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Constructions of the Right to Family Planning in Indonesian Law

Summary

In this paper I discuss the construction of the right to family planning in Indonesian law. I conclude that the right to family planning is given its content and meaning through two discourses, which each establishes the right by chains of equivalence that orient around the nodal points of 'Health' and 'Prosperous Family'. I find that the relevant subject positions available to the individual through this construction of the right, are those of 'spouse' or 'family member'. The right to family planning is thus not constructed as a right in relation to which the individual *per se* is a relevant rights-bearer. Throughout the paper, constructions of the right to family planning in discourses of international human rights law are used as a reference. The analysis in the paper is a short version, and the first step, of a larger analysis of a legal reform process whereby the international norms on the right to family planning are to be implemented in the Indonesian national system. This process of implementation is the topic of my doctoral project in international human rights law.

1 Introduction

1.1 A Short Background

In this section, I give a short background to the context of the present paper. I describe, in brief, how issues relevant for my topic have been understood and portrayed by commentators and some of the most relied upon authorities, such as the World Health Organization (WHO) and other United Nations (UN) organs.[1]

WHO estimates that more than 529,000 women die every year from pregnancy-related causes and that more than 300 millions suffer from injuries and disabilities.[2] As over 99 per cent of these deaths occur in developing countries (and of which the vast majority are preventable), maternal mortality rates constitute one of the most significant disparities between the global South and North.[3] Unmet need of family planning is

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[1] Evidently, drawing from these sources as a 'collection of truths', I myself construct a "truth that can be discussed". *C.f.* L. Phillips and M. Winther Jørgensen, *Discourse Analysis as Theory and Method* (Sage Publications, London, 2002) p. 206.

[2] *See World Health Report 2005: Make Every Woman and Child Count* (World Health Organization, Geneva, 2005) p. 10

[3] For this reason, improvement of maternal health and reduction of maternal mortality has been identified as a United Nations Millennium Development Goal (MDG). *See* 'The UN Millennium Development Goals', <www.un.org/millenniumgoals/index.html#|>.

commonly identified as one of the main factors contributing to maternal mortality and morbidity.[4] Although the causes of maternal mortality are complex, WHO estimates that 100,000 maternal deaths could be avoided each year if women who wanted to use family planning[5] had access to adequate and effective means of contraception.[6] In the *Millennium Development Goal Report 2007*, the UN estimates that 137 million women worldwide have an unmet need for family planning, meaning that they lack the means to limit and space childbirth despite a wish to do so.[7]

Since the early 1990s, family planning has increasingly been addressed in human rights terms within the international community. Examples of this development are the outcome and follow-up documents of the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing, where family planning is addressed as parts of reproductive rights "already recognized in national laws, international human rights documents and other relevant United Nations consensus documents"[8]. The language of Cairo and Beijing has since been adopted by various UN human rights treaty

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Maternal mortality rates are the highest in sub-Saharan Africa, with a life-time risk of maternal death of 1 in 16. *Ibid*., *World Health Report 2005*, p. 11. As an example, Niger has a maternal mortality ratio of 1600 per 100,000 live births, whereas Sweden has a ratio of 8 per 100,000 live births (latest statistics from 2000). *See* 'Core Health Indicators', available via WHO Statistical Information System (WHOSIS), <www3.who.int/whosis/core/core_select.cfm>.

[4] *See World Health Report 2005, supra* note 2, p. 48.

[5] *C.f.* the working definition applied by the WHO: "Family Planning implies the ability of individuals and couples to anticipate and attain their desired number of children and the spacing and timing of their births. It is achieved through use of contraceptive methods and the treatment of involuntary infertility." *See* WHO Department of Reproductive Health and Research, <www.who.int/topics/family_planning/en/>.

[6] *See World Health Report 2005*, *supra* note 2, p. 50. According to WHO, the waste majority of maternal deaths are the results of so-called 'direct causes' related to pregnancy and childbirth, such as haemorrhage, *i.e.* severe bleeding, (25 per cent); infections (15 per cent); unsafe abortion (13 per cent); eclampsia, *i.e.* convulsions leading to seizure, (12 per cent); and obstructed labour (8 per cent). *Ibid*., pp. 62-63.

[7] *See The Millennium Development Goal Report 2007* (United Nations, New York, 2007) p. 17. *See also Family Planning: A Global Handbook for Providers* (World Health Organization and John Hopkins Bloomberg School of Public Health, 2007) p. iv.

[8] *See* 'International Conference on Population and Development Programme of Action' (ICPD Programme of Action), para. 7.3. <www.unfpa.org/icpd/icpd_poa.htm> and 'United Nations Fourth World Conference on Women Platform for Action', para. 95. <www.un.org/womenwatch/daw/beijing/platform/index.html>.

monitoring bodies and other UN organs,[9] as well as by numerous human rights oriented non-governmental organisations (NGOs).[10]

Faced with growing populations and limited natural resources, several countries in the global South, and in particular in Asia, initiated national family planning programmes in the 1960s and 1970s.[11] As is widely know, Indonesia has a national family planning programme established by then President Soeharto as part of his *Orde Baru, i.e.* New Order regime. According to the United Nations Population Fund (UNFPA), the fertility in Indonesia has declined from 5.6 children per woman in 1971 to 2.3 in 2000, and the population growth has declined from 2.1 to 1.49 per cent per year during the same period.[12] This achievement has widely been attributed to the national family planning programme, initiated in the early 1970s.[13] Today, it is estimated that 60 per cent of all currently married Indonesian women use some form of family planning, and 56 per cent use what is defined as 'modern methods'.[14] Because of the significant

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[9] As an example, the Committee on the Elimination on Discrimination Against Women (CEDAW Committee) decided in 1995 that it should take upon itself to monitor the implementation of the ICPD Programme of Action through the reporting mechanism under CEDAW and develop jurisprudence on standards for women's reproductive health (although no such mandate was originally provided for in the ICPD Programme of Action). *See* General Assembly, *Report of the Committee on the Elimination of Discrimination Against Women*, (A/50/38), p. 11.

[10] There are several NGOs working to promote reproductive rights as human rights, with the New York-based Center for Reproductive Rights as one of the most well known. Mainstream human rights NGOs such as Amnesty International and Human Rights Watch for a long time did not work with reproductive rights. However, in 2006 Human Rights Watch adopted a policy on the matter (including abortion), and Amnesty International followed suit in 2007. *See* <www.hrw.org/english/docs/2005/07/07/americ11295.htm>, on Human Rights Watch's work on reproductive rights. *See* 'Amnesty International Takes on Divided World', Amnesty International Press Release, ORG 50/041/2007, 17 August 2007, <www.amnesty.org/en/library/info/ORG50/041/2007/en>.

[11] *See e.g.* J. Cleland, S. Bernstein, A. Ezeh, A. Faundes, A. Glasier, J. Innis, 'Family Planning: the Unfinished Agenda' 368:9549 *The Lancet* (2006) p. 1810.

[12] *See* 'Population Data for Development', UNFPA, <www.indonesia.unfpa.org/Population%20Data%20for%20Development.htm>.

[13] However, some demography experts argue that such correlations cannot be automatically drawn as many socio-economic factors additionally add to the picture, for which reason "it is very difficult to determine the exact contribution of the family planning program to fertility decline." *See* G.W. Jones, 'Family Planning, Demographic Change and Economic Development' in A. Niehof and F. Lubis (eds.) *Two is Enough: Family Planning in Indonesia under the New Order 1968-1998* (KITLV Press, Leiden, 2003) p. 156. As pointed out by Sri Moertiningsih Adioetomo, fertility had already started to decline before the family planning programme was initiated. *See* S.M. Adioetomo, 'Fertility and Family Planning: Prospects and Challenges' in G.W. Jones and T.H. Hull (eds.), *Indonesia Assessment: Population and Human Resources* (Institute of Southeast Asian Studies, Singapore, 1997) p. 234.

[14] *E.g.* sterilization, intrauterine device (IUD), condoms, contraceptive pills, injections or implants. *See Indonesia Demographic and Health Survey 2002-2003* (Badan Pusat Statistik – Statistics Indonesia (BPS) and ORC Macro, Calverton, 2003) p. 67. At the same time, however, according to estimations by UNFPA, the national maternal mortality rate of 307 per 100,000 live births remains the highest in the Southeast Asian region. *See also* 'About UNFPA in Indonesia', UNFPA, <www.indonesia.unfpa.org/about.htm>. UNFPA recently reported that the maternal mortality rate in Indonesia is in fact even higher, at

decline in fertility, the national family planning programme and the National Family Planning Coordination Board (BKKBN)[15] is generally considered as a great success story and Indonesia has gained international recognition for the achievements.[16] BKKBN itself represented a new form of governmental body, which reported directly to president Soeharto and coordinated the national family planning programme in which various state agencies were involved.[17] In practice, BKKBN was also directly involved in implementing the programme, beyond mere coordination.[18] A well known example of such direct implementation was the so-called '*Safari*', *i.e.* special family planning programme mass-recruitment drives. These initiatives were criticised both nationally and internationally for lack of informed consent, various degrees of coercion, as well as the involvement of the military in the recruitment of women to the programme.[19]

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an estimated 420 per 100,000 live births. *See* D. Nurhayati, 'UN Says Spend More and Save Lives', *The Jakarta Post*, 18 December 2007.

