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Huis, S.C. van; Wirastri, T.D.

### **Citation**

Huis, S. C. van, & Wirastri, T. D. (2012). Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws. *Australian Journal Of Asian Law*, 13(1). Retrieved from <https://hdl.handle.net/1887/20083>

Version: Not Applicable (or Unknown)

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**Note:** To cite this publication please use the final published version (if applicable).

## **Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws**

**Stijn Cornelis van Huis\* and Theresia Dyah Wirastri\***

*Early in 2010 a draft bill on substantive Muslim family law proposed the criminalisation of unregistered marriages and unofficial polygamous marriages in Indonesia. In the debates in the media that followed the current legal situation of unregistered marriage and unofficial polygamy was largely disregarded. In this article we argue that sufficient legal sanctions are already in place and that criminalisation of unregistered marriage is neither necessary nor desirable. The legal history of marriage registration in Indonesia indicates that from colonial times legislation has not been the problem, but, rather, a combination of lack of legal knowledge among the general public and problematic official and unofficial marriage registrars.*

Under art 2 of the Marriage Law (No 1 of 1974), Muslims in Indonesia have a legal obligation to register their marriage. Married couples must possess a marriage certificate, which is the only accepted legal proof of the existence of a marriage. However, recent research indicates that many couples do not comply with this registration requirement (Sulistiyowati Irianto et al, 2011; Van Huis, 2010; AC Nielsen / World Bank, 2006).

A number of women's organisations in Indonesia such as the National Commission on Violence against Women (Komisi Nasional Anti Kekerasan terhadap Perempuan/Komnas Perempuan), the Legal Aid Institution for Women (Lembaga Bantuan Hukum Asosiasi Perempuan Indonesia untuk Keadilan; LBH-Apik),<sup>1</sup> and the Muslim women's organisations Muslimat NU<sup>2</sup> (affiliated to Nahdlatul Ulama) and Rahima,<sup>3</sup> have long pointed to the negative consequences of an unregistered marriage for women and children. LBH-Apik Jakarta stresses the negative legal, social and psychological effects faced by women and children 'trapped' in unregistered marriages.<sup>4</sup>

In an effort to tackle the problems related to unregistered marriage, a Bill on Muslim Marriage,<sup>5</sup> drafted under the supervision of the Supreme Court and the Ministry of Religious Affairs in 2008, and

\* Stijn Cornelis van Huis is a PhD candidate at Van Vollenhoven Institute for Law, Governance and Development, Faculty of Law, Leiden University (the Netherlands).

♣ Theresia Dyah Wirastri until recently worked at the Centre for Women and Gender Studies, University of Indonesia.

<sup>1</sup> LBH APIK is an organisation which was established to create a gender sensitive legal system in Indonesia. This legal aid institute for women was established by the Indonesian Women Association for Justice (Asosiasi Perempuan Indonesia untuk Keadilan; APIK) on August 4, 2005. See [www.lbh-apik.or.id](http://www.lbh-apik.or.id).

<sup>2</sup> Muslimat NU was formed on 29 March 1946 in Indonesia as a separate women's division of the traditionalist Sunni Moslem organisation Nahdlatul Ulama (NU), which was established in 1926. This women's division finally was formalised as a separate body within NU on 28 May 1952. Muslimat NU was formed to create an Indonesian society, the members of which, particularly women, who are aware of their duties and rights in accordance with Islamic values. See [www.muslimat-nu.or.id](http://www.muslimat-nu.or.id).

<sup>3</sup> Rahima, Centre for Education and Information on Islam and Women's Rights, is a non-governmental organisation that focuses on empowerment of women in Islamic perspective. Rahima was established to respond to the needs of information on gender and Islam. Rahima was established on August 5, 2000. See [www.rahima.or.id](http://www.rahima.or.id).

<sup>4</sup> According to the leaflet, wives in unregistered marriages cannot enforce the rights attributed to a legal marriage, such as *nafkah* (livelihood) during the marriage, marital property in case of divorce, or inheritance in case of death of the husband. Second, due to the unclear status of their marriage they often have to face the stigma of being a 'dishonourable woman'. Third, children resulting from unregistered marriages will be considered the legal children of their mother only and as a result they only have a civil relationship with their mother and her family, and will be registered as children born out of wedlock. As a consequence, such children not only have to face a stigma attached to that status but also lack legal rights to daily *nafkah* provided by the father or to inheritance in case of the death of the father. See YLBH APIK Jakarta, nd.

<sup>5</sup> *Rancangan Undang Undang Hukum Materiil Peradilan Agama bidang Perkawinan* [unpublished document], version of 2008.

listed as Bill No 56 on the legislative agenda for 2010-2014, proposes to 'criminalise' unregistered marriage. More specifically, this 'criminalisation' (*kriminalisasi*) means that the regulatory offence of non-registration of a marriage, currently handled by the local government and subject to administrative fines, would be turned into a felony handled by the Prosecutor's Office, which could lead to up to three years imprisonment. This Bill unleashed lively public debate, played out in the media.<sup>6</sup> Some women's organisations such as Komnas Perempuan were in favour of criminalisation, while the organisations united in the Women's Network for Pro-Women Legislation (Jaringan Kerja Prolegnas Pro Perempuan/JKP3),<sup>7</sup> including the organisations LBH-Apik, Muslimat NU, Rahima and 37 others, expressed the opinion that the Bill should protect wives from criminal charges, since they are usually victims and not perpetrators in such cases.<sup>8</sup>

Although references were made to the Marriage Law and its implementing Government Regulation (No 9 of 1975), a thorough legal analysis of the position of unregistered Muslim marriage in current and past registration laws was lacking in the debate. As is often the case in Indonesia, both state and non-state organisations focus on a new Law as a solution to a problem, rather than focusing on the question of how the implementation of existing regulation can be improved.

This article offers an analysis of past and present legislation concerning marriage registration for Muslims and will show that shortcomings regarding Muslim marriage registration relate not so much to a lack of legal sanctions to punish disobedient citizens, but rather the failure by the responsible institutions to implement the regulations. Our main suggestion is that sufficient legal sanctions are already in place. Therefore, the current legal position of unregistered marriage does not require an increase of legal sanctions. The existing legal sanctions, if implemented and generally known, could be a sufficient deterrent for both corrupt staff and prospective spouses. Turning unregistered marriage into a felony will not resolve the situation because as long as implementation and enforcement of existing laws is lacking, there is little hope that criminal sanctions can lead to greater compliance with marriage registration regulations.

In the short legal history that follows, we will use the case of Ibu Dian<sup>9</sup> to illustrate the legal complexities surrounding unregistered marriage practice. This case study of current state of the law on unregistered marriages is linked to the way Muslim marriage registration has been regulated from colonial times onwards. In Java, the legal obligation to register a marriage has existed for more than 90 years and included administrative fines for violation of civil registration regulations. The legal sanctions had 'devalued' over time and were only recently 'updated' by the Civil Registration Law (No 23 of 2006). The Civil Registration Law enables local governments to impose much heavier administrative fines on the regulatory offence of failing to register vital events (including marriage) and also increases the legal sanctions for the felonies of forgery and fraud by both spouses and registrars.<sup>10</sup> Finally, as we illustrate by reference to a recent Supreme Court case, art 279 of the Criminal Code can be applied to prosecute informal polygamy and perhaps other forms of unregistered marriage that are disadvantageous to women.

