

P-ISSN: 2746-8127

E-ISSN: 2775-215

# Tebuireng

**Journal of Islamic Studies and Society**

Fakultas Agama Islam  
Universitas Hasyim Asy'ari Tebuireng Jombang

Volume 1, Number 2, July 2021



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Journal of Islamic Studies and Society

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Journal of Islamic Studies and Society

Vol.1, No. 2, 2021

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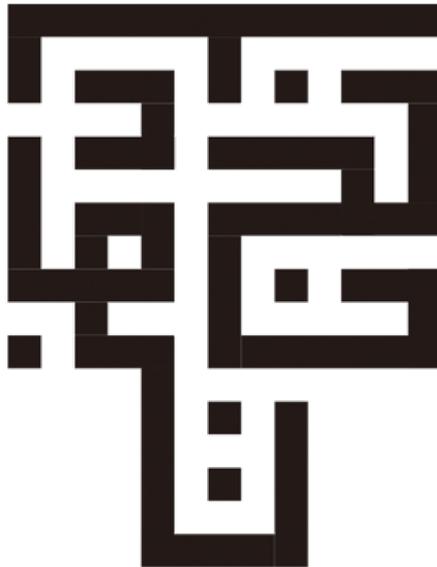
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Tebuireng Journal of Islamic Studies

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# **Debating Shari'a in Contemporary Indonesia: Issues, Competing Authorities and the Public Sphere**

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## **Abstract**

The transformation of Sharia into a legal code in different Muslim countries is not an easy process. Let alone in Indonesia, this transformation has included dialogues, conflicts and tensions between multiple groups. In the last two decades, along with the growing up of democratic life, this tension has given rise to the emergence of so-called 'progressive' and 'conservative' movements. Debates among them continue to rage even more intensely. On the other hand, as this article has argued, the development of Islamic family law in Indonesia has demonstrated the increase in the use of modern approaches to Islamic jurisprudence. Nevertheless, the State authority seems to have a decisive power to intervene the content and to determine the result of the debate. Accordingly, I would like to value all these political and legal processes as an inseparable part of the larger process of a public sphere in the Indonesian *reformasi* era.

**Keywords:** family law, reform, debates, public sphere, the *reformasi* era

## 1. Introduction

Scholars have argued that Islamic family law has been the last fortress of Sharia.<sup>1</sup> However, as commonly found in Muslim countries throughout the world, the transformation of Sharia on familial matters into a legal code was, and is, not an easy process. It has been coloured with conflicts and tensions.<sup>2</sup> The main issue revolves around both the necessity of the secularisation of normative Islamic law, and the demand for an increase in state interference as the inevitable consequence of such legislation. In the Indonesian context, there emerges a competition between those who call for reform on the one hand, and those who demand to preserve Islamic law in its form as has been long established, on the other.

After Indonesia gained its independence in 1945, the State enforced numerous Islam-based laws and regulations. Among others, a considerable development was the institutionalisation of Islamic courts and the transfer of authority over the religious courts from the Ministry of Justice to the Ministry of Religious Affairs in 1946.<sup>3</sup> Following this development, persistent calls for further reform of family law have emerged for over three decades.

The first reform took place in 1974 when the Indonesian government introduced the Marriage Law which extensively accommodated reform ideas.<sup>4</sup> Later on, the Presidential Instruction number 1 in 1991, on the Promulgation of the Compilation of Islamic Law in Indonesia (*Kompilasi Hukum Islam di Indonesia*), henceforth referred to as the *Kompilasi*,<sup>5</sup> has been considered to be a great

<sup>1</sup> Ziba Mir-Hosseini, *Marriage on trial: Islamic family law in Iran and Morocco* (London and New York: I.B. Tauris, 2000), p. 12; Lynn Welchman, *Women and Muslim Family Laws in Arab States: A comparative overview of textual development and advocacy* (Amsterdam: Amsterdam University Press, 2007).

<sup>2</sup> Léon Buskens, 'Sharia and the colonial state', in *The Ashgate Research Companion to Islamic Law*, ed. by Rudolph Peters and Peri Bearman (Surrey, England: Ashgate, 2014), pp. 209-21.

<sup>3</sup> Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Base of Legal Institutions* (Berkeley: University of California Press, 1972), pp. 64-100; Ismail Sunny, "Kedudukan Hukum Islam dalam Sistem Ketatanegaraan Indonesia" in Rachmat Djatnika, et al, *Hukum Islam di Indonesia: Perkembangan dan Pembentukan* (Bandung: Remaja Rosdakarya, 1991), p. 75.

<sup>4</sup> The existence of this law can be perceived as a further effort to strengthen the legal position of the Islamic court. See M.B. Hooker, "The State and Shari'ah in Indonesia 1945-1995", in Tim Lindsey (ed.), *Indonesia: Law and Society* (Sydney: Federation Press, 1999), pp. 97-110.

<sup>5</sup> Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum di Indonesia* (Jakarta: Gema Insani Press, 1994), p. 62.

achievement of Islamic family law in the New Order era, as it has been publicly recognised as the product of the Indonesian '*ulamā'*. On a practical level, the *Kompilasi* has been effectively used in the Religious Courts since it was issued. The Directorate of the Religious Courts of the Department of Religious Affairs published a research report in 2001 which found that almost one hundred percent of judges in Religious Courts and Religious Appeal Courts made implicit use of the *Kompilasi* as their main source and basis of law for their decisions, and seventy-one percent did so explicitly.<sup>6</sup> Nevertheless, the effectiveness of the *Kompilasi* does not necessarily mean that the controversy surrounding it has completely disappeared. Some Muslim scholars, especially from feminist groups, still regard the contents as well as the status of the *Kompilasi* as problematic.

Law number 25 on the Programme of National Development issued, by the government in 2000, demands the status of the *Kompilasi* be raised to that of a law. For this reason, Badan Pengkajian dan Pengembangan Hukum Islam (BPPHI, the Institution for Islamic Law Studies and Development) put together Hukum Terapan Pengadilan Agama Bidang Perkawinan dan Perwakafan (the bill of Applied Law of the Religious Court in Marriage and Endowment) as the replacement of the *Kompilasi*. Responding to this effort, a reformist group, called Kelompok Kerja Pengarusutamaan Gender (KKPG, the Working Group for Gender Mainstreaming), attempted a reform of the legal substance in the *Kompilasi*, by proposing an alternative legal draft in October 2004 and called it the Counter Legal Draft of Kompilasi Hukum Islam (CLD KHI), referred to as the CLD.<sup>7</sup>

The proposed draft provoked various responses and led some Muslim groups to harshly react. It attracted the interest of Muslim intellectuals and activists and led to an extensive debate. A few of the intellectuals and activists rejected the draft by putting forward the argument that the *Kompilasi* does not need to be revised because it still goes hand in hand with the true nature of Indonesian community. However, the majority of them said that the provisions in the *Kompilasi* were not enough to handle problems existing within a society that had undergone many

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<sup>6</sup> Eko Bambang S., "Pokja Pengarusutamaan Gender Depag Keluarkan Counter Legal Draft KHI" on <http://www.jurnalperempuan.com/yjp.jpo/?act=berita%7C-179%7CX>, accessed 13 March 2007.

<sup>7</sup> See "Menyosialisasikan "Counter Legal Draft" Kompilasi Hukum Islam" in *Kompas*, 11 October 2004.

changes and developments. From their perspective, every text had to be revised, otherwise it would be ignored by society.<sup>8</sup>

This article deals with recent debates of Indonesian Muslims on issues of Islamic family law. Instead of having a wide range of debates, this article is limited to focusing on the conversations and dialogues among Muslims during the Indonesian *reformasi* era (1998-2007). It asks the following questions. What are issues arising in the debates on the Islamic family law reform? What are the key notions that Indonesian Muslims speak about in the debates? Who have been engaged in the debates?

This article consists of three sections. First is concerned with a general debate on Islamic jurisprudence in the Indonesian public sphere. In this regard, I give a short description of the emergence of two groups with contradictory understandings of Islamic teachings, a “liberal” and a “fundamentalist” one, who have actively participated in producing discourses on family law. The following section addresses contemporary issues concerning the demand for the future legal reform and the discussions on legal interpretation and change. This part particularly focuses on the considerable development of the reform that is the CLD. At this point, I explore the background, methods, and some changes in the CLD. In part three, I discuss debates, dialogues and opinions of a number of ‘*ulamā*’ and academics which emerged following the issuance of the CLD. In the Conclusion, I attempt to answer the questions and to approach such debates from the perspective of public sphere in the Indonesian *reformasi* era.

## 2. Sharia and the Emergence of Public Sphere in the *Reformasi* Era

After the collapse of the New Order authoritarian regime in 1998, the contestation on religion identities, mainly concerning Islam, quickly came up. President Habibie, who replaced Soeharto, relaxed press controls. His successor, Abdurrahman Wahid, continued to maintain freedom of expression. This improved situation was visible in the re-emergence of a variety of idioms and Islamic political symbols. Due to the political instability, both liberal and conservative Muslim groups emerged in Indonesia after *reformasi*.<sup>9 10</sup>

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<sup>8</sup> See Mark Cammack, et. al., “Legislating Social Change in an Islamic Society: Indonesia’s Marriage Law”, in *The American Journal of Contemporary Law* 46: 1 (1996), pp. 45-73.

