Islamic Courts and Women's Divorce Rights in Indonesia

The Cases of Cianjur and Bulukumba

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In memory of my father

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Glossary

Listed are only the important Indonesian and Dutch terms that recur in the text. Please note that I use the Indonesian spelling for Islamic legal terms originating from the Arabic language in accordance with the way those terms are most commonly written in Indonesian legislation. The meaning and use of those terms in Indonesia may differ from those in the Arabic countries in subtle ways.

Adat: social rules and practices of a community, custom, tradition.

Adat law: *adat* rules with legal value.

Boedelscheidingen: division of the estate after divorce or death.

Bu: Ms., Madam.

Bupati: district head.

Cerai: divorce.

Cerai talak: formal divorce request at the Islamic court by a husband.

Darul Islam: House of Islam. Islamic state proclaimed by Kartosoewirjo on August 7 1949 in West Java. In 1951 Abdul Kahar Muzakkar joined the *Darul Islam* rebellion in South Sulawesi and in 1953 Daud Beureu'eh in Aceh. In other provinces there were also pockets of *Darul Islam* fighters. Beureu'eh signed a peace agreement in 1959. In 1962 Kartosoewirjo was captured and executed. The capture and execution of Muzakkar in 1965 marked the end of the rebellion.

Executoirverklaring: statement of the general court which orders enforcement of a judgment of the Islamic court. Until the reforms of the 1989 Islamic Judiciary Law the subsequent priest councils, *penghulu* courts and Islamic courts had no independent capacity to enforce their judgments. Litigants who wanted to see these judgments enforced had to petition to the general courts (during the Netherlands Indies the *landraad*) in order to obtain an *executoirverklaring*.

Fasakh: annulment of marriage.

Fatwa: legal opinion of Islamic scholars.

Fiqh: Islamic doctrine.

Gugat cerai: divorce petition at the Islamic court by a wife.

Haja: woman who has completed the *hajj*.

Hajj: pilgrimage to Mecca. One of the five obligations for a Muslim.

Haji: man who has completed the *hajj*.

Harta bersama: marital property acquired by a couple during marriage.

Hakam: mediator.

Hoge Raad, Hooge Raad: Supreme Court of the Netherlands Indies.

Ibu: see *Bu*.

Iddah: waiting period of three menstruation cycles in which the wife is not allowed to remarry after a divorce.

Ijma: consensus among Islamic scholars over a legal issue; one of the five sources of Islamic law.

Isbath nikah: petition for a declaration of the legality of a marriage in which the court investigates whether the legal requirements for a marriage have been met.

Jaksa: prosecutor.

Jaksa courts: seventeenth and eighteenth century indigenous Javanese judicial courts headed by the sultans adjudicating civil and criminal matters. The term *jaksa* courts is a colonial collective noun for the indigenous judicial courts on Java. The name of the judicial courts actually varied and often were divided into several branches.

Kadi: Islamic judge.

Kantor Urusan Agama (KUA): Office of Religious Affairs; sub-district level government institution under the Ministry of Religious Affairs which is responsible for the registration of Muslim marriages.

Khul: a traditional Islamic divorce procedure in which the wife offers her husband to return (part of) her dower (*mahr*) in exchange for his pronunciation of the *talak* and in which she will refrain from her maintenance rights during the *iddah*.

KUA: see *Kantor Urusan Agama*.

Kyai: head of an Islamic boarding school.

Landraad: court for the Indigenous population during the Netherlands Indies.

Maddhab: school of Islamic law. There are four Sunni schools of law*: the hanafi, syafi'i, maliki and hanbali maddhab.* In Indonesia the *syafi'i maddhab* is dominant.

Mahar; Mahr: dower; the bride-price given by a bridegroom to a bride. The *mahar* belongs to the bride and is hers to keep in the case of divorce. She is entitled to half if the marriage ends before consummation. The *mahar* is one of the requirements for a Muslim marriage.

Majelis Ulama Indonesia: the Indonesian *Ulama* Council. Founded in 1975 during the Indonesian New Order under the Suharto presidency as a body to produce *fatwas* and to advise the Indonesian Muslim community on contemporary issues.

Masyumi, Majelis Syuro Muslimin Indonesia: Council of Indonesian Muslim Associations. Political party established in 1943 as the result of a forced merger of the Indonesian Muslim organizations under Japanese occupation. After Indonesia's Independence in 1945 *Masyumi* turned into the main opposition to President Soekarno's rule. After 1953, when the *Nahdlatul Ulama* became a political party of its own, *Masyumi* mainly represented the modernist/reformist Muslim organizations. *Masyumi* was banned in 1960 because of its alleged support for the rebellions raging in Indonesia at that time.

Muhammadiyah: the largest modernist/reformist Muslim organization in Indonesia founded in 1912. Advocating individual interpretations of Qu'ran and sunnah.

Mut'ah: consolation gift. A man is required to give *mut'ah* to his former wife after his pronunciation of the *talak*, provided that it concerns a non-final divorce and she was not *nusyuz* at that time.

Nafkah: maintenance.

Nafkah anak: child support.

Nafkah iddah: maintenance of the husband to the wife during the waiting period after a divorce.

Nahdlatul Ulama (NU): the largest traditionalist Muslim organization in Indonesia. NU was founded in 1926 to defend the *syafi'ite fiqh* tradition against the influence of the modernist movements. Under Abdurrahman Wahid the organization became more reform-minded.

New Order: (Indonesian: *Orde Baru*) refers to the authoritarian regime of Indonesia's second president Suharto (1966-1998).

NU: see *Nahdlatul Ulama*.

Nusyuz: disobedient; not fulfilling the marital duties. Wives who are *nusyuz* lose their legal rights on maintenance from their husband. Traditionally *nusyuz* refers to the wife's

behaviour, but recently the Indonesian Islamic courts have applied the term to husbands as well.

Pak: mister.

Pancasila: the five pillars of the Indonesian state, included in the preamble of the Constitution. They are: belief in one God, nationalism, humanism, democracy, and social justice. The New Order regime (1966-1998) turned these five pillars into an elaborate single national ideology, which served as a means of promoting national unity.

Penghulu: traditionally the highest authority in the Islamic bureaucracy on the district level on Java, who in the Netherlands Indies also acted as judge in the Islamic courts and as advisor on Islamic matters in the general courts. In modern Indonesia, the district-level head of the Islamic bureaucracy.

Penghulu courts: the Islamic courts on Java and Madura, which where part of the colonial legal system of the Netherlands Indies; successors of the *priest* councils by the reforms of 1931 and 1937.

Persatuan Islam (Persis): reformist Muslim organization founded in 1923, promoting reinterpretations of Islamic law strictly based on the Qur'an and hadith. Persis strongly opposes 'un-Islamic' heresy, myth, superstition as well as the elevated status of people of Arabic ancestry in Indonesia.

Priesterraad (*plural: priesterraden)*: priest council. The Dutch used the term to refer to the *penghulus'* judicial gatherings in the indigenous legal system. The 1882 Priest Councils Regulation formally made the *priesterraden* on Java and Madura part of the colonial legal system.

Qadi: see *Kadi*.

Raad van justitie (plural: raden van justitie): first instance court for Europeans and appellate court of the *landraad* in the Netherlands Indies.

Reformasi: the period of political, legal, economic and social reforms which followed president Suharto's resignation in 1998. There is no consensus among academics about what year the *Reformasi* period ended; the start of Megawati's presidency in 2001 or Yudhoyono's presidency in 2004.

Rujuk: reconciliation of divorced spouses. *Rujuk* is only allowed during the waiting period after a non-final divorce (*talak raji'i*).

Sarekat Islam: Islamic Union, founded in 1911. A pre-independence Muslim organization in the Netherlands Indies and the colony's first mass nationalist movement. In 1921 *Sarekat Islam* became a political party.

Surambi courts: the seventeenth century judicial gatherings on matters which were ruled by Islamic law at the veranda (*surambi)* of the grand mosque as part of traditional

Javanese justice under the sultans. Whether a strict division between the *jaksa* courts and *surambi* courts existed is unclear but these separate judicial gatherings of *penghulus* at the grand mosques are well-documented. See *Jaksa* courts.

Syafi'ite fiqh: the Islamic doctrines of the *syafi'i maddhab*, which traditionally is the dominant school of law in Indonesia.

Syiqaq: a procedure in which the *penghulu* appoints one family member of each spouse as mediators (*hakam*) in an attempt to reconcile a couple. When reconciliation fails, the *hakams* have the possibility to advise the couple to divorce. In Indonesia their advice traditionally was not only directed at the husband in order to persuade him to pronounce the *talak*, but also to the Islamic judge who could divorce the couple.

Talak: divorce through the pronunciation of the *talak* by the husband.

Talak ba'in: a final divorce. The couple cannot reconcile and only remarry after the wife has been remarried with another man and subsequently divorced him.

Talak raj'i: a divorce which is not final until the wife's waiting period (*iddah*) has ended. The marriage can be reconciled (*rujuk*) during the *iddah*.

Taklik al-talak: conditional divorce. A contract pronounced by the bride-groom immediately after the conclusion of the marriage in which he states the conditions under which he will divorce his wife if she wants him to do so. A wife who wants to divorce on the base of the *taklik al-talak* must bring her case to a judge who will verify whether one of the conditions has been met. If so, she has to pay her husband the amount of compensation as established in the *taklik al-talak* and will be officially divorced. A *taklik al-talak* contract cannot be revoked during the marriage.

Ulama: religious scholar. In Indonesia the term *ulama* is used for both the singular as the plural form.

Wali: guardian. According to *syafi'ite* doctrine one of the requirements for a Muslim marriage is that a bride must be married of by a male guardian; her father, or if this is not possible by a replacement from her father's line.

Waqf: religious endowment.

Zakat: alms. Paying *zakat* is one of the obligations placed on Muslims. The alms are to be used for the welfare of the needy.

Zina: fornication, adultery, sin.

1 Introduction

> 'It is true that everywhere in Muslim countries (apart from Turkey) family law is derived at least nominally from the Sharia, but it is equally true that its substance and its mode of application are no longer the same. […] we know little of the ways in which Sharia-based family law, this last bastion of the Islamic ideal of social relations, operates in today's Muslim world; whether indeed it has any significant relevance to the life of today's Muslims; and if it does, how far and through what processes it is translated into social reality.' (Mir-Hosseini 2000: 13)

> 'Islamic courts do not attract much attention, because few people consider them a central issue of political contention, though in a grand sense they are. Yet they have gone through and are going through a process of change that is very similar to that of other institutions bearing symbolic weight in the political system.' (Lev 1972: 7)

1.1 Background to the research

1.1.1 The Indonesian Republic, Islam and the Islamic courts

With an estimated population of 253,6 million, of which about 86 percent are registered as Muslims,[1] Indonesia is the most populous Muslim-majority country in the world. Indonesia is a religious state, though not an Islamic state, as its constitution of 1945 makes no reference to Islam or sharia.[2] This was again underscored during the constitutional reforms of 1999-2002, when Parliament rejected a proposal from Islamist parties to adopt a constitutional clause declaring that sharia applies to the Muslim population. Instead, the constitutional reforms encompassed the adoption of human rights provisions,

1 www.cia.gov/library/publications/the-world-factbook/geos/id.html, last accessed March 2014.

2 The *Pancasila* (five pillars), which are part of the constitutional preamble, laid down the five principles that form the ideological foundation of the 1945 Indonesian Constitution. The first principle, belief in the One and Almighty God, clearly shows the religious nature of the Indonesian Republic as it formally left no space for atheism or polytheism. See Otto (2010: 442, 443)

including freedom of religion and the prohibition against discrimination based on race, gender, disability, language or social class (Hosen 2005 and 2007).[3]

At the same time, Indonesia's judicial system has an Islamic courts branch[4] applying national legal norms that have their base in Islamic law. This is a consequence of the plural legal system inherited from the Netherlands Indies, in which different systems of law apply to different religious and ethnic identities (Hooker, M.B. 1975). Under this legal regime, the Islamic courts have jurisdiction over Muslim family law issues, whereas general courts adjudicate family law for other religious groups.[5] The 'religious' Islamic courts are in fact 'state' courts, subject to statutory law and official part of the state legal system headed by the Supreme Court.

The Indonesian government does not refrain from regulating issues pertaining to religion and Islam – quite the contrary, it always has done so, with the objective of increasing state authority over Islamic issues. Some of those regulations limited the Islamic institutions' room to manoeuvre. For instance, Indonesia's first president, Soekarno, introduced Presidential Decree 1/1965, providing the President with the power to dissolve all organizations practicing 'deviant' religious teachings. Under the presidency of his successor President Suharto, the so-called New Order regime (1966-1998) forced all Muslim political parties to merge into a single party in 1973. In 1985 the New Order required all organizations, including Muslim ones, to take the elaborate *Pancasila* ideology as their sole foundation (*azas tunggal*),[6] which in fact meant that they formally had to renounce their Islamist foundation.[7]

From the late 1980s onwards, however, room for Islam in public life was expanded when the New Order's regime took an 'Islamic turn' (Liddle 1996). This period saw the foundation of new Islamic organizations and institutions such as the Indonesian Association of Muslim Intellectuals (*Ikatan Cendekiawan Muslim Indonesia*, *ICMI*) with an advisory role to the government in 1990 and, in the year 1991, the Islamic bank Bank Mualamat Indonesia. The change in

3 For a comprehensive analysis of all the constitutional reforms, see Butt & Lindsey (2012).

4 I prefer 'Islamic court' over the more literal 'religious court' as translation for the *pengadilan agama*. *Pengadilan agama* are courts which have jurisdiction over the Muslim population. Since they have no jurisdiction over the Indonesian population with a different religion, I follow Daniel S. Lev who used the term 'Islamic courts' as the common denominator of the institution that has been renamed several times by the authorities, from priest councils (*priesterraden*) in 1882, *penghulu* courts (*penghoeloegerecht*) in 1931, to *pengadilan agama* in 1957. In 2006 the last formal change in name took place when the *pengadilan agama* in Aceh Province were formally renamed 'sharia courts' (*Mahkamah Syar'iyah*).

5 See paragraph 2.4.

6 *Pancasila* is Sanskrit for 'the five pillars,' which are belief in one God, nationalism, humanism, democracy, and social justice. The New Order regime used this concept to formulate a single national ideology, which served as a means of promoting national unity.

7 The traditionalists *Nahdlatul Ulama* and Modernist Muhammadiyah were both originally founded as Islamist organizations, in the sense that the main mission stated in their statutes was the Islamization of Indonesian society.

policy became visible in every town and village when the New Order started funding the construction of thousands of mosques throughout Indonesia. In public life Islam manifested itself through Islamic prayers to open meetings and increasing numbers of people in public service who presented themselves as devout Muslims (Otto 2010: 448-450). With these policies the New Order clearly sought to gain support from Muslim organizations and their supporters.

The second half of the New Order era was characterized by a paternalistic, often patriarchal state ideology (Suryakusuma 1988) and an increasing regulation and incorporation of Islamic norms and institutions into the state (Otto 2010, Salim 2008). However, contrary to what an outsider would perhaps expect, the New Order continued to follow a relatively liberal regime regarding Muslim women's rights in family law issues (Lukito 2012; Bowen 2003; Cammack 1999 and 1997).

The political discourse on the Islamic courts followed a similar trajectory as the policies described above. Initially, under Soekarno's presidency, the debates in the young republic centred on the question of whether a modern state needed Islamic courts at all. However, the support of the two main Muslim political parties, the Council of Indonesian Muslim Associations (*Majelis Syuro Muslimin Indonesia*, *Masyumi*) and the Awakening of the *Ulamas* (*Nahdlatul Ulama*; NU),[8] resulted in the Islamic courts being retained by the government. In 1957 a government regulation[9] even expanded the Islamic courts by requiring an Islamic court to be established in every district in the 'outer islands.'[10]

During the first years of the New Order the very existence of the Islamic courts was again threatened when political elites favoring their abolition drafted the 1973 Marriage Bill, and once again the Muslim organizations came to the rescue. Because of the protests, the government even decided to continue the Islamic courts' central position pertaining to Muslim family law matters in the 1974 Marriage Law. The 'Islamic turn' in New Order politics led to an increase in the Islamic courts' powers, culminating in the 1989 Islamic Judiciary Law,[11] which finally made Islamic courts full-fledged members of the legal system, placing them on an equal footing with the general courts and affording them the power to enforce their own judgments.

The 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*) is another landmark in Indonesian policy on Islam and 'a rupture' in the history of Indonesian Muslim Family law, as for the first time a government decided to legislate a large part of sharia-based rules on family matters, a field in which

8 In the 1955 parliamentary elections these two Muslim parties managed to win 102 of the 257 seats in Parliament.

9 Government Regulation 45/1957.

10 The term 'outer islands' is an equivalent of the Dutch *buitengewesten*, referring to the provinces outside Java and Madura.

11 Law 7/1989.

the previous administrations of the Netherlands Indies and the Republic of Indonesia typically chose not to interfere (Nurlaelawati 2010: 22, 23).

Those simultaneous processes of the Islamization of Indonesian law, and the Indonesiazation of Islamic law (Cammack 1997), resulted in an Indonesian Muslim family law which is a blend of three elements: traditional *syafi'ite fiqh*,[12] norms based in customary law (*adat* law), and state legislation and regulations. Those processes signify a serious effort by the Indonesian state to become the authoritative 'source of social and legal meanings' in Muslim family law matters (Cammack et al. 1996: 53).

1.1.2 The Islamic courts and women's rights

In the decades following Daniel Lev's quote of 1972, mentioned at the outset of this chapter, the Islamic courts have attracted much more attention from the academic world. Indonesia's Muslim family law has most commonly been characterized as relatively liberal in terms of women's rights (Lukito 2006 and 2012; Otto 2010; Hooker, M.B. 2008; Cammack 1999 and 2007; Bowen 2003; Soewondo 1977a and 1977b; Katz & Katz 1975 and 1978); the Islamic courts' and Supreme Court's application of family law norms has even been described as 'activist' in nature (Bowen 2000). In his court study of 1972 Daniel Lev already considered the Islamic courts responsive to the demands of those who primarily addressed them: women. Some thirty years later John Bowen observed a similar attitude of the Islamic courts, having a positive effect on legal reasoning regarding family law issues. Whether the starting point is Islamic, custom-based (*adat*), nationalist, or liberal in nature 'legal reasoning in Indonesia does approach (not arrive at) a set of values and norms, such as gender equality, fairness and agreement (2003: 257).'

However, Bowen also warns that in turbulent times 'there is always danger of back-sliding' (2003: 257). Indeed, the halting of initiatives for gender-equal reforms of the 1991 Compilation of Islamic Law in Parliament can be considered a sign of the continuing strong influence of conservative forces in Indonesia (Mulia 2007; Hooker, M.B. 2008). What is more, recent research on the Islamic courts' adjudication in two different regions in Indonesia revealed several judgments that might be indicative of a more conservative attitude. In a number of cases Islamic courts in West Java, Banten and Jakarta granted permission for polygamy, bypassing clear provisions in the Compilation of

12 The *syafi'ite maddhab* is one of the four major *maddhab* of Sunni Islam (the others being the *maliki*, the *hanafi*, and the *hanbali maddhab*) and with regard to the leading opinions about norms of marriage and divorce, the differences between the *maddhab* can be considerable (see Coulson 1978; Schacht 1982). In this book I will not attempt to discuss the complexity of *ulama* opinions held by different *maddhab* or even within the *syafi'ite maddhab,* but focus on those divorce norms that have been applied in the Islamic court.

Islamic Law and Marriage Law intended to limit the practice (Nurlaelawati 2010 and 2013). In the district of Sidrap, South Sulawesi, the Islamic court followed the wishes of the family in a number of cases to divorce a couple against the will of the spouses themselves, justified by reference to strong family ties in the local *adat* (Idrus 2003). In contrast, with regard to many other marriage, divorce and inheritance issues, Nurlaelawati and others (Lukito 2012; Benda-Beckmann, K. 2009; Manan 2006) have also indicated that the Islamic courts continue to apply the provisions in the Compilation rather leniently, considering the particular cultural context of the case and the position of the women concerned. In brief, the academic literature on the Islamic courts is inconclusive about the issue.

1.1.3 The rise of Islamist discourses during the Reformasi

The turbulent situation to which Bowen refers was triggered by the Asian financial crisis of 1997, which, combined with public indignation at widespread corruption practiced by the New Order elite, led to mass protests and eventually to President Suharto stepping down in 1998. Regime change brought democratization and decentralisation and a new era in government policy towards Islam, as it meant lessened state control over national and local Islamic institutions. On the negative side, this left more space for extremist separatist, regionalist, or Islamist organizations to operate.

The military's handling of the independence struggles that flared up in East Timor, Aceh and Papua, and the bloody internal strife in the Moluccas and Sulawesi – which soon became sectarian – did not at all correspond with the recently adopted principles of democracy and human rights (Wilson 2008; Klinken 2007; Bertrand 2004; Colombijn & Lindblad 2002). It took about seven years, until 2005, before the main domestic conflicts were more or less resolved through peace agreements between the warring parties and the Indonesian government. Nonetheless, even during the disorderly years of the early *Reformasi*, the democratic commitment was visible in the political arena, where dozens of new parties competed with each other in relatively free and peaceful elections (Assyaukanie 2004). In the years 1999 and 2004, parliamentary and presidential elections took place, as well as many more provincial, district and local elections.

As a result of the decentralisation reforms of 1999 and 2004, the regions gained more power and independence from the central government. This led to a situation in which regional political actors increasingly played the ethnic and religious card (Davidson & Henley 2007; Warren & Lucas 2003). Illustrative of local Islamic politics is the introduction of local sharia-based regulations in a large number of districts, pertaining to a range of matters such as Muslim dress-codes for civil servants and school pupils, prohibitions with regard to gambling and the selling of alcohol, night curfews for women and the intro-

duction of Qur'an recitation ability as a requirement for politicians as well as for prospective brides and grooms.