<sup>6</sup> See Kompas, 2010a and Kompas, 2010b.

<sup>7</sup> JKP3 was established in 2005 by 40 organisations and individuals who are committed to promote gender sensitivity in the legislative process through research, advocacy, legislative monitoring and public campaigns. See [jkip3.apik-indonesia.net](http://jkip3.apik-indonesia.net)

<sup>8</sup> See Kompas, 2010c; and JKP3, 2010.

<sup>9</sup> 'Dian' is not her real name. For reasons of privacy we use an alias.

<sup>10</sup> The administrative fines (*denda administratif*) for violating the provisions of the Civil Registration Law concerning the registration of vital events must be established by local regulation (*Peraturan Daerah*), which considers (*memperhatikan*) the condition of the local community. See art 107 of Presidential Regulation No 25 of 2008 concerning the Requirements and Procedures for Population and Civil Registration.

## Ibu Dian's Story

In a focus group discussion conducted as part of a research project on *nikah siri* (unregistered marriage)<sup>11</sup> with 16 women, all PKK<sup>12</sup> members in *kampung* (hamlet) Rawa Badung, East Jakarta, a woman came forward and shared her story about her polygamous marriage. She spoke with a soft voice, but was not ashamed to share her story: 'I am not a hypocrite! Everyone here knows that I am the second wife of my husband. So I will not try to conceal it.'

She married her husband eleven years ago and felt it was a happy marriage. Although being a second wife attracted social stigma (see Nurlaelawati, 2010; Nurmila, 2009), Ibu Dian felt reasonably comfortable with her marital status: 'The first wife gave her consent for taking me as his second wife. This, of course, makes our polygamous marriage official!' The wedding included a wedding party and a religious ceremony in her house in Rawa Badung, led by a *penghulu* (marriage registrar) of the local Office of Religious Affairs (Kantor Urusan Agama/ KUA), the office where Muslims are required to register their marriages and divorces.<sup>13</sup> At that time, she was aware of the problematic nature of her marriage but believed that it was resolved by having obtained a marriage certificate: 'My husband works in the army and according to Government Regulation<sup>14</sup> army employees are not allowed to perform polygamy. However, I possess a marriage certificate (*buku nikah*).'

Dian's story illustrates several important aspects of the practice of unregistered marriage in Indonesia. To start with, Ibu Dian considered her polygamous marriage a legal marriage because the Muslim wedding ceremony was led by a *penghulu* (Muslim registrar) from the KUA and as a result, the marriage was concluded according to religious requirements and, moreover, she had obtained a marriage certificate. At first glance, Ibu Dian had fulfilled the religious (art 2 para 1) and registration (art 2 para 2) requirements of the Marriage Law. However, the Marriage Law also stipulates that polygamous marriages may only be performed under certain conditions (arts 4 and 5). Polygamy is allowed if the first wife is not able to perform her obligations as a wife, if she suffers from physical disabilities or incurable disease, or if she cannot conceive. Before entering a polygamous marriage, the husband must obtain permission from the Religious Court (Pengadilan Agama). Permission can be granted if the husband can demonstrate that he is financially capable of supporting more than one wife, that he will be fair to his wives, and that he has the consent of his previous wife or wives. As recently as 2007, the Constitutional Court endorsed the restrictions on polygamy in the Marriage Law.<sup>15</sup>

In the case of Ibu Dian, the spouses had not requested permission from the Religious Court and thus violated the Marriage Law, even though they had obtained a marriage certificate. Ibu Dian and her husband therefore violated state regulations in two ways. First, the marriage was concluded in violation of polygamy restrictions of arts 4 and 5 of the Marriage Law. Second, Ibu Dian and her husband were directly or indirectly involved in fraud. Both the KUA official and the couple deliberately violated registration regulations by having processed a marriage certificate for a marriage which was polygamous in nature and for which they knew that court permission was required.

Ibu Dian's husband was the one who had contacted the *penghulu* and Ibu Dian herself claimed not to have known about the content of the negotiations that took place. The *penghulu* had assured her that she would not have to worry and that he would take care of everything. Nonetheless, Ibu Dian did realise that her *buku nikah* might be *aspal* (*asli tapi palsu*, 'authentic' but false): 'I am aware of my position as the second wife of an army officer. Although a *penghulu* had been involved in my wedding

<sup>11</sup> This research by the Faculty of Law of Universitas Indonesia (FHUI) was conducted in the first half of 2010.

<sup>12</sup> PKK (*Pemberdayaan dan Kesejahteraan Keluarga*, or family empowerment and welfare program) is the organisation of female residents on the *kecamatan* (sub-district) level that was established all over Indonesia by the New Order.

<sup>13</sup> Non-muslim marriages are registered at the civil registry office (*kantor catatan sipil*).

<sup>14</sup> See Government Regulation No 10 of 1981 jo. No 45 of 1990.

<sup>15</sup> Constitutional Court Decision No.12/PLaw-V/2007. For a discussion of the case, see Butt, 2010.



and he did give me a marriage certificate, I realise that perhaps he has not really registered my marriage and [as a consequence] my marriage certificate is *aspal*.'

As the *penghulu* himself had concluded the marriage, there is a reasonable chance that an official form has been used for the *aspal* marriage certificate and that in practice no one will ever notice the forgery. However, if in the future a dispute would arise (for example an inheritance dispute in which the marital status is contested in court), or if the first wife reports the second marriage to the police, the judge might consider the marriage invalid because it was concluded in violation of official registration procedures and the Marriage Law.

The main problem which Ibu Dian's case illustrates is the commonness of non-compliance and forgery, both by spouses and registrars, in the routine application of Indonesia's Muslim marriage registration regulations. The question is whether this practice of non-compliance is due to a lack of severe legal sanctions as deterrent for potential offenders, or whether other factors are more important. A historical legal analysis of Muslim marriage registration will demonstrate that the present-day legal sanctions on non-compliance are, in fact, heavier than ever before. We argue, therefore, that a lack of sanctions is not the cause of poor compliance with the Muslim marriage regulations.

### Unregistered Marriage: Between Accepted Cultural Practice and Violation of Women's Rights

Although no official figures are available for the prevalence of unregistered marriages, let alone unregistered polygamy, the practice still appears to be widespread, especially for second marriages that follow informal divorces - the latter being divorces that have not been sanctioned by the court (AC Nielsen / World Bank, 2006).

In Indonesia, unregistered marriage is linked to customary practices concerning marriage. Polygamous marriages and delayed child marriages (*kawin gantung*) traditionally are permitted by Islamic law according to the Syafi'i *maddhab* (school of Islamic law), which is prevalent in Indonesia. In child marriages, sexual intercourse is usually delayed until both the spouses are considered to be adult. The local concept of adulthood may conflict with the provisions of the Marriage Law that sets a minimum age for marriage of 16 years for the wife and 19 for the husband. *Kawin gantung* can also be conducted between adults. In such marriages, the husband and wife initially do not live together as a married couple because one or both of the spouses must still finish their education or find a stable job (Masfuk Zuhdi, 1998: 10-12).