<sup>9</sup> This refers to the reform era marked by the resignation of Soeharto from his 32-year presidency on 21 May 1998. See Judith Bird, “Indonesia in 1998: The Pot Boils Over” in *Asian Survey* 39: 1 (1999), pp. 27-37.

The transition of the political power also had an impact on the fragmentation of Muslims' interests and the mobilisation of religious movements. People created a public sphere with no fear of state retaliation. Many new groups appeared with a wide range of orientations and promoted various streams of Islamic thought. People were very likely to get involved in a certain organisation which fitted their educational and religious preferences. Furthermore, the *reformasi* has led younger Muslim generations to the appearance of 'changing *santri*'<sup>11</sup> instead of traditional *santri* and modern *santri*, which at a certain level are NU and Muhammadiyah.<sup>12</sup>

This changing *santri* realm is constructed in two contradictory ways of understanding Islamic doctrines which are simply categorised into two groups: progressive Muslim and conservative Muslim.<sup>13</sup> These groups are actually a continuity of the sharp division between modernist and traditionalist Muslims in Indonesia in the 1970s to 1990s. The debate and the conversation between them are even more intensive. The former requires not only local contextualisation of *fiqh* to be capable of meeting the social demands, but also modern approaches to critically understand Islamic doctrines, such as the rights of non-Muslims and freedom of thought and pluralism. Michael Feener calls it "next generation *fiqh*" because the majority of activists engaged are a new generation of scholars and activists.<sup>14</sup> Their existence has given new colour to, and significantly influenced, the discourse on Islamic family law. Their appearance in the Indonesian public space has played a decisive role in determining the future of Islamic family law.

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<sup>10</sup> R. William Liddle, "Indonesia in 1999: Democracy Restored" in *Asian Survey* 40: 1 (2000), pp. 32-42.

<sup>11</sup> Nur Khalik Ridwan, *Santri Baru: Pemetaan, Wacana Ideologi, dan Kritik* (Yogyakarta: Gerigi Pustaka, 2004). The term *santri baru* (new kind of *santri* for the phenomenon of urban *santri*) is not completely appropriate. Urban *santri* including students of secular science who call for purification and the implementation of Islamic *sharī'a*, such as KAMMI and HTI, could be considered as new. In response, however, those originating from NU and Muhammadiyah who are concerned with the discussions of deconstruction and liberation are changing *santri*.

<sup>12</sup> Ronald Lukens Bull, *A Peaceful Jihad: Javanese Islamic Education and Religious Identity Construction*, Ph.D. Dissertation (Arizona: Arizona State University, 1997), pp. 10-30.

<sup>13</sup> The definition of both terms can be read in Charles Kurzman, *Liberal Islam: A Source Book* (New York & Oxford: Oxford University press, 1998), p. 5.

<sup>14</sup> Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007), p. 182.

Jaringan Islam Liberal (JIL, the Liberal Islam Network) can serve as an example to represent the progressive. This movement offers new reading of religious texts based upon a post-traditional point of view, such as deconstruction. The JIL also makes a strong attempt to promote local and pluralist understanding of Islam. Fundamentalist Muslim groups, however, viewed the JIL as an institution representing all sorts of liberalisation in Indonesian Islamic thought.<sup>15</sup> Hartono Ahmad Jaiz, an activist of Media Dakwah, for instance, has sharply criticised the JIL. Furthermore, Jaiz pronounced a *fatwā* of death against Ulil Abshar-Abdalla, the coordinator of the JIL.

Conservative Muslims groups are represented by those who proposed jihad as their ideological platform. They tend to fight against globalisation by proposing Islam as an alternative. In so doing, they are strongly committed to strengthening Muslim brotherhood.<sup>16</sup> Among these groups is Hizbut Tahrir Indonesia (HTI, the Indonesian Islamic Party of Liberation, HTI) that strived for the formal implementation of *shari'ah* and called for the establishment of a *khilāfa Islāmiyya* (Islamic caliphate).

Furthermore, the establishment of other conservative Islamic organisations, such as Laskar Jihad (the Holy War Militia Force), Forum Komunikasi Ahlus Sunnah Wal Jama'ah (the Communication Forum of the Followers of the Sunna and the Community of the Prophet, FKAJ), Majelis Mujahidin Indonesia (the Indonesian Holy Warrior Assembly, MMI), and Front Pembela Islam (the Front of the Defenders of Islam, FPI) was also a response to the Asian economic crisis that began in late 1997, and the collapse of the New Order regime in 1998. These organisations believed that globalisation had failed. They also insisted on Islamic values as the solution to multidimensional problems. The implementation of Islamic teachings, according to them, was a logical consequence of admission of being a Muslim. They also felt a strong desire to restore an ever-established-system of *khilāfa Islāmiyya* which could bring Muslims into a united community, under a united leadership. Some of them called for a jihad to aid their Muslim brothers in

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<sup>15</sup> Khamami Zada, *Islam Radikal: Pergulatan Ormas-Ormas Islam Garis Keras di Indonesia* (Jakarta: Teraju, 2002), p. 97.

<sup>16</sup> James J. Fox, "Currents in Contemporary Islam in Indonesia", paper presented at Harvard Asia Vision 21 29 April - 1 May 2004, Cambridge Mass, pp. 1-4; Andi Rakhmat and Mukmad Najib, *Gerakan Perlawanan dari Masjid Kampus* (Surakarta: Purimedia, 2001.)

conflict areas in Indonesia, such as in the Moluccas.<sup>17</sup> Fundamentalist Muslims generally put forward the idea of the integrated relationship between religion and the state. The way in which they grasp Islamic doctrines features a literal approach. Therefore, they can be called literalists as they set out strong boundaries to the methods of interpretation.<sup>18</sup>

The escalating efforts of conservative Muslims to propagate their ideas worried a number of progressive Muslim intellectuals. These intellectuals did not agree with the idea that Islam is a religion whose teachings are simply patterned from the practices of the early generations of Islam. For them, there must be a creative interpretation of Islamic texts in order to make them relevant to modernity and social demands. In this regard, humanities approaches and social theories should be employed. They therefore attempted to form a group which promoted humane values of Islam.

As has been mentioned above, the most well known group of this progressive movement is the JIL, which was established in East Jakarta, on 8 March 2001. Wahib found two conditions contributing to the formation of JIL: internal and external. The internal factor was related to the inner condition of Indonesian society in which liberal Islam thought had been disseminated since the early 1970s. The external factor comprised global circumstances, i.e. the development of liberal Islam in the Muslim world, as well as the development of social science and the financial support of international donor organisations, such as The Asia Foundation.<sup>19</sup>

Aside from JIL, there are more than a hundred Non Governmental Organisations (NGOs) all over Indonesia which also promote a critical understanding of Islamic teachings. They not only conduct research and hold scientific forums, but also publish books and assist societies. For these diverse activities, an organisation called Lembaga Kajian Islam dan Sosial (the Institution for the Study of Islam and Social, LKiS) established in the early years of the 1990s and situated in Yogyakarta, focuses on publication and financial funding, activities empowering society, such as research, training and education. The non capital “i”

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<sup>17</sup> Noorhaidi Hasan, “Between Transnational Interest and Domestic Politics: Understanding Middle Eastern *Fatwas* on Jihad in the Moluccas” in *Islamic Law and Society* 12: 1 (2005), pp. 73-92.

<sup>18</sup> Charles Kurzman, *Liberal Islam*, p. 4.

<sup>19</sup> Ahmad Bunyan Wahib, “Liberal Islam in Indonesia: The Attitude of *Jaringan Islam Liberal* towards Religious Freedom and Pluralism” MA Thesis (Leiden: Leiden University, 2004), pp. 14-20.

for *islam* of LKiS is intended to address *islam* in its vision to convey universal, tolerant, and humane values of religions.<sup>20</sup> Activists of both the JIL and LKiS are a new generation of *pesantren*-based scholars. The majority of them are affiliated with the NU, the biggest Muslim organisation in Indonesia and Pergerakan Mahasiswa Islam Indonesia (the Indonesian Islamic University Student Movement, PMII).

Outside *pesantren*, the problems of gender bias and violence against women become a main concern of a number of non-profit organisations attached to both Islamic and public universities. The Pusat Studi Wanita (Centre for Women Studies, PSW) of UIN Yogyakarta, for instance, is active in promoting the concept of gender equality through deconstructing gender-bias interpretations of Qur'anic verses on the relationship between husbands and wives. Furthermore, PSW has conducted training for religious court judges to raise their awareness of Islamic law which enhances fairness, gender equality, basic human rights, and democracy.<sup>21</sup> Still in Yogyakarta, another organisation which insists on the demand for empowering women's role in a family is Pusat Studi Islam (Centre for Islamic Studies, PSI-UII) of Universitas Islam Indonesia. PSI-UII is now undertaking the program of "Strengthening Religious Understanding and Attitudes towards Gender Justice in the Family" supported by Cordaid, the Dutch donor organisation.<sup>22</sup>

Besides young generation of NU, young intellectuals of Muhammadiyah have demanded a shift in the way Muhammadiyah perceives modern reform. Inspired by A. Syafii Maarif, Kuntowijoyo and Moeslim Abdurrahman, they view the elitist nature of Islamic modernism and the tendency toward the ideologisation and politicisation of Islam as having led to the spread of reactionary conservatism. These young intellectuals call themselves the Jaringan Intelektual Muda Muhammadiyah (the Young Muhammadiyah Intellectual Network, JIMM). The JIMM demands that Muhammadiyah accommodate local cultures and liberalisation, instead of purification, resist hegemony, and engage in social movements.<sup>23</sup>

The movement of liberalisation was also strongly voiced by the team of Paramadina. Paramadina is an academic institution based on the *waqf*

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<sup>20</sup> Mochamad Sodik, *Gejolak Santri Kota: Aktivis Muda NU Merambah Jalan Lain* (Yogyakarta: Tiara Wacana, 2000), pp. 48-63.