The introduction of these local regulations has been characterized as a sign of Indonesia's 'shariatization' (Ichwan 2007) and 'arabization' (Bruinessen 2006). Other observers have valued the developments in very negative terms and labelled it as a 'creeping sharia' (Marshall 2005; Zorge et al. 2006), with one observer even speaking of 'Taliban-like vice squads' marching the streets to uphold these regulations (Dhume 2007). The bomb attacks on Western targets in Jakarta (2000, 2003, 2004, and 2009), Bali (2002, 2005) and Makassar (2001) only contributed to the image of Indonesia as increasingly coming under the influence of Islamists radicals.

Many academics have provided a nuanced view of the nature and impact of sharia-inspired regulations (Nurlaelawati 2013; Buehler 2008a, Bush 2008), including those introduced by the autonomous province of Aceh (Kloos 2013; Ichwan 2007; Salim 2007). Such regulations were typically introduced or supported by local branches of national non-Islamist parties and, moreover, are not strictly enforced in most cases. These academics view their introduction primarily as an attempt by those parties to appropriate parts of the local Islamist agenda for their own political benefit, and not as the result of a genuine aspiration of Islamist politicians to turn Indonesia in an Islamic state.

1.1.4 Indonesian Islam as a research subject

Unsurprisingly, Islam in contemporary Indonesia has become a popular research subject, involving a wide range of issues. Important research has been carried out on the relation between the Indonesian state, law, and Islam (Otto 2010; Elson 2010; Assyaukanie 2009; Salim 2008; Allen 2007; Bruinessen 2006; Azra 2006; Ichwan 2006; Hefner 2000; Federspiel 1998; Liddle 1996), while many other researchers have conducted in-depth studies about the rise of Islamist organizations in Indonesia (Osman 2010; Sidel 2006; Noorhaidi 2006; Trotter 2006; Kolig 2005; Bubalo & Fealy 2005; Barton 2004).[13] An outspoken counter-movement within the Islamist wave is Muslim feminism. Several studies are specially dedicated to those Muslim women and men who justify gender equality from within the traditional Islamic principles, through reinterpretations of Islamic norms in the Qur'an and Sunna (Doorn-Harder 2007; Feener 2007; Mulia 2007; Wahib 2004; Hooker, V.M. 2004). To Muslim

13 I follow Graham E. Fuller's broad definition of an Islamist: 'an Islamist is one who believes that Islam as a body of faith has something important to say about how politics and society should be ordered in the contemporary Muslim world and who seeks to implement this idea in some fashion' (Fuller 2003: ix).

feminists, who have achieved considerable exposure for their ideas, women's rights and Islam are fully compatible.

The Islamization of Indonesian society since the 1990s, including its outward social manifestations, is the subject of yet another strand of research (Bruinessen 2013; Wichelen 2010 & 2009; Nurmila 2009; Hooker, M.B. 2008; Bennett 2007 & 2005; Jones, C. 2007; Rinaldo 2008; Warburton 2006; Smith-Hefner 2005; Bush 2005; Blackburn 2004). The picture that appears from this research is that especially since the 1980s social changes have taken place in the Muslim middle classes. It has not only become fashionable but even the norm to express one's Muslimness more manifestly, leading to strong peer pressure to conform to Muslim practices.

Thus, recent studies about Islam in Indonesia not only show that orthodox and liberal voices of Islam have sounded more openly during the *Reformasi*, but also that Islam has retained its central place in public discourse. In this regard, Ichwan concludes that although the New Order's 'state Islam' was dismantled during the *Reformasi*, within a decade the Indonesian state was already in the process of creating a new 'state Islam.' This process took place in the context of a decentralized government, with the regional branches of the Ministry of Religious Affairs and the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, MUI) being key players in the process (Ichwan 2006).

It is impossible to cast 'state Islam' or the 'state of Islam' in present day Indonesia as 'liberal' or 'conservative,' since governmental policies differ per issue. Indonesia has been very intolerant with regard to Muslim minority groups, and has permitted the introduction of sharia-based district regulations, thereby increasing pressure on Muslim men and women, especially within the bureaucracy and state institutions, to dress and behave like 'good Muslims.' At the same time the government retained relatively liberal statutory rights for women and introduced a quota of thirty percent female parliamentary candidates for each political party through the 2003 General Elections Law. Moreover, despite all the political dynamics and controversies surrounding the issue in the past, the Islamic courts and the relatively moderate Muslim family law they apply never came under threat, which may suggest that they have been successfully entrenched in society.

1.1.5 Research about the Indonesian Islamic courts

For a long time after Lev's comprehensive work of 1972, few researchers showed interest in the Islamic courts and Muslim family law in Indonesia, even when academic attention for Muslim family law saw a short-lived increase after the introduction of the Marriage Law in 1974. Researchers have described the Marriage Law's cumbersome legislative process and linked its legal provisions to societal changes (Katz & Katz 1975 & 1978; Soewondo 1977a and b; Vreede de Stuers 1974). However, after this momentary rise, the

attention of the international academic world faded again. This silence lasted until the late 1980s when Jan Michiel Otto and Sebastiaan Pompes conducted research concerning the position of polygamy and inter-religious marriages in the Marriage Law and in legal practice (Otto & Pompe 1988, Pompe & Otto 1990, Pompe 1991).[14]

The introduction of the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law was followed by a series of international publications by John Bowen and Mark Cammack, with Bowen primarily focusing on property and inheritance issues (2000, 1998 and 1996), and Cammack on marriage and divorce rights (1999, 1997 and 1989). In addition to these legal analyses, Mark Cammack, together with others, has published several socio-legal works in which the everyday practice of the Islamic courts, with the support of analyses of demographic statistics, are linked to legal and societal developments in Indonesia (Heaton & Cammack 2011; Cammack, Donovan & Heaton 2007; Heaton, Cammack & Young 2001, Cammack, Young and Heaton 1997; Cammack, Young and Heaton 1996).[15]

After the *Reformasi*, the Islamic courts and Muslim family law gained much more academic attention, resulting in the publication of comprehensive monographs on the Islamic courts: one on their legal history (Hanstein 2002), and three studies in legal anthropology (Nurlaelawati 2010; Bowen 2003), one of which took a feminist starting point (O'Shaughnessy 2009). Additionally, a number of academic articles are dedicated to new administrative and legal developments pertaining to the Islamic courts (Benda-Beckmann, K. 2009; Cammack and Feener 2012; Cammack 2007).

Meanwhile, much research has appeared in Indonesia about the Islamic courts, mostly focusing on the jurisdictional changes that took place over time, under the influence of the governments' changing attitudes concerning Islamic law (e.g. Nurrudin & Tarigan 2004; Arifin 1996; Zuhri 1996; Harahap 1990; Noeh & Adnan 1983). Others addressed the development of substantive Muslim family law and its relation with *fiqh* (Nasution & Aini 2007; Syarifuddin 2006; Summa 2004). A number of works described the role of case law within the Islamic courts (Zein 2010; Manan 2006 and 2008).

This study draws heavily upon these works about the Indonesian Islamic courts, as well as on legal anthropological research about Islamic courts conducted elsewhere (Peletz 2002 in Malaysia; and Mir-Hosseini 2000 in Morocco and Iran).

14 Keebet von Benda-Beckmann's excellent work about property disputes in a Minangkabau village (1984) is also worth mentioning. It did pay attention to the Islamic court as part of a larger study on all institutions and norms at play in local disputes.

15 I must also mention Jones, who has published prolifically on changes in marriage and divorce practices in Southeast Asia from a demographic point of view (Jones, G.W. 1984, 1992, 1994, 1997, 2001, 2005 and 2008; Jones, G.W. & Gubhaju 2007).

1.2 Conceptual Framework

1.2.1 Approaches and research questions

This study about Islamic courts differs from most of those mentioned above as it is not a study clearly situated in law, legal anthropology, political science, or sociology, even if it draws its methodologies from all of these disciplines. It takes the view that 'interdisciplinarity involves integrating and organising traditional forms of knowledge, skill and experience in a new and original fashion' in order to increase knowledge (Banakar & Travers 2005: 6). My interdisciplinary research is socio-legal in nature and belongs to the domain of law, governance and development (LGD), which combines top-down and bottom-up perspectives to analyze how law and governance relate to development (Hyden, Court & Mease 2004; Seidman & Seidman 1994; Arnscheidt, Rooij & Otto 2008).

Three approaches are combined in this study: an institutional history approach, a legal history approach, and an approach focusing on the Islamic courts' present-day role in divorce matters. The first approach concerns historical analysis, the span of which exceeds most other works on the Indonesian Islamic courts. It constitutes of two parts: first, the development of the Islamic courts' jurisdiction in the Netherlands Indies and Indonesia; and second, the trajectory of the Islamic courts in the two field locations Cianjur and Bulukumba. The first part explores the broader question of how the Islamic courts as state religious institutions have developed historically under the supervision of the consecutive governments of the Netherlands Indies and the Republic of Indonesia. More specifically, it analyzes the relation between changes in governmental policies towards Islam and *adat* on the one hand, and the development of legislation concerning the Islamic courts' jurisdiction on the other. The second part of the institutional history approach explores and compares the distinctive historical development of the Islamic courts on Java and those in South Sulawesi focussing on the relationships among the central government, Islamic courts, *ulamas*, and local communities. The underlying assumption is that differences between the historical trajectories of the Islamic courts of Cianjur and Bulukumba may explain differences in their present-day functioning.

The second approach is the legal history one, in which I analyze the development of Indonesian Muslim family law. Point of departure is M.B. Hooker's observation that the Islamic judge in the Netherlands Indies traditionally applied an amalgam of *shafi'ite* doctrine, customary law (*adat* law), and governmental regulations. Focussing on the Islamic courts' application of certain legal concepts over time, this approach provides a comprehensive legal historical analysis of the continuities and changes in the Islamic courts' legal doctrine. Legal doctrine can be defined as the rules, principles and concepts that are

authoritatively stated in legislation and law books, or are deduced from judicial decisions (Cotterrell 1986: 2)

I look at the developments in the Islamic courts' legal doctrine in Indonesia as constituting a development within a judicial tradition, thereby following Feener and Cammack's suggestion that it is helpful 'to develop approaches to law based on Islam within the framework of 'traditions' (Feener & Cammack 2007: 2). I define 'judicial tradition' as the legal heritage transmitted over generations within a judicial institution or system, with each generation consciously building on the transmitted heritage of their predecessors, the authoritativeness of which is based on a certain origin or historicity. Legal change proceeds within a judicial tradition by conscious reinterpretation of legal heritage, but always with due consideration for its origins and historical background (see Glenn 2007, 2005).

I start my analysis of the Islamic courts' judicial tradition in the sixteenth century when Javanese Islamic judges, applied an amalgam of Islamic law, *adat* law, and sultanic ordinances, and end with present-day Indonesian Muslim family law. I view present-day Indonesian Muslim family law as legislation that was primarily built upon an existing judicial tradition, and as the appropriation of that legislation by the judicial tradition. Even if legislative reforms have stalled since 1991, the development of Indonesian Muslim family law is ongoing: by judges' interpretations and application of legal norms in everyday adjudication processes.

I realize that my focus on the work of judges and legislators might be seen as lacking appreciation for an essential distinctive feature of the great legal tradition of Islamic law: it is developed by Muslim scholars, rather than judges or legislators (see Coulson 1978; Schacht 1982). With my approach I do not intend to challenge the authority of Islamic scholarly thought in past and present-day debates about Muslim family law reforms (Hooker, M.B. 2008; Feener 2010). Nor do I dispute the innovative means *ulamas* have employed in an attempt to provide non-*fiqh*-based provisions in the Compilation of Islamic Law with Islamic legitimacy (Nurlaelawati 2010). I simply describe the continuities and discontinuities in the application of Muslim family law within the Islamic courts, treating it as a fully-fledged judicial institution within Indonesia's legal system, with a long history.

However, I do consider a comparison between the Islamic courts' application of law at a certain time and traditional *syafi'ite fiqh* alone to be an inappropriate way to measure changes pertaining to the legal sources applied in the Islamic courts. Such a comparison would be a snapshot of a legal situation, ignoring the possibility that judges for centuries applied other legal sources than *fiqh*. This would be a-historical, unconcerned with historical developments of legal doctrines within the Islamic courts.

Horowitz (1994) points out with regard to Muslim family law in Malaysia that,'[t]he possibilities of legal change – the directions, the methods, and the content of change – are simultaneously limited and liberated by what the

proponents of change know and know about, by what they are reacting against and aspiring toward' (1994: 242). With regard to Indonesia, I hold the opinion that actors of legal change within the Islamic courts' judicial tradition, whether judges, lawmakers, or *ulamas*, may be pushed to stretch or narrow the limits of certain norms, but in the end they will have to remain within certain boundaries, or else the tradition will discontinue. With this focus, the legal history approach attempts to offer an explanation why the adjudication by the Islamic courts is characterized by both flexibility and rigidity, depending on the legal issue concerned.

The third approach concerns the present-day role of Islamic courts in divorce matters, which directly relates to the main research questions of this study:

> *What is the Islamic courts' role in realizing women's divorce and post-divorce rights and how is their performance in this regard?*

This study attempts to formulate answers to those questions in two ways. First, through the results of field research and legal analysis of selected cases, it explores whether the Islamic courts play a significant role in protecting women's divorce and post-divorce rights in the local communities concerned. Second, it evaluates the role and performance of the Islamic courts from the perspective of access to justice, rule of law and nation-state formation.

There are three reasons for a focus on women's divorce and post-divorce rights in this study of the Indonesian Islamic courts. First, the Islamic courts in Indonesia are primarily 'divorce courts.' Over the years divorce cases consist of more than 90 percent of the Islamic courts' caseload. A judicial divorce is the only one recognized by Indonesian law and the Islamic courts' influence on local communities is most profound in divorce cases. Second, divorce and post-divorce rights are not gender-neutral but gendered and contested. The normative tensions between statutory rights and obligations and local norms, between the norms forwarded by judges and litigants, and between norms articulated by the husband and those by the wife, come to the surface during a divorce suit. This makes divorce and post-divorce rights apt to depict what the gendered norms are, how litigants employ them strategically, and how the Islamic court judges apply them. Third, divorce and post-divorce rights are commonly considered to be essential for the protection of women and their children, especially when women are economically dependent on their husbands. Hence, a study about divorce can teach us how vulnerable women in a certain community are in this respect and to what extent there is a need for a legal system – in this case Islamic courts – which is able to protect women and children from potential negative financial consequences of a divorce. In order to be able to fulfil such function it is required that the Islamic courts are accessible and their judgments just, implemented by those concerned and, if not, that execution is enforceable through the court (Otto 2002).

This brings us back to the second way to attempt to answer the research question: through the examination of the Islamic courts' functioning from the perspectives of access to justice, rule of law, and nation-state formation. This examination requires that the abovementioned main research question is further divided into several sub-questions.

The first sub-question concerns the concept access to justice, further explained in section 1.2.2:

> *To what extent are the Islamic courts successful from an access to justice perspective in adjudicating and enforcing the divorce and post-divorce rights of women at the level of local communities?*

This 'access to justice' perspective, views the Islamic courts as both a justice provider, essential to the realisation of women's divorce and post-divorce rights, and a state legal institution which is bound by procedural and substantive rules. Through field research on the Islamic courts in two local communities this part of the study examines four issues: first, the number of women that access the Islamic courts to file a divorce suit and the divorce grounds they legally base their divorce on; second, the number of women that make additional post-divorce claims on spousal support, child support, and marital property, and the reasons women have for making (or not making) such claims; third, the Islamic courts' treatment of women's divorce cases and post-divorce claims; and fourth, the ex-husband's execution of court orders concerning post-divorce matters and the enforceability of such court orders.

The second sub-question involves a rule of law analysis of Islamic courts and Supreme Court judgments and focuses on how the Islamic courts apply certain statutory norms concerning divorce and post-divorce matters, as well as their discretionary judicial powers:

> *How do the Islamic courts apply the principles of the rule of law in divorce and post-divorce matters and what are the consequences of their decisions for women with children* ?

The legislator often deliberately adopts incomplete or generally and ambiguously worded legal rules. This practice relates to two social needs legal rules fulfill: 'the need for certain rules which can, over great areas of conduct, safely be applied by private individuals, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case' (Hart 1960: 130). Through adjudication courts provide interpretations of such open rules. When those interpretations are applied consistently in the court system, they have become case law (Shapiro 1981: 155).

Supreme Court Judge Abdul Manan has demonstrated that many legal changes pertaining to substantive Muslim family law in Indonesia are precisely the result of the courts' interpretations of Muslim family law rules in the adjudication process (Manan 2006). Hence, this study explores how the Islamic courts adjudicate both open and precise rules pertaining to divorce and post-divorce cases, the extent to which they apply principles from other legal traditions, the extent to which they conform to the principles of the rule of law and the consequences for women and children concerned.

The third sub-questions concerns the comparative aspect of this study:

> *How can differences between the functioning of the two Islamic courts be explained?*

In this part of the study I compare the access to justice situation pertaining to, and the workings of the Islamic courts in Cianjur and Bulukumba. Through comparative research I highlight the similarities and differences between the functioning of the two courts and formulate possible explanations.[16] Thus, the differences between the functioning of the two Islamic courts are explained in view of each Islamic courts' distinctive legal, historical, political, social and cultural contexts.

The last sub-question concerns state-formation and sees the Islamic courts as part of a larger nation-building project of the Indonesian state (see 1.2.3):

> *What role do the Islamic courts play in the Indonesia's nation-state formation project?*

My comparison of the Islamic courts in two distinctive regions provides insights into the condition of 'nation-state formation' in each district concerned and sheds light on possible factors that hamper this project.

1.2.2 Access to justice and the rule of law

Access to justice and the rule of law are key concepts for the way this study values the Islamic courts' functioning. Access to justice is a goal of many development programs (cf. World Bank 2007; UNDP 2007; 2004; Asian Development Bank 2005), yet those programs often lack a comprehensive analytical

16 Apart from a short explorative article (K. von Benda-Beckmann 2009), I have not encountered such a comparative approach with regard to adjudication in Islamic courts. See Ziba Mir-Hosseini (2001) for excellent comparative research on Islamic courts in Iran and Morocco.

framework to make a thorough access-to-justice valuation possible. A comprehensive access-to-justice assessment would include such indicators as women's legal knowledge and strategies, accessibility of the court, its use or non-use by women, and the enforceability of court decisions (Bedner & Vel 2010). I have employed the following definition of access to justice, which is based on Bedner and Vel's definition, but specified for divorce and post-divorce cases of Muslim women:

> Access to justice for Muslim women in divorce matters exists if: Muslim women, who believe to hold certain divorce and post-divorce rights, have access to a state or non-state institution of dispute resolution, can make their case be listened to, and obtain proper treatment of their case, in the sense that the rule of law is sincerely taken into account, leading to outcomes that are just, both socially and legally, and enforceable.

For reasons specified below, I have made some changes to Bedner and Vel's definition. First, I have awarded the rule of law a less paramount position. Rather than assessing whether the Islamic courts work according to the rule-of-law principles, I primarily assess to what extent they 'are sincerely taken into account.' Rule of law here basically means that the state and citizens are bound by and act consistently in accordance with substantive and procedural law and, additionally, that law itself is prospective, made public, general, stable and certain (Bedner and Vel 2010: Section 4.1).

However, courts cannot simply dismiss widely held normative convictions, as they would remove themselves too far from popular notions of justice (Shapiro 1981). Indeed, judges and other staff in the Islamic courts often apply procedures leniently and in many cases, though not all, this appears to be done out of consideration with the litigants' private situation, financially or otherwise (Cammack 2007). The problem is that a lenient application of law may create inconsistency in the Islamic courts' judgments. Bowen, who generally is very positive about this leniency, also acknowledges that the outcomes of inheritance disputes 'are not *predictable* on the basis of norms, rules or laws' due to conflicting legal norms, and the fact that 'power shapes outcomes' (Bowen 2003: 253-254). Nurlaelawati is more concerned with the rule of law and legal certainty, and problematizes the inclination of judges 'to go along with the present, temporal interests of the seekers of justice' and in so doing to sidestep the purpose of the law regarding marriage and divorce registration (Nurlaelawati 2010: 224). In short, it is clear that there is a tension between the use of discretion by judges and the consistency of judgments, which impacts upon predictability of judgments, legal certainty and the rule of law.

Nonetheless, this study does not necessarily consider a lenient application of the law or a breach of procedure to be a negative indicator of access to justice. The judge possesses discretionary powers, and may have a sound legal justification for bypassing certain rules and base this on the common good, fairness and agreement. Therefore, I assess in which cases this happens and

analyze whether this bypassing of certain rules is legally justified or more arbitrary in nature, and, ultimately, what the consequences are for women in divorce and post-divorce cases.

In addition, I place a strong emphasis on the importance of two other prerequisites of the rule of law and 'real legal certainty': the execution and enforceability of court judgments (Otto 2002). Post-trial field research may demonstrate that a decision of a state court is not as 'final' in local practice as it is in a formal-legal sense. K. von Benda-Beckmann found in Minangkabau in the early 1980s that 'in itself, the fact that a state court has decided in one's favor is not enough to convince opponents and village functionaries of the strength of one's rights' and that 'they [court decisions] are [merely] advanced as additional legitimation for one's position' (Benda-Beckmann, K. 1984: 141). Such post-trial research is often neglected in court studies, but should be part of any assessment of the effectiveness of court decisions.