With regard to polygamy, the Marriage Law, as mentioned, limits polygamous marriages to certain conditions and obliges the spouses to obtain permission by the Religious Court. The parties to the marriage (husband, wife, parents) do not always know about, or do not want to meet, the restrictions on polygamous and child marriages laid down in the Marriage Law and as a consequence conclude the marriage without registering it. In the case of polygamy, many men want to keep the second marriage secret from the first wife and therefore the marriage ceremony is kept as low-profile as possible and the marriage not registered (Suryakusuma, 2004).

A third type of marriage is a marriage in which couples are forced to marry unofficially to prevent *zina* or extramarital sex. When a relationship between an unmarried couple has 'crossed the line' of what is considered appropriate in the eyes of the local community, in some cases a marriage is arranged to avoid shame or social repercussions (Chabot, 1996).

The FHUI report identifies a fourth form of unregistered marriage in present day Indonesia: a Muslim marriage for which no legal obstacles to registration exist and which is concluded without force or pressure from the local community. There are at least three other reasons why people do not register marriages voluntarily and without community pressure. First, the spouses are not acquainted with the

law and not aware of their obligations to register their marriage. The second reason concerns financial considerations. Marriage registration in Jakarta formally costs Rp 30,000<sup>16</sup> but, in reality, registration officials of the KUA sometimes ask for more than three times as much as a registration fee and even more for their services before and during the ceremony (Sulistyowati Irianto et al., 2011; see also Lindsey and Sumner, 2010). Moreover, in many cases, ideological reasons also play a role, as people consider marriage to be primarily a religious act with registration of only secondary importance (Nurlaelawati, 2010).

As mentioned earlier, many women's organisations in Indonesia point to the negative consequences of unregistered marriages for the women and children concerned, such as the negative legal, social, and psychological consequences that women and children face. The wife will not have formal legal proof of the marriage and has to go through a court procedure (*isbath nikah*, see below) to obtain legal proof of the marriage. If she is the second wife in a polygamous marriage, the Religious Court will generally not provide legal recognition of the marriage in an *isbath nikah* case.

For a child, their status as a 'child born out of wedlock' may become a social and psychological burden to the children involved because of the stigma attached to it. Moreover, they have no legal relationship with the father and thus no legal rights to daily *nafkah* (maintenance) or to the inheritance in case of his death.<sup>17</sup> This legal situation may have changed recently, in principle at least. A judgment handed down in 2012 by the Constitutional Court states that if there is scientific or other proof that a man is the biological father of a child born outside wedlock, the child will have a civil legal relationship with the biological father and his family. This means that the biological father has a legal responsibility for his child and thus should provide child support and that, moreover, the child has rights to the inheritance of the biological father.<sup>18</sup> We can only speculate about the legal consequences of the Constitutional Court's judgment, however, as it has yet to be applied by other courts.

Despite the continuous advocacy of Indonesian women's organisations like Komnas Perempuan, Muslimat NU, Rahima and LBH Apik against unregistered marriage, imposing heavy penalties on unregistered marriage remains controversial – even amongst the organisations themselves. This became clear when the Muslim Marriage Bill was presented to the parliament (February 2010) for further deliberation. In the past, most Indonesian women's organisations have supported Komnas Perempuan in advocating the imposition of legal sanctions on the perpetrators of unregistered marriages (Komnas Perempuan, 2007).<sup>19</sup> However, JKP3, a network of women's organisations, took a more nuanced view in its response to the Muslim Marriage Bill. They made clear in a pamphlet they produced that husbands are the main perpetrators of unregistered marriage, not wives. There should be no general 'criminalisation', they argued.

Their argument is consistent with the longstanding view among most women's organisations that more often than not, women are the victims in unregistered marriages as they are unable to bring their husbands to court if the latter violate their rights - including rights to maintenance, post-divorce rights and the right to be free from domestic violence (CWGI, 2007). Another often-heard complaint in women's rights circles is that tolerance of unregistered marriages facilitates illegitimate polygamy by the husband, as it is easier to keep the second wife secret from the official wife (Suryakusuma, 2004).

The Muslim Marriage Bill was drafted by Supreme Court and the Ministry of Religious Affairs with the involvement of religious scholars (*ulama*), judges of the Religious Court and women rights groups. The draft Bill attracted a lot of attention from the media, especially the articles that would

<sup>16</sup> This fee is fixed in Government regulation No 51 of 2000 and Regulation of the Governor of Jakarta No 169/087.417.

<sup>17</sup> Sumner (2008) sums up similar negative consequences for women and children in unregistered marriages. Bedner and Van Huis (2010) point out that for many young people unregistered marriage provides some freedom to experiment before entering a fully legal marriage. Unregistered marriage is often an 'in-between' relationship, an alternative to both the heavily stigmatised extra-marital relationship and a formal marriage.

<sup>18</sup> Constitutional Court case No 46/PUU-VIII/2010. On the consequences for inheritance, see Hukumononline 2012.

<sup>19</sup> Neng Dara, commissioner of Komnas Perempuan, has publicly stated her support for criminalisation of unregistered marriage. See Kompas (2010c).

turn non-registration of a marriage from a regulatory offence into a felony. The pro-criminalisation faction<sup>20</sup> have applauded the new draft Bill, since they hope that criminalisation will restrict unregistered marriages and its social effects, as well as halt the alleged rise of unregistered polygamy since the fall of Suharto in 1998 (Van Wichelen, 2009).<sup>21</sup>

The anti-criminalisation faction consists of two groups. First, prominent figures from Muslim organisations, who argue that any marriage concluded according to the Islamic prescriptions is valid and thus cannot be criminalised. They argue that non-registration of a religiously valid marriage is a regulatory offence (and not a felony) and thus should be subject to a civil penalty. This group includes persons like Hasyim Muzadi, chair of the board of the NU (Pengurus Besar Nahdlatul Ulama); Khofifah Indar Parawansa, chair of the Central Leadership (Pimpinan Pusat) of Muslimat NU; Buya Syafii Maarif, the former chair of the central board of the Muhammadiyah; Iskan Qolba Lubis, member of parliament for the Islamist political party PKS; and Machrus Ali, chair of the Indonesian Forum for Young Religious Leaders (Forum Kiai Muda Indonesia).<sup>22</sup> The second group consists of the abovementioned network of women's rights groups in JKP3. Those organisations are not against criminalisation of unregistered marriages *per se*, but are against criminalisation of women involved in unregistered marriages.

Due to the turmoil in the media and the large opposition of Muslim organisations and women's rights groups, the parliament has not yet (September 2012) approved the Muslim Marriage Bill, and its deliberation has been postponed until further notice. Because the debate centred on the question whether or not the criminalisation of unregistered marriage is a good idea, one aspect of the Muslim Marriage Bill has been overlooked. The Bill proposes to bring the criminal offences it contains under the competence of the Religious Court. That constitutes a break with the present jurisdiction of the Religious Court, which does not extend to criminal cases (with the exception of the *jinayat* jurisdiction in certain criminal law cases granted to the *Mahkamah Syaria* in Aceh). Future debates should weigh the advantages and disadvantages of bringing criminal prosecution to the Religious Court.