<sup>21</sup> See The Asia Foundation, "2006 Project List" in <http://www.asiafoundation.org/pdf/ProjectList06.pdf> accessed 10 February 2008.

<sup>22</sup> For further information, see the profile of PSI-UII on the website [www.psi-uii.com](http://www.psi-uii.com).

<sup>23</sup> Michael Feener, *Muslim Legal Thought in Modern Indonesia*, pp. 205-207.

(endowment) foundation initiated by Nurcholish Madjid, who was the one who had already promoted the idea of *Pembaharuan* (renewal or reform) of Islamic thought in the early 1970s. This group consisted of young intellectuals and authors concerned with Islamic studies. Komaruddin Hidayat, Zainun Kamal, Mun'im A. Sirry and Zuhairi Misrawi were the key persons in the team. They wondered about the reality of *fiqh* which has become a static concept and been used to justify prejudiced animosity towards other religions. They endeavoured a re-conceptualisation towards a more dynamic, multicultural, and egalitarian *fiqh*. Subsequently, supported by the Paramadina foundation and the Asia Foundation, the team launched a book entitled *Fiqh Lintas Agama: Membangun Masyarakat Inklusif-Pluralis* (Inter-religious *Fiqh*: Establishing an Inclusive-Pluralist Society) in 2004. This book was controversial and, consequently, has led a variety of Muslim groups, such as the MMI, to protest against the publication.

The refutation of FLA was either expressed through debate between the authors of FLA and prominent fundamentalist Muslim figures, or in books and articles. The debate, initiated by the MMI, was conducted at the UIN Jakarta on 15 January 2004. From the MMI were Muhammad Thalib, a member of *Ahlul Halli wal 'Aqdi* 2003-2008, and Halawi Makmun, a member of the Department of Implementation of Islamic law 2003-2008, whilst Paramadina's representatives were Zainun Kamal, a lecturer at the Graduate programme of the UIN Jakarta, and Zuhairi Misrawi, a graduate of al-Azhar University, Egypt. The moderator of the debate was Herry Mohammad, a journalist from the weekly magazine *Gatra*. The debate was conducted in two-and-a half-hours and attended by an audience of approximately 200, largely sympathisers of the MMI.<sup>24</sup> During the debate, the MMI sympathisers of frequently screamed *takbīr* (praising God), *Allāhu akbar* "God is great."

The process of the debate was recorded and written about in two books. The first is a book written by Hartono Ahmad Jaiz, the head of the Lembaga Pengkajian dan Penelitian Islam (Institute for the Study and Research on Islam, LPPI), and one of the key Muslim thinkers behind the Dewan Dakwah Islamiyah Indonesia (Indonesian Council for Islamic Proselytising, DDII), entitled *Mengkritisi Debat Fiqih Lintas Agama* (Criticising the Debate of FLA), which was published in March 2004 by Pustaka al-Kautsar. While the second one is a book

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<sup>24</sup> Asrori S. Karni and Rohmat Haryadi, "Debat Fiqih Lintas Aqidah" in *Gatra*, 31 January 2004, pp. 20-21; Dermawan Sepriyosa, "Bukan Hanya Debat Kusir" in *Tempo*, 25 January 2004, p. 79.

edited by the Editor Team of Mujahidin entitled *Kekafiran Berpikir Sekte Paramadina* (The Infidel Thinking of Paramadina Sect) launched in April 2004 and printed by Wihdah Press.

In the speech at the opening ceremony of the debate, Irfan S. Awwas, the head of the *Lajnah Tanfidziyah* (Executive Board) of the MMI blasphemed pluralism of religion as a *talbīs al-iblīs* or adjusting fallacies with religious theorem derived from Islamic sources. Responding to this condemnation, Kautsar Azhari Noer, the Director of the Centre for Islamic Studies, said that Paramadina had been well aware of the reactions evoked by the publication of FLA. Noer then declared “You may say we are lost, but only God knows what is the truest. I am just wondering the bigger *shirk* is when we deify our faith, not our God.”<sup>25</sup>

Apart from the refutation in the debate, Agus Hasan Bashori, in his book entitled *Koreksi Total Buku Fikih Lintas Agama: Membongkar Kepalsuan Paham Inklusif-Pluralis* (A Total Correction of the FLA Book: Demolishing Counterfeit of Inclusive-Pluralistic Concept), gave a wider explanation of the position of fundamentalists on FLA.<sup>26</sup> Another book refuting FLA is *Menangkal Bahaya JIL & FLA* (Warding off the Dangers of JIL and FLA) by Hartono Ahmad Jaiz published in 2004.<sup>27</sup> A number of articles had been written by members of the MMI. Published in *Sabili*, the magazine of Indonesian Islamic activists, an article “Fikih Lintas Agama?” written by Fauzan al-Anshari, which was a report of the debate, regretted that the debate was not closed with *mubāhala*, a wish that Allah may punish Paramadina.<sup>28</sup> The other article, “Heboh Buku Fiqih Lintas Agama” written by Hery Kurniawan stated that the idea of FLA was a permanent work which had continuously been promoted since the 1970s.<sup>29</sup>

To put it simply, the *reformasi* era gave contribution to young Muslim generations to have conversations on on what the true Islam is. The concept of FLA, offered by the team of Paramadina, was a representative of liberal

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<sup>25</sup> The full version of their speech can be read in Hartono Ahmad Jaiz, *Mengkritisi Debat Fikih Lintas Agama* (Jakarta: Pustaka al-Kautsar, 2004), pp. 3-15.

<sup>26</sup> Agus Hasan Bashori, *Koreksi Total Buku Fikih Lintas Agama: Membongkar Kepalsuan Paham Inklusif-Pluralis* (Jakarta: Pustaka al-Kautsar, 2004).

<sup>27</sup> Hartono Ahmad Jaiz, *Menangkal Bahaya JIL & FLA* (Jakarta: Pustaka al-Kautsar, 2004).

<sup>28</sup> Fauzan al-Anshari, “Fikih Lintas Agama?” in *Sabili* XI: 15, 13 February 2004, pp. 58-59.

<sup>29</sup> Hery Kurniawan, “Heboh Buku Fiqih Lintas Agama” in *Sabili* XI: 15, 30 January 2004, pp. 104-106.

understanding. A considerable number of Muslim groups who represented fundamentalist understanding, such as the MMI, harshly criticised and refuted the concept. In addition to FLA, Muslim intellectuals keep struggling to liberate Islamic family law in another way, which was a reform of the *Kompilasi*, as discussed in the next two sections.

### 3. Reforming the *Kompilasi*: The Counter Legal Draft

Since it was issued in 1991, criticism of the content as well as the status of the *Kompilasi* could not be restricted. In addition, the government was concerned with making a law regulating Islamic marriage. Evidence of this serious attempt to reform the law of religious courts is the law number 25 on the Programme of National Development issued in 2000. This law ruled that one of elements indicating the success of government in the development of law was the existence of substantial law of religious courts. This law, at a more practical level, obliged the government to upgrade the legal status of the *Kompilasi* from Presidential Instruction to the law (*Undang-Undang*). The Department of Religious Affairs which at the time had the authority to supervise religious courts throughout Indonesia was assigned to carry out this agenda.<sup>30</sup>

The Directorate of the Religious Courts of the Department of Religious Affairs formed an institution with as main task to study and develop the *Kompilasi*. Established on 19 September 2002, this institution was called “Badan Pengkajian dan Pengembangan Hukum Islam” or “the Institution for Islamic Law Studies and Development” (BPPHI). The head of the BPPHI is Taufik Kamil who is the Director General of Guidance for Muslim Community and Pilgrimage Facilitation (Bimbingan Islam dan Urusan Haji). He is assisted by Mochtar Zarkasyi and Rifyal Ka’bah. The BPPHI is supervised by a number of acknowledged experts on Islamic law, such as Bustanul Arifin (the former Supreme Court Judge), Abdul Gani Abdullah (the Director General of Laws of the Department of Justice), and Ichtianto (lecturer and the former Director of Religious Courts). This institution is also steered by Said Agil Husin al Munawar (the former Minister of Religious Affairs), K.H. Sahal Mahfud (the general chief of MUI), and Faisal Ismail (the General Secretary of the Department of Religious Affairs).<sup>31</sup>

<sup>30</sup> See “RUU Terapan Peradilan Agama Digodok”, *Kompas* 1 October 2003.