[15] BKKBN, short for *Badan Kordinasi Keluarga Berencana*, was established by Presidential Decree no. 8 of 1970. *See* F. Lubis, 'History and Structure of the National Family Planning Program' in A. Niehof and F. Lubis (eds.) *Two is Enough: Family Planning in Indonesia under the New Order 1968-1998* (KITLV Press, Leiden, 2003) p. 34.

[16] Many commentators, and foreign development assistance donors, have described the Indonesian programme as a success story in family planning. *See e.g.* T.H. Hull and V.J. Hull, 'From Family Planning to Reproductive Health Care: A Brief History' in T.H. Hull (ed.) *People, Population, and Policy in Indonesia* (Equinox Publishing, Jakarta, 2005) p. 33. *See also* R. Freedman, S.E. Khoo and B. Supraptilah, 'Use of Modern Contraceptives in Indonesia: A Challenge to the Conventional Wisdom' 7:1 *International Family Planning Perspectives* (1981) pp. 3-4 and D.L. Piet, 'The Significance of Foreign Assistance to the Indonesian Family Planning Program' in A. Niehof and F. Lubis (eds.) *Two is Enough: Family Planning in Indonesia under the New Order 1968-1998* (KITLV Press, Leiden, 2003) pp. 83-89.

[17] The national family planning programme evidently involved key state agencies, such as the Ministry of Health, but also engaged other ministries, and the military. From the onset of the family programme, there seems to have been a power struggle between BKKBN and the Ministry of Health, regarding *e.g.* budget and cooperation with foreign partners. *See e.g.* D.P. Warwick, 'The Indonesian Family Planning Program: Government Influence and Client Choice' 12:3 *Population and Development Review* (1986) p. 458-459, 483. *See also* Hull and Hull, *supra* note 16, pp. 25, 28 and 53.

[18] The task of implementing certain activities in the field was later assigned to BKKBN by Presidential Decree no. 38 of 1978, *see* Lubis, *supra* note 15, p. 35. *See also* Hull and Hull, *supra* note 16, p. 23. On the cooperation between BKKBN and various international agencies such as the World Bank, USAID and UNFPA, *see* Piet, *supra* note 16, pp. 84, 91-102.

[19] The '*Safari*', most common in the 1980s, seems to be one of the most controversial strategies of the family planning programme. *See e.g.* T.H. Hull, 'The Political Framework for Family Planning' in Indonesia' in A. Niehof and F. Lubis (eds.) *Two is Enough: Family Planning in Indonesia under the New Order 1968-1998* (KITLV Press, Leiden, 2003) pp. 72-73; A. Niehof and F. Lubis 'Family Planning in Practice: Cases from the Field' in Indonesia' in A. Niehof and F. Lubis (eds.) *Two is Enough: Family Planning in Indonesia under the New Order 1968-1998* (KITLV Press, Leiden, 2003) pp. 135-136 and Warwick, *supra* note 17, p. 470. Arguably, the allegations of coercion led the Netherlands to suspend developing cooperation with Indonesia in the field of family planning in the early 1990s. *See* Piet, *supra* note 16, p. 97. On the other hand, it has also been argued that: "(…) safaris serve a variety of purposes in a country with a poor infrastructure and limited resources (…)". *See* A. Niehof, 'Family Planning in Indonesia: A Source of Far-Reaching

Since the fall of the authoritarian New Order regime in 1998, and within the first years of *Reformasi*[20], a number of political and legal reforms were undertaken with the intention to transform Indonesia from an authoritarian state to a modern democracy.[21] As part thereof, in order to increase the respect for human rights and rule of law, a number of human rights related laws were enacted, international conventions were ratified, and various human rights bodies established.[22]

1.2 Context of This Paper

In this paper, I present some ideas that I am currently working on as part of my doctoral (LL.D.) project in international human rights law.[23] The dissertation topic is implementation of the right to family planning in Indonesia. With discourse theory as a framework, I discuss how the right to family planning is constructed in international human rights law, represented by four international human rights conventions under the UN system,[24] and in Indonesian law, represented by two pieces of legislation, in their current and proposed amended form. Indonesia is a state party to the four conventions and has thereby agreed under international law to implement and realise the rights therein through the domestic legal system.[25] The relevant Indonesian laws in the area of

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Controversy; A Rejoinder to Brenan and White' 152:1 *Bijdragen tot de Taal-, Land- en Volkenkunde* (1996) p. 150.

[20] *Reformasi*, meaning 'reform', is the commonly used term, also in English, for the time period since 1998, after the end of the Soeharto presidency.

[21] There is a significant body of literature on this process of transition, of which the details are beyond the scope of this paper. *See e.g.* K. O'Rourke, *Reformasi: The Struggle for Power in Post-Soeharto Indonesia* (Allen & Unwin, Crows Nest, 2003) and M. Zurbuchen (ed.), *Beginning to Remember: the Past in the Indonesian Present* (Singapore University Press, Singapore, 2005).

[22] At the foundation of this reform are four constitutional amendments, and the introduction of enhanced local autonomy for Indonesia's 33 provinces and over 450 districts. An additional step in the reform process has been the ratification of several international human rights conventions, the adoption of a Human Rights Act and a Human Rights Court Act. The National Commission on Human Rights (*KomnasHAM*) and the National Commission on Violence Against Women (*Komnas Perempuan*) are examples of new human rights bodies.

[23] The working title of the dissertation is "The Implementation of the Right to Family Planning in Indonesia". Supervisor is Professor Gregor Noll, Faculty of Law, Lund University.

[24] These conventions are the two 1966 Covenants: International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and 1989 Convention on the Rights of the Child (CRC). In addition to the convention texts, I also analyse the interpretative documents, *i.e.* General Comments and General Recommendations, issued by the respective United Nations treaty body, assigned to monitor the state parties' compliance with the conventions.

[25] Indonesia ratified and became a state party to CEDAW in 1984, CRC in 1990, ICCPR and ICESCR in 2005. *See* United Nations Treaty Collection Databases (UNTC), <www.untreaty.un.org/English/access.asp>.

family planning are the 1992 Health Law and the 1992 Law on Population Development and Development of Prosperous Families.[26] For almost a decade, these laws have been under deliberation for reform by the Indonesian parliament, (*Dewan Perwakilan Rakyat* – DPR), but the amendment process has repeatedly stranded at the draft stage.[27] National and international commentators have attributed the failure to complete the amendment process to a variety of reasons. Most commonly, this is attributed to the politically sensitive issues at stake – *e.g.* whether or not abortion should be legalised, and which governmental body should in charge of the national family planning programme – but also to the generally perceived inefficiency of DPR.[28]

It is in the context of this legal reform process that my study takes place. Legal reform and the implementation of international norms into a national system are traditional topics for studies of law, and perhaps particularly so in the field of human rights law. The material I use, *i.e.* mostly so-called primary sources of law, are also conventional in legal research.[29] However, my research interest is in *the process of implementation and legal reform*, for which reason I carry out my study in the format of discourse analysis, mainly inspired by discourse theory. This approach presents an alternative aim for an analysis of law, compared to the more common, positivist one, which is the establishment of *lex lata* (*i.e.* what the law states) through studies of (the) legal sources.[30] The main aim of my study is to provide a picture of the

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[26] *Undang-Undang Republik Indonesia Nomor 23 Tahun 1992 Tentang Kesehatan*, enacted on 17 September 1992 and *Undang-Undang Republik Indonesia Nomor 10 Tahun 1992 Tentang Perkembangan Kependudukan Dan Pembangunan Keluarga Sejahtera*, enacted on 16 April 1992. In this text I will refer to the laws as 'Health Law' and 'Population Law'.

[27] A new Health Law was however passed by DPR in 2004, but because it was never singed by then President Megawati before the end of her term, the law did not enter into force.