The pre-trial phase is also an essential part of this study, because it is the time women decide to bring a case before the Islamic court or not. Pre-trial research typically focuses on the barriers that discourage women to access the legal system: a lack of legal knowledge and awareness, practical barriers such as time, cost and effort, psychological barriers such as anxiety about going to court, or to face the (ex-)husband in a suit, and cultural barriers, e.g. patriarchal society, preference for private negotiations (Sumner 2008; A.C. Nielsen & World Bank 2006).

I argue that a focus on legal knowledge and barriers alone is incomplete. Studies conducted in the United States have found that if it is common knowledge that implementation and enforcement of court judgments are problematic, women simply do not bother to make alimony claims (Kisthardt 2008). The presence of a similarly negative 'shadow of the law' (Mnookin & Kornhauser 1979) in Indonesia is not unlikely. Moreover, the attitude of court staff and the experiences of other women with the court, as well as the presence of strong alternative normative systems can encourage or discourage women to petition a claim.

1.2.3 Nation-state formation

One of the aims of this research is to look at the role the Islamic courts play in nation-state formation. Esman has defined nation-building as 'the deliberate fashioning of an integrated political community within fixed geographic boundaries in which the nation state is the dominant political institution' (cited in Heady 1979: 244-245).[17] In view of its large number of ethnic groups and sub-groups, it is neither self-evident that Indonesia has an integrated political

17 A recent research identified as much as 1000 ethnic groups and sub-groups in Indonesia (Suryadinata, Arifin & Ananta 2003).

community, nor that all local communities consider themselves to be part of such community to the same extent.

I define nation-state formation as the development of a centralized authoritative state structure, with a monopoly on violence, law-making and adjudication, in which subjects are being attached to the state through a shared idea of belonging to a single nation, and have become national citizens through active participation in the state. These monopolies can only be achieved if the state's use of power and the rules governing its use are widely regarded as legitimate. This legitimacy in turn relates to the state's ability to fulfil essential functions such as providing security, administration of justice and financial and macroeconomic management, in ways which meet the expectations of the population. Thus nation-state formation encompasses the processes of centralising control, creating and maintaining administrative structures and interacting and negotiating with subjects (Cf. Tilly 1990).

According to Peletz, the Malaysian Islamic courts and the family law they apply, are essential to the process of nation-state formation, as they penetrate deep into communities and families, generating individual rights and obligations based on a national citizenship, rather than membership of a certain ethnicity, class, kin or gender. Thus, Peletz underlines the Islamic courts' role in the reproduction and transformation of symbols and meanings of nationhood and cultural citizenship (Peletz 2002: 4).

By looking at the extent to which communities follow the legal requirements of judicial divorce and marriage registration, this study examines their participation in the state, and, conversely, the extent to which the state has penetrated into the community. The existence of competing state and non-state institutions that challenge the Islamic courts' authority by taking over part of their functions is a negative indicator for nation-state formation, even if it may have advantages to local communities. Finally, the extent to which the courts' decisions are implemented and are enforceable is also strongly correlated with nation-state formation (Cotterrell 1986: 301-302).

1.2.4 Normative pluralism

A person's perception of what her or his rights are may differ considerably from what her or his statutory rights are according to a judge. This difference can be related to the presence of traditional normative sources, such as *adat* law and Islamic doctrine, but also moderns ones, such as human rights. In this study I do not engage in the conceptual or normative discussion about

legal pluralism,[18] but it is important to note that in Indonesia non-state normative sources have a long history of recognition and are still influential in adjudication processes in the courts, as well as alternative dispute resolution processes (Lukito 2012; Benda-Beckmann, F. 2002, 1989; Benda Beckmann, K. 1984, 1981).

Locally, customary or religious institutions[19] may form a strong alternative for state institutions and even be the first option to redress for the local communities concerned. The norms recognized by those customary and religious institutions may differ significantly from those laid down in state law. In disputes people will present their case based on their ideas of justice, and may combine different normative sources to present their case. Particularly relevant in this context is Bowen's insight that legal reasoning in Indonesia involves a 'double movement of reference' (Bowen 2003: 4). One movement is inward, towards indigenousness, authenticity and Indonesian values (*adat* law and *syafi'ite fiqh*). The other is outward, towards universality, modernity, and transcultural values of social equality, as well as transnational interpretations of Islam.

In this study I have viewed the Islamic courts as places of interaction between state and society and I have analyzed the extent to which litigants used norms derived from alternative normative sources to frame their disputes. Through an empirical analysis of the pre-trial, trial and post-trial phases of the court processes and a close reading of court judgments and files I have been able to sketch whether and how judges take *adat* law and other norms into consideration, whether and how they make use of their discretionary powers to overrule statutory norms in such cases, and what that means for the outcome of those cases in terms of divorce and post-divorce rights.

O'Shaughnessy concluded in her research about Islamic courts in Central Java that Islamic judges are first of all responsible for transmitting the state's patriarchal ideology, with the nuclear, male-headed family positioned as the nation's cornerstone, and stigmatizing divorce as 'anti-national, and therefore inappropriate and shameful' (O'Shaughnessy 2009: 70, 71). Yet, Peletz has demonstrated how the Malaysian Islamic courts did change the patriarchal hierarchies and traditionally associated gender roles within the family, the clan, and the community in subtle ways, even if they at the same time preserved other patriarchal concepts such as the male-headed family (cf. Peletz 2003: 4). In this research I demonstrate how the Indonesian Islamic courts,

18 The main problem the legal pluralists have with a state-confined concept of law is that, in their eyes, such concept overvalues state law and tends to ignore other social normative orderings and institutions that resolve 'legal' issues. Tamanaha in turn has criticized legal pluralists for poorly defining what they mean by 'legal', with the potential effect that all rules of conduct may be considered Law. See Benda-Beckmann, F. 2002; Tamanaha 1993; Griffiths 1986; Hooker, M.B. 1975.

19 In this research I have primarily focussed on the position of local Islamic authorities. See Chapters 5 and 7.

through 'the shadow of the law' (Mnookin & Kornhauser 1979), may preserve or transform norms pertaining to divorce in subtle ways, but that the extent to which this happens depends on the Islamic courts' role and functioning in the local communities concerned and the level of competition of the local alternative normative systems and institutions. Thus, the functioning of the Islamic court in a certain area sheds light on the state of nation-state formation in that area.

1.3 Research Methods

1.3.1 Multiple methodologies

This socio-legal study required the application of multiple methodologies. It involved legal history research, research in social and political history, empirical field research, and the legal analysis of legislation and case law. The field research included quantitative and qualitative research methods. The major part of the fieldwork was spent on qualitative research, more specifically, on court room observation and interviews. Quantitative research consisted of two divorce surveys, one in Cianjur and one in Bulukumba; the collection of court files, data from court registers and annual reports of the Islamic courts of Cianjur and Bulukumba; and the collection of secondary data, primarily population surveys. In each area I worked with assistants who had experience in conducting and organising research in Indonesia, with a local network and with knowledge of the local languages, which has been indispensable to this study.

1.3.2 Field research

Field research has been a core element of my research. This study is based on data collected during field research in Cianjur in West Java (eight months) and Bulukumba in South Sulawesi (four months) conducted in three stages from November 2008 through August 2010. My research objects were the Islamic courts in those two districts.

Between the two Islamic courts, and the respective districts, there are significant similarities as well as differences. I provide a description of the districts of Cianjur and Bulukumba in Chapter 5 and Chapter 7, so I will only give a brief sketch here. Both Islamic courts have a caseload of 450-500 divorces per year and are located in the main town of a rural district. Both districts are among the few Indonesian regions that in the seventeenth century already became VOC territory, meaning that relatively early colonial accounts are

available of the areas and their Islamic courts.[20] After independence, both districts were affected by the Islamic *Darul Islam* uprising and in both districts conservative Islam has been on the rise after *Reformasi*. These significant similarities have made comparison more feasible as the differences were brought back to a relatively small number of factors.

The differences between the locations are mainly cultural and historical. Ethnically, Cianjur is primarily Sundanese while Bulukumba is Buginese-Makaserese. Although both have a bilinear kinship model in which the wife's family traditionally has a relatively strong position with regard to marital property, there is a significant difference in the aggressiveness with which honor is defended. South Sulawesi was notorious for its honor killings and, although the killings have decreased significantly after independence, women's honor remains an issue. Another main difference is that in South Sulawesi men traditionally migrate to find work (*merantau*), whereas in West Java this was less common. Since the 2000s many West Javanese women work abroad as domestic workers.

The historical differences regarding the Islamic courts are also related to the colonial administrative divisions: Cianjur is a part of Java, Bulukumba of the non-Javanese outer islands. Those geographical differences meant different legal and political trajectories for the Islamic courts. Cianjur's Islamic court's status as formal state institution dates back to the incorporation of the Javanese Islamic courts into the colonial legal system in 1882, whereas the Islamic court of Bulukumba was incorporated into the national legal system only in 1958. Cianjur traditionally has a large number of independent *ulamas*, whereas in South Sulawesi *ulamas* traditionally were less numerous and linked to the customary authorities. Such cultural and historical differences between the two districts and their Islamic courts have provided me with the tools to formulate possible explanations for their differences in performance.

1.3.3 Qualitative research

Qualitative research primarily consisted of courtroom observations and interviews. Firstly, with regard to court observations, a potential problem was that divorce hearings are closed sessions. In both Islamic courts I obtained permission to attend the closed sessions, provided the parties did not object, which no one did. In both field sites, I was a regular observer of the Islamic court for a period of months, in which I could talk with other visitors and court staff about divorce cases and other topics in rather informal settings. In the

20 In 1667 Bulukumba came under direct rule of the VOC through het Bongaais Tractaat (the Bungaya Treaty; see section 6.2.3). Ten years later in 1677 Cianjur came under direct VOC rule (see Chapter 5).

late afternoons most staff had completed their daily work, which was an opportunity to talk about local divorce practice, or any other subject.

Moreover, I am confident that my presence in the courtroom did not disturb the court hearings, as the judges clearly fell back into their daily routines and the judges, claimants, defendants and witnesses discussed the case without restraints. As I observed, the presence of lawyers, who in both locations only seldom represented clients in divorce cases, had much more of an impact on the judges and their handling of procedure than the presence of this researcher.

The second part of my qualitative research consisted of semi-structured and unstructured interviews. My informants included the judges, the courts' staff, the court clients and lawyers in the Islamic courts of Cianjur and Bulukumba. In the higher level of the judiciary key informants included a Supreme Court judge, the director-general of the Office of the Islamic Court of the Supreme Court (*Badan Peradilan Agama Mahkamah Agung*) and judges of the appellate Islamic courts of West Java and South Sulawesi. Together with the divorce surveys described below, these interviews constituted the core data for the empirical part of the two case studies.

Interviews with informants from civil society and with staff of local government institutions proved indispensable in understanding the local and national contexts of divorce and post-divorce rights and have provided me with a clear picture of the legal, religious, cultural and political issues involved. Interviews with staff of government institutions, included those of the District Office of Religious Affairs in Bulukumba, several KUAs in Cianjur and Bulukumba, and the District Office of the Civil Registry of Bulukumba. The civil society informants included heads of Islamic boarding schools (*kyais*), male and female Islamic teachers (*ustadz* and *ustadza*), academics and women's rights activists.

Finally, I have interviewed, and had informal conversations with, ordinary citizens, many of whom I met during my travel from one location to another, in the restaurants or eating stalls I visited, or elsewhere. The information I obtained from such informal encounters sensitized me to the local context of divorce and the role government institutions play in local communities. For instance, when I was preparing my field research in Jakarta, on several occasions taxi drivers, told their own or their relatives' marriage and divorce stories, including anecdotes about the available legal loopholes for those who want to remarry without a prior formal divorce. I learned that such loopholes often were facilitated by the KUAs and that it was essential to look at the relation between the KUAs and the Islamic courts. Such information has been essential to this study.

1.3.4 Surveys

Each of the two divorce surveys targeted 120 divorced women with children. The divorce surveys made possible an assessment of the context of the respondents' divorce, and included questions about a whole range of issues: their personal background; their ideas about men's and women's rights in divorce; their sources of information; whether their marriage had been registered; whether their divorce was a judicial divorce at the Islamic court or not; whether they did or did not petition for spousal support, child support or marital property, and why (or not); whether they had reached an agreement with their former husbands concerning child support or marital property, and if so, whether this had been implemented; whether the women surveyed were satisfied with the support from their former husbands; and finally how they perceived their economic situation in comparison with that prior to their divorce.

A problem inherent to a divorce survey in Indonesia is that after divorce, women often return to the care of their family, and do not live a typical single parent's life. Consequently, they constitute a 'hidden population,' which on a practical level means that researchers cannot simply trace them by going through local civil registries in search of female-headed households. A frequently used survey method for hidden populations is the chain-referral method, also known as snowball method. In this method an initial group of respondents is identified. This first group then provides information on other potential respondents, who in their turn provide referrals for other respondents (Robinson et al. 2006). The weakness of this method is the high probability that the sampling group will consist mainly of the social network(s) of the initial group of respondents, and that other social groups are left out of the survey.

To address some of the weaknesses of the abovementioned sampling methods, Watters and Biernacki (1989) have developed the targeted sampling method. Targeted sampling requires extensive research to describe the area and the target group, and identify appropriate locations within that area for inclusion in a sampling plan. Existing secondary data sources are reviewed in order to describe the target group and geographic areas to be surveyed. I have employed the targeted sampling method for the surveys in this study, with three important adjustments due to time and budget limitations. First, for each divorce survey I have chosen four sub-districts on the basis of their varying distances to the court, and comparable numbers of inhabitants. In each of those sub-districts the surveys were conducted in one town quarter and one village. Second, the sampling groups in each village or town quarter consisted of a targeted amount of fifteen respondents. Third, although the preparation of the survey and the estimation of the sampling-group population were based on the available qualitative and secondary data, I had no resources to conduct an extensive pre-study prior to the divorce surveys.

For each divorce survey I recruited eight research assistants who each were to survey fifteen respondents. In Cianjur, these were eight students of the local Suryakancana University; and in Bulukumba eight students of the local Higher Institute of Islamic Studies Al-Gazali. The research assistants spoke the local languages, which are Sundanese in Cianjur, and Buginese, Makassarese and Konjo in Bulukumba. Prior to conducting the divorce surveys I organized a training day for the research assistants in which we read the questionnaire together and I gave them instructions about the street outreach method and the way to conduct the interviews.

The street outreach method was employed in order to locate the fifteen divorced women with children. The research assistants were instructed to first politely present themselves to local village officials, and after having explained the background and purpose of the survey ask their permission to conduct it. They could start asking for information about divorced women with children from those officials, but were also stimulated to simply ask around. In order to guarantee the quality of the research assistants' work, I instructed them to note down the address of the respondents, of which I revisited a random sample as a check. Moreover, we kept regular telephone contact and held a progress meeting, in which we discussed the research assistants' experiences and problems in the field.

It appeared that due to unanticipated local circumstances in Bulukumba, which made a one-to-one implementation of Cianjur's survey design infeasible, I had to make some adjustments. First, in some villages in Bulukumba it was not possible for the research assistants to reach the targeted number of fifteen respondents per village or town quarter (*kampung*) and therefore, previously divorced women who had already remarried were included in the survey. Six respondents had no children and skipped the questions about child support. Furthermore, one research assistant had to look for additional respondents in an adjacent village within the same sub-district to reach the target of 15 respondents. Despite the slight differences between the two surveys, they reached 120 divorced women in each district, all but six of them with children. Thus, te surveys have provided essential data about women's divorce and post-divorce experiences and the role of the Islamic courts in Cianjur and Bulukumba.

1.3.5 Collection of documents and files

During my field work I collected three types of documents: court files of divorce cases; court annual reports; and data obtained from register books. During my regular visits to the Islamic court, I collected the court files concerning post-divorce rights in several stages. I managed to collect all relevant court files and annual reports of the three years pre-dating the respective field work periods. Meanwhile, I also visited local government institutions and their

official websites in search of secondary data, such as socio-economic statistics, population data and more general information about Cianjur and Bulukumba.

Finding court files which included post-divorce claims proved challenging. It appeared that almost all cases were only registered as male or female-petitioned. I realized that, in order to find the relevant court files, someone had to go through all the court register's books to look for post-divorce rights that were petitioned during the divorce process. In both Islamic courts I suggested to go through the register books myself, and on both occasions the responsible official was happy to delegate this task. In this way my assistants and I had full access to the courts' register books. An additional advantage was that we thus managed to get acquainted with the courts' staff working in the same room as we did.

Through analyses of the registers, the annual reports and the court files of the Islamic courts of Cianjur and Bulukumba, I have been able to abstract the number and setting of the post-divorce cases, the number and nature of post-divorce claims, the sex of the petitioners, the number of cases heard in the defendant's absence, the number of court fee waiver (*prodeo*) cases, and many more relevant data.

The collected court files have enabled me to analyze the claims and counter claims of the litigants, the witness accounts and the legal justification of the judges, and allowed me to compare all these written data with the outcomes of the surveys and my observations in the courtroom. As I soon discovered, court files reproduce a bureaucratized, ideal world of a rational and formal-legally correct application of procedure, which often differs considerably from the reality of the application of law in the courtroom. Yet, I have found them to be a valuable source of information about legal reasoning in the court process, even if some of the legally valuable statements uttered in the sometimes hectic reality of the court room were lost in the production of tidy court proceedings.

I have also used the court files to retrace and interview eight women in Cianjur and twelve women in Bulukumba who had been divorced at the Islamic court one to two years before my field research took place. They provided valuable data about their experiences with the divorce process in general, and the implementation of the court orders concerning child support and marital property in particular. The combination of quantitative and qualitative research of this study has been essential to provide a reliable picture of the functioning of the Islamic court and its effects on the local communities concerned

1.3.6 The research process

The research process went as follows. The preparation for my first field work period in Cianjur consisted of a desk study and legal sources. I collected and

analyzed literature about the Islamic court in Indonesia and Islamic courts elsewhere; about marriage and divorce issues in Indonesia and elsewhere, including in 'Western' countries; about access to justice and the rule of law, and about Cianjur and West Java. As part of my legal research, I analyzed the relevant legislation and regulations as well as legal scholars' commentaries thereof. I participated in a work shop in the framework of the access to justice in Indonesia program; a program to which I contributed a case study about the Islamic court in Cianjur.

During my field research in Cianjur I discovered that many women did not divorce at the Islamic court. Staff of the Islamic court estimated that about three-quarters of the couples in West Java divorce out-of-court, but also indicated that no one really knows. I decided that it was essential for this study to conduct a divorce survey about judicial and out-of-court divorces, the reasons why couples opted for them, and the real consequences for the women and children involved (cf. Huis 2010). Together with my assistant, who had previously worked for the Indonesian Survey Institute (*Lembaga Survey Indonesia*), I designed a questionnaire at the field location, based on relevant methodological literature I accessed online through the Leiden University's remote workspace. I have used the same questionnaire for the divorce survey in Bulukumba.

During my field research in Bulukumba I found that its divorce and out-of-court divorce situation was considerably different from Cianjur's. The position of local Islamic authorities and their stance towards the Islamic courts appeared to be factors which could partly explain these differences. After having returned home, I delved deeper into the history of the Islamic court and local Islamic authorities in the two districts. Besides reading and analyzing relevant contemporary academic historical works, this part of the research also consisted of analyzing the accounts of colonial Islamic and *adat* law experts about the Islamic courts in the Netherlands Indies. Additionally, I analyzed information about the two Islamic courts as compiled in the *Adatrechtbundels* and a compilation of case law concerning the Islamic courts in the Netherlands Indies (Tan 1976).

The legal history approach required substantial historical research (see 1.2.1). In order to deduce the main characteristics of the Islamic courts' judicial tradition, I analyzed colonial sources, including case law concerning the Islamic court, nineteenth and early twentieth century dissertations on the subject and accounts of nineteenth and early twentieth century Dutch colonial experts on the subject of Islamic law.

1.4 Overview of chapters

The chapters in this study reflect the three approaches of my research. Chapters 2, 5, and 7 provide a historical analysis of the Islamic courts of respectively

Java, West-Java and South Sulawesi, placing their development in their local political, legal and social contexts. Chapters 3, 4 and 9 concern the legal history approach. Chapters 3 and 4 provide a legal and political analysis about the way the legal doctrine in Islamic courts developed in colonial times and how, after independence, through processes of codification and regulation this doctrine has been turned into an Indonesian Muslim family law. Chapter 9 describes recent developments within the Islamic courts' legal doctrine through a legal analysis of recent court cases. Finally, Chapters 6 and 8 examine what role the Islamic courts of Cianjur and Bulukumba play in divorce matters and their performance in terms of access to justice and the rule of law. Chapter 10 brings the three approaches together and links their research results with nation-state formation in Cianjur and Bulukumba. Subsequently, it attempts to formulate generalizations about the role and performance of Islamic courts in divorce and post-divorce matters and the direction in which Muslim family law in Indonesia seems to be moving.

2 Indonesia's Islamic courts: a unification project

> 'Courts are, among other things, symbols of authority, and Islamic courts are symbols of Islamic authority. This may in fact be a more important function, from the point of view of those who have power to maintain them or let them be done away with, than the judicial work the courts do.' (Lev 1972: 4)

2.1 INTRODUCTION

This chapter discusses the historical development of the Islamic courts' jurisdiction in Indonesia: first during colonial times, and subsequently after independence. I take as my starting point the idea that knowledge of its history increases understanding of the present-day Islamic court and the symbolic value of recent reforms. Given that the Republic of Indonesia continued the colonial *penghulu*[1] court system on Java and Madura and established similar Islamic courts outside Java, this chapter focuses entirely on regulations concerning the Islamic court on Java. I acknowledge the different ways in which the Islamic courts' history developed outside Java, especially in regions where Islamic courts lacked formal recognition,[2] and therefore portray the courts' history in South Sulawesi separately in Chapter 6.