<sup>31</sup> See the decree of the Minister of Religious Affairs No. 416 dated 27 September 2002. Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal*

To develop the *Kompilasi*, the BPPHI prepared for making the bill of Applied Law of Religious Court in Marriage (Hukum Terapan Peradilan Agama Bidang Perkawinan). Seminars, workshops, and other activities have been conducted to adjust and review the bill. A number of articles in the bill, as admitted by the Director of the Religious Courts of the Department of Religious Affairs, Wahyu Widiana, are copied from the Marriage Law 1/1974 and the *Kompilasi*. As in the *Kompilasi*, the bill affirms a husband who has more than one wife (four wives maximum) at a same time. In a workshop held on 29 September 2003, the BPPHI also introduced new provisions, such as marriage during pregnancy, i.e. a pregnant woman can only marry the man who made her pregnant. Another new provision is that a husband has the right to disavow the legality of a child born to his wife.

This development could not too satisfy a number of Muslim intellectuals. A group, called Kelompok Kerja Pengarusutamaan Gender (the Working Group for Gender Mainstreaming), subsequently arranged a reformulation of the law material in the *Kompilasi*, by making an alternative draft published on Monday 4 October 2004 in Jakarta and called the *Counter Legal Draft of Kompilasi Hukum Islam (CLD KHI)*.<sup>32</sup>

The KKPG was a committee of Islamic legal scholars who worked on making an alternative draft for the consideration of the legislature. The draft, they claimed, was prepared under the authority of the Minister of Religious Affairs. The team consisted of 10 members: Marzuki Wahid, Abdul Moqsith Ghazali, Anik Farida, Saleh Partaonan, Ahmad Suaedy, Marzani Anwar, Abdurrahman Abdullah, K.H. Ahmad Mubarak, Amirsyah Tambunan and Asep Taufik Akbar.<sup>33</sup> A considerable number of the members are from the young generation graduated from Islamic traditional schools (*pesantren*). Marzuki Wahid, for instance, is a graduate of Pesantren al-Munawwir Krapyak, Yogyakarta, Ahmad Suaedy is the Executive Director of the Wahid Institute, an NGO initiated by Abdurrahman Wahid toward seeding plural and peaceful Islam, and Abdul Moqsith Ghazali is the head of the Islamic School of the Wahid Institute. They have a concern to establish democracy and promote gender justice. They started working on the draft in July 2001 and completed it in late 2003. The work of the KKPG was

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*Practice in the Indonesian Religious Courts*, Ph.D. Dissertation (Utrecht: Utrecht University, 2007), pp. 139-140.

<sup>32</sup> "RUU Terapan Peradilan Agama Digodok", *Kompas* 1 October 2003.

<sup>33</sup> Tim Forum, "Poligami, Jangan...Kawin Kontrak, Silakan...", *FORUM Keadilan* No. 26, 24 October 2004, p. 15.

supported financially by the Asia Foundation. The KKPG did not work alone but were assisted by a number of active contributors representing various elements of Muslim society, such as the NU, Muhammadiyah, Islamic universities, and researchers interested in the subject. MUI was not engaged because of the objection of the Fatwa Commission to the CLD.

When interviewed by journalists of the weekly magazine, *Tempo*, Siti Musdah Mulia asserted that the CLD was produced in response to two circumstances. The first was a “zero tolerance policy” on any kinds of violence against women issued by the Department of Women Empowerment in 2001. This policy strongly emphasised the elimination of all forms of discrimination against women at the socio-cultural level. The second was the government’s plan to upgrade the status of the *Kompilasi* while a number of its provisions reinforced social attitudes contributing to gender unfairness.<sup>34</sup> In addition to these two considerations, the CLD was intended to be an alternative guidance that could respond to the needs of particular areas in Indonesia. The local autonomy policy has led to the formalisation of Islamic *sharī'a* in some areas, such as Cianjur, Padang and Bulu Kumba. However, those demanding the formalisation did not have a clear concept of which *sharī'a* to implement.<sup>35</sup> The CLD was aimed at offering a new code which enhanced democracy and reflected the true nature of Indonesian culture. It was expected to serve a useful purpose in responding to the necessity to establish values of democracy and pluralism in the Indonesian nation state.<sup>36</sup>

In addition to the above considerations, the decision to make the CLD was inspired by an awareness of the large number of social, economic, and political problems. These problems have affected the concept of labour division between members of a family. Labour division for a husband and a wife, a male and a female has undergone many changes nowadays. Wives (women) generally are not necessarily restricted to work in the domestic sector, and neither are husbands (men) to work in the public sector. In the 1980s, the Pakistan Muslim thinker,

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<sup>34</sup> Interview with Siti Musdah Mulia, “Poligami Haram Karena Eksesnya”, *Tempo* 33: 33, 11-17 October 2004.

<sup>35</sup> Siti Musdah Mulia, “Toward a Just Marriage Law: Empowering Indonesian Women through a Counter Legal Draft to the Indonesian Compilation of Islamic Law” in R. Michael Feener and Mark E. Cammack (ed.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Massachusetts: Islamic Legal Studies Program, Harvard Law School, 2007), p. 133.

<sup>36</sup> Tim Pengarusutamaan Gender, *Pembaruan Hukum Islam*, p. 4.

Fazlur Rahman, found that the necessity of women to be enrolled in various fields of profession increased, though it is limited by Muslims' attitude toward the institution of family.<sup>37</sup>

The KKPG believed that there are a number of articles in the *Kompilasi* which have a gender bias. One example, according to Siti Musdah Mulia, regards the positions of husband and wife, as in article 79 which declares that a husband is the head of a family.<sup>38</sup> This article has shaped a social norm which poses a domestic rule on women. Furthermore, this provision has resulted in determining the domestic role of women in the household. Mulia suggested that these articles should be eliminated, and thus that any actions which contribute to women's marginalisation and discrimination are not institutionalised by the rule of law.

From an historical perspective, the KKPG's study found that the *Kompilasi* appeared in an uncommon form compared to the national and international legal systems that have a strong commitment to creating an egalitarian, plural and democratic society. Some Muslim intellectuals considered a number of provisions in the *Kompilasi* as having potential to hinder the ongoing process of democratisation in Indonesia. From a law purpose angle, the *Kompilasi* which is regulative and legitimist in character, tended to be technical, procedural, and practical operational, rather than strategic, theoretical, and conceptual. Besides that, its articles have a tendency to justify the previous laws and institutions made by the state, such as the KUA and religious courts. The norms of Islamic law in the *Kompilasi* have shifted from the authority of divine law to the authority of state law.<sup>39</sup>

Based on the study of provisions of the *Kompilasi*, the KKPG was convinced that the materials within the *Kompilasi* had not been fully contextualised into the Indonesian outlook. Instead, they more represented *fiqh* configured in the Middle Eastern countries. Furthermore, the *Kompilasi* did not accommodate the demands of Muslims in Indonesia because it was not inferred from the local knowledge of society. This phenomenon was slightly different from the record of family law reform in other majority Muslim countries, such as Egypt, Tunisia, Jordan, and Syria, which have revised their family law repeatedly in the modern period. The

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<sup>37</sup> Fazlur Rahman, "A Survey of Modernization of Muslim Family Law", in *International Journal of Middle East Studies* 11: 4 (1980), pp. 453-454.

<sup>38</sup> See the interview of Ulil Abshar Abdalla (JIL) with her on <http://islamlib.com/id/index.php?page=article&id=408>, accessed 7 September 2007.

<sup>39</sup> Tim Pengarusutamaan Gender, *Pembaruan Hukum Islam*, pp. 9-11.

Tunisian Family Law Act of 1957 required that divorce could only be obtained before a court, and abolished polygamy.<sup>40</sup>

The spokesperson of the KKPG, Abdul Moqsiṭh Ghazali, explained that a number of Muslim thinkers have pointed out that some points in classical *fiqh* texts were irrelevant to the current condition. These texts were produced in eras, cultures and social contexts different from today. Classical *fiqh* texts have problems due not only to the irrelevant materials they contain, but also to the paradigm on which they stand. For instance, *fiqh* is always perceived as understanding divine laws which are practical and inferred from theorems of the Qur'an and *ḥadīth*. This definition leads to making the normative truth of *fiqh*. In the end, the truth of *fiqh* is not measured by its capability of giving goodness and benefits to human beings, but by its textual reference to the Qur'an and *ḥadīth*.<sup>41</sup>

The abovementioned epistemology is a way of thinking applied by literalist groups the CLD was directed to avoid. Instead, the CLD was focused on revitalising a number of principles of Islamic legal theory which had been marginalised and not included in classical books. Although these principles appeared in a number of books of Islamic legal theory, they have not been optimally made functional. These principles are those such as *al-'ibra bi khuṣūṣ as-sabab lā bi 'umūm al-alfāz* and *takhṣīṣ bi al-'aql wa takhṣīṣ bi al-'urf*. Furthermore, the CLD relied on a methodological framework which identifies and revitalises principles of Islamic legal theory which have not been covered by classical *fiqh* books and deconstructs the structure of classical *fiqh*.<sup>42</sup>

Some alternative principles of Islamic legal theory were formulated by the KKPG. First of all, the principle of *al-'ibra bi al-maqāṣid lā bi al-alfāz* requires a *mujtahid* to consider the law purposes contained in the verses of the Qur'an and *ḥadīth* when he performs *ijtihād*. The imam al-Ḥaramayn, al-Juwaynī (1028-1085) who was among the first scholars of Islamic legal theory emphasising the importance of understanding *maṣlaḥa*, said one cannot be considered capable of applying Islamic law before well understanding the purposes of Islamic law.<sup>43</sup> Second, the principle of *jawāz naskh al-nuṣūṣ bi al-maṣlaḥa* indicates an annulment of a doctrine with regard to *maṣlaḥa* consideration is allowed. This principle is deliberately verified because Islamic law revealed by God is aimed at creating

<sup>40</sup> Siti Musdah Mulia, "Toward a Just Marriage Law", p. 134.