[28] *See e.g.* 'IFPPD Profile' (Indonesian Forum of Parliamentarians on Population and Development, Jakarta) p. 9. 'Lawmakers Discuss Health Law', *The Jakarta Post*, 20 November 2007. *C.f. also* the interview with Mr. Rizal Malik, Chairperson of Indonesian Planned Parenthood Association (PKBI): 'Public Norms Biggest Challenge to Reproductive Health Programs', *The Jakarta Post*, 28 January 2008. It has been argued that the abortion issue was subject to equal controversy during the deliberation of the 1992 Health Law. *See* T.H. Hull, S.W. Sarwono and N. Widyantoro, 'Induced Abortion in Indonesia' 24:4 *Studies in Family Planning* (1993) pp. 242-245. In recent times, Indonesian media has reported on a number of corruption scandals within DPR and the political parties. *See e.g.* 'PDI-P legislators return legislation fees', *The Jakarta Post*, 21 February 2008, p. 9 and A. Khalik, 'Parties Put Own Interest Above All Else, Survey Says', *The Jakarta Post*, 15 May 2008, p. 9.

[29] However, some formalist legal scholars would probably contest the use of General Comments and General Recommendations (as well as elucidation acts), as these are commonly not regarded as sources of law in the stricter sense. *See e.g.* M. Shaw, *International Law* (Cambridge University Press, Cambridge, 2003, 5th ed.) p. 66 and P. Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, New York, 2002, 7th ed.) p. 36. *But see* J. Grimheden, *Themis vs. Xiezhi: Assessing Judicial Independence in the People's Republic of China* (Lund University, Lund, 2004) p. 21.

[30] However, it should be added that recent years have seen a vast variety of alternative approaches to the traditional, positivist forms of legal research. It is probably fair to argue that researchers in the field of law and gender have been at the forefront of this

constructions of the right to family planning in international human rights law and Indonesian law, with a focus on implementation and what takes place when a national domain encounters an international domain in a process of legal reform involving human rights. Discourse theory provides an inspirational framework and terminology to describe the process of reform as a re-articulation of moments. Although implementation of international norms into a national legal system is a common theme of legal study, *what takes place in terms of actual process of implementation*, is not as common a theme. Here, I believe that discourse theory can benefit the understanding of the process of implementation and legal reform, by thinking of it as domains with colliding discourses, with chains of moments establishing certain meanings, and where re-articulation of these moments are inevitable as change takes place. Hence, when(ever) a right is implemented, the re-articulation of moments that occur will inevitably affect other moments through the chains of equivalence in which they form part. This means that in order to accommodate a new construction of, for instance, the right to family planning, moments in the chains of equivalence surrounding the construction will also be affected and thereby given a partly new and different meaning. Hence, there is a domino effect of re-articulations whereby available subject positions and subject relations are altered – which will also have consequences for how other relations are constructed and rights and duties are understood.

1.3 Issues Discussed

For the purpose of the present paper, I have decided to focus on the part of my study that concerns the Indonesia Law, *i.e.* constructions of the right to family planning in the current Indonesian Health Law and Population Law, and the interpretative documents called 'elucidation acts' (*Penjelasan*), which accompany them.[31] Elucidation acts are usually drafted by the ministry from where the law itself originates, to give interpretation guidance on how the law should by applied, for instance by the courts.[32] Evidently, analysis of discourses is not limited to analysis of articulations in texts,[33] but for the purpose of this paper, and the

development, as can be exemplified by a number of recent works. In the Swedish context, *see e.g.* U. Andersson, *Hans (ord) eller hennes?* (Bokbox förlag, Lund, 2004) and M. Burman, *Straffrätt och mäns våld mot kvinnor* (Iustus, Uppsala, 2007) especially pp. 19-57. *C.f. also* historian S. Edenheim, *Begärets lagar: moderna statliga utredningar och heteronormativitetens genealogi* (Östlings bokförlag Symposion, Eslöv, 2005).

[31] *Penjelasan atas Undang-Undang Republik Indonesia Nomor 23 Tahun 1992 Tentang Kesehatan*, hereafter Health Law Elucidation Act and *Penjelasan atas Undang-Undang Republik Indonesia Nomor 10 Tahun 1992 Tentang Perkembangan Kependudukan Dan Pembangunan Keluarga Sejahtera*, hereafter Population Law Elucidation Act.

[32] However, although not immediately relevant here, elucidation acts are not considered to be sources of law and are therefore not legally binding. *C.f.* Law Number 10 of 2004 on Establishment of a Legislation System, para. 7. However, in practice: "elucidations are given a lot of weight in interpreting statutes in Indonesia". *See* G.F. Bell, 'Decentralisation in Indonesia – Theory and Practice' 23:1 *Jurnal Hukum Bisnis* (2004) p. 8.

[33] *See* E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy* (Verso, London, 2001, 2nd ed.) pp. 107-108.

dissertation, I have decided to limit the domain of study to articulations in laws and interpretative documents.[34] I will from hereon refer to the domain of study as the Indonesian Law Domain.

The main question asked in this paper is: How is the right to family planning constructed in Indonesian law? The paper consists of four parts. Throughout, I also make comparisons to constructions in the International Human Rights Domain, *i.e.* the four conventions and their interpretative documents. However, my intention here is to focus on the constructions in the Indonesian Law Domain, and to let the International Human Rights Domain serve as a reference in the background. In the next part of the paper, I discuss the fixating of the floating signifier 'family planning'.[35] The following part deals with the construction of the right to family planning in the domain. I believe here that it is relevant to distinguish two discourses that position family planning in relation to a variety of moments constructing family planning as a right. I have named these discourses after the nodal points in relation to which the right is given content and meaning through chains of equivalence:[36]

- The Health Discourse
- The Prosperous Family Discourse

In the subsequent part, I discuss specifically the subject positions and relations that are established by the discourses through the equivalence chains. These subject positions, and relations between the relevant subject positions, are of a particular interest, as their re-articulation is a key component in the reform process and the understanding of rights as they determine which positions (and actions) are available to the individual.[37] In the final part I discuss the possible grounds for antagonism between the discourses in the International Human Rights Domain and the Indonesian Domain in the process of legal reform. I conclude the paper with a few thoughts and ideas which I intend to explore further as part of my doctoral dissertation.

A few words on the material and methodology of the study may be in order. As is commonly acknowledged by Indonesian and international scholars alike, Indonesian legislation is rather inaccessible, both

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[34] Here, I have been inspired by Phillips and Winther Jørgensen on how to practically delimit an order of discourse, or domain. Hence, I treat the domain as: "the common platform of different discourses, and the discourses are the patterns of meaning within (…)." *See* Phillips and Winther Jørgensen, *supra* note 1, p. 144.

[35] *See e.g.* E. Laclau, *New Reflections on the Revolution of Our Time* (Verso, London, 1990) p. 28 and E. Laclau, *Emancipation(s)* (Verso, London, 1996) pp. 94-95. On the distinction (and similarities) between floating signifiers and empty signifiers, *see e.g.* E. Laclau, *On Populist Reason* (Verso, London, 2005) p. 133.

[36] On nodal points, *see e.g.* Laclau and Mouffe, *supra* note 33, pp. 112-113

[37] *C.f. e.g.* E. Laclau, 'Metaphor and Social Antagonisms' in C. Nelson and L. Grossberg (eds.) *Marxism and the Interpretation of Culture* (Macmillan Education, Houndmills, 1988) pp. 254-255; and Phillips and Winther Jørgensen, *supra* note 1, p. 55.

physically and in terms of content.[38] Apart from the fact that the actual statutes are difficult to access, as they are not consistently published nor widely distributed,[39] the texts themselves pose a number of challenges as contradictory provisions and inconsistent use of word are common. Official translations of Indonesian legislation to English are rare, and to the extent any translations exist, they are usually provided by the ministry where the law was drafted.[40] Translations from the ministries are often inadequate and frequently contain grammatical and spelling errors. Letters, words or whole sections are sometimes missing, which at times leaves the text difficult to comprehend. For this reason the translations used in this paper are my own, with the original text provided as reference in footnotes. As some quotes are quite long, I use italics to highlight the parts most relevant to the point I would like to make.

From a methodological point, although obvious to the reader familiar with discourse theory, it could also be emphasised that the discourses I describe below are products of my own understanding of relevant frontiers, or delimitations of inclusion and exclusion, after repeated in-depth reading and analysis of the material.[41] Evidently, not every reader of the same material would necessary agree with my understanding, or find the same delimitations to be relevant, which is the inevitable result of all scholarly productions being "truths that can be discussed"[42].

2 Family Planning As a Floating Signifier

In this paper, and in my dissertation, I treat family planning as a floating signifier. In the Indonesian Law Domain, as represented in this paper by the Health Law, the Population Law, and the two elucidation acts, I have found that family planning is constructed more inclusively than in the International Human Rights Domain. This I argue after finding that the

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[38] *See e.g.* Gary F. Bell's analysis of the laws on regional autonomy, G.F. Bell, 'The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws' 2:1 *Asian-Pacific Law & Policy Journal* (2001), especially p. 4, and Bell, *supra* note 32, pp. 5-14. *See also* H. Juwana, 'Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003' 7:2 *Singapore Journal of International & Comparative Law* (2003) pp. 661-663.