In this chapter I argue that ever since the VOC first issued special regulations concerning Muslim family law in 1642, a gradual convergence of Islamic and national law has taken place. This convergence first accelerated when the *penghulu* courts were made part of the colonial legal system in the nineteenth century. Soon the traditional Islamic institution had to prove its relevance amid two seemingly opposing forces. On the one hand there was a strong desire within the late nineteenth and early twentieth century colonial government and judiciary to unify and modernize the court system. On the other hand the *adat* law policy in which local customary law was to remain the law of the native (*Inlander*) gained prominence as well among the same political and judicial colonial elite. As a consequence of the gradual adoption by the colonial

1 The *penghulu* was the highest Javanese Islamic official of a district (*kabupaten*) and the head of a Muslim bureaucracy responsible for Muslim affairs.

2 Bowen (2003) gives an elaborate history of the Acehnese Islamic courts, which were never incorporated into the colonial court system.

government of *adat* instead of Islam as the basis of family law in the Netherlands Indies, as well as the colonial judiciary's antipathy for the old-fashioned *penghulus*, the Islamic courts increasingly lost the jurisdictional battles with the general colonial courts. When in the 1930s the colonial government decided to significantly decrease the jurisdiction of Islamic courts, these 'old-fashioned' *penghulu* courts[3] gained strong symbolic value as courts with an Islamic foundation, and, as a consequence, generated support from Muslim organizations that had an alternative, more Islamic, view of modernization. This support proved to be decisive for the Islamic courts' survival.

After independence, proponents of the Islamic court generally viewed the national legal system as an indispensable part of a modern Muslim state, and strove for an actualization of Islamic courts' procedure and law more in keeping with modern times. Hence, I analyze the development of the Islamic court after independence on the basis of Horowitz's observation in the Malaysian case that 'simultaneously, then, staunch proponents of Islam and detractors of Islamic law are mollified by a course of innovation that is heavy on the convergence of legal systems' (Horowitz 1994: 576). Innovation accelerated in Indonesia after the 'Islamic turn' of the New Order regime in the 1980s (Liddle 1996), and resulted in a bureaucratization and rationalization of the Islamic courts, but without compromising their Islamic character. On the contrary, some of the colonial *adat* law reforms were reislamized. The 1989 Islamic Judiciary Law annulled the loss in the first half of the nineteenth century of the Islamic courts' jurisdiction in inheritance and marital property matters. After the fall of the Suharto regime in 1998 this process of convergence of legal systems continued when in 2005 the government put the Islamic courts, previously being administered by the Ministry of Religious Affairs, fully under the umbrella of the Supreme Court and again increased their jurisdiction. After this process, the Islamic courts even gained powers in a field which previously never had been part of the colonial *penghulu* courts: Islamic banking.

2.2 Islamic courts in the Netherlands Indies

2.2.1 *Jaksa* courts, *surambi* courts and *the role of penghulus* in the sultanates of Java

When the first Dutch merchant ships arrived on the coast of Java in 1596, the Javanese Muslim sultanates of Demak (1475-1548), Cirebon (1479-1906), Banten

3 Hisyam (2001) provides rich accounts of how the Muslim organizations established in the first half of the twentieth century initially stereotyped the *penghulus* as rather old-fashioned, colonial civil servants, with lack of Islamic knowledge, and subsequently refutes this image by showing that many *penghulus* in fact did have considerable Islamic education and knowledge.

(1527-1813) and, last but not least, the powerful sultanate of Mataram (1588-1681) had all integrated Islamic law into their court systems: the so-called *jaksa*[4] courts.[5] Through trade and the *hajj,* as well as religious studies, the Indonesian sultanates maintained contact with the rest of the Muslim world. The *jaksa* courts were sultanate courts at the regency level and held jurisdiction in all civil and criminal matters. As in the rest of the Muslim world, three systems of law in a broad sense operated in the sultanates (An Na'im 2002: 12): first, sultanic law consisting of decrees and regulations promulgated on the basis of the ruler's authority (*siyasa*); second, Islamic doctrines (*fiqh*), of the *syafi'ite maddhab*, and ultimately based on a divine authority; third, customary norms based in *adat* that ruled the daily lives of local communities. Within the *jaksa* courts an Islamic judge (*qadi*) passed judgments in Muslim family law and inheritance law.

The position of *qadi* was not the same in each sultanate or each period. In the Banten Sultanate in West Java, the *qadi* was also in charge of tax-collection and he personally appointed the lower rank officials in the Islamic bureaucracy who collected Islamic tax of *zakat* and other taxes at the local level. Thus, the role of *qadi* in Banten extended beyond the position of chief judge of Islamic justice (see Hisyam 2001; Bruinessen 1995). In Mataram under the reign of Sultan Agung (1613-1646), the venue of the courts was changed from the sultan's palace to the veranda of the grand mosque (*surambi*). Eventually, the chief of the grand mosque (*penghulu*) presided over the Islamic courts in all the regencies of the Mataram Sultanate (Lubis 1994:58-59). Because of the perceived resemblance between *penghulus* and Catholic priests, the Dutch called those *surambi* courts 'priest councils' (*priesterraden*).

The chief *penghulu* was the highest authority in religious affairs in a regency under the indigenous regent, serving as both the chief Islamic judge of the Islamic court and the head of the Islamic bureaucracy. This bureaucracy ran from the chief *penghulu* and other *penghulus* at the regency level, to the *naib* at the sub-district level, and *kaum* (in West Java *amil*) in the villages. All these functionaries could advise the local population in marital and divorce affairs, but only a *penghulu* could act as a judge (Hisyam 2001: 35-36; Juynboll 1882). In their judicial role, the *penghulus* decided family law and inheritance cases and advised in criminal cases within the *jaksa* court, presided over by the sultan or his representative (Lubis 1994). Islamic *hudud* punishments, like the cutting off of thieves' hands, and the sanctions of retaliation (*qisas*) and blood

4 Jaksa is Sanskrit for prosecutor.

5 In this part my main focus is the colonial influence on the Javanese Islamic courts, since it was the Dutch regulation of the Javanese courts that eventually created the context in which a national Islamic judiciary could develop (see for instance Lev 1972). In the Muslim kingdoms outside Java Islamic justice also existed, in some areas as a separate part of the judicial organization of a Sultanate and in other areas side-by-side or as part of the customary justice system. A Dutch colonial perspective on where Islamic justice was 'indigenous' can be found in Van de Velde, J.J. (1928), Chapter I and II.

money (*diyyat*) were imposed during the reign of Sultan Agung, but how often we do not know (Gobée 1884).[6]

2.2.2 The *penghulus* in VOC regulations (1602-1798)

After the founding of Batavia in 1619, the VOC initially decided to implement Dutch laws within its occupied territories.[7] Thus, the Instruction of 16 June 1625[8] stipulated that the law in the East Indies would consist of all ordinances that applied in the cities and rural areas in the Netherlands. At that time the VOC territory consisted of relatively few settlements (Ball 1982: 5-6). With the foundation of the magistrate court (*Schepenbank*) in 1620 – renamed Court of Justice (*Raedt van Justitie*) in 1626 – the VOC established a general court for the whole population of the 'Christian republic' of Batavia, and formally abolished the indigenous courts in its directly ruled territory.

The VOC soon realized that Dutch substantive law was at odds with the customary and religious practices of the indigenous population. Therefore, it issued several instructions to regulate indigenous legal matters. A VOC instruction of 26 May 1640 stipulated that in inheritance cases of 'Chinese, Heathens and Moors', the laws and customs of the relevant population would apply. Likewise, Article XIII of the Statutes of Batavia (*Bataviasche Statuten*) of 1642 stipulated that indigenous law would apply to the indigenous population (*inlander*) in family law and inheritance matters.

Although in the seventeenth century different ethnic and religious communities inhabited the VOC's territory, with different normative systems governing their everyday matters (including family law), the VOC chose not to set up a plural court system in its directly ruled territory of Batavia and surroundings. This changed in the eighteenth century, by which time the VOC had become a major player in local political and military struggles, as a consequence of which a large part of the island of Java had come under its rule. Large parts of East and Central Java became VOC territory according to the peace treaty with the Mataram Sultanate of 11 November 1743. The West Javanese Sultanates of Cirebon and Banten became VOC protectorates in 1680 and 1752 respectively. The legal system of the East Indies, designed for small VOC settlements

6 In the nineteenth century, most crimes were settled with *diyyat* or compensation money to the victim (Gobée 1884: 19).

7 The description of the legal position of indigenous law and courts, including Islamic courts, vis-à-vis European law and courts in section 2.2.2 and 2.2.3 is partly based on an annex in the General Elucidation of the proceedings of the House of Representatives of the Netherlands 1904-1905, titled 'the origin and development of the differences in the administration of justice between the European and Native population of the Netherlands Indies' (*Kamerstukken II* 1904/1905, 125.1, A, pp 15-34).

8 *Plakkaat van 16 Juni 1625*, see Van der Chijs, J.A., Nederlandsch-Indisch Plakkaatboek, 1602-1811.

like Batavia and other ports in the archipelago, became unsustainable and was reorganized.

On 30 November 1746, the VOC established the *landraad* in Semarang (Central Java), a general court for the indigenous population in which European judges were instructed to apply indigenous law.[9] In civil and criminal matters, the *landraad* existed alongside the *Raad van Justitie*, the first instance court for Europeans, which applied European law. One court was insufficient for such a large territory and in practice the court only attracted inhabitants of Semarang and its direct surroundings. Hence, it is unlikely that the *landraad* did take over all the judicial functions in marriage, divorce and inheritance affairs: so the *penghulus* continued performing their traditional tasks. Nonetheless, the establishment of the *landraad* by the VOC marks a turning point, as it introduced a plural formal court system in the VOC territories of Java: the *Raad van Justitie* applying Dutch law for Europeans and the *landraad* applying indigenous law for the indigenous population.

2.2.3 'Priests' in the Netherlands Indies until the 1882 Priest Councils Regulation

In 1798, the VOC went bankrupt and the Dutch government took over the administration of all VOC territories. Daendels, Governor-General of the Netherlands Indies from 1807-1810, decided to expand the legal system. More *landraad* courts were established on Java, increasingly dividing the colonial legal system into indigenous and European sections. Even in the indirectly ruled sultanates of Banten and Cirebon the *jaksa* courts had to accept a transfer of jurisdiction in murder cases to the *landraad* headed by the Dutch *resident*, the official colonial representative at the regency level and advisor to the indigenous ruler (*regent*).

During this time of expansion of the *landraad*, Daendels instructed the indigenous rulers of Java's Northeast Coast and Cirebon not to obstruct chief *penghulus* and *penghulus* in settling marriage, divorce and inheritance matters, including the division of property (*boedelscheidingen*) (Nederburgh 1880: 5-6). Article 73 of the Instruction of 1 September 1808 concerning the Reorganization of the European and Indigenous Administration and the Court System at the Javanese Northeast Coast even recognized the judicial powers of the *penghulus* in marriage and inheritance affairs as it intended to install an appeal possibility at the *landraad* for the *penghulus'* judgments.[10] Thus, the Dutch colonial government of the early nineteenth century recognized the *penghulus'* role in

9 To this end a compilation indigenous law *''Mahometaanse wetboek Moghaerer''* was issued in 1750. See 3.3.1.

10 *Plakaat van 1 September 1808 in zake de reorganisatie van het Europeesch en Inlandsch bestuur en van het Inlandsche rechtswezen.*

family and inheritance matters and may even had the intention to formally regulate their jurisdiction. However, the Instruction of September 1808 would not be implemented, due to geopolitical developments in Europe.

After the Netherlands was occupied by the French troops of Napoleon Bonaparte, the British conquered Java. A short but consequential period of British administration of the Netherlands Indies followed (1811-1816). Lieutenant-Governor Raffles issued in 1814 the 'Regulation for the more effectual administration of justice in the provincial courts of Java.' Java was reorganized into sixteen regencies, each of which formally headed by an indigenous regent, but with the colonial *resident* in charge of the civil administration, tax levying and indigenous administration of justice. In each regency (*residentie*) a *landraad* was established headed by the *resident*. In Semarang, and Surabaya two new *raden van justitie* (first instance courts for Europeans and appellate courts for the *landraad*) were established besides the one that already existed in Batavia.

The *landraad* still had to apply indigenous law and customs, subject to general principles of justice and fairness. The *penghulus* (and *jaksas*) were transformed from judges into advisers of the *landraad*. Neither *penghulu* nor *jaksa* courts were made formally part of this colonial court system. In 'The History of Java', Raffles demonstrated that he had been aware of the imperative role *penghulus* played in the traditional administration of justice on Java, but he considered this to be contrary to the 'fully impartial administration of justice' he intended to introduce, since they had too many links to the sultan and the regent, who also acted as judges in *jaksa* court hearings (Raffles 1817: 309-327).

Not long after the Dutch returned to power in 1816, they issued the 1819 Instruction on the Courts of Justice in the Netherlands Indies (the 1819 Courts of Justice Instruction),[11] which continued most reforms of Raffles' 1814 Regulation. The 1819 Courts of Justice Instruction recognized substantive indigenous law and custom 'as long as they are compatible with the general principles of justice and Dutch regulations' (Article 3). The *penghulus* retained their place as expert advisors of the *landraad*, who had to be consulted in civil and criminal matters.

However, other than the British, the Dutch, through the 1820 Regulations concerning the Duties, Titles and Rank of Regents on Java (the 1820 Regents Regulation), explicitly recognized the role of *penghulus* in settling marriage, divorce and inheritance.[12] Article 13 of the 1820 Regents Regulation read:

> 'The indigenous regency head (*regent*) supervises matters of the Muslim religion and guarantees that the priests, in accordance with the Javanese norms and customs, are free in practicing their profession, such as in marriage matters, division of property in divorce and inheritance matters (*boedelscheidingen*) and such.'

11 *Instructie voor de Raden van justitie* (S 1819/20).

12 *Het reglement op de verpligtingen, titels en rangen der regenten op het eiland Java* (S 1820/22).

This recognition of the role of *penghulus* (or 'priests' as the Dutch called them) in marriage, divorce and inheritance matters, however, should not be confused with an official recognition of the formal jurisdiction of *penghulus* as judges. The formal incorporation of the *penghulus* into the legal system of the Netherlands Indies turned out to be a gradual process in which, perhaps surprisingly, case law played an important role.[13]

Initially, case law remained indecisive about the *penghulus'* jurisdiction in judicial matters. In 1834, the Court of Justice of Semarang was the first court that understood Article 13 of the 1820 Regents Regulation to have granted *penghulus* jurisdiction over disputes concerning marriage, divorce and inheritance (Nederburgh 1880: 9-10). This judgment proved controversial, leading to the issuance of two missives by the Supreme Court (*Hooge Raad*) in Batavia[14] formulating strong disagreement with the judgment.

The first missive read as follows: 'Article 13 of S 1820/22 only established the fact that they [indigenous population] can consult the priests. By providing priests and chiefs with any larger jurisdiction, the *landraad*, under [the supervision of] the *resident* has exceeded the limits of its jurisdiction.' The second missive of the Supreme Court clarifies that Article 13 speaks of the profession of 'priests' and does not mention 'priest councils' (*priesterraden*) at all. Therefore, according to the missive, 'it is not probable that Article 13 was intended to establish a 'council' or 'court' so that the *landraad* remains the only court for the indigenous population, even in cases where Muslim laws apply.'[15] The missives make clear that in 1835, the Supreme Court in Batavia did not consider the *penghulus* as judges whose judgments were final and binding for the parties. Against the background of this jurisdictional controversy, in 1835 the Governor-General issued the Resolution concerning Judgments in Civil Actions Resulting from Disputes among the Javanese (S 1835/58)[16] to clarify the scope of Article 13:

> '[...] As ampliative and explication, in order to explain Article 13 of the regulation on the duties, titles and ranks of the district heads on the Island of Java [S 1820/22]; that in many instances disputes occur, among Javanese, about matters of marriage, [about] property after divorce and death and such, that must be decided according to Islamic law; that it is the priests who must give a judgment, yet that all civil actions, for settlement and payment, as a result of those decisions, will be brought before the general courts, in order to, whilst respecting those decisions and to ensure the executions thereof, do justice.'

13 The part below is mainly based on Nederburgh 1880.

14 The Supreme Court was established in 1806 in the former *Raad van Justitie* in Batavia.

15 The missive of 18 May 1835; and the missive of 15 September 1835. For the discussion on the stance of the Supreme Court about the status of decisions of *penghulu* courts, see Nederburgh (1880: 9-18).

16 *Resolutie van den Gouverneur Generaal ad interim in Rade, van den 7den December 1835 no. 6. Uitspraak in civiele actiën, voortspruitende uit geschillen, tusschen Javanen onderling* (S 1835/58).

The colonial government clearly overruled the Supreme Court. S 1835/58 is important to the history of the Islamic court in Indonesia in three ways. First, it is the first colonial regulation that established the competence of *penghulus* to adjudicate disputes concerning marriage, and division of property after death or divorce. As such, it opposed the stance of the Supreme Court, which in the very same year, 1835, had described judgments of 'priests' as 'advice.' Secondly, it established a legal mechanism to enforce the priests' decisions through the colonial legal system. A request for implementation of decisions by 'priests' had to be addressed to the colonial court (*landraad*). Officially, this stipulation was intended to ensure enforcement of *penghulu*s' judgments, but of course an increased control over the *penghulus* had also been a consideration. This dependency on the general court to enforce judgments of the Islamic court would remain in place for more than 150 years, and would only be lifted in 1989 by the Law on the Islamic Judiciary, which would provide the Islamic court with autonomy in matters of enforcement capacity. Thirdly, the phrase 'respecting those decisions and to ensure the execution thereof', implied that an implementation request at the *landraad* was not an appeal, and, therefore, the *landraad* could only look at procedural and jurisdictional issues and not treat the legal substance of the priests' judgments. Several courts indeed initially interpreted S 1835/58 in this way, and considered the judgments of *penghulus* to be final.

On the whole, S 1835/58 proved to be an essential event in the history of the Islamic court. As we have seen, neither the British legal reforms of the early nineteenth century, nor the opinions of the *Hooge Raad* pointed to a future incorporation of *penghulu* courts into the colonial court system. With S 1835/58, the colonial government formally and incontestably recognized the jurisdiction of *penghulus* in family law disputes.

The Regulation on the Judicial Organization and Justice Policies (S 1847/23)[17] maintained the *penghulu*s' jurisdiction, and enforcement requests still had to be directed to the *landraad*. Initially, the possibility of appeal at the *landraad* was included in the draft of the Regulation, but in the end it was decided that *penghulus*' decisions were final and could not be formally appealed (Nederburgh 1880: 25-26). Nonetheless, Article 3 of S 1847/23 introduced three delicate adjustments to the jurisdiction of the priests, making it less straightforward. The first adjustment is that chiefs (according to Nederburgh, Chinese chiefs) appear alongside priests as institutions with jurisdiction in the abovementioned civil disputes. Secondly, the 'priests and chiefs' administered justice over the 'indigenous population (*Inlanders*) and persons who are equated with them', whereas the subjects of S 1835/58 were the Javanese (*Javanen*). As we will see in Chapter 7, this generalization created confusion about the status of the Islamic courts outside Java. Thirdly, Article 3 changed

17 *Reglement op de Rechterlijke Organisatie en het Beleid der Justitie.*

the jurisdiction of the priests to 'those civil disputes, which according to their religious laws or old customs and institutions (*instellingen*), should be decided by their priests or chiefs.' S 1835/58 had been very specific about the priests' jurisdiction; it applied in disputes concerning marriage, and division of property after a divorce or death. Based on interviews with people involved in the law-making process, Nederburgh concluded that those changes were not intended to change the jurisdiction of the *penghulus*, but anticipated the creation of judicial bodies for the Chinese population presided over by their chiefs, which was planned but never came about (Nederburgh 1880: 28). However, as I will explain below, in practice this lack of specificity regarding the jurisdiction of the *penghulus* provided the general colonial courts room to decide what this jurisdiction exactly encompassed.

In 1848, the Netherlands adopted a constitution turning the Netherlands into a parliamentary monarchy. In addition to the constitutional provisions considered applicable to the Netherlands Indies, special provisions were incorporated into a proto-constitution, the Governmental Regulation of the Netherlands Indies (*Regeringsreglement van Nederlandsch Indië*; RR).[18] The RR adopted a provision concerning the jurisdiction of priests which is very similar to Article 3 of the Regulation on the Judicial Organization in Article 78(2) RR which established their jurisdiction in matters where 'according to the local religious laws, and old customs (*godsdienstige wetten en oude herkomsten*) priests and chiefs were to decide.'

