

LEGAL REFORM PROJECT, ACCESS TO JUSTICE, AND GENDER EQUITY IN INDONESIA

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Abstract

This article is to discuss the impact of legal reform project between Indonesian and Australian government in assisting women, the poor and those living in remote areas to access the judiciary in Indonesia. Through the program access to the Religious Courts for divorce cases, for example, women are able to document their role as female heads of household. The document is necessary to facilitate access to the Indonesian Government pro-poor programs such as cash transfers, free health treatment, subsidized rice or enrolment of children at state schools. This article argues that the access to justice program in Religious Courts has positive impacts on gender equity development in Indonesia. This argument is based on Amartya Sen's conception of development that must go well beyond "the accumulation of wealth and the growth of gross national product and other income-related variables." Thus, the process of development is really all about removing "the unfreedoms" from which the members of society may suffer. Access to the Religious Courts program for women, the poor and marginalized groups, which was initially supported by the Australian Government through its agencies, has "opened" Indonesian government mind on how to address obstacles in removing "the unfreedoms" of gender discrimination caused by the family laws.

A. Introduction

The concepts of women's right and gender equity have gained significant attention in development issues in the last several decades. The attainment of both women's right and gender equity become an important indicator to understand global well-being. They are believed to further the cause of child survival and welfare of nuclear family members which, in turn, advance the development for all society.² Given their importance, international and national institutions have developed gender-based strategies for improving their legitimacy, efficacy and

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² See Anup Shah, "Women's Rights", article last updated on March 14, 2010 in *Global Issues*, <http://www.globalissues.org/article/166/womens-rights>, March 1, 2011.

capacity which are informed, among other things, by United Nations declarations, conventions, and resolutions focused on gender equality and the promotion of women's human rights.³

Despite ratification by the states to the aforementioned international human rights instruments, numerous issues still exist in attaining gender equity and, in turn, hampering the efforts to empower women. For example, reservations have been made by the states to CEDAW's articles which are potentially in conflict with cultural and/or religious norms held by the society. As a consequence, there are still some aspects of state laws and policies which perpetuate gender discrimination against women; this is true especially in the area of family law. Thus, country which has ratified UN treaties on gender equity and women's right, but yet reformed its family law may still developmentally lag behind because such an instrumentalism approach is inadequate to address the complex issue of attainment of gender equity.

Indonesia's performance on gender equity, for example, lags behind neighboring countries. United Nations Development Programme (UNDP) has categorized Indonesia as a country with medium human development; as per 2010 Indonesia ranked 108 out of 169 countries surveyed in Human Development Index. With regards to gender equity development, Indonesia's Gender Inequality Index ranked 100 out of 138 countries surveyed in 2008. The value of Gender Inequality Index of Indonesia was 0.680;⁴ maternal mortality rate 420 per 100,000 live birth; population with at least secondary education (% ages 25 and older) female 24.2% : male 31.1% per 2010; labour force participation rate female 53.3% : male 86.2%. This

³ Rashida Manjoo and Kristen DeRemer, "Introduction" in Women Living Under Muslim Laws, *Mechanisms and Structures to Promote and Protect Women's Human Rights and Gender Equality* (Dossier 29, July 2008), ix.

⁴ Gender Inequality Index is an indicator to:

"reflects women's disadvantage in three dimensions—reproductive health, empowerment and the labour market—for as many countries as data of reasonable quality allow. The index shows the loss in human development due to inequality between female and male achievements in these dimensions. It ranges from 0, which indicates that women and men fare equally, to 1, which indicates that women fare as poorly as possible in all measured dimensions".

See UNDP – Human Development Report, "Composite Indexes – HDI and Beyond", <http://hdr.undp.org/en/statistics/indices/>, April 12, 2011.

data are not completely different from UN Human Development Report 2003 in which Indonesia's GDI (Gender Development Index) performance ranked 91 out of 144 countries in 2002. A combination of women's lower literacy rate of 86% (as opposed to 94% for men), women's fewer mean years of schooling (6.5 years compared to 7.6 years), and women's smaller share of earned income (38% compared to 62%) contributed to counteract women's advance in life expectancy resulting in Indonesia's lower GDI ranking.⁵