Two other important matters are lacking in the debates on marriage registration: a historical legal perspective, and harmonisation of the Muslim Marriage Bill with the Civil Registration Law adopted in 2006. To start with the latter, the Civil Registration Law has substantially increased the maximum legal sanctions applicable to unregistered marriage, as will be shown. The substance of those legal sanctions constitutes a good middle ground between those against, and those in favour of, making unregistered marriage a felony. Moreover, the purpose of the Civil Registration Law was to unify Indonesian civil registration laws and to reduce the diversity of the colonial legacy of legal pluralism<sup>23</sup> (although it maintains the dualism in marriage registration by continuing the KUA for Muslim and Civil Registration Offices for non-Muslims). Harmonisation of the legal sanctions in the Muslim Marriage Bill with the Civil Registry Law would be more in line with that legal unification effort and increase the consistency and clarity of the regulations concerning marriage registration.

<sup>20</sup> Besides Neng Dara, a Commissioner of Komnas Perempuan, the former Chief Justice of the Supreme Court, Harifin A Tumpa, the Chief of the Constitutional Court, Mahfud MD, as well as, the chair of the Indonesian Commission for the Protection of Children (Komisi Perlindungan Anak Indonesia, KPAI), Hadi Supeno, and the head of the Coordinating Office for the National Family Planning Program (Badan Koordinasi Keluarga Berencana Nasional, BKKBN) Sugiri Syarif, have endorsed the criminal sanctions in the Muslim Marriage Bill. See Kompas, 2010a; Kompas, 2010d; and Kompas, 2010e.

<sup>21</sup> Although no official figures are available concerning unregistered polygamous marriages, most observers signal a significantly higher number of unofficial polygamies as compared to official data. See Nurmila, (2009); Nurlaelawati, 2010; and Bedner and Van Huis, 2010.

<sup>22</sup> Most prominent Muslim scholars of NU, Muhammadiyah and the Indonesian Ulama Council maintained in the debate that state registration is not required to make a marriage valid. See Kompas, 2010f; Kompas, 2010g; Kompas, 2010b; Kompas, 2010h; and Kompas, 2010i.

<sup>23</sup> The general elucidation to Law No 23 of 2006 explains that unification of civil registration laws was one of the goals of the law 'In the fulfilment of population rights, specifically in the field of Civil Registration we still could find a classification of the population that was based on a discriminatory treatment which differentiated [the population on the basis of] ethnicity, descent and religion as was regulated in several Dutch colonial laws. Such a discriminatory classification of the population is contrary to Pancasila and the Constitution of 1945'.



Second, an historical legal analysis demonstrates that legal sanctions alone are insufficient to tackle the problem of unregistered marriages and that the main issue is how to bring the registry under bureaucratic control. By 'bureaucratic control' we mean the use of rules, policies, hierarchy of authority, written documentation, reward systems, and other formal mechanisms to influence employee behaviour and assess performance.

In our opinion, policy makers should build on both knowledge of the legal history and assess the current state of affairs in Muslim marriage registration. By providing a historical legal analysis concerning the position of marriage registration in Indonesian history, we demonstrate that the present-day legislation concerning civil registration is not inadequate but has simply not been properly implemented.

## Marriage Registration and the Law: A Historical Overview<sup>24</sup>

State regulation of the registration of Muslim marriages in Indonesia goes back to 1896, when the colonial *Staatsblad* 1895 No 198 concerning *Huwelijken en Verstootingen onder Mohammedanen* (Marriages and Repudiations under Mohammedans) came into force for the islands Java and Madura. *Staatsblad* 1895 No 198 contains a mere six articles and thus regulates the broad lines of registration only. Article 1 stipulated that only persons appointed by the Dutch district government could register marriages, divorces (*talaq*) and instances of *rujuk* or reconciliation of a marriage. For their activities these appointed marriage registrars could charge an administrative fee. Persons other than the appointed registrars who concluded marriages or in practice functioned as a registrar in marriage, *talaq* and *rujuk* matters, faced a fine of 8 to 50 guilders (art 4). Husbands failing to register a *talaq* or *rujuk* were subject to a lower fine of 1 to 5 guilders.

In 1929, the Dutch colonial government introduced a regulation that further organised marriage registration. *Staatsblad* 1929 No 348 bears the same title as its predecessor and also only applied to Muslims on Java and Madura, yet is usually referred to as the '*Huwelijks-ordonnantie*' or the Marriage Ordinance. The Marriage Ordinance incorporated the stipulations of *Staatsblad* 1895 No 198 (the marriage registrar is appointed by the colonial government, registration of marriage, *talaq* and *rujuk* is a legal obligation and non-registration is a regulatory offence subject to a fine) but a number of provisions further regulated Muslim marriage registration.<sup>25</sup>

The Marriage Ordinance stipulates a minimum and maximum fee that the marriage registrars may ask from their clients and to be laid down in district regulation. If the registrars overcharged they could be disciplined. Moreover, the chief marriage registrars who were responsible for the registration records obtained the status of *openbaar ambtenaar* (civil servant). Those provisions were clearly aimed at increasing bureaucratic control over the marriage registrars in order to combat practices of overcharging and corruption. Unfortunately, the status of civil servant never resulted in a pensionable salary for the *penghulu* (the religious official who was both marriage registrar, judge at the Religious Court and head of the district mosque), since as early as in 1934 a new regulation had 'demoted the *penghulu* from salary earners to recipients of allowances' (Hasyim, 2001: 202-203). As a reaction to their loss of the benefits of their newly-acquired status as civil servant (as well as the transfer of jurisdiction over inheritance to the civil court),<sup>26</sup> the *penghulu* in 1937 organised themselves in the *Perhimpunan Penghulu dan Pegawainya* (Association of the *Penghulu* and their Staff).

<sup>24</sup> The Colonial registration laws analysed here are taken from Hanstein, 2002.

<sup>25</sup> In colonial times several other marriage ordinances have been issued that regulated marriage registration. For matters of space they are not analysed here. Until Law No 22 of 1946 came into force, Muslims in the self-governing sultanates of Surakarta and Yogyakarta on Java were subject to a separate marriage ordinance (*Staatsblad* 1933 No 98). In the outer islands a marriage ordinance (*Staatsblad* 1932 No 482) was in force until it was amended by law No 32 of 1954. Christians were subject to the Marriage Ordinance for Christians (*Staatsblad* 1933 No 74) and there was also a Regulation for Mixed Marriages (*Regeling op de Gemengde Huwelijken*, *Staatsblad* 1898 No 158). See, Koeswadi, 1976; Prins, 1952.

<sup>26</sup> Inheritance was lucrative to the *penghulu* because of the practice of charging a 10 percent *uzur* payment, calculated on the inheritance value.