As he had done regarding the Regulation on the Judicial Organization Nederburgh argued that Article 78(2) was not intended to and did not annul S 1835/58 (Nederburgh 1880: 31, 32). Nevertheless, the inclusion of 'old customs' in Article 78 (2) RR and Article 3 of the Regulation on the Judicial Organization broadened the *landraad*'s discretion in decisions concerning what the jurisdiction of *penghulus* was. No one knew exactly what the old customs were and what they said about *penghulus*. In this way, the *landraad* could exercise considerable control over them. Indeed, after 1848, case law of the *landraad* and *Raad van Justitie* would demonstrate that those courts assumed discretion in interpreting what the old customs were, thereby limiting the priests' jurisdiction and effectively nullifying their judgments in all disputes concerning marital property and inheritance.[19]

18 S 1855/2.

19 For a description of the case law on the appeal issue see Nederburgh (1880) and Van der Velde (1928).

2.2.4 The unification of Javanese *penghulu* courts under the 1882 Priest Councils Regulation

After including the *penghulus* in the RR as 'priests', and with mounting criticism in the Dutch parliament concerning the economic, political and religious power of local *penghulus*,[20] notably in West Java, the Dutch government attempted to regulate and decrease their powers.[21] The Regulation concerning the Priest Councils on Java and Madura (1882 Priest Councils Regulation)[22] was part of this strategy, since it pulled away the priest councils from the administrative control of the Javanese regents and brought them under the direct administration of the Department of Internal Affairs (Lev 1972: 13). The official aim of the 1882 Priest Councils Regulation was to curb corruption and to prevent inconsistent judgments by the *penghulus*. In fact, the Dutch government had the additional aim of increasing control over the *penghulus* and Islamic justice on Java (Hanstein 2002: 50).

The 1882 Priest Councils Regulation consisted of a mere seven articles – and in fact did not include measures that were necessary to curb corruption, like providing a salary for its officials. Only the chief *penghulus* received a salary as heads of the Islamic bureaucracy, and for their advisory work at the general colonial court, among other duties (Berg 1882: 18).[23] The judicial work in the priest councils of all other *penghulus* remained unsalaried, making their income dependent on informal fees and was therefore 'ineffective' in achieving its anti-corruption aim (Lev 1972: 14).

The 1882 Priest Councils Regulation did increase government control over the *penghulus* by creating a unified administration of Islamic justice on Java and Madura, tearing down in the process the Islamic pillar of the Javanese sultanate legal system. According to Daniel S. Lev, the removal of the *penghulus* from the indigenous court system resulted in an Islamic judiciary 'that was more independent from the local aristocracy and had a more supra-local orientation' (Lev 1972: 14-17). As such, it may be seen as the birth of the national Islamic court of today. On the other hand, the *penghulus'* associations

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20 A good example is the debate in 1870 between the Minister of Colonial Affairs, the Governor-General of the Netherlands and the Parliament concerning the strong economical position of priests in the Preanger, West Java. Source: Invoering der reorganisatie van de Preanger regentschappen, *Kamerstukken II* 1870-1871, 82, 1-3, pp 1221-1231. I will further elaborate on the central role of *ulamas* in West Java, and Dutch attempts to diminish their power in Chapter 5.

21 Article 17 of the Instruction to the Regents (*Instructie voor de Regenten in de Gouvernementslanden*; S 1867/114), for instance, was intended to increase control of the colonial government over the priests. It stipulated a priests registration requirement for the Regent and prohibited unregistered individuals to act as a priests. The registers had to be send to the *resident* (Berg 1882: 2).

22 *Reglement betreffende de priesterraden op Java en Madura (S 1882/152).*

23 This was stipulated in S 1867/125. See Hisyam (2001) on the *penghulu* under the Dutch administration.

with the colonial regime undermined their independence in the eyes of the Javanese Muslim community. Independent and often anti-colonial *kyais* and *ulamas* questioned the *penghulus'* motives and expertise in Islamic matters and consequently became a rival authority to them at the local level (Lev 1972: 12-13; Hisyam 2001, Laffan 2003).[24]

Even so, the 1882 Priest Councils Regulation laid down some foundational aspects of the future Islamic courts. Article 1 stipulated that alongside every *landraad* on Java and Madura there should be a priest council. Articles 2 and three stipulated that a priest council should consist of a minimum of three and a maximum of eight *penghulus* and was presided by the chief *penghulu.* The Governor-General of the Netherlands Indies appointed and dismissed the *penghulus.* This was a slight change regarding an Instruction of the Governor-General (S 1867/168) which provided that the resident appointed the *penghulus* and the Governor-General the chief *penghulus*. Articles 4, 5 and 6 concerned procedure. To render a judgment valid, a panel of *penghulus* had to consist of at least three members, including the chief *penghulu* as chair. The judgment, including the legal justification, had to be written down, signed by all members of the panel of *penghulus*, and kept in a registry.[25] The litigants were to receive a copy of the judgment. Article 7, finally, stipulated that when a priest council transgressed its jurisdiction, the judgments could not be enforced through an *executoirverklaring* by the *landraad*. These procedural stipulations were meant to improve the internal and external checks and balances, and to improve consistency of judgments. They would remain in force until 1989 when the Law on the Islamic Judiciary withdrew them.

2.2.5 The jurisdiction of the priest councils in case law from 1848-1927

The 1882 Priest Councils Regulation did not regulate the jurisdiction of priest councils. Thus, the imprecisely worded Article 3 of the 1847 Regulation concerning the Judicial Organization and Article 78(2) of the 1854 RR still applied. Hence, the judge of the *landraad,* the appellate Court of Justice and ultimately the Supreme Court had broad discretionary powers in determining the jurisdiction of the priest councils, Their case law regarding the execution of priest councils' decisions (*executoirverklaring*) determined in fact this jurisdiction.

In his dissertation, J.J. van de Velde (1928) has made a legal analysis of this case law in the period 1848-1926. His analysis demonstrates that judgments of the Supreme Court, the Court of Justice of both Semarang and Surabaya,

24 See also Chapter 4.

25 Raffles (1817) noted that traditionally the *penghulu* in the *surambi* courts already wrote down their decisions and kept a registry.

and a number of *landraad*[26] were initially inconclusive about the jurisdiction of *penghulu* courts, but by the early twentieth century case law had settled the matter. I will not go into the details of the judgments themselves but restrict myself to summing up the different legal issues in which the priest court was or was not competent according to this case law.

First of all, case law of the period 1848-1926 established that the judge considered the priests councils competent in validating marriage and divorce. The jurisdiction of the *penghulus* in these fields was undisputed (Velde 1928: 68-70). Secondly, *landraad* case law and the appellate Court of Justice had been inconclusive about the enforceability of priest councils' judgments concerning maintenance or support (*nafkah*) until, on December 27 1894, the Supreme Court in Batavia denied enforceability of a decision of the priest council of Tegal, and argued that this whole overdue *nafkah* dispute should have been brought before the *landraad*, because disputes concerning overdue *nafkah* had to be considered general debt cases (Velde 1928: 71-73). In theory, this meant that from 1894 onwards the priest councils had no jurisdiction to order the husband to pay a certain amount of overdue *nafkah*. However, in practice the *penghulu* did not apply the principle of precedent, and without exception would accept all *nafkah* cases including those concerning overdue maintenance (Velde 1928: 61).

Thirdly, disputes concerning the division of property upon divorce (*boedelscheidingen*) were one of the fields explicitly mentioned in S 1835/58 as falling under priest councils' jurisdiction. However, although the *landraad* and the appellate *Raad van Justitie* generally considered a consensual division of marital property to fall within the jurisdiction of the priest councils, the *landraad* considered disputes to fall within their own jurisdiction (Velde 1928: 70-71). The same approach could be found in case law concerning inheritance matters. The priest councils were generally considered competent in determining who the inheritors were, and in establishing the subsequent division of the inheritance (Velde 1928: 126). However, towards the 1920s, *landraad* case law and the *Raad van Justitie* denied the priest council's jurisdiction in cases where the inheritance was disputed. As appears from three decisions by priest councils in the 1920s, they did not always consider themselves competent in inheritance cases in which the property was disputed, and referred the parties to the *landraad* (Velde 1928: 74-78).

Thus, before the 1931 Regulation on Religious Justice[27] regulated the jurisdiction of priest councils (see 2.2.7 below), the development of case law in the early twentieth century most commonly pointed to a refusal of their jurisdiction in disputes concerning property and debts in divorce and inherit-

26 In the Dutch language the correct plural form for landraad is *landraden*, but I choose to use *landraad* for the singular and plural form in order not to confuse the reader.

27 *Reglement op de godsdienstige rechtspraak, de benoeming van voogden en de inlandse boedelkamers op Java en Madura* (S 1931/53).

ance cases. In practice, this meant that by the 1920s, the *landraad*, Court of Justice and the Supreme Court considered the priest councils to be competent to issue declaratory judgments only, while the *landraad* was competent to order an action from one of the parties. One may say that as an echo of the first missive of the Supreme Court in 1835, and with the exception of judgments concerning the validity and the validation of marriage and divorce, the formal status of the *penghulu* courts' judgments in disputes concerning marital property and inheritance was again reduced to advice (*fatwa*) and the *penghulus*' role as judges reduced to mediators. S 1835/58 had lost all legal force. Of course, this does not mean that the priest councils in practice did not issue court orders on those matters anymore, but rather that their orders could no longer be enforced through the colonial legal system.

2.2.6 *Adat* law at the heart of colonial policies concerning Islam

The limitation of the priest councils' jurisdiction through case law was closely linked to controversies among experts and government advisers in the late nineteenth and early twentieth century, centering on the role of Islamic law in the life of Indonesians. Up to the 1880s, experts like Winter, Keyser and Van den Berg had formulated the prevailing opinion that Islamic law ruled the lives of Indonesian Muslims, and that the differences between prescribed norms and local practices were caused by persistent local customary norms, regulations by the local authorities or incorrect behavior – a theory that has become known as *receptio in complexu*.

As a critique of *receptio in complexu*, the so-called *adat* law (*adatrecht*) school of the Dutch scholars Snouck Hurgronje, Van Vollenhoven and Ter Haar developed the reception theory (*receptietheorie*). Reception theory held that it was not Islamic law that ruled everyday life in Indonesia, but customary law or *adat* law. According to the *adat* law school the role of Islamic law had to be limited to those Islamic norms that the local *adat* law had incorporated or received. Thus, living norms rather than prescribed norms of Islamic law were central.

During the first half of the twentieth century the *adat* law school would prevail. In the opinion of the *adat* law proponents, the indigenous population should as much as possible be ruled by their own *adat* law norms and, therefore, the *landraad* should apply the local *adat* law (defined as *adat* norms with legal consequences) in their judgments. Although they saw *adat* law as a living law, the *adat* law scholars also tried to preserve local customary law, thus, whether intentionally or not, sustaining traditional hierarchies which facilitated colonial rule (Benda-Beckmann, F. & Benda-Beckmann, K. 2011; Burns 2004; Prins 1954). Van Vollenhoven expressed his concern about the encroachment of both Islamic and European law on *adat* practices within society (1931: 70). Like Snouck Hurgronje (Adatrechtbundel I 1911: 210), he was of the opinion

that the regulation and unification of priest councils in 1882 was based on 'misconceptions of the colonial administrators' concerning the role of Islamic law in society (Vollenhoven 1931: 565).

The influence of the *adat* law school was visible in the new proto-constitution of the Netherlands Indies, the *Indische Staatsregeling* (S 1925/415; IS), which replaced the old 1854 RR (Nurlaelawati 2010 :48).[28] Article 134 (2) on the jurisdiction of the *penghulu* courts amended Article 78 (2) 1854 RR as follows: 'civil lawsuits between Mohammedans fall under the jurisdiction of the religious judge, provided that this is in accordance with their *adat* law, and not contrary to stipulations in [colonial] legislation.' Hence, Islamic law was made subordinate to *adat* law, and the general colonial courts had to take local *adat* norms as starting point in judgments concerning execution of *penghulu* courts' judgments. Both in policy and the administration of justice the opinions of the *adat* law specialists became central, rather than those of Islamic law specialists.[29]

2.2.7 Limiting the formal jurisdiction of the *penghulu* courts (1931)

Case law of the colonial courts, *adat* law policy and the *adat* law clause in Article 134(2) of the 1925 IS all pointed to a change in policy towards the *penghulu* courts. Indeed, in 1922 the Dutch government created a commission to assess the jurisdictional division between the priest councils and the *landraad* on Java and Madura. The commission was headed by RA Hoesein Djajadiningrat, a specialist in both Islamic law and Javanese and Sundanese literature and culture, employed by the Law School (*Rechtshogeschool*) in Batavia, and who, moreover, in 1924 would become the first native Indonesian with the rank of Professor. The commission also included Professor Ter Haar, a main proponent of the *adat* law school as well as representatives of *penghulus* and Muslim organizations, the most renowned being Mohammad Dahlan of the *Muhammadiyah* (Lev 1972: 18).

Despite the presence of the *penghulus* and the representatives of the Muslim organizations, the commission drafted a report recommending a major transfer of the *penghulu* courts' jurisdiction to the *landraad*. With the exception of the dower (*mahr*) and maintenance (*nafkah*), jurisdiction over all matters concerning

28 The *Indische Staatsregeling* came into force on January 1 1926. Only one of seventy-seven decisions by the Dutch colonial courts and four (of 166) of the priest councils discussed in Van de Velde 1928 were issued after this date, hence my decision to discuss the Netherlands Indies case law of 1848-1926 in section 2.2.5.

29 Snouck Hurgronje as an Islamic law expert took a slight different position than his successors. He believed that the development of Islam should be the main focus of colonial policies, whereas the *adat* law scholars of the last decades of the colonial period, like Ter Haar, mainly 'were interested in securing and preserving what they understood as tradition' (Lev 1972: 17).

property, including inheritance matters, was transferred to the *landraad*, which should apply *adat* law rather than Islamic law. Execution of Islamic courts' decisions still required an *executoirverklaring*. The commission also recommended to improve the education and provide a salary of all staff of the *penghulu* courts, a matter the Muslim organizations had brought up (Lev 1972: 17-22; Hanstein 2002: 50-52).[30]

The subsequent draft regulation adopted the recommendations of the Djajadiningrat Commission. The draft Regulation was accepted by the Dutch parliament, with the caveat (S 1931/53, Article 5) that, because of the sensitivity of the subject, the Governor-General of the Netherlands Indies would decide when it would come into force. In 1931, in order to prevent protest by the Muslim community, Governor-General De Jonge decided to introduce only the procedural second and third chapter of the 1931 *Penghulu* Courts Regulation. It was six years later when Tjarda van Starkenborgh Stachouwer, the last Governor-General of the Netherlands Indies, introduced the first chapter concerning the transfer of jurisdiction through S 1937/116.[31] As could have been expected, it led to heavy protests from Muslim organizations (Hanstein 2002: 52). Moreover, even Hazairin, a well-known Dutch-trained *adat* law scholar with a PhD from Leiden University, called reception theory 'the theory of the devil which insults the faith of Muslims, God, the Qur'an, and the Traditions of the Prophet' (Nurlaelawati 2010: 48).

Among the most active opponents of the 1931 *Penghulu* Courts Regulation were the *penghulus* of the Islamic courts on Java and Madura, who decided to organize themselves in the Association of *Penghulus* and their Staff (*Perhimpunan Penghoeloe dan Pegawainya;* PPDP) to advance their interests. On 16 May 1937, the PPDP held its first conference, during which it submitted a joint statement to the colonial government. The statement protested the withdrawal of their jurisdiction in inheritance and *waqf* cases, and stressed the inconsistent nature of *adat* law vis-à-vis Islamic law. The PPDP even threatened to label people living under *adat* law as apostates (Hanstein 2002: 55). The *penghulu*'s fierce resistance was partly due to the fact that inheritance cases were the most rewarding, since it was customary to pay a fee (*usur*) of ten percent of the value of the property,[32] while the Department of Internal Affairs, because

30 Nonetheless, to dissatisfaction of the *penghulu*, the Dutch never implemented it. See Hisyam (2001).

31 In the same year, the 1937 Regulation on Religious Justice in parts of Southern and Eastern Borneo (*Reglement op de godsdienstige rechtspraak voor een gedeelte van de residentie Zuider- en Oosterafd. van Borneo*; S 1937/638) regulated and recognized the local Islamic courts that were called *qadi* courts and a separate regulation (S 1937/ 639) established an Islamic high court in Banjarmasin. Other than the *penghulu* courts in Java and Madura, the *qadi* courts in Kalimantan would retain jurisdiction in inheritance matters.

32 Ironically, Muslim organizations like *Sarekat Islam* in the past were amongst those who had harsh criticism of the customary *usur* practice, for which there is no base in Islamic law (Hisyam 2001:192-197)

of budgetary reasons, kept postponing the implementation of the provision stipulating a salary to all *penghulu* courts' staff (Lev 1972: 21). However, this aspect of personal interest should not distract us from the genuine ideological opposition to the colonial government's *adat* policy.

In the end the protests were unsuccessful, and the colonial government did not relent (Hanstein 2002: 55). The *penghulus* then turned to a strategy of silent rejection, and continued their role as Islamic experts in inheritance cases giving legal opinions (*fatwa*) concerning the division of the inheritance. Those *fatwa* would only be effective when they resulted from an agreement between all parties (Lev 1972: 185-222). As mentioned above, even before 1937 *landraad* case law had established that disputes concerning an inheritance should be brought before the *landraad*, and judgments of *penghulu* courts in such disputes could not be enforced.

A second reform in 1937 seems to be at odds with the limitation of the *penghulu* courts' jurisdiction. The creation of an Islamic high court in Surakarta, falling under the responsibility of the Ministry of Justice, seems atypical in the era of the *adat* law school.[33] However, there is an explanation for this further institutionalization of Islamic courts. Shapiro states that the establishment of appellate Islamic courts is often driven by concerns for political control (Shapiro 1986: 222). In other words, the colonial government expected the Islamic high court to implement the reforms of 1931 and 1937, and to make sure the first instance *penghulu* courts would do the same. The Islamic high court indeed implemented the jurisdictional changes, and as we will see in Chapter 6, denied the jurisdiction of Islamic courts in South Sulawesi on the grounds that it never had been a customary institution there.

Some *penghulus* opposed the creation of the Islamic high court, probably out of fear that the colonial government wanted to increase its grip on them (Lev 1972: 30). But generally the Islamic high court was welcomed by Muslim intellectuals and seen as a significant increase in status of the Islamic court. This was already an indication that opposition was not directed against state influence as such, but rather against any perceived attack on the last bastion of Islamic law, Muslim family law. The issue of family law proved to have the power to unite the otherwise divided Muslim organizations and temporarily silence their criticism of the *penghulus*, who were generally appointed from the ranks of the local nobility and according to independent *ulamas*, sometimes lacked expertise in Islamic law (Lev 1972: 12-13).

When Dutch colonial rule was abruptly brought to an end by the Japanese invasion of 1942, the Dutch, in spite of the limitation of the Islamic courts' jurisdiction, had sown the seeds for Islamic courts as a recognized branch of the national judicial system. In 1882, the courts had been brought under colonial administration, making them less dependent of local rulers. The

33 The chapter concerning the Islamic high court (*Hof van Islamietische Zaken*) for Java and Madura in the 1931 *Penghulu* Courts Regulation came into force through *Staatsblad* 1937/610.

Islamic high courts were intended to ensure more consistent judgments. They were welcomed as a modernization of the Islamic court and had the potential to speed up its bureaucratization. Nonetheless, the image of the Islamic court as an old-fashioned remnant of the past proved persistent. It would take another fifty years before the tide would turn.

2.3 The Japanese occupation (1942-1945)

Few changes took place under Japanese occupation (1942-1945) with regard to Islamic courts. However, in the future political landscape in the independent Republic of Indonesia regarding the Islamic courts already became visible. The nationalist parties, as well as the growing communist party, wanted to abolish the Islamic courts. Islamic parties objected, and pressured the Japanese to increase the jurisdiction of the Islamic courts and improve the standard of the judges' Islamic education. In January 1945, Indonesian representatives of political parties in the *Sanyo Kaigi* (an advisory body of the Japanese government in Indonesia, established in 1944 in order to plan Indonesia's future independence) voted on the question of whether it was necessary to retain the Islamic court alongside the general court. Many influential Indonesian politicians, including Soepomo and Hatta, preferred unification of the legal system, and wanted to abolish the *penghulu* courts altogether. However, the proponents of the Islamic court outvoted their opponents by one vote: six votes against five (Lev 1972: 36-39). As a result of this narrow escape, the Japanese changed nothing with regard to the *penghulu* court other than renaming it *Sooryo Hooin*.

The status quo in the *Sanyo Kaigi* concerning the Islamic character of the future Republic seemed to change on the eve of the declaration of independence (17 August 1945). From June to August 1945 a preparatory committee had been in the process of drafting the constitution of the future independent republic of Indonesia. The Islamic and secular representatives worked out a compromise; the so-called Jakarta Charter. The preamble of the draft constitution said that 'the state is based on the belief in the all-mighty God, with the obligation to carry out sharia for the adherents of Islam.' This clause was also incorporated into Article 29 of the draft constitution.

The sharia clause was removed from the constitution, because prior to the proclamation of independence, secular forces surrounding president-to-be Sukarno had succeeded in convincing him and influential Muslim leaders that the Islamic clauses would threaten national integrity (Lev 1972: 43). In itself, adoption of the Jakarta Charter would not necessarily have meant that the Islamic courts would obtain a broader jurisdiction. An inclusion of the sharia clause in the constitution could also have resulted in the application of Muslim family law by general court judges, a practice that is quite common in Muslim

majority countries (Otto 2010). However, those Muslims who supported a sharia-based constitution felt betrayed.

2.4 Islamic courts after independence

In this section, I will demonstrate that as Islamic courts gradually generated more political support and as a result their jurisdiction, consistency of judgments and efficiency were increased by various measures and laws. The end result of this gradual process was a more uniform Islamic court. This process of bureaucratization was not only part of a nationalist agenda of increasing state control over Muslim family law matters, but was also the result of a concurrent agenda of the Ministry of Religious Affairs and an Islamist faction in the Supreme Court to Islamize family and inheritance law in order to ideologically undo some of the main effects of the colonial reception theory.