This low Gender Development Index has created another development problem when women become the head of households. According to the World Bank, there are at least six million households in Indonesia headed by women whose husbands have died, divorced or left them. They include single women with children or unmarried women who are the main breadwinners of their families. More than half of these women breadwinners are from poor families⁶ and many are lack of such legal documents as marriage or divorce certificates. These women and their family's members therefore experience different kinds of violence and abuse to their rights. The situation is further exacerbated by existing social and cultural values in Indonesian society which are not always supportive of women head of households, meanwhile the state system does not side them as well.⁷ As a consequence, many women heading households trapped in poverty cycle and unable to improve their household economy through government's development programs because they are ineligible to access the programs since there are no required legal documents to establish their status as the head of households.

This article is to discuss the impact of legal reform project between the Federal Court of Australia, the Family Court of Australia, and Supreme Court of the Republic of Indonesia in

⁵ The World Bank, "Gender Program in Indonesia", www.worldbank.org/id/gender, March 1, 2011. see UNDP – Human Development Report, "Table 4 Gender Inequality Index", http://hdr.undp.org/en/media/HDR_2010_EN_Table4_reprint.pdf, April 12, 2011.

⁶ The World Bank, "Gender Program in Indonesia".

⁷ *Ibid.*

assisting Muslim women, the poor and those living in remote areas to access the Religious Courts. Through the program access to the Religious Courts for divorce cases, for example, women are able to document their role as female heads of household. The document is necessary to facilitate access to the Indonesian Government pro-poor programs such as cash transfers, free health treatment, subsidized rice or enrolment of children at state schools, and help break entrenched cycles of poverty in women-headed households.

This article argues that legal reform project in the form of access to justice program in Religious Courts has positive impacts on gender equity development in Indonesia. This can be explained with Amartya Sen's conception of development that must go well beyond "the accumulation of wealth and the growth of gross national product and other income-related variables."⁸ Thus, the process of development is really all about removing "the unfreedoms" from which the members of society may suffer. Development should be measured by how much freedom a country has since without freedom people cannot make the choices that allow them to help themselves and others. Sen defined freedom as an interconnection and complimentary among: 1) political freedom and civil rights; 2) economic freedom including opportunities to get credit; 3) social opportunities such as arrangements for health care, education, and other social services; 4) transparency guarantees, namely interactions with others, including the government, which are characterized by a mutual understanding of what is offered and what to expect; 5) protective security, such as unemployment benefits, famine and emergency relief, and general safety nets.⁹ With the access to justice program in the Religious Courts, many poor families headed by women now can exercise the freedoms of economy, social opportunities and protective security. In addition, the program has prompted the government to prioritize "justice

⁸ Amartya Sen, *Development as Freedom*, (New York: Anchor Books, 2000), 14.

⁹ See *ibid*, 15-17, 38-41

for all” program (especially children and women) in their development policy agendas in order to achieve Indonesia’s broader poverty alleviation objectives, including the Millennium Development Goals.¹⁰

Prior to analyzing the impact of access to the Religious Courts’ program on development, this article will briefly describe gender inequity in Indonesian family laws. This discussion will help us to understand why there are many undocumented marriage or divorce cases in Indonesia. Then, it will discuss the judicial cooperation between the Family Court of Australia and the Religious Courts of Indonesia with particular focus on access to justice program. The impact of the program on development in Indonesia will be assessed afterwards, especially on how the program has changed government approach to address the issue of women’s rights and gender inequity in family law holistically, beyond the instrumentalism. Lastly, this paper will propose lessons learnt from the program for the advancement of gender equity in Indonesia.

B. Gender Inequity in Family Laws of Indonesia

In order to understand the status of women in Indonesian family law, it is necessary to analyze provisions related to rights and obligations of women in marriage life. There are two family laws put into effect in Indonesia: first, Law No 1/1974 concerning Marriage (Undang-Undang Perkawinan, or **UUP**) which prevails for all Indonesian citizens; second, The 1991 Compilation of Islamic Laws (Kompilasi Hukum Islam, or **KHI**) which specifically regulates Muslim family law. Both laws must be read to understand the status of Muslim women, because the KHI qualifies the UUP in accordance with Islamic law.