<sup>41</sup> Abd Moqsiṭh Ghazali, "Argumen Metodologis CLD KHI," in *Kompas*, 7 March 2005.

<sup>42</sup> Tim Pengarusutamaan Gender, *Pembaruan Hukum Islam*, p. 23.

<sup>43</sup> 'Abd Malik al-Juwayni, *al-Burhān fīUṣūl al-fiqh* (Cairo: Dār al-anṣār, 1980), p. 295.

universal public interest (*jalb al-maṣāliḥ*) and rejecting dangers (*dar' al-mafāsid*). A pupil of al-Juwaynī, al-Ghazālī (1058-1111), defines *maṣlaḥa* as preserving the five essential elements of life, i.e. religion, life, intellect, offspring and property.<sup>44</sup> These five elements of *maṣlaḥa* are known as *al-darurāt* or *al-darūriyyāt al-khamsa* and can be classified into three different orders depending on their purposes, i.e. primary, secondary, and tertiary.<sup>45</sup> Third, the principle of *yajūzu tanqīḥ al-nūṣūṣ bi 'aql al-mujtama'* means that the public reasoning has an authority to select and annul some relatively and tentatively legal certainties.<sup>46</sup>

In addition to reviewing research reports and theses on the *Kompilasi*, the KKPG also invited specialists of Islamic law (as mentioned above) to arrange arguments in multidimensional aspects: theological, sociological and political. A series of discussions organised, recommended that a revision of the *Kompilasi* was not only necessary but urgent. Aside from the literature study, the KKPG also conducted fieldwork. The fieldwork was intended to observe local traditions which had not been included in the *Kompilasi*. The KKPG also interviewed judges and other religious leaders in the provinces of West Sumatra, West Java, South Sulawesi and West Nusa Tenggara. The interviews exposed that a majority of interviewees favoured changes to the *Kompilasi*. The respondents also felt that the substance of the *Kompilasi* should be re-examined to make it capable of meeting the practical demands of Indonesia's complex society.<sup>47</sup>

Among the three features of the *Kompilasi* examined, it was deemed necessary to revise Islamic marriage law for the greatest part. On the principle of marriage, for instance, the CLD declared monogamy (*tawahḥud al-zawaj*) as the basic principle of Islamic marriage.<sup>48</sup> The CLD believed that the goals of *sakīna* (serenity), *mawadda* (prosperity), and *raḥma* (blessedness) of a marriage, as that in article 3 of the *Kompilasi*, were not sufficient to addressing social problems. For this reason,

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<sup>44</sup> George F. Hourani, "Ghazali on the Ethics of Action", in *Journal of the American Oriental Society* 96: 1 (1976), pp. 69-70; Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā min 'Ilm al-uṣūl*, (Cairo: al-Maktaba al-tijāriyya, 1937), vol. 1, p. 140.

<sup>45</sup> Felicitas Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory" in *Islamic Law and Society* 12: 2 (2005), pp. 182-223.

<sup>46</sup> Fazlur Rahman offered a theory called "double movement" to find the general principle of legal verses in the Koran. See Fazlur Rahman, *Islam & Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982), p. 20.

<sup>47</sup> See "Menyosialisasikan "Counter Legal Draft" Kompilasi Hukum Islam" in *Kompas*, 11 October 2004.

<sup>48</sup> See "Dari Poligami sampai Kawin Beda Agama", *Tempo* 33: 33, 11-17 October 2004.

the CLD asserted some other principles of marriage, such as agreement (*al-tarāḍ*), equality (*al-musāwā*), justice (*al-'adāla*), interests (*maṣlaḥa*), pluralism (*al-ta'addudiyya*) and democracy (*al-dīmuqrāṭiyya*).<sup>49</sup> Aside from being aware of the important substance of these principles, the Arabic translation of the principles implied that they relied upon the authentic Islam. Authenticity is a key notion which the KKPG struggled for.

The KKPG argues that if a marriage is based on the principle of *tawahhūd al-zawj*, polygamy (having more than one wife) is legally invalid. The KKPG discovered that in most of the cases of polygamy in Indonesia there was no approval from the wife. In this sense, Mulia declared that polygamy was prohibited for its effects (*ḥarām li ghayrih*).<sup>50</sup> A considerable change also occurred in the rule of guardianship of a marriage (*walī al-nikāḥ*). The *Kompilasi* (articles 19, 20, 21, 22, and 23) declares that the right of guardianship is in the hands of the man. There is no chance for a mother to be the guardian of her daughter's marriage, unless her father is enfeebled. The hierarchy of guardianship prescribed in article 21 is considered as strengthening the patriarchal culture and as discrimination against women.<sup>51</sup>

Not only marriage law, but divorce law was also influenced by the spirit of equality in the CLD. Article 84 (1) of the *Kompilasi* acknowledges *nushūz* as wife's negligence of the obligations as stated in article 83 (1) that a wife is to dedicate physically and spiritually to the husband in as much as the Islamic law allows. In the CLD, either spouse can be considered disobedient if they fail to perform obligations and violate the rights of the other party. This new concept of *nushūz* enables both parties to file a claim in a court trial. The CLD does not differentiate between a divorce initiated by the husband (*cerai talak*) and a divorce initiated by the wife (*cerai gugat*). Following a divorce, both a husband and a wife observe a waiting period during which they may not marry or receive offers of marriage. The waiting period of the divorced husband is the same as that of his former wife. In the *Kompilasi*, only the husband can intend to reconcile with his ex-wife who is still in the period of 'idda, while in the CLD reconciliation (*rujū'*) is available to either spouse.

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<sup>49</sup> Muhammad Zain and Mukhtar Alshodiq, *Membangun Keluarga Humanis: Counter Legal Draft Kompilasi Hukum Islam yang Kontroversial Itu* (Jakarta: Grahacipta, 2005), pp. 25-26.

<sup>50</sup> See, "Poligami Haram Karena Eksesnya", *Tempo* 33: 33, 11-17 October 2004.

<sup>51</sup> Tim Pengarusutamaan Gender, *Pembaruan Hukum Islam*, p. 17.

#### 4. Debates on the CLD

Though the CLD should be considered to be an academic discourse, some aspects of the CLD were considered crossing the demarcation line of *sharī'a* which has been long practiced in religious courts. This point was the weakness of the CLD in terms of social acceptance. Predictably, the proposed CLD provoked a variety of intense reactions, comments, critiques and appreciation. Responses to the CLD did not come only from social religious institutions, such as the NU, Muhammadiyah or the MMI, but also from Muslim scholars who were concerned with such an issue. The debates which emerged on the issue, however, implied that the establishment of Islamic law in Muslim countries, particularly family law, must be approached from a social discourse perspective, and not just as a political phenomenon. The intense debates are indicative of the development of a new public sphere in Indonesia.<sup>52</sup>

Responses from the Muslim community to the CLD can be categorised into two major groups: those who called for the necessity of the reform and thus supported the CLD, and those who viewed the reform as strengthening the legal substance as that in the *Kompilasi*. The former view was held by intellectuals and NGO activists, the latter by, among others, '*ulamā*' affiliated with Islamic organisations, such as conservative factions within the MUI, MMI and the HTI.

##### 4.1 The Reaction of the MUI

From the early discussions until the launch of the CLD, the conservative MUI party harshly criticised the idea. The statement of refutation was delivered in the seminar of the launch. Hasanudin AF, the head of the Fatwa Commission of the MUI and the Dean of the Islamic Law Faculty of UIN Jakarta, decisively refuted changes to the *Kompilasi* in the name of pluralism, gender equality and human rights. He argued "We are not in America or Europe". With respect to the prohibition of polygamy, he argued that Islam does not prohibit polygamy though it can only be practiced in an emergency.<sup>53</sup>

Furthermore, Mustafa Ali Yaqub, a member of the Fatwa Commission, responded to this draft by putting forward a pronouncement that the CLD was a

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<sup>52</sup> See Léon Buskens, "Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere" in *Islamic Law and Society* 10: 1 (2003), pp. 70-131; Pauline Johnson, "Habermas's Search for the Public Sphere" in *European Journal of Social Theory* 4: 2 (2001), p. 218.