2.4.1 Islamic courts during the independence struggle (1945-1949)

Although a large majority within the preparatory committee had voted against the establishment of a Ministry of Religious Affairs only a year before, on 3 January 1946 the revolutionary government founded such a Ministry, in an attempt, according to Lev, to appease those Muslim parties that were disappointed with the Constitution (Lev 1972: 44). Only a few months after the Ministry was established, Law 22/1946 on the registration of marriage, divorce and reconciliation (*pentjatatan nikah, talak dan rujuk*), was issued, largely based on colonial regulations, but now centralizing civil registration of Muslims under the Ministry's control (Huis & Wirastri 2012). Because of administrative difficulties caused by the revolution this law was initially only in force on Java and Madura.[34]

The Minister of Religious Affairs issued Decree 6/1947, taking charge of three matters concerning the *penghulu* courts. Firstly, it declared the Ministry responsible for the appointment of *penghulus*, which under colonial rule had been the responsibility of the Governor-General of the Netherlands Indies. Secondly, the decree also transferred the administration of religious affairs, including the *penghulu* courts from the Minister of Home Affairs to the Ministry of Religious Affairs. Thirdly, through the decree the Minister of Religious Affairs took over the administration of the Islamic high court which previously had fallen under the Ministry of Justice.

Moreover, the decree also created two *penghulu* offices: first, the district *penghulu*, in charge of the district mosque and other religious affairs, and

34 Law 32/1954 put the law into force throughout Indonesia.

second, the *penghulu hakim*, chief judge of the Islamic court.[35] Through these actions the Ministry of Religious Affairs made clear its intention to unify the country's administration of Islamic marriage and divorce under its authority, and took a next step towards the creation of a specialized Islamic judiciary in Indonesia.

Working together with Muslim parties, the Ministry turned out to be a countervailing power to the majority within the cabinet and parliament that wanted to unify all civil courts. Proof of the latter can be seen in Bill 19/1948 which would have abolished the Islamic court and created Islamic chambers within the general court (Hanstein 2002: 59-60). This Bill had already been accepted by parliament, but never came into force due to political turmoil. Thus, the Islamic courts survived the revolutionary years merely by chance.

2.4.2 The Islamic courts under Sukarno (1945-1965)

The recognition of the Republic of Indonesia by the Dutch government in 1949 did not end the political instability of the revolutionary years. In West Java, Muslim militias of the so-called *Darul Islam* movement, led by Kartosuwirjo, continued the struggle for an Indonesian Islamic State (*Negara Islam Indonesia*, *NII*, promulgated in 1949). In Aceh and South Sulawesi militant Muslim groups joined the rebellion. In West Java the leaders of the *Darul Islam* surrendered only in 1962, whilst in South Sulawesi the rebellion lasted until 1965 when the rebel leader, Kahar Muzakkar, was shot.[36]

The Jakarta Charter and the *Darul Islam* rebellion had an enduring impact on the Indonesian government's stance towards groups with Islamist aspirations. However, the government's hard stance towards the Islamist groups in the last years of Sukarno's presidency did not mean that it was suspicious towards all Islamic institutions. The government decided to retain and expand the jurisdiction and number of Islamic courts, perhaps to keep the support of the remaining Muslim organizations, the NU in particular.

Emergency Law 1/1951 on the Jurisdiction and Procedures of the Civil Courts,[37] which abolished all indigenous *adat* courts,[38] stipulated a future

35 Actually, in the late nineteenth century, after the chief *penghulu* had become advisor of the *landraad,* in many areas of Central Java such dualism had already developed. In the regencies concerned a *penghulu kaum*, as head of the central mosque and responsible for other religious matters was established alongside the *penghulu landraad* who had only a judicial role. In contrast, in West Java the chief *penghulu* remained the head of both judicial and spiritual Islamic matters (Van den Berg 1882: 7).

36 A more elaborate discussion about the *Darul Islam* is provided in Chapter 4 about West Java, and Chapter 6 about South Sulawesi.

37 Emergency Law 1/1951.

38 No *adat* courts existed on Java.

government regulation concerning the Islamic courts. Government Regulation 45/1957 concerning the Establishment of Islamic courts outside Java and Madura[39] required the formation of an Islamic court in each district (*kabupaten*) where there was a general court; this meant an enormous expansion of the Islamic courts in Indonesia. In addition, appellate Islamic courts were to be established in each province. Islamic courts outside Java and Madura retained their competence over inheritance cases[40] if 'according to the living law they are to be resolved according to Islamic law' (Article 4). In other words, as had been the case in the colonial period, judges were to decide to what extent *adat*, Islamic, or civil law norms were part of the 'living law' of a community (*masyarakat*) and – equally important – to decide what was meant by '*masyarakat*' (Lev 1972: 116).

Just three years after GR 45/1957 had granted a conditional jurisdiction in inheritance matters to the Islamic courts outside Java, in 1960 the Supreme Court limited their jurisdiction once again. In a case originating from the general district court of Makassar,[41] the Supreme Court argued that Islamic courts held no jurisdiction over issues in which, according to the living law, Islamic law did not apply. Because living law in inheritance cases in Indonesia was *adat* law, according to this ruling competence in inheritance cases lay with the general courts.

Before independence, the *Indische Staatsregeling* of 1925, the Netherlands Indies' 'proto-constitution,' stipulated that Islamic courts held jurisdiction over those matters where *adat* had received Islamic norms. In line with the reception theory it considered Islamic norms to be part of *adat*. The 1960 Supreme Court judgment took things a step further and separated Islam from *adat* – it was either Islam or *adat*. This line of reasoning was similar to the framing of *adat* in the Basic Agrarian Law in 1960, and reflected the nationalist, socialist and anti-feudal discourses of that time (see Bedner & Huis 2008). Thus, it created a national *adat* law, a prescriptive rather than a descriptive *adat* law (see Bowen 2003: 254), semantically and officially separating *adat* law from the various local communities living on certain territories within the Indonesian state.

Meanwhile the Minister of Religious Affairs attempted to further increase its control over the Islamic courts. In 1963 it issued Decision 19/1963 in which it assumed cassation power with regard to cases that originated in the Islamic courts. The decision provided that 'The head of the Directorate of Religious Justice is given the authority to examine and determine whether or not a decision of a religious court, in the first or second instance, fulfills the conditions and rules laid down by statute, and also to declare such a decision invalid' (Lev 1972: 95-96). By granting the Directorate cassation power the

39 Government Regulation 45/1957.

40 The transfer of jurisdiction in inheritance matters from the Islamic court to the *landraad* by S 1931/58 only applied to Java and Madura.

41 Supreme Court judgment 109/K/Sip/1960. See Lev 1972: 68.

Ministry hoped to increase uniformity in the Islamic courts' decisions. However, the number of cases the Directorate received were too limited, half a dozen from 1963 until 1971, to make a real difference (Lev 1972: 99).

2.4.3 The 1974 Marriage Law and the position of the Islamic courts

In 1965, a coup took place, allegedly by communist elements within the military, which General Suharto successfully quelled in a military counter-action. President Sukarno's position was immensely weakened by the coup. Finally, in 1967 Sukarno stepped down and General Suharto became the new president of Indonesia. President Suharto's New Order regime that had organized a total crackdown of the communist party, introduced policies to increase its control over the Muslim parties as well.

In 1971, the Republic of Indonesia organized general elections for the second time. With 62.8 percent of the votes, it turned out to be an enormous victory for the Golkar party – President Suharto's main political base in Parliament. With such strong support in Parliament, President Suharto decided to radically reorganize the political landscape of Indonesia. In 1973 the Muslim parties – despite their doctrinal differences – were forced to merge into a single party, the United Development Party (*Partai Persatuan Pembangunan*, or PPP). The nationalist parties and the smaller Protestant and Catholic parties were joined together into the Indonesian Democratic Party (*Partai Demokrat Indonesia*, PDI).

In the context of this political transformation, a marriage bill was submitted to Parliament. The Marriage Bill of 1973 had been drafted by the Ministry of Justice and proposed far-reaching substantive legal reforms and a further limitation of the jurisdiction of the Islamic courts.[42] With a majority in Parliament, the new ruling party Golkar was overconfident, as it could single-handedly pass the bill. Importantly, the Ministry of Religious Affairs, a stronghold of the traditionalist Muslim organization *Nahdlatul Ulama* and a strong supporter of the Islamic courts, had not been involved in the drafting process. As it appeared, Golkar had hugely underestimated Muslim opposition to the Bill.

In Parliament only the PPP opposed the Bill, but with 20 percent of the seats was in no position to prevent it from being enacted. Yet, the Muslim movements that were associated with the politicians in this party (*Nahdlatul Ulama, Muhammadiyah, and Sarekat Islam*) had an enormous and active powerbase within society. Protests mounted. The law was portrayed as an attack on the divine law of Allah, and led to emotional outcries in Parliament (Hanstein

42 In this section I will concentrate on the jurisdictional consequences of the marriage law. The substantive norms will be treated in Chapters 3 and 4.

2002: 282-284).[43] On the 27th of September, two days before the start of the holy month of Ramadan, a group of hundreds of young people, many of them women, entered the parliament building, while a crowd of demonstrators took possession of the streets. By this time the government realized that opposition had to be taken seriously. The Minister of Justice started negotiations with the Minister of Religious Affairs and the PPP, in order to work out a compromise (Nurlaelawati 2010: 69). The Ministry of Religious Affairs, bypassed during the drafting process, now reclaimed its place in Muslim affairs.

The Bill proposed to replace the religious basis of marriage with a civil one (Article 2) and to require permission from a general court for divorce (Article 40) and polygamy (Article 3) (e.g. Katz & Katz 1975 and 1978; Cammack et al. 1996; Butt 1999; Bowen 2003; O'Shaughnessy 2009). Hence it proposed a more secular basis for family law, meaning a further decline in the Islamic courts' jurisdiction. Bowen argues that the strong symbolism of losing control over the last strongholds of Islamic law, i.e. family law and the Islamic courts, was at least as important as the proposed substantive reforms in the Bill. According to the PPP and its supporters, if state courts should decide upon Islamic family law issues at all, it ought to be Islamic courts, by judges with their authority vested in their mastering of Islamic law (2003: 181). The Bill was indeed conceived as an attack on Islam itself, since it jeopardized the last bastion of Islamic law in Indonesia, and, I should add, bypassed the Ministry of Religious Affairs, the last stronghold of Muslim organizations in the government. The New Order government decided to give in to most of the demands of the Muslim organizations and removed the most controversial articles of the Bill, whilst the Islamic courts retained their jurisdiction in divorce and polygamy matters.

Through the events surrounding the 1973 Bill the New Order realized that it had a problem, i.e. what Cammack et al. have called 'the direct conflict between state positivism and Islam' (Cammack et al. 1996: 53). The political solution was government support for national Islamic courts. As the Dutch had realized before, unification of Islamic courts fuses the State with the Divine to a considerable extent. In this way a clear choice between the two loci of ultimate legal authority can be avoided, and the state could, and can, exercise control over ever-sensitive Muslim family law issues in an effective and legitimate way. Nonetheless, the 1974 Marriage Law did also constitute a major change in terms of nation-building and rule of law formation. For the first time in the history of the Islamic court, substantive family law rules for Muslims were established in national legislation, constituting a next step in the process of the rationalization of its administration of justice.

43 For example, H.A. Balya Umar, a member of the PPP fraction in Parliament, warned that the law would lead to 'alcoholism, drug addiction and extramarital intercourse.' He even predicted 'manslaughter, violence, rape, increased prostitution and hospitals full of sexually transmitted disease patients' if the law was implemented (Hanstein 2002: 283).

2.4.4 The Supreme Court's cassation powers over the Islamic courts (1970-1979)

Law 14/1970 on Judicial Power made the Islamic courts into one of the four pillars of Indonesia's judicial system, alongside the general courts, the military courts and the administrative courts. Article 10(3) stipulated that the Directorate of Religious Justice had to transfer its cassation powers, which it had assumed in 1963 (see 2.4.2), to the Supreme Court.

It was not until 1977 that the Supreme Court took further steps to actually implement its newly acquired authority over the Islamic courts, when it issued a regulation (PerMA 1/77) concerning procedures for appeals in cassation of Islamic courts' judgments. In reaction, the Ministry of Religious Affairs sent a circular (Circular 89/1978) to all Islamic courts in Indonesia, instructing them to prevent litigants from seeking cassation. A year of heated public debates followed, fueled by fears that cassation review by the Supreme Court posed a threat to the Islamic courts' Islamic character. When the Supreme Court in 1979 passed judgment in two cassation cases originating in the Islamic courts, the Ministry faced a *fait accompli*, and gave up its initial resistance (Cammack 2007: 154-155).

In case 13/K/Ag/1979 concerning desertion as a divorce ground, the Supreme Court reaffirmed the status of the 1974 Marriage Law and its 1975 Implementing Government Regulation (GR 9/1975) vis-à-vis the *taklik al-talak* conditions, which since 1955 were included in the standard marriage contract of the Ministry of Religious Affairs. Article 19(b) of GR 9/1975 listed six divorce grounds, one of which was 'desertion by one of the spouses for a period of two years or more', while in the *taklik al-talak* marriage contracts, desertion of the wife for six months or longer was a condition for a *talak* divorce.[44] The first instance Islamic court and the Islamic high court argued that the six-month desertion clause in the *taklik al-talak* marriage contract was still valid. The Supreme Court reversed the decision, stating that since the *taklik al-talak* marriage was conducted after the issuing of the 1974 Marriage Law, the valid divorce grounds were those listed in the more recent legislation. The Ministry was quick to act, and adjusted the standard *taklik al-talak* contracts according to the new statutory provision.

Case law could potentially settle many legal issues the Marriage Law had left open as a result of a difficult political compromise. More specifically, jurisdiction over property disputes, child support, spousal support, and custody (*hadana*) remained unregulated. The Ministry of Religious Affairs initially took the position that Islamic courts had jurisdiction over these matters. However, in 1975 the Supreme Court decided to settle the matter through a circular,[45]

44 See Chapter 3.

45 Supreme Court circular MA/pemb/0807/75.

which stated that laws not explicitly replaced by the Marriage Law were still valid. By implication, the 1931 *Penghulu* Courts Regulation still applied, and so the Islamic courts had no jurisdiction in custody and property cases (Cammack 1989: 66; Hanstein 2002: 324-325). The execution of the Islamic courts' judgments still had to be processed by the general court. As a result, the Islamic courts' judges and their staff were left with the feeling that they were still regarded as second-class courts.[46] It was not until the late 1980s that the true emancipation of the Islamic courts began.

2.4.5 Bureaucratization and upgrading of the Islamic courts in the 1980s

Although on several occasions the New Order resorted to violence to pacify Muslim resistance, it also applied a more peaceful strategy: the incorporation of Islamic institutions into the state (Cf Otto 2010). In 1975, the Indonesian *Ulama* Council (*Majelis Ulama Indonesia*, MUI) was established to mobilize Muslim support for the New Order's development policies. The New Order sought Islamic legitimacy through supportive legal opinions (*fatwa*) of Muslim scholars on sensitive issues such as, for instance, birth control (Hooker, M.B. & Lindsey 2002; Bruinessen 1996; see also Feener 2010). Similarly, a broadening of the jurisdiction of the Islamic courts was a way for President Suharto to reach out to the Muslim organizations that secretly disagreed with the obligation to adopt the New Order *Pancasila* ideology, rather than Islam, as the sole foundation of their organization (Nurlaelawati 2010: 81).[47]

By the early 1980s, the jurisdictional issues between the Ministry of Religious Affairs and the Supreme Court were settled, and cooperation between the two institutions began. In 1982, Busthanul Arifin, Supreme Court judge and a strong proponent of Islamic legal institutions, became the first chair of the Islamic division of the Supreme Court. This was a major change, since previously there had been little support for the Islamic court within the Supreme Court (Pompe 1996: 75; 387-389). Munawir Syadzali, Minister of Religious Affairs (1983-1993), realized that the views of part of the Supreme Court and the Ministry had moved closer and lobbied the Supreme Court in order to develop a joint agenda (Nurlaelawati 2010: 80-84).

The rapprochement between the Ministry of Religious Affairs and Busthanul Arifin immediately achieved results. Three programs were put into motion simultaneously: first, a standardization plan to improve the manage-

46 The subtitle 'the repositioning of Islamic courts from inferior (*pupuk bawang*) courts towards proper courts of justice' of Gunaryo and Ramadhan's work *Pergumulan Politik & Hukum Islam* (Political struggle and Islamic law) reflects this feeling (Gunaryo and Ramadhan 2006).

47 Nurlaelawati (2010: 81) describes how Busthanul Arifin had framed the Compilation of Islamic Law project in precisely this manner when he proposed the law-making project to President Suharto.

ment of Islamic courts; second, a law-making program to draft a Bill on the Islamic Judiciary; and third, the drafting of a Compilation of Islamic Law that would be used as the main legal source for substantive Islamic law.

In this section I will focus on the standardization plan, as the 1989 Islamic Judiciary Law (see 2.4.6) and the 1991 Compilation of Islamic Law (See 4.2.5) will be discussed in separate sections below. This plan was issued in 1983 and 'set forth a bold agenda for improvement in the facilities and staffing of the courts' (Cammack 2007: 151). The pragmatic purpose of the plan was to manage the enormous increase in the caseload of the Islamic court. In 1974, the Islamic courts processed only 23,758 cases, while in 1979, due to the legal obligation stipulated in the Marriage Law to divorce before the court, this number had increased to 257,337 cases (Cammack 2007: 150-151). The caseload required swift action, and in 1984 the plan was implemented in anticipation of its formalization in the Islamic Judiciary Law. In practice, the standardization plan unified the Islamic courts in several ways: their appearance; their equipment, including the books which were to be included in the courts' library; and importantly, their judges, who now were to hold a secondary degree of academic training.

However, Cammack has also stressed that the New Order's agenda behind the standardization plan of 1983 was not an increase of efficiency but of control: 'when the plan to vest control over Muslim courts [through the Marriage Bill of 1973] proved politically unworkable, the strategy changed from an attempt to transfer the functions of the Islamic court to the regular court, to transforming the Islamic judiciary based on the model of the regular court' (Cammack 2007: 154).

At the same time the modernization of the Islamic court was part of the New Order's strategy to generate support of Muslim organizations. Furthermore, the New Order cannot be viewed as a single entity. The main actors within the Ministry of Religious Affairs and the Supreme Court were also part of the New Order, but had a different goal: the upgrading of Muslim family law and the Islamic courts and, ultimately, the strong symbolic act of giving Islamic law its rightful place in Indonesian law. These are fundamental differences with the agenda of the Marriage Bill of 1973, which had been more liberal in character.

Hence, the making of the Marriage Bill of 1973 and the standardization plan reflect the agendas of the actors behind the plans. The Ministry of Religious Affairs had been left out altogether from the drafting committee of the Marriage Bill, which was dominated by officials of the Ministry of Justice (see above), while officials of the Ministry of Religious Affairs, together with Busthanul Arifin of the Supreme Court, were the main actors for the design of the standardization plan. Throughout the New Order the Ministry remained Islamic in orientation. It had accepted the *Pancasila* ideology as the state's foundation, but '[i]n this Ministry and associated institutions, Islam is of high priority and its values are constantly lauded and put forward as worthy for

the state and nation to follow' (Federspiel 1998: 97). By taking the lead in the standardization plan and the drafting processes of the Islamic Judiciary Bill and the Compilation of Islamic Law, this Islam-oriented Ministry could retain a degree of control over the Islamic courts.

The symbolism of a modern Islamic court applying an Islamic law compatible with modern times was surely appealing to most Muslim organizations. Of course, Muslim society in Indonesia is plural, and should not be equated with or reduced to supporters of a larger role of Islamic law and the Islamic court in society (Federspiel 1998, Bruinessen 1996; Geertz 1976). Nonetheless, what Horowitz observed about Malaysian Islamic courts applies to Indonesia too: 'While the urge to recapture Islamic authenticity has been strong, the secular system, within its sphere, remains the subject of considerable respect of the Islamic reformers'(Horowitz 1994: 244).[48] This is reflected in the behavior of the Indonesian *ulamas* with regard to the reforms. Although some *ulamas* initially voiced objections to the Indonesian state's increasing say in Islamic matters, in the end the *ulamas* affiliated with the main Muslim organizations *Muhammadiyah* and *Nahdlatul Ulama* agreed to the reforms without much resistance (Nurlaelawati 2010: 82-84).

2.4.6 The 1989 Islamic Judiciary Law

The second program set in motion by the Ministry of Religious Affairs and Supreme Court judge Busthanul Arifin was the drafting of a Bill concerning the Islamic Judiciary. Besides the creation of a unified and more efficient Islamic court system, their aim was to increase the jurisdiction of the Islamic court by amending and annulling colonial legislation which had favored an *adat* law based family and inheritance law with some essential issues falling under the general courts' jurisdiction.

As we have seen the 1974 Marriage Law had been a political compromise and the result of fierce negotiations between two opposing camps (see 2.4.3). Consequently, a number of substantive matters which were considered too controversial in the political process towards the adoption of the Marriage Law were not included in the law. The Ministry of Religious Affairs had assumed that the Islamic courts were competent in those matters, however, the Supreme Court decided that the 1931 *Penghulu* Courts Regulation still applied and that the general rather than the Islamic courts held jurisdiction in disputes concerning marital property, maintenance and child custody (See

48 In the late colonial period, Muslim organizations like the *Nahdlatul Ulama*, *Muhammadiyah* and *Sarekat Islam* had already voiced their concern about the colonial 'priest councils', and the need to modernize their administration and improve the education of the judges. In matters of substantive law they preferred non-interference of the colonial state (Hisyam 2001, in particular Chapter V).