[39] As noted by Andrew I. Sriro regarding legal material in regional courts and government offices: "(…) the lack of legal materials relevant to even the most directly related aspects of official duties is alarming." *See* A.I. Sriro, *Sriro's Desk Reference of Indonesian Law 2006* (Equinox Publishing, Jakarta, 2006) p. xii. Generally on the lack of legal material and literature (especially in international law) in law faculties around Indonesia, *see also* H. Juwana, 'Teaching International Law in Indonesia' 5:2 *Singapore Journal of International & Comparative Law* (2001) pp. 416, 418 and 423.

[40] In addition, some laws are made available in English translations provided by academic institutions such as Asian Law Centre at Melbourne University. *See* 'Indonesia-related commentary and legislation', <www.alc.law.unimelb.edu.au/go/research-programs/indonesia/commentary-and-legislation/index.cfm>.

[41] *C.f.* Phillips and Winther Jørgensen, *supra* note 1, pp. 143-144, 147.

[42] *C.f.* Phillips and Winther Jørgensen, *supra* note 1, p. 206.

floating signifier family planning is positioned in relation to *more, and partly other*, moments in the equivalence chain.

For this comparison to make sense, a few words on my conclusions from the International Human Rights Domain are needed. In short, I argue that family planning is articulated in the International Human Rights Domain, in relation to various moments which can be summarised as 'information'-related and 'services'-related.[43] There, family planning is given its content and meaning in relation to information-related moments such as 'advice'[44], 'counselling'[45], 'information'[46], 'education'[47], 'sex education'[48]. 'Service'-related moments, in turn, are for instance 'health care services'[49], 'sexual and reproductive health services'[50], 'services in family planning'[51], 'means'[52], 'methods'[53], 'contraceptives'[54], and

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[43] The construction of family planning as a floating signifier in the International Human Rights Domain is the subject of Chapter 2 of my dissertation, and unfortunately, the full account of this analysis is beyond the scope of this paper.

[44] *See* CEDAW art. 10(h).

[45] *See* CEDAW art. 14(2)(b) and CEDAW Committee, *General Recommendation no. 24 (Women and health, Twentieth session, 1999)*, A/54/38/Rev.1, para. 23.

[46] *See e.g.* CEDAW arts. 10(h), 14(2)(b) and 16(1)(e); ICESCR Committee, *General Comment no. 14 (The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights, Twenty-second session, 2000)*, E/C.12/2000/4, paras. 21 and 34; CEDAW Committee, *General Recommendation no. 21 (Equality in marriage and family relations, Thirteenth session, 1994)*, A/47/38, para. 22 and CEDAW Committee, *General Recommendation no. 24*, *supra* note 45, para. 23; CRC Committee, *General Comment no. 4 (Adolescent health and development in the context of the Convention on the Right of the Child, Thirty-third session, 2003)* CRC/GC/2003/4, paras. 10 and 28.

[47] *See e.g.* CEDAW art. 16(1)e and CRC art. 24(2)(f); ICESCR Committee, *General Comment no. 14*, *supra* note 46, para. 21 and CRC Committee, *General Comment no. 3 (HIV/AIDS and the right of the child, Thirty-second session, 2003)*, CRC/GC/2003/3, para. 6.

[48] *See e.g.* ICESCR Committee, *General Comment no. 14*, *supra* note 46, para. 34; CEDAW Committee, *General Recommendation no. 21*, *supra* note 46, para. 22 and CEDAW Committee, *General Recommendation no. 24*, *supra* note 45, para. 31(c); CRC Committee, *General Comment no. 3*, *supra* note 47, para. 6.

[49] *See e.g.* CEDAW art. 12(1) and ICESCR Committee, *General Comment no. 14*, *supra* note 46, para. 21.

[50] *See e.g.* ICESCR Committee, *General Comment no. 14*, *supra* note 46, paras. 14, 21 and 36; CRC Committee, *General Comment no. 3*, *supra* note 47, para. 20 and CRC Committee, *General Comment no. 4*, *supra* note 46, para. 31.

[51] And 'family planning services'. *See e.g.* CEDAW art. 14(2)(b) and CRC art. 24(2)(f); CEDAW Committee, *General Recommendation no. 21*, *supra* note 46, para. 22

[52] *See e.g.* CEDAW art. 16(1)(e) and ICESCR Committee, *General Comment no. 14*, *supra* note 46, para. 34.

[53] *Ibid.*, footnote 12. *See also* CEDAW Committee, *General Recommendation no. 24*, *supra* note 53, para. 45 and CRC Committee, *General Comment no. 3*, *supra* note 47, para. 20.

[54] And 'contraception' and 'contraceptive measures'. *See e.g.* ICESCR Committee, *General Comment no. 14*, *supra* note 46, para. 34; CRC Committee, *General Comment no. 3*, *supra*

'abortion'[55]. However, in the Indonesian Law domain, I find that family planning is given its content and meaning in relation (also) to other and different moments, as can be exemplified by the following articulation:

"Family planning is the means to increase society's concern and participation by means of *raising the marriage age, birth control, building family endurance, increasing family welfare in order to create small, happy, and prosperous families*."[56].

In the following I will discuss the moments in relation to which family planning as a floating signifier is given its meaning in the Indonesian Law Domain. To facilitate the description, I believe it is beneficial to group these moments into three groups: one about family planning as birth control, one about family planning as what could be described as various societal efforts, and one about family planning as procreation *i.e.* having children. There is no sharp division between the moments in these groups, some are presented in the same articulations, which is just a further illustration of the moments being linked to each other. Together these moments, as linked together in a chain of equivalence, give family planning a meaning that is different from the understanding in the International Human Rights Domain.

First, similar to the International Human Rights Domain, the Indonesian Law Domain also contains articulations which positions family planning in equivalence with 'birth control':

"*Birth control* constitutes certain measures for the couple of husband and wife to *plan the ideal number of children, spacing of childbirth*, and the ideal marriage age, as well as the ideal age of having children in order to have a healthy life."[57]

"*Birth control* […] is carried out by methods which are efficient and effective to use and which can be accepted by husband and wife couples in accordance with their choice."[58]

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note 47, para. 20 and CRC Committee, *General Comment no. 4*, *supra* note 46, paras. 28 and 31; and CEDAW Committee, *General Recommendation no. 21*, *supra* note 46, para. 22.

[55] The articulations on abortion by the treaty monitoring bodies vary significantly. However, some of the statements on family planning by the CEDAW and CRC Committees are made in relation to abortion, *see e.g.* Human Rights Committee, *General Comment no. 28 (Equality of rights between men and women (article 3), Sixty-eighth session, 2000)* CCPR/C/21/Rev.1/Add.10), paras. 10-11, CEDAW Committee, *General Recommendation No. 19 (Violence against women, Eleventh session, 1992)*, A/47/38, para. 24(m); CEDAW Committee, *General Recommendation no. 24*, *supra* note 45, para. 31(c), and CRC Committee, *General Comment no. 4*, *supra* note 46, para. 31.

[56] "*Keluarga berencana adalah upaya peningkatan kepedulian dan peran serta masyarakat melalui pendewasaan usia perkawinan, pengaturan kelahiran, pembinaan ketahanan keluarga, peningkatan kesejahteraan keluarga untuk mewujudkan keluarga kecil, bahagia, dan sejahtera.*" Population Law art. 1, para. 12.

[57] "*Pengaturan kelahiran merupakan suatu upaya bagi pasangan suami istri untuk merencanakan jumlah ideal anak, jarak kelahiran anak, dan usia ideal perkawinan, serta usia ideal untuk melahirkan anaknya agar dapat hidup sehat.*" Health Law Elucidation Act para. 13.

[58] "*Pengaturan kelahiran* [*sebagaimana dimaksud dalam Pasal 16 ayat (2)*] *diselenggarakan dengan tata cara yang berdaya guna dan berhasil guna serta dapat diterima oleh pasangan suami istri sesuai dengan pilihannya.*" Population Law art. 17,

Second, however, family planning is *also* articulated in relation to various moments describing *societal efforts* such as 'delaying marriage and childbearing (age)',[59] and 'improving family welfare, quality and/or resilience'[60]. This can be exemplified by the following:

"Family planning is the means to increase society's concern and participation by means of *raising the marriage age, birth control, building family endurance, increasing family welfare in order to create small, happy, and prosperous families*."[61]

"Development of prosperous families is aimed at *development of family quality through means of family planning* within the framework of mainstreaming the norm of *a small, happy, and prosperous family*."[62]

"(…) Means of development of prosperous families, *includes family planning, not only for birth control, but also to create families which are happy and prosperous*. (…)"[63]

Third, another significant difference between how the floating signifier is articulated in the International Human Rights Domain compared to the Indonesian Law Domain, is that the former give family planning meaning in terms of 'limit' and 'spacing' of births, whereas the in the latter additionally includes moments related to the opposite of birth control, *i.e.* to actually have children. Through various articulations, the floating signifier is here given a more unconventional meaning in the Indonesian Law Domain compared to the International Human Rights Domain. Apart from family planning in terms of birth control, *e.g.* limit and spacing of births, having children, including through assisted reproduction,[64] is also part of the meaning of family planning:

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para. 1. Brackets added here. This article refers back to a provision on the implementation of family planning, art. 16, para. 1, via art. 16, para. 2.

