fanaticism. Indonesian

independence resulted from the struggle of the people as a whole of the nation, not only the Muslim community, but also the Non-Muslim community.

5. The Principle of Human Rights (*iqamah al-huquq al-insaniyyah*)

Human rights are the privilege rights of human beings having been granted by God to every person. Human rights reveal all human aspects, which must be preserved and guaranteed in order to respect and maintain the existence of human beings as a whole. Therefore, as human beings with each of their own privileges are the creatures of Allah, we can say that human rights are granted to human beings directly by Allah, and all human beings will automatically have human rights as their birthrights. Islam is a religion, which has commitment and serious concern to the enforcement of human rights in the society. In its initial history, Islam emerged to enforce the existence of human rights, especially the rights of the Muslim people classified into *mustadh'afin*, whose rights have been taken by the powerful patrons. For example, came to reinstate or restore the rights of women, slavers, and poor people, who are very risky to loss their rights even the most basic rights.

6. The Principle of Democracy (*al-dimuqratiyyah*)

Democracy is a concept, which believes in the principles of freedom, equality and sovereignty of human beings to make decision in all the matters concerning public affairs, which basically can be said parallel with the principles of Islamic Ideology. It means that in principle, there is virtually no controversy between Islamic ideology and Democracy.

SUBSTANTIAL ARTICLES OF AMENDMENT OF MARITAL LAW

The Counter Legal Draft on the Compilation of Islamic Law also consists of three substantial issues, namely marriage, inheritance and charitable foundation rules. But this paper simply focuses on the matters of marriage. Discussing about marriage, let me start from understanding the substantial meaning of marriage itself. Marriage is recognized by the society in two aspects. **First**, the society recognizes marriage as an obligation from God and as a form of worships, which must compulsorily be implemented. But, the worship itself is simply understood within a narrow thought, namely an obligation. Whereas in all *fiqih* books, the discussion of marriage is included into the *muamalat* section, not solely in worship section itself. An ambiguous or bias understanding the substantial meaning of marriage causes Muslim women to compulsorily marry men because they are afraid of being sinful to God and their parents, despite their refusal to the marriage itself. Another implication of their narrow understanding of marriage, the society recognizes that a marriage cannot be aborted by a divorce, even though when the marriage itself may results bad impact to the wife and the children As a consequence, many women have forcefully to defend their marriages despite suffering within their marriages themselves from ill-treatment or harassment conducted by their husbands or other family members. Worship should actually be recognized in a broad meaning, namely to include all human activities in order to seek God's Blessing. Therefore, all human activities such as eating, drinking, learning, trading, working etc., when intended simply to seek God's Blessing, are considered into doing worship, including marriage.

Second, the society recognizes that marriage is a contract of ownership, in which to marry means to own or hold someone. This narrow understanding causes unfair or disharmonious relationship between a husband and a wife in a marriage. Therefore, it is said that:

a husband to marry and a wife to be married; a husband to feed and a wife to be fed; a husband to give bounty and a wife to be given bounty; a husband to divorce and a wife to be divorced; a husband to remarry and a wife to be remarried; a husband to conduct a polygamy and a wife to be the victim of the polygamy; a husband as a family head and a wife as a family member; and so on. In brief, there is no guarantee for equality of position between those two genders in a marriage. No wonder if women have no bargaining positions in marriages. Further, *ijab* (offer in a marriage contract) and *qabul* (acceptance of an offer in a marriage contract), although it is not aimed as a ‘selling and buying contract,’ but in reality, it is recognized as a ‘selling and buying contract’ due to the presence of *mahr* (dowry given to the wife by the husband when the celebration of marriage), which is meant as a tool of exchange, whose object is a woman. Despite not an intention, that is the reality in our society.

This narrow understanding of gender inequality is very disadvantageous to the development of democracy and the enforcement of Human Rights in the society. Therefore, it is necessary to revise the circumstance. The proposed concept is to revise the unequal relationship between a husband and a wife in a marriage to be equal and fair, in which they love and respect each other full of human value. Changing relationship between a husband and a wife shall start from changing the understanding of the meaning of marriage itself. Marriage is simply a choice of life for human being, not a must nor even more an obligation. To marry or to get married is only one of the most substantial rights of human being, popularly known as a *non-derogable* (an unreduced right for whatever the reason). A human may freely chose, whether or not he/she wants to marry or to get married.