2.4.4). Additionally, colonial legislation still applied in inheritance matters, according to which the general – and not the Islamic – courts were competent, with the exception of South and East Kalimantan. Moreover, S 1835/58 still applied and consequently the Islamic courts had no autonomy in enforcing their judgments. The drafters of the Bill on the Islamic Judiciary therefore intended to introduce major reforms.

The Ministry of Religious Affairs and Busthanul Arifin strategically framed their plea for a broadening of jurisdiction of Muslim family law within the framework of *Pancasila.* One year after the Tanjung Priok riots of 1984, which were crushed with excessive force by the special forces and left hundreds of Muslim anti-*Pancasila* protesters dead, they tried to convince President Suharto that support for a modernization and emancipation program pertaining to the Islamic courts was a chance for the New Order to demonstrate to Muslim organizations that the New Order and its *Pancasila* ideology were not anti-Islam in character after all. Their strategy proved successful and in 1985 the drafting programs of the Law on the Islamic Judiciary and the Compilation of Islamic Law could take off. President Suharto even decided to support the project of the Compilation of Islamic Law personally, with his own private funds (Nurlaelawati 2010: 82).

With regard to the aim of creating a unified and efficient Islamic Court the 1989 Islamic Judiciary Law adopted most points of the abovementioned standardization plan (see 2.4.5). As a consequence, the organization of the Islam court was unified and modeled on the general court. With regard to education Islamic court judges were required to hold either a law or a sharia law degree (Article 13(1)).

With regard to procedure not much changed. The same legislation applies as in the general courts, except where the law explicitly stipulates otherwise (Article 54). Thus, on Java and Madura the colonial *Herziene Inlandsch Reglement* (HIR)[49] and on the other islands the *Rechtsreglement voor de Buitengewesten* (RBg),[50] remained in force. An example of a special procedure is Article 89(1), which stipulates that a divorce request or suit must be filed at the Islamic court where the wife resides, regardless of whether it is the husband or the wife who initiates the divorce. The party initiating the suit must pay the administrative costs, irrespective of who wins or loses. In this way, the law facilitates women's access to divorce in the Islamic court, especially in cases where the husband has left and is untraceable (Bedner & Huis 2010: 180).

In Parliament, the new provisions concerning unification and organization of the Islamic court system were passed smoothly. The issue of jurisdiction over inheritance and property disputes, however, provoked controversy. The drafting committee proposed to give the Islamic courts full jurisdiction over all matters of matrimonial property and inheritance. For the opposition, headed

49 S 1941/44.
50 S 1927/227.

by the political party PDI – which in terms of numbers could not prevent the law being passed, but which succeeded in gaining support from the influential Armed Forces Faction in Parliament – this was unacceptable. The PDI favored the existing limited jurisdiction of the Islamic courts and opposed the introduction of an Islamic inheritance based on the 1 : 2 ratio regarding female and male heirs. Again, the role of Islamic courts in Indonesia became subject of fierce public debate (Cammack 2007: 157).

In the end, the members of the Armed Forces Faction succeeded in reaching a compromise. The General Elucidation to the 1989 Islamic Judiciary Law includes the clause 'that prior to the [registration of the] case the parties can choose which body of law shall be used in the division of the estate.' In other words, parties in inheritance cases must agree first whether they want the lawsuit to fall under *adat* or Islamic law, and thus the general court or the Islamic court handles the case.

Last but not least, the 1989 Islamic Judiciary Law led to an important increase in jurisdiction for the Islamic court. It now held a shared competence to decide cases between Muslims in inheritance matters and full competence in disputes concerning child custody, division of property, and alimony which previously fell under the general court (Elucidation to Article 49(1)). Moreover, the 1989 Islamic Judiciary Law made the Islamic courts competent to enforce their decisions independently from the general court. On an ideological level, the 'rightful' competence over inheritance cases lost in 1937[51] was, at least partly, reinstated, and this was considered a major victory for the proponents of Islamic law.

In short, the Ministry of Religious Affairs and Busthanul Arifin succeeded in bringing family and inheritance law for Muslims under an Islamic institution. The sentiments the subject carries, as well as the strategy of linking the issue to *Pancasila*, is revealed in the words of Yahya Harahap, Supreme Court judge and member of the drafting committee of the Compilation of Islamic Law, who in 1990 published a standard work on the 1987 Law of the Islamic Judiciary. In the introduction to this work he provided a justification for the increase of the jurisdiction of the Islamic court, and linked this to *Pancasila*. Summarized, his plea reads as follows: the unification of law since colonial times has caused 'religious reductionism',[52] which must be halted because it is felt by the Muslim community to be a violation or assault (*pemerkosaan*) on Islam.[53] Therefore, Islam had to retrieve its rightful place in family and

51 As mentioned in section 2.2.6, in the colonial period prior to 1937 the competence of *penghulu* courts was not settled. Case law of the colonial court prior to 1937 indicated that *penghulu* were considered competent in dividing an inheritance by means of a declaratory judgment, but not competent in issuing a condemnatory judgment on the matter.

52 Religious reductionism generally attempts to explain religion by boiling it down to certain non-religious causes.

53 *Pemerkosaan* also means 'rape' and has a strong emotional connotation. Yahya Harahap uses the term five times in a single paragraph.

inheritance law. A plurality of family law and inheritance law is fully in compliance with *Pancasila* and the motto of the Indonesian Republic 'unity in diversity' (*bhineka tunggal ika*). Therefore, he argued, an increased role for Islamic law would be no threat to the unity of Indonesia (Harahap 2009: 1-7).[54]

2.4.7 The Islamic courts after the Reformasi, *1998 to the present*

In 1998, the New Order's legitimacy had been undermined by the Asian financial crisis and following mass demonstrations and riots, President Suharto stepped down. In the next few years Indonesia introduced far-reaching institutional changes. In this so-called *Reformasi* period, it amended its constitution four times, adopting a true division of powers, a decentralized government, democratic standards of government, human rights, and a constitutional court to guard the new reforms. An attempt by the PPP and smaller Islamic parties to include the Jakarta Charter in the Constitution failed to gain support of the large Muslim and non-Muslim political parties, and any reference to sharia remains absent (Hosen 2005).

On the other hand, the trend towards incorporating Islamic institutions and norms into national policies, which had begun under the New Order of the late 1980s (Hefner 2000), continued during the *Reformasi*. In the *Reformasi* era, national legislation has been introduced which adopted religiously inspired norms (Otto 2010). Sharia-inspired district regulations played an important role in local political constellations.[55] The special autonomy of the Aceh province even led to the formal introduction of Islamic penal law (*jinayat*) for certain crimes.[56]

The Islamic court system was also affected by those developments. The third amendment of the Constitution adopted the Islamic court system as one of the pillars of Indonesia's court system in Article 24(2).[57] In other words, the position of the Islamic court is constitutionally guaranteed. Moreover, Law 35/1999 as reaffirmed by Law 4/2004 on the Judiciary introduced a one-roof system, with the Supreme Court administering all court branches. By implication, it transferred the administration of the judiciary from the executive to the Supreme Court (Otto 2010: 457-458).[58] For the Islamic court this meant

54 The first edition published in 1990 already includes this introduction.

55 See Bush 2008, for an analysis of the sharia-inspired district regulations in Indonesia, See Buehler (2008a) and Buehler & Tan (2007) for an analysis of the role Islamic regulations play in the local district politics of South Sulawesi.

56 Law 11/2006 formalized the *qanuns* issued in Aceh since 2002, introducing the corporal punishment of caning for gambling, drinking and adultery.

57 Article 24(2) of the Constitution: The judicial powers shall be carried out by a Supreme Court and by its subordinate judicatory bodies dealing with general, religious, military, state administrative judicial fields, and by a Constitutional Court.

58 With the notable exception of the Constitutional Court.

that 60 years of financial and administrative supervision by the Ministry of Religious Affairs came to an end in 2005. The transfer of the Directorate for Religious Justice (*Badan Peradilan Agama, or Badilag*) including its staff and assets to the Supreme Court ensured continuity (Law 4/2004, Article 44).

Wahyu Widiana, Director-General of *Badilag* from 2000 to 2012, has acknowledged that there were persons within *Badilag* and the Islamic courts who were skeptical regarding the transfer to the Supreme Court. However, the increase in funds and e-management programs muted their criticism.[59] In terms of equipment and facilities the transfer meant a significant improvement. Salaries of judges, clerks and other staff increased. The most visible change is the springing up of large new Islamic court buildings along the main roads of district capitals. Only a few years before, most of the first instance Islamic courts had been located in small buildings – often on the compound of the district office of the Ministry of Religious Affairs.[60]

Next, the Supreme Court – supported by AusAid – initiated programs for transparency and digitization that resulted in better online facilities for court users and laptops for Islamic courts' staff (Sumner & Lindsey 2010; Widiana 2011). Ausaid and other donors were attracted by the relatively positive image of the Islamic courts in terms of performance and integrity as well as by its role as access to justice provider, in relation to women's issues in particular (Sumner & Lindsey 2010; Sumner 2008; Cammack 2007). This growing attention has led to more funds, better facilities and higher status for the Islamic courts.

2.4.8 The amendment of the 1989 Islamic Judiciary Law

Article 13(1) and Article 14(1) in the 2004 Law on Judiciary stipulate that the provisions concerning the organization, administration and finances of each judicial sector under the Supreme Court shall be regulated by a separate law. Hence, in 2005 a drafting team was composed to amend the 1989 Islamic Judiciary Law. The team was chaired by Akil Mochtar, a prominent Golkar politician. The draft was presented to Parliament in February 2006 and on 22 March 2006, the President signed Law 3/2006 amending the 1989 Islamic Judiciary Law.[61]

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59 Personal communication with Wahyu Widiana, Director General of Badilag, 19-11-2009.

60 Personal communication with staff of the Islamic court of Cianjur, the Islamic court of Bulukumba, the Islamic high court of Makassar and the Director General of Badilag.

61 In 2009, law 7/1989 would be amended for a second time. Law 50/2009 mainly concerns internal (by the Supreme Court) and external (by the Judicial Commission) checks on the Islamic court and includes a dishonorable discharge sanction for personnel demanding unofficial fees. Moreover, to increase the access to justice, law 50/2009 stipulates that every Islamic court has to create a legal aid office within its building which provides legal information to court clients free of charge.

Most media attention centered on the Islamic courts' broadened jurisdiction, now including sharia economics (*ekonomi syariah*; Islamic banking, trading and such),[62] and the special position of the Acehnese Islamic court (*Mahkamah Syariyah*), which because of its competence in Islamic criminal matters (*jinayat*) falls partly under the jurisdiction of the general court. A team was formed in 2006, headed by Supreme Court judge Abdul Manan, who has a background as Islamic court judge, in order to compose a Compilation of Sharia Economic Law. This Compilation was introduced by Regulation of the Supreme Court 2/2008.

Besides sharia economics, Law 3/2006 adopted significant changes with regard to inheritance law, which passed almost unnoticed through Parliament.[63] As we have seen, the Law on the Islamic Judiciary included the possibility for litigants to choose whether they wanted an inheritance case settled according to Islamic or *adat* law. This provision caused a lack of procedural clarity when there was no agreement between the parties about which body of law should apply. For defendants, it offered opportunities to delay and frustrate the adjudication process. Matters were complicated even further by the stipulation in Article 50 that ownership disputes were to be decided by the general court first before a case could proceed to the Islamic courts.

Law 3/2006 intends to make the procedures clearer and favors the Islamic court. The General Elucidation to Law 3/2006 explicitly abolishes the phrase that allows the parties a choice of law, as it declares the Islamic court the single institution to hold jurisdiction in inheritance cases of Muslims. Furthermore, Article 50 has been amended and at present stipulates that the Islamic court is competent to settle property disputes among Muslims in divorce or inheritance cases. Therefore, these do not have to be referred to the general court first. The relatively smooth passing of the Law is remarkable, particularly in view of the strong opposition to the inheritance provisions proposed in 1989.[64]

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62 Recently, the 2009 amendment (48/2009) on the 2004 Law on Judicial Power has imposed an overlapping jurisdiction in sharia economics between the Islamic and general courts. The impact of this overlapping jurisdiction remains to be seen. The impact of the Islamic courts in this field is small anyhow, since according to official staticstics of *Badilag* very few *ekonomi syariah* cases are adjudicated by the Islamic courts. All Islamic courts together have adjudicated a single case in 2007, four cases in 2008, five cases in 2009, nine cases in 2010, five cases in 2011 and thirteen cases in 2012. Source: Badilag 2013, *Majalah Peradilan Agama*, Vol 2: 67.

63 An exception was the website www.hukumonline.com, which provides information for legal practitioners in Indonesia. Hukumonline, Klausul *'Pilihan Hukum' Waris dalam UU Peradilan Agama Bakal Dihapus* [The 'choice of law' clause in inheritance in the law on the Islamic Judiciary will be erased], 22 February 2006.

64 A possible explanation for the smooth passing of the amendments of 2006 is that the government of President Yudhoyono heavily relied on the Islamic political parties for support, whereas the PDI-P, the successor of the PDI, which together with the armed forces had led opposition against an Islamic inheritance law for Muslims, rejected to join a broad cabinet.

Another major reform is that Law 3/2006 for the first time provided the Islamic court competence to adjudicate cases involving non-Muslims. As many non-Muslims are involved in sharia economics and Islamic banking,[65] the Islamic courts' authority over Muslims was extended to 'those people who voluntarily have subjected themselves to Islamic law' (Article 49 and its elucidation). A new amendment in 2009 (Law 50/2009) lacks this additional phrase and has created confusion about whether sharia economics cases involving non-Muslims should be adjudicated by the Islamic court or not.[66]

On the whole, the Islamic courts' full jurisdiction in the fields of sharia economics and Muslim inheritance, is a continuation of the emancipation process that started with the 1989 Islamic Judiciary Law. For those supporting a more Islamic character of Indonesian national law this situation is applauded as a restoration of the rightful place of Islamic law. In the words of Supreme Court judge Abdul Manan:

> 'the Islamic community (*umat Islam*) had the opportunity to reclaim its jurisdiction that was brought to the fore by Van den Berg and his allies in the *receptio in complexu* theory: the laws that applies to Muslims are their religious law, specifically Islamic law, in the field of marriage, inheritance, *wakaf* and *sedekah*' (Manan 2008: 312).

2.5 Conclusion

This chapter described the development of the colonial and Indonesian policies towards the Islamic courts, which passed the subsequent stages of denial, tolerance, regulation, incorporation, limitation, persistence and emancipation.

65 Professor Eman Suparman of Padjadjaran University estimates that more than fifty percent of sharia economics is controlled by non-Muslims. See Hukumonline, 'UU Peradilan Agama yang Baru Kembali Persempit Subjek Hukum', 11 June 2010.

66 Hukumonline, 'UU Peradilan Agama yang Baru Kembali Persempit Subjek Hukum,' 11 June 2010.

Table 1: Stages of government policies regarding the Islamic courts

Denial	*Acceptance*	*Recognition*	*Incorporation*	*Limitation*	*Persistence*	*Emancipation*
VOC Instruction of 16 June 1625	Daendels Instruction of 1808	The 1820 Regents Regulation	The 1882 Priest Councils Regulation	1925 IS	The 1974 Marriage Law	The 1989 Islamic Judiciary Law
		S 1835/58		Case Law *1848-1926*		The 2006 Amendments on the 1989 Islamic Judiciary Law
		1954 RR		The 1931 *Penghulu* Courts Regulation		

I began my legal analysis in the year 1642, when the VOC first issued a regulation concerning Muslim marriage, divorce and inheritance for Muslims, marking the beginning of the development of a legal plural colonial legal system, partly based on Islamic law. Subsequently I have analyzed the continuities and changes in the regulations pertaining to the position of *penghulu* courts during the eras of the VOC (1609-1798), the Netherlands Indies (1798-1945), the Japanese period (1942-1945), the Old Order (1945-1967), the New Order (1967-1998) and the *Reformasi* (1998-2013)

I have demonstrated that the VOC and the Netherland Indies both considered Islamic law to be a legal source for adjudication in marriage, divorce and inheritance of Muslims. Both did not codify the substantive norms, and in both eras the *landraad* consulted the *penghulus* as local Muslim legal experts in these matters. The VOC had already laid the foundation for a unified – but plural – legal system, by having established courts for the indigenous population (*landraad*), a Court of Justice (*raad van justitie*) for the European population, which also were appellate courts for the *landraad*, and a Supreme Court (Hooge Raad).

An important change took place after the demise of the VOC in 1798: a gradual strengthening of control by the colonial state over the Islamic courts and their officials. In the early nineteenth century the Netherlands Indies became a colony of the Netherlands, which gradually attempted to establish its central authority – including its monopolies on violence, lawmaking and adjudication – over formally indirectly ruled territories. Within a century the Indonesian population was governed by a proto-constitution, numerous administrative laws and regulations, a criminal code and a Dutch civil code – the latter only partly applying to the indigenous citizens, as in most civil law issues they formally fell under their own religious and customary laws.

On Java and Madura, the colonial government incorporated Islamic courts into the unified court system. Formally speaking this incorporation happened

only in 1882, but in fact already in 1820. As a result, the procedures pertaining to the *penghulus*, the *penghulu* courts and their administration of justice were standardized, thus marking the start of processes of rationalization and bureaucratization. In such a plural legal system, legal issues inevitably arise concerning the relative jurisdiction between the different branches of the court system. Hence, ever since the issuance of S1820/22 and its recognition of the *penghulus'* adjudicative powers in Muslim family law and inheritance matters, jurisdictional tensions between the *penghulus* and the *landraad* existed, especially in cases involving property.

In this chapter I have suggested that case law from 1848-1926 of the regular colonial courts settled many jurisdictional issues in favor of the *landraad*, long before the 1931 Penghulu Courts Regulation, implemented by S 1937/136, formally granted the *landraad* jurisdiction in all property disputes. In the eyes of proponents of Islamic law this symbolized the subjugation of Islamic law to *adat* law. In fact, many judgments of the colonial courts on property issues even predate the rise of the *adat* law paradigm. This suggests that for the *landraad*, the choice of *adat* law was not exclusively ideological, but perhaps also the result of a sustained preference within the colonial court system to have such important legal issues handled by a court headed by Dutch judges.

The legal supremacy of *adat* law over Islamic law provoked protests from Muslim organizations, and as a consequence the Islamic courts acquired symbolic value as their bastion against secularization and *adat* rule. As a consequence, the Islamic court not only generated the support of Muslim organizations, but also, after independence, of the Ministry of Religious Affairs. This support proved essential for the Islamic courts' survival in the first decades after independence, when their very existence came under threat. The battle was finally won in 1974, when the 1973 Marriage Bill was rejected and the new Marriage Law created a substantive role for the Islamic courts.

In the late 1980s, the Islamic turn in Indonesian politics brought about a broadening of the Islamic courts' jurisdiction through the 1989 Islamic Judiciary Law. I agree with Cammack that the Islamic courts' emancipation cannot be solely explained in terms of Islamization of Indonesia, and that it just as much involved an Indonesianization of Islamic law, signaling that the state had finally managed to take control over the Islamic courts and substantive Muslim family law (Cammack 1997; Otto 2010: 479-481). Ever since, the Islamic courts have become more and more bureaucratized, modernized and modeled on the general courts. These processes have accelerated after the fall of Suharto in 1998, when the Islamic courts sector was placed under the Supreme Court, and became a target of modern management programs, including computerization and e-management, jointly organized by the Supreme Court and foreign donors (Lindsey & Sumner 2010).

I do not agree with Cammack, however, that those processes were the result of an alternative strategy of the Indonesian state to turn them into a Muslim variant of the general courts when their abolition proved infeasible (Cammack

2007). The Indonesian state, of course, is not monolithic. I have demonstrated that this modernization along the lines of the general courts was equally driven by proponents of Islamic law within the state apparatus, as a strategy to improve its position in Indonesia. The most notable among these were the Ministry of Religious Affairs and an Islamic faction within the Supreme Court.

Thus, I have argued that, much as in Malaysia, the political struggles between 'proponents and detractors of Islamic law are mollified by a course of innovation that is heavy on the convergence of legal systems' (Horowitz 1994: 576). As long as proponents of the Islamic court perceive the process of bureaucratization along the lines of the general court as constituting the modernization and upgrading of a consistently Islamic institution, actors within the Islamic court, the Ministry of Religious Affairs and Muslim organizations will support the convergence as part of a strategy 'to give Islam its rightful place in society.'

This also implies that a religious-based state institution can never completely achieve formal legal rationality, because the strong religious symbolism involved cannot be bypassed. As we will see in Chapters 3 and 4, this is especially true in the case of substantive Muslim family law.

3 The evolution of the judicial tradition of the *penghulus*

> 'A woman may at any time, when dissatisfied with her husband, demand a dissolution of the marriage contract by paying him a sum established by custom.' (Raffles, cited in Jones, G.W. 1994: 202)

> 'Where independent religious courts exist, however, these have the tendency to develop along the line of orthodox doctrine and to purify themselves from all adat flaws. Our interference in the religious administration of justice, which made them collegial and independent from the regents, without doubt had the effect, that these "priest councils" increasingly applied a purified Mohammedan law, which not necessarily leads to satisfactory or beneficial outcomes for the population concerned' (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 943).[1]

3.1 INTRODUCTION

In Chapter 2 we have seen how the jurisdiction of the Islamic courts in Indonesia is rooted in the pre-colonial *jaksa* and *surambi* courts on Java, which after they in 1882 were incorporated into the colonial state as so-called priest councils (*priesterraden*) and, in 1931, as *penghulu* courts (*penghoeloegerechten*), became subject to government regulations and case law of colonial courts. In this chapter we turn from the jurisdictional development of the Islamic courts to the substantive family law norms that the *penghulus* applied during the colonial era.