<sup>53</sup> See "Dari Poligami sampai Kawin Beda Agama", *Tempo* 33: 33, 11-17 October 2004.

devil's law. He warned Muslims not to go along with the CLD, otherwise they would be apostates. The 1974 Marriage Law and the *Kompilasi*, in his opinion, have been effective in addressing Indonesians' problems. He claimed that the Minister of Religious Affairs was responsible for this matter.

The refutation of the MUI was not only voiced at the launch seminar. Five days after the seminar, on 9 October 2004, the Fatwa Commission had a discussion on the ground floor of the Istiqlal Mosque, Jakarta to further discuss the draft. The members of the forum were in favour of rejecting the draft, which they condemned as being contradistinctive to Islamic doctrines. Some of the members recommended that the MUI recall and investigate MUI members who had been engaged in drafting the CLD. Some others preferred not to react and let the society refute the draft. In the end, the Fatwa Commission decided to put the case to the Leadership Board of the MUI.<sup>54</sup>

In response to the proposal of the Fatwa Commission, the Leadership Board of the MUI sent a letter no. B-414/MUI/X/2004, dated 12 October 2004, to the Minister of Religious Affairs. In the letter signed by Umar Shihab (the head) and Din Syamsuddin (the general secretary), MUI asserted its view that the CLD was extremely deviated from Islam. MUI demanded that the Minister take action: that he withdraw the draft and ban its dissemination.<sup>55</sup>

The attempt to obstruct the CLD being spread widely did not yet end with the letter. In the '*Ulamā*' Conference (*Ijtima' Ulama*) held in the modern *pesantren* of Gontor, East Java, from 24 to 27 May 2006, the Fatwa Commission once more stressed its support of the bill of the Applied Law of Religious Court. In this conference, the Fatwa Commission recommended the government to swiftly legislate the bill to be the law.<sup>56</sup>

Regardless of the diversity of opinions within the MUI, the mainstream response and the *fatwā* of the MUI seems to be in line with the conclusion of Ichwan's article on the MUI and politics, which says that "the actual influence of each utterance is very much related to the prevailing social and political context."<sup>57</sup> The MUI's *fatwā* on the CLD can be deemed as an affirmation of its claim to be the most authoritative institution in the nation in Islamic matters. Its letter to the

<sup>54</sup> "Poligami No, Kawin Kontrak Yes", *Tempo* 33: 33, 11-17 October 2004.

<sup>55</sup> See "Surat Pimpinan MUI", No. B-414/MUI/X/2004, 12 October 2004.

<sup>56</sup> 19 Fatwa of the MUI, quoted from <http://www.halalguide.info/content/view/197/40>.

<sup>57</sup> Moch. Nur Ichwan, "'Ulamā', State, and Politics: Majelis Ulama Indonesia after Suharto" in *Islamic Law and Society* 12:1 (2005), pp. 45-72.

Minister also demonstrates its strategic position in the State through which they are able to lead people to adhere to their legal opinions.

#### 4.2 *Criticism of the CLD: Muslim's voices*

In addition to the MUI, the CLD provoked a wave of criticism from other Muslim organisations and scholars. MMI argued that the CLD had the ambition to deconstruct sensitive areas of Islamic law, such as the prohibition of polygamy and permission for a woman to marry herself. This organisation even sent an invitation to the KKPG to begin a debate. In an article written by a MMI activist, the CLD was called *Komunis (Kompilasi Hukum Non-Islam, the Compilation of Non-Islamic Law)*. The article condemned the CLD as a product of approaches linked to secular philosophy and literary criticism (hermeneutics).<sup>58</sup>

The head of the *Lajnah Tsaqafiyah* (Cultural Board) of the HTI in Yogyakarta, M. Shidiq al-Jawi said that the CLD did not reflect Islamic law, but did express the ideology of capitalism. In other words, it was a medium meant to occupy Indonesian Muslim society with foreign values wrapped in Islamic law. It was a tool of Western colonialism for deconstructing Islamic family law. He condemned the purposes of the CLD as hindering the struggle to completely implement Islamic *sharī'a*, maintaining the domination of infidel capitalism, applying vague and obscured methodology, and producing controversial sections which were contradictory to Islamic norms. These purposes, in his view, were despicable and could only be supported by colonialists' henchmen as they were funded by the West, in an attempt to break Islam.<sup>59</sup> The HTI's opposition to the CLD was not merely intellectual. By questioning the methodological foundations upon which the KKPG had built their perspective, it also challenged their position in the Indonesian religious field.

The CLD also evoked critical responses from Muslim thinkers. A professor of Islamic law at the University of Indonesia, Tahir Azhari, considered some points in the draft to be fiction. With respect to the concept of temporary marriage, he explained that a marriage must be established on the law and not only on a

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<sup>58</sup> "Kerancuan Metodologi Draft Kompilasi Hukum Islam", in [http://hidayatullah.com/index.php?option=com\\_content&task=view&id=1433&Itemid=60](http://hidayatullah.com/index.php?option=com_content&task=view&id=1433&Itemid=60), 7 September 2007.

<sup>59</sup> M. Shiddiq al-Jawi, "Menyoroti Draft KHI dari Perpektif Ideologis dan Metodologis (1)," in *Suara Muhammadiyah*, 89: 23, 1-15 December 2004, pp. 38-39; idem, "Menyoroti Draft KHI dari Perpektif Ideologis dan Metodologis (2)," in *Suara Muhammadiyah*, 89: 24, 16-31 December, 2004, pp. 38-39.

contractual agreement.<sup>60</sup> Nabilah Lubis, a Professor of UIN Jakarta, also objected to the CLD. He argued that the law 1/1974 on marriage and the *Kompilasi* of Islamic Law were still capable of accommodating social interests. The materials contained in the marriage law and the *Kompilasi* have been in accordance with Islamic norms. What the CLD offered, such as the same portion of inheritance for both man and woman and the decision of *'idda* for husbands, conflicted with accepted principles of Islam. The CLD exceeded the limits of permissible reinterpretation.<sup>61</sup>

In a seminar held by the University of Yarsi on 29 October 2004, Rifyal Ka'bah, a Supreme Court judge attached to the Muhammadiyah, emphasised that the KKPG, as the reformer, transgressed the accepted bounds of that taught in the Qur'an and the *hadīth* and assailed the legal opinions of outstanding scholars of the Islamic law schools, such as al-Shāfi'ī. Ka'bah criticised the terms used, such as desert *fiqh*, for classical legal thought. Ka'bah doubted the knowledge of the KKPG members on the socio-political situation in Muslim countries, such as Tunisia or Syria, which the KKPG used as an example of reformation.<sup>62</sup>

The wave of criticism of the CLD was unleashed by Al-Majlis al-'Alami li 'Alimat al-Muslimat (MAAI), or the International Council of *Muslima* Intellectuals, in a discussion in its 5<sup>th</sup> year anniversary celebration. There were a number of points drawn from the discussion. MAAI suggested that the government maintain the products of Islamic law which were officially enacted and applied by the Indonesian Muslim community. MAAI advised the society to be wary of liberal and secular thought which obviously contradicted Islamic doctrines. Existing institutions of the study of Islam, such as the MUI, were expected to enforce and more widely disseminate their *fatwā* in order to make the society perceptive to crucial issues. Liberal thinkers were warned not to overuse their ratio which could mislead common society. The MAAI viewed the CLD as a grand strategy to break Indonesian Islam. Instead of raising the position of women, the CLD was regarded as a potential for destroying family institutions. To reinforce the argument that the use of ratio should be restricted, MAAI made reference to the Qur'anic verse, al-Jāthiyā (45): 18, which says: "Then We put thee

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<sup>60</sup> "Draf Kompilasi Hukum Islam Picu Kritik", *Republika*, 5 October 2004.

<sup>61</sup> Nabilah Lubis, "Peran Suami Istri Sama dalam Perkawinan," *Dialog Jum'at* (Tabloid *Republika*), 24 June 2005.

<sup>62</sup> Rifyal Ka'bah, "Kompilasi Hukum Islam Tandingan", a paper presented in the seminar held by the University of Yarsi, 29 October 2004, pp. 4-5.

on the (right) way of religion: so follow Thou that (way), and follow not the desires of those who know not.”<sup>63</sup>

In the MAAI’s discussion, Huzaemah Tahido Yanggo, a professor in the comparison of Islamic law schools at UIN Jakarta, a graduate of Azhar University, published a small book entitled *Kontroversi Revisi Kompilasi Hukum Islam* (The Controversy surrounding the Revision of the *Kompilasi*). The book appeared at the request of the Muslim community who worried about controversial issues in the CLD. The book was widely distributed in religious courts throughout Indonesia. By referring to the Qur’an, *ḥadīth*, and legal opinions of ‘*ulamā*’, she criticised eight main controversial points of the CLD. She accused the CLD of replacing the textual meaning of verses of the Qur’an with an approach based on *maqāṣid al-sharīʿa* whose aim is to maintain social justice and local wisdom. The KKPG was not aware that what they did was a wrong way of going about the renewal of Islamic law.<sup>64</sup>

The critiques of the CLD are related to the way Muslims should properly interpret Islamic sources. All the opponents of the CLD condemned the CLD as deviated from the ideal Islamic norms. The language they used implies that the opponents claim authenticity, that the truest ways, including Islamic law and its method, of understanding Islam is theirs, not the KKPG’s.