Al-Qur’an always figures out that a marriage contract is holly agreement between two parties, which have equal rights and positions, who love and respect each other. Therefore, both parties are obliged to maintain or preserve the sanctity and existence of the agreement. All the articles in the Holly Koran and the Prophet Traditions always expressively state that marriage in Islam Belief is a form of contract, indicated by the presence of *ijab* and *qabul*. Hence, a marriage is a contract or an agreement between two equal parties, namely a husband and a wife, which has fulfill the requirements of the prevailing laws, and based on the willingness and deep affection of one to the other to form a family and be bound within a marriage.

The essence or the highest value of marriage is clearly cited in Al-Qur’an as a reunification process to the most substantial aspects of human being, namely *nafsin wahidah* (one spirit). The God intentionally uses the term of *nafsin wahidah* as He intends to show us that a marriage is essentially a reunification process of a man and a woman within a practical level after being reunified in the essential level, namely the origin of the creation of human being as a one body or coming from one body. Other articles emphasize the essential relationship of human being, *min anfusikum*, as a form of unity of an ideal theoretical level and that of practical level (marriage), which is full of love and respect. This harmonious relationship cannot possibly be acquired if one negates or subordinates the other. A marriage as an institution, which practically unites a man and a woman in religious level, is actually the closest definition to the generic meaning of marriage itself, namely *al-dham*, that means ‘to gather or unify’, to gather a wife and children within an very essential and practical unity without hierarchy. Hence, here there is no meaning of ownership concept centralistic on a husband. There is also no recognition of domination concept by any party.

Based on this reiterated concept of the meaning of marriage, we herein offer the following revisions: The definition of marriage (Article 2 of the CLD) is a powerful bond entered into with understanding by a man and a woman for the purpose of creating a family and

based on the assent and agreement of both parties. This emphasis on marriage as an institution founded in awareness and choice is in conscious contrast to the analogous provision of the Compilation which stresses that marriage is commanded by God and its performance an act of worship. The values of autonomy and choice in marriage are also reflected in other aspects of the CLD.

The traditional requirement that the marriage be contracted through an offer by the male guardian of the bride (wali nikah) and an acceptance by the prospective husband which is also contained in the Compilation is not recognized in the CLD. Whereas the Compilation lists the marriage guardian as one of five requirements for marriage, the CLD requires the use of guardian only if parties lack legal capacity to marry because one or both is not of age, of sound mind and mature. Under the CLD each party contracts his or her own marriage personally. In contrast to traditional practice in which the prospective wife is always in the role of the offering party and the prospective husband the accepting party, the CLD authorizes either party to act in either role. The CLD abolishes the use of a wali nikah as a requirement for marriage, and requires that a marriage must be registered in order to be valid.

The basis of marriage in the CLD is monogamy. Marriage is established based on the principles of willingness, equality, fairness or justice, benefit, pluralism and democracy. The purpose of marriage is to establish a happy and prosperous family, based on love and respect each other, besides to meet both parties' biological need legally, healthily, safely, conveniently and responsibly.

The other animating value of the CLD is the principle that women and men are equal within marriage. The principle of equality of the sexes is stated unequivocally in Article 47 which states: The status, rights and responsibilities of husband and wife are equal, both in family life and in their life together in society. Meanwhile the wife's role in bearing children is recognized in article 50. The principle that women are full equals within marriage permeates the entire code and is the basis for a variety of specific doctrines.

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

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

Conclusion

Islam offers things of great multitude in the frame of building civilized and just community, among others the teachings of the equality between man and woman, especially as

regards marriage. The position of man and woman in married life complies with the duties have on their shoulders. If a man is fully responsible for the management of his family and household, he may be entrusted to become the *qawwam* (protector), of the family in the most honorable manner (*ma'ruf*), not in an authoritarian and despotic way. However, when one day the whole responsibility is put on the wife's shoulders, as a consequence, the position of a *qawwam* may be offered to her. But one thing is certain, namely, the purpose and aim of Islamic marriage is conceived as to make humankind live in pair in a married life and family life which are characterized with *mawaddah wa rahmah* (love and affection), *sakinah* (peace and tranquility), as well as *saadah* (happiness and prosperity).

The counter legal draft is proposed by putting into account the principles as follows: **First**, the principle of *al mashlahat* (benefit). In essence, the shari'a (Islamic Law) has no other purpose than realizing the universal benefit for mankind (*jalb al-mashaalih*), and refuse all forms of *dar'u al mafaasid*. **Second**, the principle of nationality (*al-muwaathanah*). As it has been known that as a unitary state, Indonesia was founded by not a single religious community and not on the base of religious criteria, but on the foundation of nationality. **Third**, the principle of holding in high esteem the Human Rights and democracy which is grounded in the principle of freedom, equality, and sovereignty. **Fourth**, principle of gender equality (*al-musaawah al-jinsiyyah*). **Fifth**, principle of pluralism. There is no denying that the fact that Indonesia is a very pluralistic state. Plurality is not only in terms of ethnics, race, culture, and language, but also in terms of religion. These principles should become the foundation and substance of all structures of Islamic law. Those principles should be in the mind of all *fuqaha* (experts in fiqh) when they are formulating a fatwa. Departing from these principles will mean contradicting or conflicting with the aspiration of the Islamic law itself.