The Marriage Ordinance also established procedures concerning marriage registration and legal sanctions for violating the procedures. Article 1 of the marriage ordinance stipulates that parties who have the intention to marry must report their intention to the authorities one week before marriage at the latest, and conclude the marriage under the supervision of the official appointed marriage registrar. Parties failing to do so would face a fine. Article 3 provides that: 'He who marries or marries off a woman according to the Mohammedan law, other than under the supervision of the [...] appointed marriage registrar or his representative, will be punished with a fine of up to 50 guilders.'

Apparently, the colonial government did not consider women who failed to register their marriage as a party to their marriage. Under the *Syafi'i maddhab*, the most widespread *madhhab* in Indonesia, daughters were (and are) married off by a guardian (*wali*). Therefore, the *wali* and not the wife was subject to a fine. This *wali* usually was (and is) the father of the bride or another male blood relative in the male line but in their absence they can be replaced by a religious functionary (*wali hakim*). Traditionally, the husband - if of age - is a party to the marriage himself. Thus, if he violated the provisions of the Marriage Ordinance, he could face a fine.<sup>27</sup>

Appointed Muslim marriage registrars who overcharged could face a fine of 100 guilders or three months imprisonment. A religious figure who conducted an informal marriage was subject to a fine of maximal 100 guilders or three months imprisonment. The Dutch clearly wanted to establish authority in Muslim marriage affairs by increasing control over the official *penghulu* and at the same time combating the informal ones. Nevertheless, in its effort to set up a civil registration for Muslims on Java and Madura, the Dutch colonial government showed considerable tolerance towards unregistered marriages since the court decision that established the violation and the fine did not revoke the marriage itself. The marriage could still be registered if the court so decided (art 3, para 5). In practice, the marriage ceremony itself was thus still considered valid and unregistered marriages were not considered unofficial marriages *per se*. As we will demonstrate below, this stance towards unregistered marriages has not changed. To this day it is still possible to register a marriage by court decision through the *isbath nikah* procedure.

The legal sanctions in Dutch legislation were aimed at two groups. First, they were aimed at the religious authorities involved in marriage and divorce. The Dutch intended to regulate and curb the corrupt behaviour of the officially appointed (but unsalaried) marriage registrars and to bring to an end to the practice of marriages performed by unofficial religious figures. Second, it was aimed at the parties who violated the registration stipulations in the Marriage Ordinance. Through legal sanctions and bureaucratic control the Dutch hoped to increase and develop the civil registration of the Muslim population of Indonesia and to increase the reliability of the registrars. Although the Dutch laid the foundations for Indonesian marriage registration and the KUA, they failed on the second point. By leaving the core of the Muslim marriage registrars unsalaried, the Dutch created a situation in which the registrars had to be 'creative' in order to earn an income.

## Marriage Registration: A Priority in the Revolutionary Years

In 1946, less than a year after the declaration of independence of 17 August 1945, the Indonesian revolutionary government established the Ministry of Religious Affairs (*Kementerian Agama*, KemenAg). One of the first pieces of legislation issued on the initiative of KemenAg was Law No 22 of 1946 concerning Muslim Marriage Registration. In the revolutionary struggle against the Dutch the new Republic clearly considered registration of marriage, divorce and reconciliation essential to build up a modern Republic. For KemenAg itself, this would also mean an increase of its role in society, since all Muslim marriage and divorce registration would be unified and placed under its supervision. Because Indonesia in 1946 was still in state of revolution (*bersiap*), Law No 22 of 1946 initially only

<sup>27</sup> Under art 3 husbands would also face a fine when they had failed to register a *talaq* or *rujuk*.

applied to Java and Madura. Law No 32 of 1954, however, applied it to the entire Republic of Indonesia.

Law No 22 of 1946 aimed at unifying marriage registration for Muslims under the newly established KemenAg. Thus, from that time it was no longer the districts (*regentschappen*) that appointed the registrars and established the administration fees, but KemenAg on the national level. Moreover, it made marriage registrars salaried civil servants (*openbaar ambtenaar*).

The general elucidation underlines the importance of salaried registrars for combating corruption:

[...]Moreover the [colonial] regulations that have been revoked, did not guarantee an income for the marriage registrars, [the income] which was dependent on the amount of fees that could be obtained from those who marry, divorce (*menalak*) and reconcile (*merujuk*). In this way the marriage registrars do not fulfil their duty as they ought to, only aiming to increase their income, and not sufficiently taking the Islamic laws into account. Such corrupt behaviour degrades the status of marriage registrars, not only resulting in scorn from the side of the Indonesian women's organisations but also from the ranks of the Muslim movements that really know the prerequisites for a talaq, etc., [they] don't agree with such a manner of securing the livelihood of the marriage registrars.<sup>28</sup>

The legal drafters of the Law clearly considered the Muslim marriage registry inherited from the Dutch to be corrupt, and they claimed that both women's organisations and Muslim movements agreed. They therefore tried to increase control over the marriage registrars by providing them a salary. Unfortunately, the assistant marriage registrars (*pembantu pegawai pencatat nikah*, P3N) at the village level remained unsalaried, and that is still the situation today. The P3N remained dependant on unofficial fees and are thus still prone to corrupt registration practices (Sulistiyowati Irianto et al, 2011; Nurlaelawati, 2010).

Under Law 22 of 1946, both the registration obligations and the sanctions for violating those obligations remained more or less the same as in colonial times.<sup>29</sup> A week before a marriage can take place the intention to get married must be reported to the local marriage registrar. Only a person appointed by KemenAg may act as a marriage registrar. Anyone else acting as a marriage registrar will face a fine of 100 guilders.<sup>30</sup> The fine for violating marriage registration procedures remained 50 guilders. The fine for not registering a *talaq* divorce was increased from a maximum of five guilders to 50 guilders, since, according to the general elucidation to Law No 22 of 1946, the previous fine of five guilders had been set too low.

Apart from the articles regulating the supervision and central control of KemenAg, Law No 22 of 1946 did not differ greatly from the colonial Marriage Ordinance. It was intended as a transitional law only, to be further developed when the new Republic had become more stable.<sup>31</sup>

## The Marriage Law and Muslim Marriage Registration

It was not until the early years of the New Order that the Republic would further regulate marriage. Marriage Law of 1974 and its implementing Government Regulation No 9 of 1975 do not deal specifically with civil registration (a unified law on civil registration would be enacted as late as 2006), but they once again underlined the marriage registration obligation for Indonesian citizens.

Article 2 para 2 of the Marriage Law clearly establishes the legal obligation to register one's marriage. Article 9 of Government Regulation No 9 of 1975, stipulates that a marriage may take place only ten days after the intention is made known to the local marriage registry - for Muslims the KUA.

<sup>28</sup> General Elucidation to Law No 22 of 1946.

<sup>29</sup> For example, art 3 of Law No 22 of 1946 is almost a direct translation of art 3 of *Staatsblad* 1929 No 348.

<sup>30</sup> Note that in the original Law the fine is established in guilders and only in later versions, is it restated in Rupiah. Because of the devaluation of the Rupiah from the 1950s onwards the fines laid down in Rupiah became very low. In this way the intended deterrent effects were nullified.

<sup>31</sup> See the General Elucidation to Law No 22 of 1946.