[59] *E.g.* Health Law Elucidation Act art. 13, Population Law art. 1, para. 12 and art. 16, para. 3.

[60] *E.g.* Population Law art. 1, para. 12 and art. 3 para. 2.

[61] "*Keluarga berencana adalah upaya peningkatan kepedulian dan peran serta masyarakat melalui pendewasaan usia perkawinan, pengaturan kelahiran, pembinaan ketahanan keluarga, peningkatan kesejahteraan keluarga untuk mewujudkan keluarga kecil, bahagia, dan sejahtera.*" Health Law art. 1, para. 12.

[62] "*Pembangunan keluarga sejahtera diarahkan pada pengembangan kualitas keluarga melalui upaya keluarga berencana dalam rangka membudayakan norma keluarga kecil, bahagia, dan sejahtera.*" Population Law art. 3, para 2. 'Membudayakan' is here translated to 'mainstreaming'. Another, more literal translation could be: 'to civilize' or 'to bring into mainstream of civilization'. *C.f.* J.M. Echols and H. Shadily, *Kamus Indonesia-Inggris, An Indonesian-English dictionary* (Gramedia, Jakarta, 1989, 3d edition).

[63] "*(…) Upaya pembangunan keluarga sejahtera, termasuk keluarga berencana, bukan hanya semata-mata untuk pengaturan kelahiran, tetapi juga untuk menciptakan keluarga yang bahagia dan sejahtera. (…)*" Population Law Elucidation Act, General Provision no. 4.

[64] 'Assisted reproduction' is the definition I have chosen to use for the processes described in Health Law art. 16 and Health Law Elucidation Act art. 16. This is based on the WHO definition of 'assisted reproductive technology' meaning "any treatment or procedure that involves the *in vitro* of human oocytes and sperm or embryos for the purpose of establishing a pregnancy". *See* 'Assisted Reproduction in Developing Countries – Facing Up to the Issues' 63 *Progress in Reproductive Health Research* (2003) p. 3.

"Every family may determine whether to have children and in what number, based on the respective situation and capability, realizing its responsibility towards society and the child's development. (…)"[65]

"(1) A pregnancy can be created other than through the natural process as a last measure to assist the husband and wife to have an offspring."[66]

"(1) If it is medically proven that a legal couple of husband and wife truly cannot have an offspring through the natural process, the couple of husband and wife in question may create a pregnancy other than through the natural process as a last measure by means of scientific knowledge and medical technology."[67]

To summarise, in the Indonesian Law Domain, family planning is given its content and meaning through a chain of equivalence which incorporate moments not only on birth control (limiting and spacing of childbirth), but also the rising marriage age and childbearing age. In addition, increasing family welfare through happiness and prosperity is also articulated as part of the meaning of family planning. Finally, assisted reproduction is placed in position of equivalence with family planning. These moments together construct family planning, *i.e.* give a meaning to the floating signifier, which must be considered as rather inclusive. This becomes evident when compared to the construction in the International Human

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[65] The rest of the article refers to adoption, and reads: "The realization of an adoption of a child as referred to in this article is [to be] based on provisions of prevailing regulation and legislation." "*Setiap keluarga dapat menentukan apakah akan mempunyai anak dan dalam jumlah berapa, berdasarkaan keadaan dan kemampuan masing-masing, dengan menyadari tanggung jawabnya terhadap masyarakat dan perkembangan anak. Perlaksanaan pengangkatan anak sebagaimana dimaksud dalam pasal ini didasarkan atas ketentuan peraturan perundang-undangan yang berlaku.*" Population Law Elucidation Act art. 7. 'Capability' (*kemampuan*) here can also mean 'prosperity'.

[66] "*(1) Kehamilan di luar cara alami dapat dilaksanakan sebagai upaya terakhir untuk membantu suami istri mendapat keturunan.*" The rest of the article reads: "(2) A measure to create a pregnancy other than through the natural process, as referred to in paragraph 1, may only be taken by a legal couple of husband and wife provided that:(a.) the result of conception is by sperm and ovum from the husband and wife in question, and is planted in the womb of the wife where the ovum came from;(b.) it is carried out by health workers that have the expertise and competence for it;(c.) at an appropriate health facility." "*(2) Upaya kehamilan diluar cara alami sebagaimana dimaksud dalam ayat (1) hanya dapat dilakukan oleh pasangan suami istri yang sah dengan ketentuan:(a) hasil pembuahan sperma dan ovum dari suami istri yang bersangkutan, ditanamkan dalam rahim istri dari mana ovum berasal;(b) dilakukan oleh tenaga kesehatan yang mempunyai keahlian dan kewenangan untuk itu;(c) pada serana kesehatan tertentu.*" Health Law art. 16.

[67] "*(1) Jika secara medis dapat dibuktikan bahwa pasangan suami istri yang sah benar-benar tidak dapat memperoleh keturunan secara alami, pasangan suami istri tersebut dapat melakukan kehamilan diluar cara alami sebagai upaya terakhir melalui ilmu pengetahuan dan teknologi kedokteran.*" The rest of the article's elucidation reads: "(2) Means carried out in relation to a pregnancy other than through the natural process must be carried out in accordance with legal norms, religious norms, ethical norms, and norms of propriety.(c) Approved health facilities are health facilities that have personnel and equipment which meet the regulations for the carrying out of means in relation to pregnancy other than through the natural process and which are approved by Government." "(*2) Pelaksanaan upaya kehamilan diluar cara alami harus dilakukan sesuai dengan norma hukum, norma agama, norma kesusilaan, dan norma kesopanan.(c) Sarana kesehatan tertentu adalah sarana kesehatan yang memiliki tenaga dan peralatan yang telah memenuhi persyaratan untuk penyelenggaraan upaya kehamilan di luar cara alami dan ditunjuk oleh Pemerintah.*" It can be noted that there is no elucidation given to paras. 2(a) and (b). Health Law Elucidation Act art. 16.

Rights Law Domain. Hence, family planning in the Indonesian Law Domain, is not equivalent to family planning in the International Human Rights Law Domain. This first finding provides us with an important piece of information for the continuing study of implementation and legal reform.

3 Constructions of the Right to Family Planning

As mentioned above, I believe that it is relevant to distinguish two main rights-oriented discourses which construct the right to family planning within the domain of Indonesian Law. I have decided to name the two discourses after the nodal points around which they construct the right to family planning through chains of equivalence: the Health Discourse and the Prosperous Family Discourse. In the following, I will summarise them briefly and give examples of how the discourses give content and meaning to the right to family planning by positioning the floating signifier, family planning, in relation to other moments. Although it would have been preferable to quote the relevant material in whole, only illustrative examples will be given here, due to the limited format of this paper.

The first discourse which I believe can be distinguished and through which a right to family planning is constructed, I refer to as the Health Discourse. In this discourse, the right to family planning is constructed through a chain of equivalence that orient around health as a nodal point. In summary, the chain binds together moments related to the health of the individual, the married couple, the family and the public.[68]

There are several articulations that position the individual in relation to the nodal point, as can be exemplified by the following:

"Health is a prosperous physical, spiritual and social condition that enables every *individual* to live in a socially and economically productive way."[69]

"Each *individual* has an equal right in obtaining an optimal standard of health."[70]

"Each *individual* is obliged to participate in preserving and improving the standard of health of the individual, family, and environment."[71]

However, in contrast, family planning is positioned by the Health Discourse in relation to the health of the married couple or spouses,

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[68] I have decided to leave out the discussion on the right to family planning in relation to public health here, due to constraints of space in this paper. However, one conclusion from the analysis of the chain of equivalence on public health is that public health is placed in a position of equivalence with moments on morality, religious values and ethics in the discourse.

[69] "*Kesehatan adalah keadaan sejahtera dari badan, jiwa, dan social yang memungkinkan setiap orang hidup produktif secara social dan ekonomis.*" Health Law art. 1 para., 1.

[70] "*Setiap orang mempunyai hak yang sama dalam memperoleh derajat kesehatan yang optimal.*" Health Law art. 4. 'Equal' (*sama*) can also be translated to 'same'.