¹⁰ See Presidential Instruction No. 3/2010 concerning A Just Development Program; see also Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia’s Islamic Courts and Justice for the Poor* (Double Bay, NSW: Lowy Institute for International Policy, 2010), 41.

The promulgation of the UUP in 1974 was intended to elevate the status of women in marriage. By means of the UUP, the government tries to limit arbitrary *talak* divorce and polygamy by men as well as eliminate child marriage.¹¹ Yet, there are some provisions in the UUP and KHI which contains discriminatory stipulations for women in marriage and the family, such as:

1. The minimum age of marriage differs for the groom and bride, i.e. at least 19 years for the former and 16 years for the latter;¹²
2. Registration is only required for administration purposes,¹³ thus unregistered marriages leave women without proof of their marriages;
3. The husband is recognized as head of the family and the wife solely as housewife;¹⁴
4. Polygamy is allowed through court decisions,¹⁵ but many polygamous marriages occur outside of the courts;
5. Children born outside of legal marriages cannot claim relations with their fathers or access inheritance from them;¹⁶
6. Specifically for Muslims, the concept of disobedience (*nushuz*) to one's husband in the KHI which results in the loss of maintenance¹⁷; it is often used to justify acts of domestic violence.

¹¹ Mark Cammack, Lawrence A. Young, Tim Heaton, 'Legislating Social Change in an Islamic Society – Indonesia's Marriage Law', (1996) 44 *The American Journal of Comparative Law* 45; see also Azyumardi Azra, 'The Indonesian Marriage Law of 1974: An Institutionalization of the *Shari'a* for Social Changes', in Arskal Salim and Azyumardi Azra (eds), *Shari'a and Politics in Modern Indonesia* (Singapore: Institute of Southeast Asian Studies 2003), 78.

¹² See the UUP, art. 7(1); the KHI, art. 15(1).

¹³ See the UUP, art. 2(2); the KHI, art. 5(1).

¹⁴ See the UUP, art. 31(3); the KHI, art. 79(1).

¹⁵ See the UUP art. 3(2); the KHI, art. 56(1)

¹⁶ See the UUP art. 43(1); the KHI art. 100.

¹⁷ See the KHI art. 84(1)(2)(3).

Such discriminative provisions against women have made poor women in Indonesia become more vulnerable to violence and abuse to their rights. A case in point is the requirement of marriage registration, since it does not determine the validity of marriage in Indonesia, many Islamic marriages thus are contracted by local religious leaders, without registration (*nikah sirri*). The *nikah sirri* might jeopardize the status of Muslim women and children and might cause them become neglected, if the marriage dissolves. This is because the husbands may deny the marriage so as to avoid from providing *iddah* (waiting period for a divorced wife) maintenance and children maintenance. The status of Muslim women and children in this case therefore is weak, because of the lack of marriage registration. Meanwhile, the certificate of marriage is instrumental to be a proof for wives' claims on the maintenance in the courts.¹⁸ In addition, the children cannot get a birth certificate without the marriage certificate; this makes them difficult to enroll at public school under the program of free nine-year mandatory school.

In addition, the practice of *nikah siri* in Indonesia has opened the opportunity of polygamous marriages being contracted by Muslim without the Religious Courts' permission. Along with the objective of the KHI to restrict the polygamous marriage, a husband is only allowed to contract polygamy after acquiring the permission of a Religious Court and the consent of a wife. Yet, the possibility of *nikah siri* practice often makes this requirement meaningless. Furthermore, the polygamy which is conducted arbitrarily has caused the number of abandoned wives and children increase in Indonesia.¹⁹ The number of women becoming the head of households thus is increasing in Indonesia;²⁰ not only as an outcome of poverty, labor migration

¹⁸ See Karamah, 'Women's Rights within Islamic Family Law in Southeast Asia', <http://www.karamah.org/docs/Womens_rights_%20SEA.pdf> 20 September 2005, p. 6.

¹⁹ See Siti Musdah Mulia, 'A Revision to Islamic Law Book' (June 2005) 2 *The International Center for Islam and Pluralism* [3] 4.