The KUA checks whether any legal barriers (such as a forced marriage, marriage to a close blood relationship or an underage marriage) exist that would prevent the marriage. In this way, prior reporting of the intention to marry plays an important role in combating forced, child or polygamous marriages.

The Marriage Law does not contain legal sanctions for breaches of the law. This absence of legal sanctions is one of the reasons that women's organisations have pushed for revisions to the Marriage Law. Nonetheless, art 45 of Government Regulation No 9 of 1975 established a maximum fine of Rp 7,500 for all persons who conclude a marriage without prior notice to the responsible marriage registrar (KUA for Muslims), who violate the stipulation to marry under the supervision of an official marriage registrar, or who conduct a polygamous marriage without court permission. The legal sanctions for Muslim marriage registrars in Law No 22 of 1946 were not included in Government Regulation No 9 of 1975, but were not annulled either. Nonetheless, as the result of many years of inflation the fines in Rupiah had become very low (1975 saw a rate of Rp 415 for \$1, against Rp 9,000 for \$1 in 2006), until they ceased to be a financial barrier to those considering transgressing the registration requirements (Butt 1999). Recently, adoption of the Civil Registration Law in 2006 has changed this situation, though many people – including women activists – seem unaware of this. As mentioned earlier, the drafters of the Muslim Marriage Bill did not harmonise the legal sanctions in the Bill with those in the Civil Registration Law either.

### The Civil Registration Law: Harsh Legal Sanctions

In 2006, a new piece of legislation was passed by the Indonesian national legislature, the DPR: the Civil Registration Law No 23 of 2006. Its main focus is to unify civil registration in Indonesia by annulling the plural colonial registration laws. The Civil Registration Law applies to all residents (*penduduk*), defined as all (Muslim and non-Muslim) Indonesian and foreign citizens who reside in Indonesia. All residents have the right to obtain personal documents (art 2) and are obliged to report vital events, including marriage (art 3). Unification did not put an end to the separate marriage and divorce registration offices for Muslims and non-Muslims. Marriage, divorce and *rujuk* of Muslims should still be reported to the KUA (art 8 para 2). More importantly for our argument, the Civil Registration Law considerably increased the fines for violation of civil registration obligations.

According to the Civil Registration Law, a couple is obliged to report their marriage to the authorised institution within sixty days of its conclusion (art 34). The fine or civil penalty on the regulatory offence (*sanksi administratif*) for not registering one's marriage (art 90(1b)) is set at the maximum of Rp 1 million (art 90 para 2), less than a minimum month wage for a salaried factory worker in the peri-urban regions.<sup>32</sup> For the poor, Rp 1 million is a substantial amount of money, but for the middle classes it is not a large barrier.

The legal sanctions for felonies (*sanksi pidana*) are potentially more deterring. Persons who forge personal documents will face a maximum sentence of six years and a fine of Rp 50 million (art 93). Persons who change the content of their personal documents will face 2 years imprisonment and a maximum fine of Rp 25 million (art 94). Persons who distribute blank personal documents are subject to the most severe penalties. They face up to ten years imprisonment and a fine of Rp 1 billion (art 96). If civil registration officials are involved in the abovementioned felonies, their punishment will be increased by one-third (art 98 para 1).

The legal sanctions in the Civil Registration Law are harsh compared to earlier laws, especially for perpetrators of fraud and forgery. At the same time, the maximum fine of Rp 1 million for violating the registration requirement is not disproportionate for persons who do not know that marriage registration is a legal obligation or who become victims of an unregistered marriage. In this way,

<sup>32</sup> In Tangerang, West Java, the minimum wage for an unskilled worker in a factory is about Rp 1,500,000 per month. See Kompas, 2012.



couples who are fooled because an assistant registrar did not officially register the marriage and kept the administration fees for himself, or a wife who is fooled by her husband, because she did not know that she was the second wife in a polygamous marriage, will not face excessively harsh legal penalties.<sup>33</sup>

New legal sanctions, therefore, are unnecessary and would, in fact, go against the unification goal of the Civil Registration Law. Incorporation of the legal sanctions of the Civil Registration Law into the Muslim Marriage Bill will suffice, provided the responsible institutions implement them appropriately.

## Back to Ibu Dian's Marriage

Returning to Ibu Dian, it is clear that her marriage violated several provisions of the Civil Registration Law. If the marriage registrar indeed had not registered her marriage, as she fears, she faces a fine of up to Rp 1 million (art 90). Forgery of the *buku nikah* (marriage certificate) by the *penghulu* is a felony and the *penghulu* faces a sentence of up to six years imprisonment and a fine of Rp 50 million (art 93). If the *penghulu* used a blank marriage certificate, he even faces a penalty of 10 years imprisonment and a fine of Rp 1 billion (art 96). All penalties applied by the *penghulu* can be increased by one-third since he is a registration official. If the forgery was undertaken at the instigation of Dian's husband, he faces two years imprisonment and a maximum fine of Rp 25 million (art 94).

Still, if no one reports the violations to the responsible institutions, nothing will happen. Failing to ask for permission for a polygamous marriage and failing to register a marriage are regulatory offences under the Civil Registration Law and Government Regulation No 9 of 1975 and are subject to administrative fines (*denda administratif*). The local Office of Population and Civil Registration (*Dinas Kependudukan dan Catatan Sipil, dispendukcapil*) is responsible for issuing and collecting the fines. The fines are established in a local regulation and are part of the local revenues of the district concerned.

Misdemeanours and felonies are subject to criminal sanctions (*sanksi pidana*). The violations should be reported to a civil investigating officer (*Penyidik Pegawai Negeri Sipil, PPNS*) in the field of civil registration. The PPNS sends a report to the police who subsequently will have to decide whether the investigation will be followed-up. If so, the public prosecutor will bring the case to the civil court.

It is likely, however, that the parties in Ibu Dian's case will get away with their violations of the Civil Registration Law. Since colonial times, the chief problem arising in Muslim marriage registration is not a lack of legal sanctions but a lack of performance on the part of the responsible institutions: a lack of bureaucratic control within the KUA and Office of Population and Civil Registration, corruption; low priority given to civil registration violations on the part of police and prosecutor; and a lack of legal awareness among the public (Sulistiyowati Irianto et al, 2011; AC Nielsen / World Bank, 2006).

There are nonetheless examples of strict enforcement of civil registration requirements. Although we lack data on the frequency of such cases, we have come across examples in which the prosecutor followed up reports of civil registration violations. For example, a LAPAS (*Lembaga Permayarakatan*, prison) employee in Bulukumba, South Sulawesi, informed us two recent violations in the field of marriage registration that were followed up by the police. One case concerned a wife who had remarried after her husband had left her for a year to work in Malaysia, without first being divorced. Her husband reported her to the police and she was detained a week before the parties reached an agreement (the wife had agreed to return the *mahar* or bride price to settle a divorce) and the charges were dropped. The second case concerned a secret polygamy case in which the first wife had reported

<sup>33</sup> Elsewhere, one of the authors has pleaded for pragmatism in marriage registration and understanding for local social conditions. See Bedner and Van Huis, 2010. Unofficial marriages that occur under enormous social pressure, for instance because of a teenage pregnancy, or out of fear of the stigma of extramarital sex (*zina*), require a quick and uncomplicated marriage and divorce. Criminalisation of such 'emergency marriages' is not advisable.



her husband to the police. The prosecutor took up the case and in the end the husband was found guilty of conducting illegal polygamy (*poligami tidak sah*).<sup>34</sup>

The latter case indicates that violation of the polygamy restrictions in the Marriage Law must be considered a felony and that Ibu Dian and her husband could face criminal charges for concluding an informal polygamous marriage were they reported to the police. As we will demonstrate in the next section, a 2009 decision of the Supreme Court has clearly established that unregistered polygamy should be regarded a felony.