#### 4.3 *The CLD for Empowering Women*

Despite the criticism of the CLD, the CLD was deeply appreciated. Encouraged by the necessity of modern approaches to the reform, the majority of women activists and intellectuals appraised the CLD as a progressive achievement. According to them, in addition to normative texts in Islam, social realities must be taken into account in the making of a law. The approaches of sociology, anthropology, gender, and politics cannot be ignored. Abu Rokhmad, a lecturer at IAIN Walisongo Semarang, in his article “KHI dan Gerakan Kesetaraan Gender” (KHI and the Movement of Gender Equality) put forward an argument that the CLD was an attempt to respond to the bill of Applied Law of Religious Courts which substantially was the *Kompilasi*. He viewed the weakness in the *Kompilasi*, particularly related to the inheritance law which disadvantages women, as having to be revised into a more compatible rule. Rokhmad praised an article in the CLD

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<sup>63</sup> “Kompilasi Hukum Islam Revisi yang Dikoreksi” in *Republika*, 18 February 2005.

<sup>64</sup> Huzaemah Tahido Yanggo, *Kontroversi Revisi Kompilasi Hukum Islam* (Jakarta: Adelina, 2005).

which completely prohibited Muslims from practicing polygamy, as it relied on logical argumentation, while the *Kompilasi* acknowledged polygamy under strict conditions.<sup>65</sup>

Maria Ulfah Anshor, a chairwoman of the youth women's organisation of the NU (*Fatayat*) 2000-2004, asserted that Indonesian society was not ready to face changes and diversity. In terms of the idea of gender equality in Islam, the KKPG had to consider the appropriate media to disseminate. For well-educated people, the controversy surrounding the CLD issues should be utilised as a forum to put forward arguments, while for the public society, the dissemination of the ideas should be completed with a manual explaining the normative sources and mentioning references of each issue proposed.<sup>66</sup>

Furthermore, in the book entitled *Membongkar Fiqh Negara* (Deconstructing State *Fiqh*), Ridwan, a lecturer of STAIN Purwokerto, demanded that the discourse of family law reform in Indonesia, mainly the CLD, be set in an academic framework. He held to a point of view that the epistemological and methodological framework employed in the marriage and inheritance law contradicted the normativeness of Islamic jurisprudence and that this was a crucial matter. Even so, the CLD was a successful attempt to preserve the consistency of the renewal of Islamic law in accordance with the principles of continuity and change.<sup>67</sup>

Nasarudin Umar, a Professor of *tafsīr* of UIN Syarif Hidayatullah Jakarta found a positive side to the developing of the idea of the CLD, i.e. it was a call to the Indonesian public society to rethink (a shock therapy) and opened a new horizon to them. However, he reminded about the negative effects caused by the CLD, such as making a confusion of the issue in common society, which needed to be considered.<sup>68</sup> In the same spirit as Ridwan's opinion, Mochamad Sodik, a lecturer at UIN Sunan Kalijaga, asserted that the CLD was an alternative solution to the rigidity of Indonesian *fiqh* witnessed by society and woman activists. Toward the existing controversy surrounding the issue, the academic world (universities and research institutions) ought to react with discursive courage, and not

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<sup>65</sup> Abu Rokhmad, "KHI dan Gerakan Kesetaraan Gender" in *Suara Merdeka*, 26 February 2005.

<sup>66</sup> Maria Ulfah Anshor, "Pro Kontra Counter Legal Draft KHI Harus Dijembatani," in *Kompas*, 18 October 2004.

<sup>67</sup> Ridwan, *Membongkar Fiqh Negara: Wacana Keadilan Gender dalam Hukum Keluarga Islam* (Yogyakarta: Unggun Religi, 2005), pp. 209-210.

<sup>68</sup> Nasaruddin Umar, "Tak Ada yang Baru dalam Counter Legal Draft KHI," in [http://www.nu.or.id/data\\_detail.asp?id\\_data=4017&kategori=WARTA](http://www.nu.or.id/data_detail.asp?id_data=4017&kategori=WARTA)

completely accept or reject the idea. The humane spirit of the CLD should be balanced by awareness of making good statements. He argued using an ancient (*purba*) *fiqh* to call classic *fiqh* should be avoided.<sup>69</sup>

Furthermore, a range of NGOs working on issues related to discrimination, human rights, women's empowerment and pluralism were supportive of the CLD. These supporters of the CLD were the Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan (the Legal Aid Indonesian Women Association for Justice, LBH APIK), Komisi Nasional Anti Kekerasan Terhadap Perempuan (the National Commission on Violence against Women, Komnas Perempuan), Solidaritas Perempuan (Women's Solidarity of Human Rights), and the two NU women's affiliates (*Fatayat* and *Muslimat*). Moreover, forty individuals representing mass organisations and NGOs united in an alliance called the Network for Strengthening Civil Rights, set up to campaign for the CLD and for the amendment of the Marriage Law.<sup>70</sup>

To put it simply, the response above is in support of the CLD, in terms of the urgency of the reform. However, such response has also reminded the KKPG that social acceptance is an important element to take into account. In this regard, Esposito has insisted that the effectiveness of family law reform in a country depends on how the society perceives the essence of the reform. The reform must be directed toward reconstructing Islamic thoughts in a consistent way to create a balance between accommodating new changes and preserving old traditions.<sup>71</sup> Furthermore, John Obert Voll has insisted that all development in contemporary Islam is best explained through old in-house processes of *tajdid* (renewal) of pre-modern heritage rather than through disorienting conflict with the West. By the end of the 1960s, for instance, people were convinced that the ideologies of secularism led people to turn to traditional religion. Humanity's major problems were not solved by the process of modernisation.<sup>72</sup>

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<sup>69</sup> Mochamad Sodik, "Mencairkan Kebakuan Fikih: Membaca KHI dan CLD KHI bersama Musdah Mulia," in *As-Syir'ah* 38: 2 (2004), pp. 194-211.

<sup>70</sup> Siti Musdah Mulia, "Toward a Just Marriage Law: Empowering Indonesian Women through a Counter Legal Draft to the Indonesian Compilation of Islamic Law" in R. Michael Feener and Mark E. Cammack (ed.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Massachusetts: Islamic Legal Studies Program, Harvard Law School, 2007), p. 133.

<sup>71</sup> John L. Esposito and Natana J. Delong Bas, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001), pp. 132-133.

<sup>72</sup> John Obert Voll, *Islam: Continuity and Change in the Modern World* (New York: Syracuse University Press, 1994), p. 273-276.

### 5. The Intervening State Authority

In response to the MUI's letter, the Minister of Religious Affairs, Said Agil Husin al Munawar, issued two letters MA/271/2004 and MA/274/2004, dated 14 October 2004. The first letter was sent to the head of the KKPG, harshly warning her not to conduct seminars on behalf of the Ministry and commanding her to submit the original draft to the Minister. Whilst the second letter was sent to the MUI explaining that the Minister had warned the head of the KKPG not to continue disseminating the draft, and never had issued a letter authorizing the KKPG formation.<sup>73</sup> These two letters were officially Minister's declaration of the annulment of the draft, even though in the launching seminar of the CLD, where the Minister delivered a keynote speech, he showed his respect to the draft, which had offered a new perspective and hence should be critically studied.

In late October 2004, Muhammad Maftuh Basyuni took over from Said Agil Husin al Munawar as the Minister. Shortly after Basyuni officially became Minister, he reasserted the attitude of the Ministry toward the CLD. Having visited the office of the MUI, Basyuni abrogated the CLD as that of the former Minister. The annulment relied on the consideration that the CLD was in contradistinction to mainstream Islamic beliefs in Indonesia, and led to social unrest. In the opening ceremony of the 5<sup>th</sup> anniversary of MAAI in Jakarta on 14 February 2005, he reemphasised that the CLD, which contained the revision of the *Kompilasi*, was not only delayed but was invalidated. He disagreed with a number of provisions in the CLD, such as the permissibility of inter-religious marriage and the prohibition of polygamy. He declared that although he did not perform polygamous marriages, he did not have the right to forbid a husband who is able to be just to his wives and children to have more than one wife.<sup>74</sup>

The two letters and the declaration of the successor Minister were indicative of the end process of the reform discourse. This decision, in my view, hindered the creation of a public space in which a society is capable of playing a role in the process of legal and judicial reform. The government, the Ministry in particular, interfered too strongly in this matter. The idea of establishing an optimistic,

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<sup>73</sup> See "Surat Menag RI", No. MA/271/2004 and "Surat Menag RI", No. MA/274/2004.

<sup>74</sup> "Dinilai Resahkan Umat, Menteri Agama Batalkan Draf Kompilasi Hukum Islam," *Kompas* 15 February 2005.

rational, and critical Indonesian society, the dream of a number of intellectuals, swiftly failed.

The intervention of the Minister in the CLD has supported a theory developed by Abdullahi Ahmed An-Na'im, the Sudanese expert on religion and law and human rights activist, asserting that changes of the family law foundation are not built solely on the *sharī'a* base but also rely upon the political will of the state.<sup>75</sup> In other words, *sharī'a* which has been legislated as a state law, through the political will of the state, will no longer be the religious law of Muslims. It is always human beings who convey what God says and therefore *sharī'a* cannot be separated from the question of power.