[71] "*Setiap orang berkewajiban untuk ikut serta dalam memelihara dan meningkatkan derajat kesehatan perseorangan, keluarga, dan lingkungannya.*" Health Law art. 5.

rather than the individual, as can be illustrated by the following articulations:

"The *health of the husband and wife* is prioritised for the means of *birth control* within the framework of creating a healthy and harmonious family."[72]

"*Birth control* constitutes certain measures for the *couple of husband and wife* to plan the ideal number of children, spacing of childbirth, and the ideal marriage age, as well as the ideal age of having children *in order to have a healthy life*."[73]

"*Husband and wife have equal rights and obligations* as well as the same level of status in determining a method of birth control."[74]

"*Husband and wife must agree about birth control and the method to be used* in order for the aim to be successfully achieved. A unilateral decision or action may cause failure or problems in the future. Equal obligation between the two also mean, that *when the wife cannot use a birth control device, drug and method*, for example because of health reasons, *then the husband can use a device, drug, and method* intended for men."[75]

That the entity of the couple or the spouses are the primary relevant subject in relation to which family planning is articulated by the Health Discourse, can additionally be illustrated with the articulations on health in relation to pregnancy and childbirth, which is referred to as the health of the 'wife' (*istri*):

"The *health of the wife* includes health at the time before pregnancy, during pregnancy, after childbirth and the time beyond pregnancy and childbirth."[76]

In turn, the health of the wife is exclusively linked to her function as a mother, through placing 'wife' in a relationship of equivalence with 'mother' (*ibu*).

"*A wife as a mother* has a large part in taking care of, bringing up and raising the child. *Because of this* it is necessary to improve maternal health that includes the time before

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[72] "*Kesehatan istri meliputi kesehatan pada masa prakehamilan, kehamilan, pascapersalinan dan masa di luar kehamilan, dan persalinan*." Health Law art. 13.

[73] "*Pengaturan kelahiran merupakan suatu upaya bagi pasangan suami istri untuk merencanakan jumlah ideal anak, jarak kelahiran anak, dan usia ideal perkawinan, serta usia ideal untuk melahirkan anaknya agar dapat hidup sehat*." Health Law Elucidation Act para. 13.

[74] "*Suami dan istri mempunyai hak dan kewajiban yang sama serta kedudukan yang sederajat dalam menentukan cara pengaturan kelahiran*." Poplation Law art. 19. 'Equal' (*sama*) can also be translated as 'same'. 'Status' (*kedudukan*) here can also mean 'position'.

[75] "*Suami dan istri harus sepakat mengenai pengaturan kelahiran dan cara yang akan dipakai agar tujuannya tercapai dengan baik. Keputusan atau tindakan sepihak dapat menimbulkan kegagalan atau masalah di kemudian hari. Kewajiban yang sama antara keduanya berarti juga, bahwa apabila istri tidak dapat memakai alat, obat, dan cara pengaturan kelahiran, misalnya karena alasan kesehatan, maka suami mempergunakan alat, obat, dan cara yang diperuntukkan bagi laki-laki*." Population Law Elucidation Act art. 19.

[76] "*Kesehatan istri meliputi kesehatan pada masa prakehamilan, kehamilan, pascapersalinan dan masa di luar kehamilan, dan persalinan*." Health Law art. 14.

pregnancy, during pregnancy, childbirth, after childbirth, the time beyond pregnancy and childbirth."[77]

In addition to the couple being a primary subject in the Health Discourse, family planning is strongly associated and repeatedly articulated in relation to 'family health'. As an illustrative example, provisions on family planning in the Health Law are almost exclusively found in chapter V, part two which carries the headline 'Family Health' (*kesehatan keluarga*). In the Health Discourse, family health is articulated both as a *means* and as a *goal* of family planning, as can be illustrated with the same articulation as above:

"The health of the husband and wife is prioritised for the means of *birth control* within the framework of *creating a healthy and harmonious family*."[78]

Family health is articulated as a condition, but also as an *action*, or a means. This can be exemplified by a number of articulations, including:

"(1) Family health *is carried out to create* a healthy, small, happy and prosperous family."[79]

"(1) Each family *practices and develops* family health within the family."[80]

This means and goal, family health, is articulated by the Health Discourse in relation to the married couple as a relevant subject, but additionally includes and positions a number of other subjects as relevant:

(2) *Family health*, [as referred to in paragraph (1)], includes the *health of the husband, wife, child and other family members*."[81]

"(2) Family health in this paragraph refers not only to the health of the husband or wife him- or herself, but refers also to the *health of the husband and wife as a couple* in order to create a healthy and harmonious family. *Other family members are every other person who lives in the same household* as the family mentioned, regardless of whether or not they are related by blood."[82]

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[77] "*Istri sebagai ibu mempunyai peranan yang besar dalam merawat, mendidik, dan membesarkan anaknya. Oleh karena itu diperlukan peningkatan kesehatan ibu yang meliputi baik dalam masa prakehamilan, kehamilan, persalinan, pascapersalinan, masa diluar kehamilan, dan persalinan.*" Health Law Elucidation Act art. 14.

[78] "*Kesehatan istri meliputi kesehatan pada masa prakehamilan, kehamilan, pascapersalinan dan masa di luar kehamilan, dan persalinan.*" Health Law art. 13.

[79] "*(1) Kesehatan keluarga diselenggarakan untuk mewujudkan keluarga sehat, kecil, bahagia, dan sejahtera.* Health Law art. 12, para. 1.

[80] *"(1) Setiap keluarga melakukan dan memgembangkan kesehatan keluarga dalam keluarganya.*" Health Law art. 18, para. 1.

[81] "*(2) Kesehatan keluarga sebagaimana dimaksud dalam ayat (1) meliputi kesehatan suami istri, anak, dan anggota keluarga lainnya.*" Health Law art. 12, para. 2.

[82] "*(2) Kesehatan keluarga dalam pasal ini dimaksudkan bukan hanya ditujukan kepada kesehatan suami atau istri saja, namun juga ditujukan kepada kesehatan pasangan suami istri agar tercipta keluarga sehat dan harmonis. Anggkota keluarga lainnya adalah setiap orang yang tinggalserumah dengan keluarga tersebut, baik yang menyapunyi hubungan darah maupun tidak.*" Health Law Elucidation Act art. 12. para. 2.

As we can see, the family, in relation to family health, is here articulated as a larger unit than the nuclear family. This leads us into the discussion on the second discourse that I would like to distinguish, *i.e.* the Prosperous Family Discourse. The chain of equivalence that give content and meaning to the right to family planning here, orients around the nodal point of the prosperous family. As will be illustrated, the right to family planning is constructed by this discourse as an extensive right to form a family and to create and develop a family that is prosperous:

"*Every inhabitant as a family member has a right to develop a prosperous family* by having the ideal number of children, or by adopting children, or by providing education to children on family life as well as other rights in order to create a prosperous family."[83]

"*Every family may determine whether to have children and in what number*, based on the respective situation and capability, realizing its responsibility towards society and the child's development. The realization of an adoption of a child as referred to in this article is [to be] based on provisions of prevailing regulation and legislation."[84]

As pointed out above, the founding of a family is also articulated in relation to assisted reproduction:

"(1) A pregnancy can be created other than through the natural process as a last measure to assist the husband and wife to have an offspring."[85]

"(1) If it is medically proven that a legal couple of husband and wife truly cannot have an offspring through the natural process, the couple of husband and wife in question may create a pregnancy other than through the natural process as a last measure by means of scientific knowledge and medical technology."[86]

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[83] "*Setiap penduduk sebagai anggkota keluarga mempunyai hak untuk membangun keluarga sejahtera dengan mempunyai anak yang jumlahnya ideal, atau mengangkat anak, atau memberi pendidikan kehidupan berkeluarga kepada anak-anak serta hak yang lain guna mewujudkan keluarga sejahtera.*" Population Law art. 7.

[84] "*Setiap keluarga dapat menentukan apakah akan mempunyai anak dan dalam jumlah berapa, berdasarkaan keadaan dan kemampuan masing-masing, dengan menyadari tanggung jawabnya terhadap masyarakat dan perkembangan anak. Perlaksanaan pengangkatan anak sebagaimana dimaksud dalam pasal ini didasarkan atas ketentuan peraturan perundang-undangan yang berlaku.*" Population Law Elucidation Act art. 7. 'Capability' (*kemampuan*) here can also mean 'prosperity'.

[85] "*(1) Kehamilan di luar cara alami dapat dilaksanakan sebagai upaya terakhir untuk membantu suami istri mendapat keturunan.*" The rest of the article reads: "(2) A measure to create a pregnancy other than through the natural process, as referred to in paragraph 1, may only be taken by a legal couple of husband and wife provided that:(a.) the result of conception is by sperm and ovum from the husband and wife in question, and is planted in the womb of the wife where the ovum came from;(b.) it is carried out by health workers that have the expertise and competence for it;(c.) at an appropriate health facility." "*(2) Upaya kehamilan diluar cara alami sebagaimana dimaksud dalam ayat (1) hanya dapat dilakukan oleh pasangan suami istri yang sah dengan ketentuan:(a) hasil pembuahan sperma dan ovum dari suami istri yang bersangkutan, ditanamkan dalam rahim istri dari mana ovum berasal;(b) dilakukan oleh tenaga kesehatan yang mempunyai keahlian dan kewenangan untuk itu;(c) pada serana kesehatan tertentu.*" Health Law art. 16.