The most crucial thing in the Compilation is related to the methodology (*ushul fiqh*). A number of academically-initiated studies conclude that the Compilation is not entirely dug up from the empirical reality of Indonesia, rather, they transport information as such from the normative explanation of classical religious interpretation, paying little attention to the benefit for the Indonesian Muslims. The Compilation issued by the government quote almost completely all interpretations of classical *fiqh*. The Compilation does not really represent the need and necessity of Indonesian Muslim people. Even, the Compilation is not dug up from the Indonesian local wisdom. In short, the process of sanctifying classical *fiqh* has been going on, which we believe even their writers themselves do not want to.

Many Islamic thinkers have found irrelevancies in the classical *fiqh* points of view, quite understandably, since such outlooks were formed out of different era, culture, and imagination.¹⁴ Even, it is found out that those classical books of fiqh are irrelevant not only in terms of materials but are also problematic from their methodological domain. For example, as far as definition was concerned, classical fiqh was always understood as "knowing the law of *syara*" which was practical in nature, and obtained from the *tafshili*-based argumentations, namely Al-Qur'an and Sunnah (*al-'ilmu bi al-ahkaam al-syar'iiyyah al-'amaliyyah al-muktasab min adillatihaa al-tafshiliyyah*). Referring to that *ta'rif*, the truth of the fiqh is very normative, so that the truth of fiqh is not matrixed from how far it can reflect benefit for the mankind, but how far it is true from the point of view of referential aspect to the literal meaning of Al-Qur'an and Sunnah. Such literalistic methodology and outlook have led much to the claim of truth, and such

14 The figure most often mentioned such as Muhammad Abduh from Egypt, Fazlur Rahman from Pakistan, Mohamed Charfi from Tunisia, Sadiq Jalal al-'Azam from Syria, Abdullahi an-Naim, from Sudan, and Harun Nasution from Indonesia.

claim is very dangerous. This will only make Muslims more exclusive in the multi-religious and multicultural relationship. The proof is not too far to seek that such claims did not exert any positive effect on the efforts to build a tolerant shared life in a pluralistic society.

Therefore, it can be concluded that the Islamic law is, in essence, the product of Islamic legal thinking which stems out from the interaction between the *ulamas* and their social environments. Although Al-Qur'an and *Hadiths* have legal-binding rules, the number is comparatively smaller to cover all life problems which require their legal stipulations.¹⁵ To fill the hiatus, the *ulamas* conducts *ijtihad*, using their mind in such a way and the results are legal thinking products as they are today. Whether the color and dynamism of legal thinking products will be left as they are today largely depends on the courage of Islamic legal thinkers of today. However, it should be reminded that the departure of an individual or a community from one legal thinking product to another does not necessarily mean that the mentioned individual or community deviate from Islamic law.

A number of studies of *ushul fiqh* conclude that it is necessary to pay attention to the principle of rationality in *istimbath al-ahkam*. Rationality occupies most important position in the Islamic law. This very important position of rationality is explicitly and definitely stated in the principle of *ushul fiqh*: (verily what is good or bad according to the law of reason, the *shariah* will designate law to them as required or forbidden). Only by adopting rationality will the structure of *ushul fiqh* methodology be dynamic and applicable as well as able to respond to every contemporary issue which arises any time. At this level we can be sure that *shariah* will no longer become a "problem," but it will convincingly turn out to be a "solution" at any time and any place (*shalihun li kulli zaman wa makan*).

As a conclusion, I will observe attentively the word of Ibn al-Qayyim al-Jawziyah, an expert in law of Hambali's school of Islamic law: that Islamic law (*syariah*) is built for the interest and universal cause of humanity, namely *al-mashalahat*, *al 'adl*, *al-rahmat*, and *al-hikmah*. Everything which contradicts such essential and underlying purpose is not part of *syariah*, in spite of being organized in a systematic way.¹⁶ *In uriidu illa al-ishlah mastatha'tu. Wa ma tawfiqy illa billah. Wa Allah a'lam bi al-shawab.*

Jakarta, 20 September 2005

15 Research conducted by Abdul Wahab Khallaf concerning the legal-related verses brings to light that the number of Al-Qur'anic verses which contain clearcut legal stipulations are only some 5,8% or as many as 368 verses only, while the largest number pertains to the universal values, such as justice, love and affection, peace, and freedom, which are all religious moral messages which can be used as guidance in social life. For more information see Abdul Wahab Khallaf, 'Ilm Ushul Fiqh, 1956.