### Supreme Court Decision No 2156 K/Pid/2008: Unregistered Polygamy is a Felony

For women's organisations in Indonesia one of the most detested consequences of unregistered marriage is that it may negate one of the main results of a long struggle: the legal restrictions on polygamy.<sup>35</sup> As mentioned above, the Marriage Law does not contain legal sanctions for violating the polygamy restrictions and Government Regulation No 9 of 1975 only sets a fine of Rp 7,500. Simon Butt (1999: 132) has described how local authorities in Indonesia generally proceeded when they were confronted with polygamous marriages. After payment of a fine of Rp 7,500 the polygamous marriage itself was left untouched. In only very few cases do the authorities report the polygamous couple to the responsible institutions. Thus, informal polygamy was treated as a regulatory offence rather than a felony.

Nonetheless, case law of the Supreme Court has pointed out that art 279 of the Criminal Code applies to informal polygamy cases that are reported to the police (Bowen, 2003; Butt, 1999). Article 279 threatens persons who marry despite being aware that there are legal barriers for the marriage with a maximum sentence of five years (para 1(1)). The same penalty applies to persons who marry although they know that an existing marriage of one of the parties forms a legal barrier to the marriage (para 1(2)). Persons who deliberately conceal a previous marriage that constitutes a legal barrier to a marriage as meant in para 1(2), will face a maximum sentence of up to seven years imprisonment (para 2).

Bowen (2003: 184) has described a Supreme Court judgment in 1991<sup>36</sup> in which the prosecutor filed criminal charges based on art 279. The first-instance court sentenced the husband to five months imprisonment. The Supreme Court upheld the decision. The position of the Supreme Court has not changed in this regard. Recently, in a judgment of 12 April 2009 (No 2156 K/Pid/2008) the Supreme Court once again interpreted informal polygamy (between Muslims) to constitute a felony under art 279 of the Criminal Code. In what we will call Ali's case, the husband was sentenced to six months imprisonment.

In summary, in April 2005 (the couple did not remember the exact date), at 8pm, in the city of Bengkulu, Ali married a woman named Eni. The polygamous marriage was not registered but concluded secretly and without the consent of Ali's first wife Nur. Nur found out about her husband's polygamous marriage and reported her husband to the police. In the end, the prosecutor charged Ali under art 279 for entering into marriage with Eni despite knowing that his first marriage formed a legal obstacle to the second marriage. The prosecutor demanded a sentence of 1 year and 8 months imprisonment.

The first instance court sustained the charges but sentenced Ali to only six months imprisonment – a much lower penalty than the prosecutor had demanded. Ali appealed, but in vain, as the sentence of

<sup>34</sup> Interview with Pak Jurman, Bulukumba, 6 June 2011. 'Illegal polygamy' is the term the LAPAS employee used. We do not know what the actual charges were, as we were unable to access the court file.

<sup>35</sup> Until the 1970s, Indonesian women's organisations were divided over the issue and the major Muslim women's organisations of NU (Muslimat; Fatayat) and Muhammadiyah (Ayisyah) were initially opposed restrictions on polygamy. However, at present the main Muslim women's organisations support the limitations on polygamy in the Marriage Law. Of course there are also Muslim parties, such as PKS, which are pro-polygamy. See Robinson, 2009; and Katz and Katz, 1975.

<sup>36</sup> Case 2147/K/Pid/1988.

the first instance court was sustained by the high court of Bengkulu. Ultimately, Ali appealed by cassation to the Supreme Court.

In his plea, Ali challenged the judgment of both the first instance court and the high court of Bengkulu that his second marriage with Eni must be considered a marriage with legal consequences. Ali claimed that because he had only been married according to the religious requirements (in this case Islam) he had only fulfilled the first of the two paragraphs of art 2 of the Marriage Law. The couple had not registered the marriage as stipulated in art 2 para 2, and Ali, therefore, claimed he had not been married in a legal sense. He argued that the state only recognises registered marriages and that only marriage certificates are accepted as legal proof of a marriage. Thus, the second marital union should not be regarded a marriage with legal consequences as meant in art 2 (1 and 2) of the Marriage Law and thus art 279 should not apply.

The Supreme Court, however, held that the High Court of Bengkulu already had considered the claims of Ali and had applied the law correctly. The Supreme Court saw no reason to intervene. Ali's cassation was therefore, was rejected.

Ali's case is only a single case in a country without a case law tradition, in the sense that there is no system of precedent and that judgments of the Supreme Court are not binding in similar cases. Nevertheless, the case does indicate that the judges in the General Courts (Pengadilan Umum),<sup>37</sup> regard art 279 of the Criminal Code as applicable to informal polygamous marriages. Again, this case demonstrates that most of the legal sanctions women's organisations are asking for, in fact already exist. The problem is that these sanctions are relatively unknown to the public and are therefore too seldom implemented.

### Are Harsher Penalties on Non-Registration Needed?

Most theoretical legal debates surrounding unregistered marriages in Indonesia centre on the relation between art 2 para 1 of the Marriage Law (which states a marriage must be conducted according to the religion of the parties) and art 2 para 2 (which establishes the legal obligation to register one's marriage). Case law of the Supreme Court has solved the problem in the sense that a Muslim marriage that conforms to religious norms (art 2 para 1) generally is considered valid (Bowen, 2003).

The Religious Court shows great tolerance for unregistered Muslim marriages. Most Religious Courts will register marriages that are concluded according to Islamic requirements (*istbath nikah*), based on the transitional art 7 in the Marriage Law of 1974, even when the marriage has been concluded after the coming into force of the Marriage Law in 1974 (Nurlaelawati, 2010). In this regard there is, again, continuity with colonial laws, since the same registration-through-court-decision policy can be found in *Staatsblad* 1929 No 348 and after independence was adopted in Law No 22 of 1946.

Of course, not registering a marriage is still a regulatory offence. The fact that an unregistered marriage is considered valid does not diminish the legal obligation to register one's marriage. The registration obligation has been in place since colonial times and was restated just after the birth of the Indonesian Republic, when President Soekarno and Minister Fatoerachman of the newly-established Department of Religious Affairs signed Law No 22 of 1946 in Linggardjati, then the temporary residence of the Indonesian government.