[86] "*(1) Jika secara medis dapat dibuktikan bahwa pasangan suami istri yang sah benar-benar tidak dapat memperoleh keturunan secara alami, pasangan suami istri tersebut dapat melakukan kehamilan diluar cara alami sebagai upaya terakhir melalui ilmu pengetahuan dan teknologi kedokteran.*" The rest of the article's elucidation reads: "(2) Means carried out in relation to a pregnancy other than through the natural process must be carried out in accordance with legal norms, religious norms, ethical norms, and norms of propriety.(c) Approved health facilities are health facilities that have personnel and

In addition to founding a family, the right to family planning is constructed by the Prosperous Family Discourse as a right to create and develop a prosperous family. There are numerous articulations that together give this meaning and content to the right to family planning within the Prosperous Family Discourse, as can be illustrated by the following:

"That which is meant by *means to implement family planning is means to form small prosperous families*. Development of small prosperous families has phases, related to targets as well as activities and time dimensions."[87]

"Every inhabitant has the right and the widest opportunity to participate in means of population development and the *development of prosperous families*."[88]

The discourses also established a relation of equivalence between prosperity and small and/or happy families, and family planning is a means to create and develop these families.

"(…) Means of development of prosperous families, includes family planning, not only for birth control, but also to *create families which are happy and prosperous*. (…)"[89]

"*Development of prosperous families* is aimed at development of family quality through *means of family planning* within the framework of mainstreaming the norm of a small, happy, and prosperous family."[90]

Prosperity, in turn is placed in a position of equivalence with a number of moments, not only on material or financials standards, but also to spiritual and social ones:

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equipment which meet the regulations for the carrying out of means in relation to pregnancy other than through the natural process and which are approved by Government." "(*2) Pelaksanaan upaya kehamilan diluar cara alami harus dilakukan sesuai dengan norma hukum, norma agama, norma kesusilaan, dan norma kesopanan.(c) Sarana kesehatan tertentu adalah sarana kesehatan yang memiliki tenaga dan peralatan yang telah memenuhi persyaratan untuk penyelenggaraan upaya kehamilan di luar cara alami dan ditunjuk oleh Pemerintah.*" It can be noted that there is no elucidation given to paras. 2(a) and (b). Health Law Elucidation Act art. 16.

87 "*Yang dimaksud dengan upaya penyelenggaraan keluarga berencana adalah upaya untuk membentuk keluarga kecil sejahtera. Pembangunan keluarga kecil sejahtera mempunyai tahapan, baik menyangkut sasaran, maupun kegiatan, dan dimensi waktu.*" Population Law Elucidation Act art. 16, para. 1. 'Targets' here could also be translated with 'objectives' or 'aims'. However, I use 'targets' as this was the word used within the family planning programme. *See e.g. Indonesian Family Planning/Reproductive Health Programme: Shifting from Demographic Targets to Reproductive Rights* (BKKBN, Jakarta, 2006) p. 14.

88 "*Setiap penduduk mempunyai hak dan kesempatan yang seluas-luasnya untuk berperanserta dalam upaya perkembangan kependudukan dan pembangunan keluarga sejahtera.*" Population Law art. 24, para. 1.

89 "*(…) Upaya pembangunan keluarga sejahtera, termasuk keluarga berencana, bukan hanya semata-mata untuk pengaturan kelahiran, tetapi juga untuk menciptakan keluarga yang bahagia dan sejahtera. (…)*" Population Law Elucidation Act, General Provision no. 4.

90 "*Pembangunan keluarga sejahtera diarahkan pada pengembangan kualitas keluarga melalui upaya keluarga berencana dalam rangka membudayakan norma keluarga kecil, bahagia, dan sejahtera.*" Population Law art. 3, para. 2.

"A prosperous family is a family which is formed based on a legal marriage, able to form *a suitable spiritual and material existence*, in respect of the One Almighty God, that has relations which are compatible, harmonious, and balanced between the members and between the family and society and environment."[91]

"The norm of a small, happy and prosperous family is a certain value which is consistent with religious and socio-cultural values entrenched in the individual person, family and society, which is oriented towards a prosperous life with an ideal number of children to create *physical welfare and spiritual happiness*."[92]

Something that is evident in the constructions of the right to family planning in the Indonesian Law Domain is that the right is not solely constructed as a clear-cut, one-way relationship between rights-holder (individual) and duty-bearer (state), as would be the traditional construction of human rights in a liberal context.[93] In most articulations, the individual (as a family member or spouse) is positioned as the rights-holder and the state as the duty-bearer in the construction of the right to family planning. However, there are also articulations that turn the table, *i.e.* where the individual is positioned by the discourse as the duty-bearer and the state is the rights-holder:

"(…) Actions (interventions) are [to be] carried out as preventive measures when there are indications which point to the emergence of conditions which do not support implementation of population development and development of prosperous families objectives as referred to in Article 4, or as repressive measures when deviations from such objectives are found."[94]

"Each *individual* is obliged to participate in preserving and improving the standard of health of the individual, family, and environment."[95]

"To attain compatibility, harmony, and balance [as referred to in paragraph (1)], every *inhabitant* has an obligation to develop her or his own quality through improving health, education, and quality of life."[96]

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[91] "*Keluarga sejahtera adalah keluarga yang dibentuk berdasarkan atas perkawinan yang sah, mampu memenuhi kebutuhan hidup spiritual dan materiil yang layak, bertaqwa kepada Tuhan Yang Maha Esa, memiliki hubungan yang serasi, selaras, dan seimbang antar anggota dan antara keluarga dengan masyarakat dan lingkungan.*" Population Law art. 1, para. 11. *C.f. also* Health Law Elucidation Act art. 12, para. 1 (not quoted here).

[92] "*Norma keluarga kecil, bahagia, dan sejahtera adalah suatu nilai yang sesuai dengan nilai-nilai agama dan sosial budaya yang membudaya dalam diri pribadi, keluarga, dan masyarakat, yang berorientasi kepada kehidupan sejahtera dengan jumlah anak ideal untuk mewujudkan kesejahteraan lahir dan kebahagiaan batin.*" Population Law art. 1, para. 16.

[93] One of the more classic reference on the correlation between rights and duties in the liberal tradition, *see* W.N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' 26:8 *Yale Law Journal* (1917) pp. 710, 718-719.

[94] "*Tindakan (intervensi) dilakukan secara preventif apabila ada gejala yang menuju timbulnya suatu keadaan yang tidak menopang pelaksanaan tujuan perkembangan kependudukan dan pembangunan keluarga sejahtera sebagaimana dimaksud dalam Pasal 4, maupun secara represif apabila telah terdapat penyimpangan dari tujuan tersebut.*" Population Law Elucidation Act art. 25, para. 3.

[95] "*Setiap orang berkewajiban untuk ikut serta dalam memelihara dan meningkatkan derajat kesehatan perseorangan, keluarga, dan lingkungannya.*" Health Law art. 5.

[96] "*Untuk mencapai keserasian, keselarasan, dan keseimbangan sebagaimana dimaksud dalam ayat (1), setiap penduduk berkewajiban mengembangkan kualitas diri melalui*

In relation to the positioning of right-holders and duty-bearers, I will discuss in the following, which subject positions are established by the discourses, and how they relate to each other.

4 Subject Positions and Relations

In part 2, I held that family planning, as a floating signifier, is given a different meaning in the Indonesian Law Domain than it has in the International Human Rights Law Domain. Subsequently, in part 3, I argued that the right to family planning is constructed in the domain through two main discourses, named after the nodal points around which the chains of equivalence orient: Health and the Prosperous Family. In this section, I will elaborate more in depth on something that was introduced already in the previous part – the subject positions and relations between subjects which the discourses establish.[97] Focusing on the relevant subject positions that are established by the discourses, the main question asked here is thus: Who has the right to family planning, *i.e.* which subject positions are made available to the individual in the construction of the right to family planning?