16 Ibn al-Qayyim al-Jawziyah, A'lam a-Muwaqqi'in, p. 3.

BIBLIOGRAPHY

Al-Qur`an Al-Karim.

Abu Zayd, Nasr Abu Hamid, *Dekonstruksi Gender: Kritik Wacana Terhadap Perempuan Dalam Islam* (Terjemahan), SAMHA, Yogyakarta, 2003.

Afkhami, Mahnaz, *Freedom and Faith: Women's` Human Rights in the Muslim World*, Syracuse University Press, Syracuse, 1995.

Arkoun, Mohammed, *the Islamic World: From Classical to Modern Times*, ed. C E. Bosworth, dkk, Darwin Press, Australia, 1989.

Asghar Ali Engineer, *Hak-Hak Perempuan Dalam Islam*, Bentang, Yogyakarta, 1994.

Ibnu Abidin, *Al-Durr al-Mukhtar*, Dar. A-Fikr, Beirut, 1979.

-----, *Nasyr al-`Urf fi Bina` Ba`d al-Ahkam `ala al-`Urf*, Dar al-Ma`arif, Damascus, 1884.

Ibnu al-Qayyim al-Jauziyah, *Al-Thuruq al-Hukmiyah fi Siyasat al Syar`iyyah*, Maktabah al-Madani, Jeddah, t,th.

-----, *A`lam a-Muwaqqi`in*, p. 3

Ihromi, Tapi Omas, *Wanita dan Hukum Nasional: Hukum Adat, Tradisi, dan Budaya Lokal*, (Makalah), Jakarta, 1997.

Irianto, Sulistyowati, *Perempuan Di antara Berbagai Pilihan Hukum*, Yayasan Obor, Jakarta, 2003.

Cammack, Mark, *Legislating Social Change in Islamic Society: Indonesia's Marriage Law*, The American Journal of Comparative Law, Vol. XLIV, 1996

Cossmann, Brenda, *What is Feminist Legal Theory?*, in *Feminist Legal Theory*, The Thatched Patio N0. 1-2, July/August, 1990.

Departemen Agama RI, *Pedoman Fatwa Produk Halal*, Jakarta, 2003.

Fakih, Mansour, *Analisis Gender: Transformasi Sosial*, Pustaka Pelajar, Yogyakarta, 1997.

Kantor Menteri Negara Pemberdayaan Perempuan RI, *Fakta, Data dan Informasi Kesenjangan Gender di Indonesia*, Jakarta, 2001.

MacKinnon, Catherine A, *Toward a Feminist Theory of the State*, Harvard, London, 1991.

Mulia, Siti Musdah, *Negara Islam: Pemikiran Politik Husain Haikal*, Paramadina, Jakarta, 2000.

-----, *Potret Perempuan Dalam Lektur Agama*, (Pidato Pengukuhan Sebagai Ahli Peneliti Utama), Departemen Agama, Jakarta, 1999.

----- (Ed.), *Keadilan dan Kesetaraan Gender*, Tim Pemberdayaan Perempuan, Dep. Agama, Jakarta, 2000.

-----, *Perempuan Dalam Hukum Perkawinan di Indonesia*, Makalah, Jakarta, 2003.

-----, *Islam Menggugat Poligami*, Gramedia, Jakarta, 2004.

------(Ed.), *Pembaruan Hukum Islam: Counter Legal Draft*, Departemen Agama, Jakarta, 2004.

-----, *Muslimah Reformis: Perempuan Pembaru Keagamaan*, Mizan, Bandung, 2005.

-----, *Perempuan dan Politik*, Gramedia, Jakarta, 2005.

An-Naim, *Dekonstruksi Syari'ah* (terjemahan), LKiS, Yogyakarta, 1995.

Ruether, Rosemary Radford, *Sexism and God-Talk: Toward Feminist Theology*, Bacon Press, Boston, 1983.

Al-Syatibi, Abu Ishaq, *Al-Muwafaqat fi Ushul al-Syari'at*, Al-Maktabah al-Tijaniah al-Kubra, Cairo, 1975.

Shihab, Quraisy, *Penetapan Hukum Islam Secara Tekstual dan Kontekstual: Tinjauan Mufassir*, in *Dialog*, No. 35 Th XVI, February 1992, h. 3-5.

Weisberg, D. Kelly, *Feminist Legal Theory*, Temple Univ. Press, Philadelphia, 1997.