²⁰ According to Indonesian Central Bureau of Statistics (Badan Pusat Statistik or BPS), there were 65 million of households in Indonesia, of which 14% (9 million) were headed by women. See Badan Pusat Statistik, *Women and Men in Indonesia 2008* (Jakarta: BPS, 2009), 19.

and armed conflict but also because discriminative provision against women in Indonesian family laws. Since the community and the state do not recognize their leadership in the household unless with legal document such as family cards issued by civil registry office, these women face obstacles: in providing sustenance for their families through the poverty relief programs of the government; are denied access entitlements; and cannot conduct legal acts on behalf of their households. Ultimately, an increasing number of families are forced to survive without proper access to legal and social protection.²¹

Through legal reform project of cooperation between Indonesia and Australia, female heads of household and family can finally enjoy reasonable access to legal and social protection thanks to access to justice program designed and implemented in the Religious Courts.

C. Access to Justice Program in the Religious Courts

Access to Justice Program in the Religious Courts is one program of the legal reform project of cooperation between the Federal Court of Australia, the Family Court of Australia and the Supreme Court of the Republic of Indonesia (Mahkamah Agung or MA). The parties signed the Memorandum of Understanding on July 21, 2008 in Melbourne. The objectives of programs are “development of each party court, procedures and understanding of other contemporary legal issues to the mutual benefits ... [particularly for Indonesia] enhancing the capacity of the MA to fulfill its mandate in the newly democratized Indonesia.”²² The forms of cooperation may include: from on-going technical assistance cooperation between judges, registrars and court

²¹ See National Profile “Indonesia”, *Musawah for Equality in Family*, http://www.musawah.org/np_indonesia.asp, March 1, 2011.

²² Memorandum of Understanding between the Federal Court of Australia, the Family Court of Australia, and the Supreme Court of the Republic of Indonesia on Judicial Cooperation, July 21, 2008 (heretofore MoU), Art. 1(c).

staff; working meetings and roundtable discussions; exchange of materials and other legal resources.²³

In Indonesia, the Supreme Court will cooperate with Judicial Reform Team in implementation and in accordance with any donor coordination which consist of combination between Australia and Indonesia experts. Routine consultation for the purpose of implementation of program take place among: the Judicial Reform Team at MA; the Federal Court of Australia (International Program Office in Sydney); the Family Court of Australia (Executive Advisor to the Chief Executive Officer in Canberra); and Indonesia Australia Legal Development Facility – IALDF (team leader Jakarta and the lead adviser – judicial reform).²⁴ Fund for the cooperation is mutually determined by both parties.

Activities under the MoU include the MA case backlog reduction program and judicial transparency; financial management reform; leadership and change management; support to the judicial reform team office; and specific activities for the Religious Courts including strengthening client services and information technology systems.²⁵ The access to justice program in the Religious Courts has not been included in the MoU because it was incorporated later on during the amendment on September 23, 2010. The incorporation of this program into the MoU was informed by the result of Religious Courts access and equity surveys 2007-2009 (this survey is to implement the activities for the Religious Courts enshrined in the MoU). The surveys were conducted by the Supreme Court of Indonesia, the Family Court of Australia, IALDF, and supported by PEKKA (Pemberdayaan Perempuan Kepala Keluarga)²⁶, PPIM (Pusat

²³ MoU, Art. 2(a)(b)(c).

²⁴ MoU, Art. 4(5).

²⁵ MoU, Annex.

²⁶ PEKKA was established in 2001 and works with over 12,000 female heads of household through a network of 500 PEKKA groups dispersed across 330 villages in 8 Indonesian Provinces, including NAD, West Java, Central Java, West Kalimantan, West Nusa Tenggara, East Nusa Tenggara, North Maluku and Southeast Sulawesi. PEKKA supports about 6,500 rural widows in over 300 villages, 38 sub-districts and across 8 provinces. The program

Pengkajian Islam dan Masyarakat)²⁷, SMERU²⁸ and several individual research consultants and lawyers. This survey was supported by the Australian Government through the AusAID-funded Indonesia Australia Legal Development Facility (IADLF), a joint Indonesian and Australian Government Initiative. Among other findings are:

1. The poorest group in Indonesian society face significant obstacles (financial: court fees and transportation costs to the courts) in bringing their family law cases to the courts. From female heads of household living under the poverty line studied, nine out of ten were unable to access the courts for their divorce cases as required by the family laws;²⁹
2. This kind of household also experiences a cycle of non-legal marriage (*nikah sirri*) and divorce; meanwhile, failure to obtain legal documentation for their marriage and divorce has prompted 56% of children from these marriages not acquiring birth certificates;³⁰
3. The average total cost of litigation in a religious court was around Rp. 800.000 which was almost four times the monthly per capita income of those living on/below the Indonesian poverty line. In addition the Religious Courts usually overestimate the down payment on costs of litigation which can be disincentive for poor justice seekers; meanwhile reimbursement of the balance at the end of the case did not always happen.

focuses on village level capacity building and microfinance activities, and social and economic empowerment. It has a special program for widows of the tsunami victims in Aceh. See www.pekka.or.id/8/index.php.

²⁷ PPIM is a research center at State Islamic University (UIN) Syarif Hidayatullah, Jakarta. It aims at the advancement of academic excellence in research and policy studies, and for publication on Islam and social issues in Indonesia and Southeast Asia. See www.ppim.or.id.

²⁸ SMERU is an independent institution for research and public policy supported by Australia Indonesia (AIP). SMERU studies various socioeconomic and poverty issues considered most urgent and relevant for the people of Indonesia. See www.smeru.or.id.

²⁹ *Providing Justice to the Justice Seeker: A Report on the Access and Equity Study in the Indonesian General and Religious Courts 2007 – 2009* (Mahkamah Agung and AusAID, 2010), 28-49; see also Cate Sumner and Tim Lindsey (2010), 19-20, 47-54.

³⁰ *Ibid.*

The survey found that the Religious Courts' users paid 24% more as a down payment than the final cost of case mentioned in the judgments.³¹

Given the fact, the parties then progress the cooperation to the following key areas: *inter alia*, judicial transparency and affordable and accessible court services for poor and marginalized groups through enhancing and broadening access to the courts for the poor and other marginalized groups, particularly women in family law cases. The court is strengthening its delivery of client services through court fee waivers, circuit courts to remote areas and providing assistance for the establishment of legal aid posts in courts and service charters.³² These new areas of cooperation is developed in line with the Indonesian Court's Blueprint for Reform 2010-2035 which aims at court excellence framework in seven areas, namely: court management and leadership; court policies; human, material, and financial resources; court proceedings; court users' needs and satisfactions; affordable and accessible court services; public trusts and confidence.³³

To follow up findings and recommendations of the 2007-2009 survey, the Directorate of Religious Courts (Badan Peradilan Agama or Badilag) has maintained a website that contain information required for transparency and accountability as well as link to more than 300 Religious Courts on district and provincial level. Public now has access to the Religious Courts' judgments. In 2006, there were no Religious Courts' judgments that can be accessed from the website, now there are around 5000. Likewise, information on litigation fees collected by the

³¹ *Ibid.*

³² Annex to MoU, September 23, 2010.

³³ In this second phase of judicial cooperation, the role of IALDF was replaced by AusAID (represented by Counselor, Governance, Policy and Coordination).

Religious Courts now is made available publicly in the website and published in the Religious Courts annual report for 2008 and 2009.³⁴

With regards to access to the Religious Courts for women, the poor and those living in remote areas, the Courts now were granted budget increase by Rp 23 billion in 2008. This money is intended to expand the Religious Courts' access to justice program so that those who live in remote areas where the Courts reside can access the Courts for their family law cases. Because of the budget increase, the Religious Courts now can intensify their *prodeo* cases (fee waivers for the poor) as well as their circuit courts that travelled to remote areas. For a comparison, the Religious Courts' budget for both programs were only less than Rp 1 billion in 2007 but increased to Rp 24 billion in 2008.³⁵

D. Analysis: Impact on Gender Equity Development

Efforts to improve gender equity in Indonesia have been initiated by the state since 1970s through legislation. When the government under Soeharto regime proposed a national marriage law draft without consulting the Department of Religion in 1973, the proposal was strongly opposed by Muslim representatives in the parliament and angry protesters outside the House. The proposal was submitted to directly attack Islamic doctrine on marriage because it stated that a valid marriage is: when the statutory requirements were fulfilled, inter alia parties' consent and majority; conducted in front of an official registrar; and then recorded by the official registrar. The opponents of proposal maintained that pursuant to Shafi'i school of Islamic law recognized in Indonesia a marriage is valid simply when offer (*ijab*) of the bride's guardian and acceptance (*kabul*) of the groom complete and two qualified witnesses present during marriage solemnization. The draft finally was enacted to Law No. 1/1974 on Marriage after the parliament

³⁴ Cate Sumner and Tim Lindsey (2010), 29.