In the construction of the right to family planning, the discourses position the subjects in various different positions and relations to each other. As will be discussed here, I believe that it is relevant to emphasis the following subject positions in particular:

- The individual (or inhabitant, an unspecific, singular subject)

- The spouse (a husband or a wife)

- The family member (a spouse or a member of a household)

As we have seen above, the Health Discourse and the Prosperous Family Discourse position the individual as a relevant subject through a number of articulations. First, we can conclude that the individual is positioned as a bearer and maintainer of health.[98] The individual is also positioned as the relevant subject in terms of founding as family in the wider sense,

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peningkatan kesehatan, pendidikan, dan kualitas hidup." Population Law art. 8, para. 2. The article refers back to Population Law art. 8, para. 1 which reads: "(1) Every inhabitant has an obligation to create and preserve compatibility, harmony, and balance between the quantity, quality and mobility with the life environment and observance of economic capability, socio-cultural values, and religion." *"(1.) Setiap penduduk berkewajiban mewujudkan dan memelihara keserasian, keselarasan, dan keseimbangan antara kuantitas, kualitas, dan mobilitasnya dengan lingkungan hidup serta memperhatikan kemampuan ekonomi, nilai-nilai social budaya, dan agama.*" The Population Law and the Population Law Elucidation Act almost exclusively use 'inhabitant' (*penduduk*) and not 'individual' (*orang*) when referring to singular subjects.

[97] *See* Laclau and Mouffe, *supra* note 33, p. 115. *C.f. also* L. Althusser, 'Ideology and Ideological State Apparatus (Notes Towards an Investigation)' in L. Althusser, *Lenin and Philosophy and Other Essays* (Monthly Review Press, New York, 2001, 2nd edition) pp. 115-120.

[98] *See e.g.* Health Law arts. 1 para., 1, 4-5 and Population Law art. 8.

keeping in mind that family has a rather broad meaning in the Indonesian Law Domain.[99] It could be noted, however, that *there are no articulations through with the individual is positioned as relevant subject in relation to a right to family planning*. The articulations where the individual is positioned as a relevant subject in relation to health or founding of a family are all general, *i.e.* the individual is positioned as relevant subject for health in general, and the family in general, but there is no link of equivalence between the individual, health and family planning, nor between the individual, family and family planning. Instead, the relevant subject position in relation to which the right to family planning is constructed is the spouse, or the family member.

The first relevant subject position in relation to which the right to family planning is articulated is the spouse, *i.e.* the husband or the wife. We see this in a number of articulations, positioning the spouses as users and decision-makers in relation to family planning.[100] This construction is further emphasised through the relation of equivalence between 'wife' and 'mother'.[101] In terms of subject relations, it can be noted that the right to family planning is constructed as an equal right between the spouses, but not an equal obligation, as the presumption is on the wife to be the primary contraceptive user.[102] The second subject position which is articulated by the discourse in relation to the right to family planning is the subject as a family member.[103] As have been illustrated by the articulations above, it is the subject in its position as a member of a family that has the right to form a family or to develop a prosperous family.

Through inclusion of these subject positions in the discourse, it can be argued that a number of possible subject positions are not articulated, hence excluded. As an example, there are no articulations positioning women and men beyond their positions as wife (and mother) and husband. This means that unmarried persons and women that are not mothers are not relevant subjects for the construction of the right to family planning. Consequently, unmarried persons are not right-holders in relations to family planning the Indonesian Law Domain. In conclusion, the right to family planning is constructed as a right relevant only to subjects in their position as spouses and family member, not to subjects as individual men and women.

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[99] *See* Population Law art. 6, para. 1a.

[100] *E.g.* Health Law art. 13, 16; Health Law Elucidation Act art. 13, 16; Population Law art 17, para. 1, 18, 19; Population Law Elucidation Act art. 19.

[101] *C.f.* Health Law art. 14 and Health Law Elucidation Act art. 14.

[102] *C.f.* Population Law art. 19 and Population Law Elucidation Act art. 19.

[103] *C.f.* Population Law art. 7 and Population Law Elucidation Act art. 7.

5 Possible Antagonisms in Legal Reform

Since family planning is understood as something beyond just birth control, services and information in the Indonesian Law Domain, it is perhaps not surprising that the relevant subject positions are also different. Hence, in the reform process and the implementation of the right to family planning from the International Human Rights Domain into the Indonesian Law Domain, we cannot assume that 'family planning equals family planning'. Furthermore, when international norms are implemented they will not be introduced to fill a void or empty space in the Indonesian Law Domain. On the contrary, when new constructions are introduced they will be exposed to already existing constructions. The effects of this must be taken into consideration when we look at the implementation of the right to family planning through legal reform in Indonesia. Antagonism will most certainly appear between old and new constructions, but it is premature to conclude *which* moments will be altered and *where* the chains of equivalence will potentially rupture.[104] At this stage, one can only point out what seems to be evident differences between the construction in the International Human Rights Domain and the Indonesian Law Domain. As I have argued here, such differences seem to appear in relation to the concept of family planning, the floating signifier, *per se*. In the International Human Rights Domain, family planning is understood, in summary, as means and services to limit and space child birth. In contrast, in the Indonesian Law Domain, family planning *also* means, for instance, the delaying of marriage and childbirth, having children, including through assisted reproduction and improvement of family welfare and prosperity.

The way in which family planning as a floating signifier is given meaning in the Indonesian Law Domain will consequently affect the way in which the right to family planning is constructed. I argue here that it is relevant to distinguish two rights-oriented discourses that give content and meaning to the right to family planning. These discourses construct the right through chains of equivalence orienting around the nodal points of Health and the Prosperous Family. In summary, the discourses construct the right as a health right, and a right to found and develop a prosperous family. This construction is also different from the construction of the right to family planning in the International Human Rights Domain, which could be described as a sexual and reproductive health right, and a right to reproductive self-determination.[105]

As moments in the chains of equivalence, the discourses position subjects as relevant for the construction the right to family planning. As I have concluded above, the individual is present as a relevant subject position in the discourses, but not in relation to family planning. Instead, it is the position as spouse or family member which takes the primary position as a subject in relation to which the right is given its content and meaning.

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[104] *C.f.* Laclau and Mouffe, *supra* note 33, p. 131.

[105] This is the conclusion from the second chapter of my dissertation, which I did not have the possibility to further discuss in this paper due to its limited format.

This is undoubtedly different compared to the subject positions in the International Human Rights Domain, which primarily positions the individual as the relevant subject.

In connection to the subject positions, a few words on the relation between subjects could also be mentioned, as this also has a bearing on the construction of the right to family planning. As we have seen, the right to family planning is constructed as a right, with rights-holders and duty-bearers. What we see constructed by the discourses in the Indonesia Law Domain, however, is that these relations of rights and duties are established differently than in the International Human Rights Domain. This becomes evident if we look at the relation between subjects position of spouses: the right to family planning articulated as an equal right between the spouses, but not as an equal obligation, as the presumption is on the wife as the primary user of family planning and the husband as the secondary. Furthermore, there are a number of articulations which establish the state as the duty bearer in providing means and services in family planning, and implied, the individual couple or family as the rights-holder. However, there are also articulations which create duties for the individual, couple or family in relation to practice family planning (*e.g.* in terms of improving prosperity) and through which the state becomes a rights-holder.

In conclusion, there are a number of differences between the constructions of the right to family planning in the Indonesian Law Domain compared to the International Human Rights Domain. These differences are found both in terms of the meaning of family planning as such, how the right is constructed by discourses, and in particular which subject positions that are available and which relations between subjects that are established by these discourse. Through the illustration of these differences, I aim to point out possible ground for antagonisms and space for re-articulation of moments in the process of legal reform in Indonesia.

6 Some Final Remarks and Further Issues to Explore

The purpose of this paper is to explore some ideas that I am currently working on as part of my doctoral dissertation. The focus is on the analysis of the material that deals with Indonesian Law, although comparisons are also made to the analysis of the International Human Rights Domain. Since the material for this domain is not made available to the reader in the same way as the Indonesian material is, I acknowledge that it may seem like my analysis lacks some transparency. However, my intention here is to focus on the constructions in the Indonesian Law Domain, and to let the International Human Rights Domain serve as a reference in the background.

The next step of my work is to explore the process of legal reform in the area of family planning through the analysis of proposed amendments to the Health Law and Population Law. The aim is to illustrate the complexity of what takes place in a process of implementation of international human rights norms into an existing national system.

Hence, what I am interested to find out is which – and how – moments are re-articulated through the new amendments. How is the right to family planning constructed in the domain? Is the floating signifier family planning given a new meaning? Which discourses construct the right to family planning? Which subject positions and subject relations are relevant for the construction of the right? Are chains of equivalence ruptured as the result of antagonisms between the existing constructions and new ones? Do we, at all, see re-articulations that resemble constructions in the International Human Rights Domain, or are they new and different? Regardless of which moments will be re-articulated and which will not, this tells us something about implementation of international human rights norms in a national context.

If, on the one hand, the new amendments expose re-articulation through which moments are given new meanings, the chains of equivalence that construct the right could rupture and new constructions of the right appear. If, on the other hand, the new articulations result in little or no change in the construction of the right, this is an example of existing constructions resisting antagonisms, and of maintained hegemony in the domain. This, in turn, could be a sign of the current discourses being so sedimented, that they have become 'objectivity'.[106]

[106] *C.f.* Laclau, *supra* note 35, p. 34.

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