Still, we argue that the practice of the Religious Court and Supreme Court of considering most unregistered marriages as valid marriages (if concluded in conformity with religious norms) is a very humane one. In this way couples involved in an unregistered marriage, together with their children, may get access to personal documents needed to access state-sponsored programs or formal education (Bedner and Van Huis, 2010; Lindsey and Sumner, 2010). Moreover, field work in the Religious Courts

<sup>37</sup> All criminal cases in Indonesia currently must be brought before the Civil Court, not the Religious Court, except in Aceh, where the religious court has some criminal jurisdiction.

of Cianjur and Bulukumba<sup>38</sup> has indicated that the Religious Court refuses to register polygamous marriages through the *isbath nikah* procedure. *Isbath nikah*, therefore, offers no loophole to escape the polygamy restrictions.

The stance of the Supreme Court regarding the validity of unregistered marriages is different as well when polygamous marriages are concerned. Ali's case suggests that two points can be made in this regard. First, polygamous marriages without prior court permission are not regarded valid by the court and thus remain officially unrecognised. Second, the non-recognition of an informal polygamous marriage does not mean that the deliberate intention to enter an unregistered marital union in order to circumvent the legal barriers to an official polygamous marriage remains unpunished. Article 279 of the Criminal Code applies to such cases.

The Supreme Court judgment in Ali's case indicates that the general rule concerning the validity of unregistered marriages means that unregistered Muslim marriages that conform to the religious requirements are considered valid in Indonesia's legal system, *when no legal barriers to such marriage exist*. The Supreme Court decision above may indicate that the State will only recognise the legal consequences of an unregistered marriage when such marriage is in accordance with the Marriage Law. The Marriage Law clearly states that a marriage must be based on the consent of both prospective spouses (art 6 para 1) and that marriages below the age of 16 for women, and 21 for men, require prior permission from the state authorities (art 7 para 2). Thus, in child marriage and forced marriage cases there is a clear analogy with the informal polygamy case, in the sense that the parties have concluded a marriage while knowing that there are legal barriers to that marriage. That is a violation of the substance of the abovementioned art 279 para 1(1). Thus, if one would extend the line of reasoning of the Supreme Court in the informal polygamy cases it follows that unregistered marriages should not be considered valid if the marriage was concluded in violation of the Marriage Law, that is when one of the spouses was forced into the marriage, was under-aged, or already married to another person at the time of marriage.

Let us now turn to our main arguments. First, we have demonstrated that since the colonial Marriage Ordinances there have been legal sanctions applicable to unregistered Muslim marriages in Indonesia. In the revolutionary period (Law No 22 of 1946) and the New Order period (Marriage Law), the marriage registration requirements were restated. Recently, after the issuance of the Civil Registration Law, the maximum administrative fines on non-registration of marriage and the maximum criminal sanctions on forgery of marriage certificates have become much heavier. Furthermore, the Supreme Court has recently confirmed that art 279 of the Criminal Code is applicable to informal polygamous marriages. To cut a long story short, legal sanctions on violation of marriage registration requirements have long been in place and only have recently been increased. Therefore, a further criminalisation of unregistered Muslim marriage is not needed.

Second, legal sanctions alone are insufficient deterrent to halt the practice of unregistered marriages. Although corruption and fraud are felonies and render offenders liable to incarceration, marriage registrars are still very much involved in such practices since they usually get away with it. A solid registration policy requires a twin policy. On the one hand, a proper implementation and enforcement of the criminal sanctions on fraud and corruption of the Civil Registration law is needed. That necessitates an increase of bureaucratic control, greater commitment to reform on the part of the KUA, and properly functioning law enforcement agencies. On the other hand, common sense with regard to unregistered marriages must be retained. A considerable fine (without confinement) is a sufficient sanction in most unregistered marriage cases. Moreover, at least for the moment, it remains essential for women and children that unregistered marriages can be legalised by court decisions

<sup>38</sup> Fieldwork was conducted in Cianjur, West Java from November 2008-June 2009 and Bulukumba, South Sulawesi from May-August 2011.



through the *isbath nikah* procedure so that they can obtain access to governmental services that require personal documents.

## Conclusion

The Dutch established a plural registration system in which the *penghulu*, the main religious functionary at the *kabupaten* (or sub-provincial) level, was responsible for the registration of Muslim marriage and divorce. The *penghulu* were dependent on fees for their income and this often resulted in overcharging and corruption. Only a few months after the proclamation of Independence, Law No 22 of 1946 promised that the Indonesian government would repair the flaws in the colonial registration policy. More specifically, the Dutch policy of leaving the marriage registrars unsalaried became the breeding ground for corrupt behaviour. Because of the emergency situation in Indonesia of that time the issue was left to future legislation. Unfortunately, legislation that would provide a salary to all staff involved in Muslim marriage and divorce registration never came about because, to this day, the assistant registrars (P3N), responsible for registering the bulk of Indonesian Muslim marriages, do not receive a salary.

In 1974, the Marriage Law integrated the existing registration obligation. Government Regulation No 9 of 1975 established a fine of Rp 7,500 for non-registration of a marriage, which, because of years of inflation, lost much - if not all - of its deterrent effect. Still, it would take another thirty years before civil registration would be regulated more thoroughly.

The Civil Registry Law of 2006 unified the civil registration of vital life events by Indonesian citizens (although it preserves the separate marriage registration offices for Muslims and non-Muslims). It adopted harsh maximum administrative fines for non-registration and incarceration penalties on forgery of civil registration documents. The Indonesian government responded to corrupt practices in marriage registration by updating and increasing the legal sanctions.

In present day Indonesia, the laws concerning Muslim marriage registration offers a balanced package of legal weapons and empathetic pragmatism, enabling the state to combat the negative variants of unregistered marriage without inflicting a harsh punishment on those who are in an unregistered marriage due to social pressure. Criminal punishment of unregistered marriages should only take place in cases of fraud, forgery, forced marriages, child marriages, unlawful polygamy, and other similar situations. In those areas, legal sanctions are already in place and stand as a potential deterrent.

Unfortunately, the history of the registration laws in colonial and independent Indonesia tells us that legal sanctions alone are not enough to change the problematic behaviour of the KUA marriage registrars and their clients. Improved bureaucratic control over the Muslim registry is essential to improve the implementation and enforcement of existing laws. Therefore, in line with the spirit of Law No 22 of 1946, we argue that there should only be salaried marriage registration staff and the P3N should be made into civil servants. With regard to society at large, legal awareness programs, especially those that target women, will do part of the job. However, without implementation of the fines, lax compliance rates are likely to continue.

Rather than creating new and overlapping legal sanctions in the field of marriage registration, priority should be given to the implementation of the Civil Registration Law and harmonisation of the Muslim Marriage Bill with the Civil Registration Law. The criminal sanctions on fraud, corruption and forgery should be strictly enforced to increase bureaucratic control over KUA staff.

The legal history of Muslim marriage in Indonesia shows that the promulgation of legal sanctions has not been sufficient, in itself, to solve the problem of unregistered Muslim marriages. The harsh penalties in the Muslim Marriage Bill are symptomatic of a general tendency to look for solutions into new laws with harsher penalties, while disregarding enforcement and consistency with other laws. This legal analysis of the history of Muslim marriage registration and its implementation reveals why



legal sanctions alone will not promote compliance. To address this, the implementation of registration laws must be prioritised.

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