³⁵ *Ibid*, 30, 63.

reached compromise with the orthodox demands wherein all provisions contrary to Islamic doctrine removed. Thus, marriage registration for example no longer become valid marriage requirements; if Muslims want their marriage to be legal according to the state law, however, they need to performed it before the official registrar and then register it.³⁶

Along with intensive encounter with gender equity and women's right information as well ratifications to International Human Right Law such as CEDAW and Convention on the Right of Child (CRC), the government has made gender equity as a part of national agenda. The president issued Inpres No 9/2000 of Gender Mainstreaming in the National Development by which every ministry and state department are required to include gender equity in their policy and agenda. Department and commissions on women empowerment and children was also established. In 2004, Indonesia moved forward to realize gender equity through the promulgation of Law No 23/2004 concerning the Elimination of Violence in Household. Despite of this, gender inequity are still prevalent in Indonesia and women and children are still discriminated by government system. Many Indonesian feminists argued that this is caused by discriminative provisions against women in Indonesian family laws: the UUP No. 1/1974 and especially the KHI 1991.

Indonesian family law reform has actually been entered into the priority programs of national legislation. For Islamic family law reformation, the Ministry of Religious Affairs was assigned to prepare the draft. The Ministry then formed a Gender Mainstreaming Commission to conduct study on Islamic family law, either classical or modern, and then come up with a draft purported to amend the KHI. After accomplishing their studies over two years and drafting the

³⁶ See Mark Cammack, Lawrence A. Young, and Tim Heaton, "Legislating Social Change in an Islamic Society – Indonesia's Marriage Law", 44 *American Journal of Comparative Law* 61 (1996), 61-62; Mark E. Cammack, Helen Donovan, and Tim B. Heaton, "Islamic Divorce Law and Practice in Indonesia" in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, Massachusetts: Islamic Legal Studies Program, Harvard Law School, 2007), 99-100.

Counter Legal Draft to KHI (CLD KHI), however, the CLD KHI received criticism from many elements of Indonesian Muslims. These criticisms were unsurprising because almost all provisions in the KHI, especially those which are considered to discriminate against women, are dismantled by means of legal ethics and universal values of Islam induced from the Koran, such as pluralism, human rights and gender equality. The results include marriage registration became legal conditions of marriage, polygamy is not allowed and deemed void by law, interfaith marriages are allowed, and disobedience (*nushuz*) applied also to the husband. This is done to evoke public awareness of some problems which exist in the community, stemming from some provisions in the KHI. These problems include the increasing number of abandoned wives and children as a result of polygamy, and domestic violence against women.³⁷

In addition, the KHI is unparalleled with the national and international law which have been ratified in Indonesia such as Law No 7/1989 of CEDAW Ratification, Law No 39/1999 of Human Rights, CEDAW,³⁸ and ICCPR.³⁹ Akin to the situation of the UUP No. 1/1974 legislation in 1970s, The CLD KHI was accused of infringing the doctrines of Islamic marriage. Therefore, it had to be revoked so as not to create restlessness among Muslim communities. As a matter of fact, rallies committed by Islamic groups occurred many times demanding the CLD KHI to be withdrawn from scheduling in the Parliament. Based on this, the Minister of Religious Affairs dissolved the commission and revoked the CLD KHI from Ministry Religious Affairs' agenda.

³⁷ See Siti Musdah Mulia, 'A Revision to Islamic Law Book' (June 2005) 2 *The International Center for Islam and Pluralism* [3] 4; Saparinah Sadli, 'Feminism in Indonesia in an International context, in Kathryn Robinson and Sharon Bessel (eds.), *Women in Indonesia, Gender, Equity and Development* (Singapore: Institute of Southeast Asian Studies, 2002) 88.

³⁸ See the CEDAW, Art. 16.