The Minister's warning to the KKPg to stop disseminating the CLD was the ending of the story of the reform. This phenomenon was the price reformers (the KKPg) had to pay for fighting the state. The KKPg seemed to be aware that liberal ideas and contemporary approaches were not enough for effective reform. The political nuance was in fact more visible, and the political struggle was harder than the social one. From the case of the CLD, it can be clearly seen that the political power, under the banner of saving society from worry and unrest, tended to use its authority to interdict the CLD. Aware of this situation, a number of Indonesian prominent scholars gave other opinions. They preferred to place themselves outside the ring of debate. They tended to argue about what the agenda should be for the future of the reform. They declared that the more important points in the debate were revitalising the variety of opinions and disseminating them to the public. They were more interested in viewing such a case from a communicative perspective.

These scholars were of the view that the great diversity of opinions within the discourse on Islamic law, on the one hand, was a treasure which demonstrated an open climate, tolerance, and appreciation of the community of the plurality of religious understanding. However, on the other hand, they were aware that such controversy to some extent hindered the process of reformation. They viewed establishing a space of dialogue as the best way to address the problems and as the viable way to achieve consensus. A vice-chairman of Indonesia's largest moderate Muslim organisation, the NU, and the head of the Pesantren Tebu Ireng

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<sup>75</sup> Abdullahi Ahmed An-Na'im, "Sharia and Islamic Family Law: Transition and Transformation," in *Islamic Family Law in a Changing World: A Global Resource Book*, Abdullah Ahmed an-Na'im (ed.) (London: Zed Book, 2002), pp. 17-18.

Jombang, Salahuddin Wahid, emphasises the importance of the dialogue as a part of the solution.<sup>76</sup>

In addition to Wahid's response, Khaeron Sirin, a lecturer at UIN Jakarta, in his response to the *fatwā* issued by the MUI, asserted that there was no reason that society should worry about the future of religious life in Indonesia. The future of society is not just the concern of modernist Muslims, but of all Muslims, including the MUI. Consequently, wherever there is Muslim society, the gates to dialogue should be freely opened. The existence of the MUI's *fatwās*, in his opinion, should be made a source of learning to educate Islamic society to be more aware of the importance of understanding religious principles properly. This point is important to strengthen the identity and conviction of Muslims, with an aim to implement and attain a civilised Islam in Indonesia.<sup>77</sup>

To bear prolific and understandable thoughts, society needs a fair and trustworthy dialogue which is accompanied by encouragement to all parties to perform introspection and evaluation. This idea demands a public sphere which is not only designed physically but is modified as a social space resulting from communicative actions. The public sphere can be a place where public opinion is built and which reflects the developing issues at the elite and grass-root level. Opinion building through establishing a process of dialogue and debate has the power (communicative power) to participate in the process of formal decision-making.<sup>78</sup>

Furthermore, the planned reform should head for emancipative social changes. It must enlighten the society about the ways to behave properly. Obviously, emancipation does not merely mean liberation from social constraints, such as oppressive hegemonic power (the power of law and thought), but also liberation from internal obstacles, such as ignorance and stupidity. The progression of traditions of public debate, concerning all aspects within social life indirectly can increase the learning capacity of all people and make them capable

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<sup>76</sup> Salahuddin Wahid, "Dialog, Sekali Lagi Dialog (Solusi Untuk "Konflik Terbuka" Pemimpin Umat)," *Republika*, 15 August 2005.

<sup>77</sup> Khaeron Sirin, "Geliat MUI di Wacana Publik," *Republika*, 8 August 2005.

<sup>78</sup> The availability of a public sphere as a medium to express ideas in an equal position which enables people to establish a transaction of discourse and political practice without any distortion and anxiety is a condition to implement civil society. John R. Bowen (1999), "Legal Reasoning and Public Discourse in Indonesian Islam," in Dale F. Eickelman and Jon W. Anderson (eds), *New Media in the Muslim World: The Emerging of Public Sphere* (Bloomington and Indianapolis: Indiana University Press), pp. 80-105.

of being critical and mature, in order to face the realities of plurality and diversity. This situation to some extent will reduce the narrow primordial ideology and the absolute dependency on the rule of social figures that often trigger the emergence of horizontal conflict on behalf of religion.

Their idea seemed to be similar to that of the German philosopher and sociologist, Jürgen Habermas, who coined a critical theory of knowledge and human interests. Habermas argued that human knowledge could be categorised as technical, practical, and emancipatory based on primary cognitive interests. He suggested that these areas are “knowledge-constitutive interests” because they determine categories that humans interpret as knowledge. He wants to probe the deep linkages between knowledge, experience and human purpose. Particularly in his book, *Knowledge and Human Interests*, and in some earlier commentaries Habermas offered that the content of the thought is less important than the manner of the thought. Specific opinions can change or be changed but, beneath them, epistemological assumptions frequently remain unchallenged. He argued that the interests are based on aspects of social existence, such as work, interaction, and power. He connected technical interests to work, practical interests to interaction, and emancipatory interests to power.<sup>79</sup>

Misftahus Surur, a researcher at the Desantara Institute for Cultural Studies, Jakarta viewed the case of the CLD as a lesson to be taken. He suggested that the movement of gender equality might be turned away from the state circumstance. Instead, women activists could optimally attempt to establish as many public spheres as possible for dialogues. With respect to the CLD, he criticised the concept of contract marriage (*mut'a*) as strengthening the patriarchal position of men over women. Surur suggested that the failure of the KKPG to submit the CLD to the State means that the interpretations of social problems and empowering women must be proportionally placed in the local context of where a woman lives. When women are aware of the domestic problems they face, regulations by law are not more essential than internalisation of gender conception into their daily lives.<sup>80</sup> The existence of spaces for dialogue is necessary to support gender empowerment. However, the other problem is if the output of

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<sup>79</sup> Bev Taylor, “Technical, Practical, and Emancipatory Reflection for Practicing Holistically,” in *Journal of Holistic Nursing* 22: 1 (2004), p. 74; Howard A. Doughty, “Jürgen Habermas’ Concept of Universal Pragmatics: A Practical Approach to Ethics and Innovation,” in *The Ethic of Innovations* 8: 4 (2003).

<sup>80</sup> Misftahus Surur, “Belajar dari Pembatalan “Counter Legal Draft KHI”, in *Kompas* 28 February 2005.

dialogues is given to the historical mechanism to determine. In terms of the theory of the social contract between the state and the people, it is the former which has the authority to accomplish the people's view.

## 6. Conclusion

Indonesian Muslims agree that the reform of the *Kompilasi* has to be undertaken, although they disagree on what the reform should be. Traditionalist Muslims, comprising the majority of 'ulamā', a small number of academics, and some Islamic organisations (MUI, MMI and HTI), define the reform as only affirming the content of the *Kompilasi* and raising its status to the law. They support the government's project of *Hukum Terapan Pengadilan Agama*. However, reformist Muslims, including some 'ulamā', the majority of academics, feminists and NGO activists regard the reform as renewal of its articles, which are considered to be normative, conservative, not capable of maintaining Muslim necessities in relationship to adherents of other religions, and strengthening social attitudes contributing to violence against women. They keep struggling through the draft of the CLD. This CLD speaks, frequently accompanied with the Arabic terms, in concepts of pluralism (*al-ta'addudiyya*), nationality (*muwāṭana*), democracy (*al-dīmuqrāṭiyya*), public interest (*maṣlaḥa*), human rights (*ḥuqūq al-insān*) and gender equality (*al-musāwa*). Fieldwork reports and United Nations' covenants serve as important sources.

The CLD evoked various critiques and invited appreciation from Muslim communities. Although it is difficult to discern the opinions of the opponents, their response represents varieties of fundamentalist understanding of Islam. The opponents are represented by the MUI, MAAI, MMI, HTI and some academics, socially the educated urban middle-class. The MUI letter to the Minister not only demonstrates religious authority, but political authority as well. Questioning the methodological foundations upon which the KKPG built their perspective, some of the opponents also challenge their position in the Indonesian religious field.

Proponents of the CLD include modernists, intellectuals, feminists and NGO activists who are also from the educated urban middle-class. The young generation of the NU and Muhammadiyah are included in this group. The majority of them had traditional Islamic educations. They share certain concepts, such as enhancing democracy and pluralism as well as empowering women. In addition to the proponents and opponents, another faction of the Muslim

community chooses to place itself outside the ring of debate. They insist on the urgency of dialogue.

The reform of Islamic family law in Indonesia has involved dialogues and conversations between the young generation, academics and activists. The ample space given to debate by fundamentalist and liberal Muslims can be regarded as the gate of *ijtihad* opened widely in the Indonesian public sphere. The increasing number of modern approaches and methods regarding Islamic jurisprudence that they contest is another factor presenting Islamic family law in Indonesia, which is no longer an old-fashioned clinging to classical traditions. Nevertheless, the space established for dialogue disappeared because of interference of the State. This situation, in my view, is contra-productive and could threaten the process of the emergence of a public sphere in Indonesia. The authority to determine what Islamic family law should be in future is finally in the hands of the political power.

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