³⁹ See the *International Covenant on Civil and Political Rights*, Art. 23(2-4).

Reform of Indonesian family laws is actually a requirement because discriminative provisions against women in the UUP and the KHI have hampered the effort to attain gender equity in Indonesia. Gender inequity, in fact, has been started and preserved from the very unit of Indonesian society, ie., family, which in turn has put restriction on poor women headed the households and their children from exercising freedoms of economy, social opportunities and protective security. They cannot access to a range of government welfare services such as health insurance for poor, rice subsidies or direct cash assistance payment because they cannot establish their status as the head of household in the family card verifying poverty. Meanwhile, to get the family card verifying poverty with their status as the head of household, they need to show the marriage and/or divorce certificates. This is something render difficult for them because their marriages were unregistered in the first hand, or their divorces were not pronounced before the Religious Courts as required by the UUP and the KHI. As a consequence, discriminative provisions against women in the Indonesian family laws have put women headed the households living under poverty line in the cycle of non-legal marriage and divorce and, in turn, in the cycle of poverty.

The 2007-2009 surveys revealed that 33% women headed the households which are members of PEKKA could not access the 2008 cash assistance payment program; 34% did not receive health cards to be eligible receiving the health insurance for poor (Jamkesmas). Children living in the households also suffered from the negative impacts of the non-legal marriage and divorce cycle; from the survey, 56% of children born in that kind of marriages cannot obtain their birth certificates. This finding confirmed UNICEF estimation that around 60% of Indonesian children under five lack birth certificates; the rate is higher in poor provinces with the figure is above 80%. Without birth certificates, these children cannot enroll at government nine

years education program. The link between the completion of nine years education program and having birth certificate was found in the PEKKA survey.⁴⁰ The 1991 KHI actually opens the opportunity for unregistered marriage and divorce to be validated before the Religious Courts. However, the survey found that nine out of ten PEKKA members could not access the courts because of court fees and transportation.⁴¹

Hence, improving women's rights and gender equity in Indonesia cannot be done with such instrumentalism approach as radical reformation towards Islamic family laws as proposed by the CLD KHI. Along with the emergence of Islamist groups in Indonesia who are suspicious with western agenda in Indonesia, adopting ideas like women's rights and gender equality as enshrined in CEDAW without reserve is counterproductive. Instead, bottom-up strategy and real programs for the affected women are necessary to deal with difficulties in amending discriminative provisions against women in Indonesia right now.

Access to justice program in the Religious Courts is a breakthrough in gender equity development adopted by the government. With the access to justice program in the Religious Courts, many poor families headed by women now can exercise the freedoms of economy, social opportunities and protective security. The number of divorce cases heard by the Religious Courts increase as the ability of the poor to access the courts: 148,890 cases in 2006 compared to 223,371 cases in 2009.⁴² This can limit the occurrence of unregistered divorce cases which put poor women in restriction to exercise their freedoms to social opportunities (health care and free schooling for children) and protective security (rice subsidies and cash assistance payment). In addition, through their circuit court program in remote areas and *prodeo* fee waiver program, the

⁴⁰ Cate Sumner and Tim Lindsey, (2010), 25.

⁴¹ See footnote 28.

⁴² Mahkamah Agung and AusAID (2010), 33; Cate Sumner and Tim Lindsey (2010), 31.

Religious Courts have processed more than 13,000 marriage legalization (*isbat nikah*) which also helped to address birth certificate problems for children born within unregistered marriages.⁴³

Given its impacts on gender equity development, the program has prompted the government to prioritize “justice for all” program (especially children and women) in their development policy agendas in order to achieve Indonesia’s broader poverty alleviation objectives, including the Millennium Development Goals. This is then formalized into statutes which require all courts (Pengadilan Negeri and Pengadilan Agama) to provide a range of services for the poor and marginalized groups to access the courts, and implemented into Indonesia’s Medium-Term Development Plan 2010-2014.⁴⁴ The government’s commitment was proven by allocating almost Rp 300 billion to support the program. Of that amount, the Religious Courts were granted budget increase by Rp 23 billion in 2008. This money is intended to expand the Religious Courts’s access to justice program so that those who live in remote areas where the Courts reside can access the Courts for their family law cases. Because of the budget increase, the Religious Courts now can intensify their *prodeo* cases (fee waivers for the poor) as well as their circuit courts that travelled to remote areas. For a comparison, the Religious Courts’ budget for both programs were only less than Rp 1 billion in 2007 but increased to Rp 24 billion in 2008.⁴⁵

E. Conclusion: Lessons Learnt

When we evaluate a legal reform project we also need to see how the project may push the local actors to further pursue their legal reform agenda. This shows that the project goes

⁴³ Cate Sumner and Tim Lindsey (2010), 32.

⁴⁴ See Law No. 48/2009 on Judicial Authority, Art. 56-57; Law No. 49/2009 on Amendment of Law No. 2/1986 on the General Courts, Art. 68; Law No. 50/2009 on Amendment of Law No.7/ 1989 on the Religious Courts; see also Presidential Instruction No. 3/2010 on A Just Development Program; see also Cate Sumner and Tim Lindsey (2010), 41.

⁴⁵ *Ibid*, 30, 63.

beyond transplanting foreign legal ideas and attitudes to the third world as per suggested by John Henry Merryman.⁴⁶ Instead, the project is expected to trigger awareness among the local actors on the importance on, inter alia, equal access to justice in their legal system in order to pursue development goals such as gender equity. Access to the Religious Courts program for women, the poor and marginalized groups, which was initially supported by the Australian Government through its agencies, has “opened” Indonesian government mind on how to address obstacles in removing “the unfreedoms” of gender discrimination caused by the family laws. In the course of family law reformation history in Indonesia, it turns out that instrumentalism approach deemed to fail given socio-political context of Muslims in Indonesia which tend to be conservative when it comes to family law reformation informed by human rights.

Australian government seemed to be aware of this Indonesian Muslims socio-political context, and avoided the stereotype of donors’ attitude in imposing the blue print of women’s rights on legal reform projects in the host country. Activities in the judicial cooperation between Indonesia and Australia were yielded through intensive communication among parties: the donor, the agencies, the implementers, the recipients and beneficiaries. As a matter of fact, the access to the Religious Courts program for women, the poor and marginalized groups was executed because of responses acquired by the Religious Courts from users’ survey in 2007 – 2009.

One thing we can learn from this legal reform project in the context of gender equity development in Muslim countries is that it would be more relevant to question how to bridge the gap created by universalism and cultural relativism than to question the possibility of setting them aside. To put it differently, not pushing donor own agenda but willingness to cooperate

⁴⁶ John Henry Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement”, 25 *American Journal of Comparative Law* (1977).

with the host country as well as to hear voices of groups who will be affected on such gender equity development program that make rule of law assistance has positive impacts on development. This is because excessive universalism or cultural relativism leads to the same way, i.e. deprivation of women's right and gender equity. Universalism may promote moral vision in protecting individual rights of women from violations perpetrated by the state or dominant group which try to enforce laws deemed to violate women's rights. Moral vision is a belief that such humanistic values as mutual respect or complimentary relationship between wives and husbands proposed by international human right instruments are also shared by Islam or other cultures.

However, too much emphasis on universalism without due regards the value of sharia as "divine" may lead to rejection against the international human rights instruments. This is so since religious doctrines strongly influence Muslims on matters related to family law. As a matter of fact, family law is one aspect of the Sharia which is heavily regulated by the Koran; yet, this does not necessarily mean that the so called religious doctrines of Islamic family law are immutable. Too much emphasis on universalism also may hamper the moral vision promotion between international human right instruments and Islam, since the donors failed to engage with the Muslim host countries.

On the other hand, excessively favoring cultural relativism may suggest that Muslim regime or dominant group in Muslim host countries failed to acknowledge Islamic values of women's right which happen to be invoked by the donors. Amartya Sen has presented the facts about "missing women" because of development that does not emphasize the aspect of eliminating "unfreedom" that cause suffering for all elements of society. By using the analysis of Sen, it is not surprising that the number of "missing women" who live under Islamic family laws

is relatively high given lack of freedoms of economy, social opportunities and protective security generated by gender biased family law and government discriminative development policies. Therefore, law reform project related to women's human rights that can bridge the two extreme poles of universalism and cultural relativism were supposed to become a factor in the further development of gender equality in Indonesia.

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