In this chapter I depict the continuities and changes regarding the application of substantive family law norms by the *penghulu* courts, and sketch the political debates regarding this issue as they took place in the Netherlands Indies. I do not treat the Japanese era (1942-1945) here because of a lack of literature about the influence of the Japanese government on substantive Muslim family law.

In this book I approach the development of substantive Islamic law in Indonesia as part of the development of a distinctive judicial tradition which the Indonesian Islamic courts inherited from the *jaksa, surambi* and *penghulu* courts (see 1.2.1). Through the analysis of the *penghulus'* interpretations of three

1 My own translation.

key legal concepts, namely *taklik al-talak*, *syiqaq* and *harta bersama*, I will show that the *penghulu* courts in their adjudication applied those norms in a lenient way – not necessarily in accordance with the traditional Islamic doctrine of the *syafi'ite maddhab*.

3.2 The development of substantive law in the *penghulu* courts on Java in the pre-colonial period

3.2.1 Family law in the Javanese Islamic courts prior to colonial interference

Before Islam made headway into Indonesia, the Indonesian archipelago saw the rise of two great Hindu-Buddhist Kingdoms, Sriwijaya (7th-13th century) and Majapahit (1292-1500). Their cultural and normative influences have been especially strong on the islands of Java and Bali. From the eleventh century onwards, a *sufi* form of Islam spread to Indonesia via the Indian traders of Gujarat, introducing *syafi'ite fiqh* first to what now is Aceh and later in the 15th century also to the Hindu-Buddhist centers in West and Central Java (Ricklefs 1991).

Under Sultan Agung of Mataram (1613-1645), who ruled over most of Java at the time the Dutch first arrived there, the *penghulus* were part of the ruling elite (*priyayi*) *as* chiefs of Islamic affairs in the districts of the Sultanates. One of the tasks of a *penghulu* was that of judge in Islamic law matters in the *surambi* courts (see 2.2.1). Hardly anything is known about the religious training of the pre-colonial *penghulus*. Before the eighteenth century, systematic religious education through *madrasah* and *pesantren* had not yet developed and the level of education of *penghulus* must have differed from place to place (Bruinessen 1994). However, we do know that during that time, the number of *fiqh* books a *penghulu* on Java would consult probably numbered only five or six *syafi'ite fiqh* books of the hundreds out of *fiqh* works of the *syafi'ite maddhab* (Hisyam 2001: 27-28).

The *penghulus* did not solely draw on *syafi'ite fiqh* books; Muslim family law in the administration of justice by the pre-colonial *penghulus* was a blend of written sultanic ordinances, *syafi'ite fiqh* and *adat* law (Hooker, M.B. 1984; Nakamura 2006). The *penghulus'* acceptance of certain *adat* norms certainly related to the religious practices of Javanese society at that time. Large parts of Javanese society practiced a syncretic form of Islam, a blend of Islamic norms and rituals with old Javanese and Hindu customs and beliefs (Geertz 1976). *Adat* is the unwritten custom of a given community, presumably governing all aspects of personal and public life from birth to death and beyond. Since sharia is also supposed to regulate private and public life, there inevitably is a substantial overlap between *adat* and sharia.

Additionally, sultanic ordinances regulated certain aspects of life on Java. As the *penghulus* were not only judges in the sultanate courts but also high-

ranking government officials, the position of the *penghulus* on Java depended considerably on their relation with the sultan. The sultans on Java had the power to promulgate ordinances – a practice which in the Muslim world had long been accepted as long as the ruler reserved an important place for divine law (An Na'im 2002). On Java the commonness of conditional divorce (*taklik al-talak*), which was stipulated in an ordinance of Sultan Agung, seems to be proof of a strong influence of sultanic ordinances in family law matters (Nakamura 2006). In contrast, until the second half of the eighteenth century the VOC did not interfere in the adjudication by the *penghulus.* As a result, Javanese Muslim family law would largely remain the traditional blend of *syafi'ite fiqh* rules contained in the *fiqh* books, regulations by the sultan and local *adat* practices (Berg 1892; Juynboll 1903; Vollenhoven 1928). In the sections below I will describe the components of this blend, starting with *syafi'ite fiqh.*

3.2.2 Divorce rights of Muslim women under *syafi'ite fiqh*

In order to be able to describe the special characteristics of Muslim family law norms applied in the administration of justice by the Javanese *penghulu*, I first have to provide a short summary of divorce rights according to the *syafi'ite fiqh*. *Syafi'ite fiqh* is the doctrine within the *syafi'i maddhab* and consists of the various opinions of the authoritative *ulamas*. *Fiqh* is equivocal in nature as authoritative opinions can differ substantially from one another. In this section I will not provide a comprehensive discussion of the different opinions of the authoritative *ulamas* concerning family law issues, I will suffice with a short selection of *syafi'ite fiqh* concerning divorce law, based on Indonesian handbooks concerning *fiqh* in family law matters (Syarifuddin 2006; As-Subki 2010). The selection of authoritative norms concerning divorce and post-divorce rights that I present in this section are those derived from the authoritative *kitab kuning*, the Javanese traditional canon of religious textbooks, including *fiqh* books on family law issues. Van Bruinessen has found that in the late sixteenth century a limited number of *syafi'ite fiqh* books were studied in Java, including those concerning family law (Bruinessen 1994: 13). Therefore, while admitting that not much is known about what law was applied in practice by the Islamic judges of that time, it seems likely that those *fiqh* family law norms were important sources for the pre-colonial *penghulus*.

In traditional *syafi'ite fiqh*, as in the other *maddhab*, men's and women's rights to divorce are not equal. A man has the absolute right to repudiate his wife through the pronunciation of the *talak*, without the obligation to provide grounds for the divorce. After the wife's three-months waiting period (*iddah*) has passed, the divorce will be irreversible (*ba'in*). When the husband has uttered the *talak* divorce for the first or second time during the marriage, he still has to provide maintenance (*nafkah*) and shelter for his wife during the

iddah in which she may not marry anyone else. During the *iddah* period the husband can take his wife back (*rujuk*), even if she does not agree.

If a husband pronounces the *talak* for the third time during the same marriage, the divorce immediately becomes final,[2] which means that he loses his right to continue the marriage (*rujuk*) during the *iddah* period that his former wife still has to observe in order to establish whether she is pregnant or not. As a consequence of the third *talak*'s finality, and provided his former wife is not pregnant of his child, the husband has no duty to provide maintenance for his wife during the *iddah* period. However, in all *talak* divorces the husband has to provide a consolation gift or *mut'ah.* Alternatively, the husband can divorce by *li'an*, a pledge before the judge in which the husband swears that his accusation of the adulterous behavior of his wife has been true. A *li'an* divorce is always final and does not require a *mut'ah* consolation gift.

Women have no right to repudiate under *syafi'ite fiqh*, but this does not mean that there are no divorce procedures available to them. In fact, under the *syafi'ite maddhab* women have relatively broad grounds to divorce compared to the *hanafi maddhab* (Mir-Hosseini 1996: 123). First, a judge can annul the marriage through a procedure called *fasakh*, based on witness evidence. Grounds for annulment of the marriage include impotence, or another incurable illness of the husband; the husband's adulterous behaviour (*zina*) or other forms of reprehensible behavior (*maksiat*); severe cruelty of the husband; or the husband's failure to provide maintenance in accordance with the standards of his wife's social status. Besides a *fasakh* divorce, a wife can negotiate a divorce with her husband through a procedure called *khul* or *khuluk.* In this procedure the wife offers her husband a part of her dower (*mahr*) in exchange for his pronunciation of the *talak*. Both *fasakh* and *khul* divorce are final, which means that the husband has no duty to provide maintenance during the wife's *iddah* period.

The post-divorce rights of a wife, besides those already described with regard to the *iddah* period, are as follows. After a divorce, the dower remains property of the wife except where the marriage has not been consummated. In that case, the wife must return half of the dower to her husband. All property brought into the marriage by the wife, including inheritances, remains hers upon divorce. Marriage does not generate communal property of husband and wife. Moreover, after a divorce the ex-father must provide child support for his children who reside with his ex-wife until they are independent (*balligh*). Opinions within *syafi'ite fiqh* differ regarding *balligh*, and applicable ages range from 5 to 12 years old. Only in the exceptional case of a child born after a *li'an* divorce would the ex-husband not be held responsible, as he has cut his bond with the child who is considered to have been born out of wedlock.

2 In Islamic legal terms a final divorce is referred to as *talak ba'in*, and a non-final divorce as *talak raj'i*.

3.2.3 Influences of sultanic ordinances on pre-colonial *penghulu* justice

According to Prins, Sultan Agung of Mataram (1613-1645) had institutionalized an ordinance providing a *third* procedure to facilitate women's divorce in pre-colonial Java, in addition to *fasakh* and *khuluk*: the *taklik al-talak* or conditional divorce (Prins 1951: 292; see also Nakamura 1983: 36-37, 2006: 13). *Taklik al-talak* refers to a set of provisions in the marriage contract which delegate the husband's power in *talak* to the wife. Van den Berg mentions abandonment of the wife for six months without a valid reason or a lack of maintenance as the conditions under which the wife could make use of this delegation of power. The husband had to pronounce the *taklik al-talak* during the marriage ceremony just after the marriage had been concluded. If the wife felt she had the right to and wished to divorce her husband, she could bring the case to the *penghulu*, who on the basis of witness testimonies would have to decide whether one of the stated conditions had been met, and, consequently, the *talak* had come into effect (Berg 1892: 485-486).

Indeed the *taklik al-talak* has been known and discussed by *ulamas* of all Islamic schools, including the *syafi'ite maddhab,* regarding the question of whether the husband may delegate his divorce right to his wife (*tawfid*) and what matters may be regulated in a marriage contract (Hak et al. 2012: 288). The general *syafi'ite* opinion is that a marriage contract may regulate all matters as long as it does not forbid things that are allowed (*halal*) nor stipulate things that are forbidden (*haram*) according to sharia (As-Subki 2010: 106). The reason I discuss *taklik al-talak* as part of the sultanic law is that on Java, unlike most Muslim areas in the world, it is likely to have became standard practice via a regulation by Sultan Agung, instructing *penghulus* to generally apply it in marriage ceremonies:

> [T]a'liq al-talaq was institutionalized as a product of *siyasa* (policy, administrative decision) by the ruler. In this format, the husband did not pronounce it by himself, but was guided by a deputy of the religious judge (*penghulu naib*) representing the sultan. The husband only gave his agreement to the latter's statement. It fell therefore in the category of *janji dalem* (royal promise), a contract between the ruler and the subject. This aspect seems to have been connected with the military duty (*wajib militer*) in the Mataram Sultanate. (Nakamura 2006: 13)

In fact, the conditions were restatements of some of the divorce grounds that already applied in *fasakh* divorce, and therefore *taklik al-talak* had a solid base in *fiqh.* I did not come across reliable sources that confirmed the common application of *taklik al-talak* in seventeenth century Java, but it seems likely that Sultan Agung's ordinance contributed to the prevalence of the practice in many parts of Java some two centuries later, as Van den Bergh observed (1892). The institutionalization of *taklik al-talak* on Java, and its practice elsewhere in Indonesia, meant that the husband uttered the conditions of the *taklik al-talak* (which were similar to the *fasakh* divorce grounds for women) in each

formal marriage ceremony concluded by a religious official under the *penghulu.* This must have significantly increased women's legal awareness about their divorce rights under *syafi'ite fiqh*.

3.2.4 Influences of *adat* on pre-colonial *penghulu* justice

In addition to *syafi'ite fiqh* and sultanic ordinances such as the *taklik al-talak*, *adat* was the third component of Muslim family law on Java. The most notable example of an *adat* norm recognized by the Javanese *penghulus* was the custom that property obtained during the marriage was joint property of both spouses (*harta gono-gini* or *harta bersama*). The standard recognition of joint marital property is unknown in *syafi'ite fiqh,* but was customary in nineteenth century Java. The custom is believed to be part of Javanese *adat* and was also adopted in ordinances of the pre-Islamic Javanese kingdoms (Berg 1892: 476-477; Vollenhoven 1928). The custom remained wide-spread on Java after the Islamization of the former Hindu Javanese kingdoms, since the Javanese *penghulus* sustained it in their judgments.

Thus, according to Javanese *adat* both spouses hold rights over the joint marital property. Upon divorce this property is divided among the spouses. The *penghulus* would divide the joint marital property either equally among the spouses or give the husband twice the share of his wife, depending on region or preference. Joint property rights thus did not automatically mean an equal division of joint marital property.

3.2.5 The pre-colonial *penghulus* as women's divorce rights providers

The cases above illustrate that a legal tradition had developed in the Javanese *penghulu* courts simultaneously based on and distinct from *syafi'ite fiqh*. The relatively strong position of Javanese women in *adat* was taken into account by the *penghulus* and Sultans of Java. In this way, *adat* norms and ordinances influenced the adjudication by the *penghulus*, who in the case of *taklik al-talak* stretched the parameters of *syafi'ite fiqh*, and in the case of joint marital property adopted an *adat* norm which was justified by reference made to *fiqh.*

Intentionally or unintentionally, as many *penghulus* were not well-trained in *fiqh* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 963-989), the *penghulus* developed a Muslim family law which was relatively liberal with regard to women's rights. The judgments of the *penghulus* were of great significance for the extent to which women could access their divorce and post-divorce rights. Men could divorce their wives without the interference of a *penghulu.* Women who wanted to divorce through a *khul* divorce still had to obtain the consent of their husband to pronounce the *talak.* If the husband refused they only had the option to divorce under *fasakh* and *taklik al-talak* and had to bring

their case to the *penghulu*. Muslim family law as applied by the pre-colonial *penghulus* was essential to both women's divorce rights and the development of a substantive Muslim family law.

3.3 Policies, debates and views about Muslim family law in the colonial period

3.3.1 Absence of colonial legislation on substantive Muslim family law

As we have seen in the previous chapter, Dutch formal legal interference with the Javanese *penghulus* only started with the issuance of the 1819 Regulation on the Administration of Justice in the Netherlands Indies, which gave *penghulu* courts jurisdiction in marriage, divorce, and inheritance and made the *penghulus* advisers to the *landraad* (see 2.2.3). S 1835/58, which stipulated that parties should submit requests to enforce *penghulu* court judgments to the *landraad*, had institutionalized the interaction between *penghulu* courts and the colonial legal system. The 1882 Priest Councils Regulation unified the *penghulu* courts and placed them under direct colonial administration.

Dutch control over the *penghulu* courts in the end greatly limited their jurisdiction. As appears from case law, the *landraad* and appellate courts primarily used their powers over the *penghulu* courts to settle the relative jurisdiction in their own favor by limiting the penghulu courts' jurisdiction to declaratory judgments only. In the second decade of the twentieth century, through the influence of the successive *adat* law scholars Snouck Hurgronje, Van Vollenhoven and Ter Haar, *adat* law became increasingly central to the Netherlands Indies' Islam policy. The 1931 Penghulu Courts regulation exemplifies this as it formally transferred jurisdiction in all inheritance and property cases (except maintenance) to the *landraad*, which had to apply *adat* law.

Another consequence of Dutch policy was that the *penghulu* courts were made formally independent from local rulers, which according to Van Vollenhoven constituted an unprecedented autonomy resulting in the creation of a completely new institution (1928: 564-565). I would not speak of a completely new institution but rather of new circumstances that were created for the judicial tradition, since the new institution was largely based on the *penghulus'* judicial tradition. The previous paragraph showed that in this tradition, despite that the *syafi'ite fiqh* was 'the primary legal source in marriage and divorce matters' (Prins 1954), the *penghulus* had incorporated *adat* norms and royal ordinances into their adjudication, making it distinct from fiqh. Moreover, in order to avoid conflict with the Muslim community, the colonial government never issued a regulation concerning substantive Muslim family law and thus intentionally continued the judicial tradition of the *penghulus*.

However, the actions and policies of colonial actors did excert some influence on the legal doctrine of the *penghulus*. This colonial influence has been threefold. First, in order to increase legal certainty, in 1754 Governor-General Mossel ordered that a compilation of Muslim family law be drawn up. In the drafting process of the 1760 Freijer Compilation (*Compendium Freijer*), VOC officials relied heavily on the opinions of local chiefs, *penghulus* and *ulamas* concerning Muslim family law. Its participatory drafting process, its substantive norms and its codebook form remarkably foreshadow the 1991 Compilation of Islamic Law. Secondly, colonial experts such as Van den Berg and Van Vollenhoven identified the 'idiosyncracies' within *syafi'ite fiqh* in the *penghulus'* adjudication in Muslim family law, categorizing them as *adat* rather than Muslim family law norms. Finally, the Dutch colonial government attempted to regulate Muslim marriage registration by requiring Javanese Muslims to register marriages and divorces.

3.3.2 The VOC and the compilations of Islamic law (1600-1798)

The *Compendium Freijer* was in fact not the first attempt to create a handbook of indigenous law. The *landraad* established by the VOC in the second half of the eighteenth century had to apply indigenous religious and customary norms in civil law matters concerning the indigenous population. As a consequence, the Dutch needed to compile applicable legal sources. The colonial government issued a number of such compilations, which were mostly based on sultanic ordinances. The *Mogharraer* Code issued in 1750, the Cirebon Code from around the same period, and a compilation of South Sulawesi *adat* law by Van Clootwijk, focused on penal law and contained little family law. Little is known about to what extent those compendia actually were applied in practice (Nurlaelawati 2010: 45). The *Compendium Freijer*, issued in 1760, was exceptional in that it concerned substantive family law and Muslim inheritance law (*faraid*), and in that it had been based on consultations with *penghulus* and *ulamas*. I treat it in some detail here because it can provide insights into the Muslim family law norms that were applied by the *penghulus* of that time.

The *Compendium Freijer* was structured like a legal code, consisting of chapters, articles and paragraphs. A number of these articles concerned the tasks of the *penghulus* (the term 'priest' (*priester*) is used) and are proof that by 1760 the VOC recognized that *penghulus* played an important role in indigenous justice, even if they were not formally recognized as advisers to the *landraad*, nor as full-fledged judges (see 2.2.3). Further proof of mutual influence between the legal system set up by the VOC and the *penghulus* is the fact that the *Compendium Freijer* was translated into Malay and circulated among the *penghulus,* who allegedly used it as legal source (Gobée 1884).

The text provides valuable insights into divorce norms applied by the colonial courts of that time. The articles about family law mostly concerned

divorce procedures, including the *fasakh* procedure[3] and the *khul* divorce. Remarkably, it included a divorce procedure based on continuous discord very similar to the *syiqaq* procedure, a Muslim procedure which according to Lev was introduced in the 1930s (1972: 169-174). Considering that the *Compendium Freijer* had largely been compiled based on information provided by *penghulus* and *ulamas*, its inclusion indicates that the *syiqaq* procedure was already known and applied by *penghulus* on Java before 1760.[4] The procedure resembling *syiqaq* was implicit in Articles 80-84. A wife could ask for a *penghulu*'s intervention on the grounds of continuous discord. The *penghulu* could subsequently order the spouses to live in separation, during which representatives (*hakam*) from both families would try to reconcile the couple.[5] If such attempts failed, the husband or the *penghulu* could divorce the couple.

The *syiqaq* procedure is part of *syafi'ite fiqh* and based on the Qur'an,[6] but authoritative *ulama*s' opinions differ on whether the advice of two *hakam* can be considered an order to the spouses to divorce, let alone stand as legitimate grounds for judicial divorce when the husband does not agree to pronounce the *talak* himself (As-Subki 2010: 328-329). In contrast, the *Compendium Freijer* indicates that the Javanese *ulamas* and *penghulus* of the mid-1750s typically interpreted *syiqaq* to be a procedure that can result in a judicial divorce by the *penghulu*. This is remarkable, given that the Association of *Penghulus* and their Staff (PPDP)[7] made *syiqaq* officially applicable as judicial divorce in the *penghulu* courts only in 1938. In 1972 Lev characterized this as a recent development considerably increasing women's rights in divorce (Lev 1972:170). It now appears likely that *syiqaq* had been applied as a judicial divorce procedure by the Javanese *penghulus* some 178 years before. As a consequence I would rather view the PPDP's step as the unification and standardization of a traditionally lenient interpretation of *syiqaq* by *penghulus*. As we will see, in the nineteenth century Van den Berg also gave an account of such a lenient application of *syiqaq* by the *penghulus*, which supports this view.[8]

Absent from the *Compendium Freijer* are references to the practices of *taklik al-talak* and joint marital property. This is rather surprising, given that the accounts of Van den Berg, Snouck Hurgronje and Van Vollenhoven demonstrate that the Javanese *penghulus* of the nineteenth and twentieth century

3 The term *fasakh* is not used in the text of the *Compendium Freijer*, but the description of the procedure matches *fasakh*.

4 To date, very little is known about the content of the judgments by the *penghulu* courts, neither those in the Javanese Sultanates nor the unified *penghulu* courts under S 1882/152.

5 Article 82 speaks of '*commandanten*' or superiors. The term used in *fiqh* is '*hakam*' most commonly translated as 'mediator.'

6 Surah An-Nisa (4): 35.

7 *Perhimpunan Penghoeloe dan Pegawainya*. See 2.2.7.

8 A possible explanation for the PPDP's step is that from the 1920s onwards, the lenient application of *syiqaq* came under fire by reformist *ulamas*, necessitating a general stance of *penghulus* on the matter. However, I cannot substantiate this hypothesis.

generally applied those legal concepts. Possibly, the *ulamas* who were consulted rejected these concepts as contrary to *syafi'ite fiqh* during the drafting process. Another possibility is that Dutch Islamic law experts rejected the concepts. Van den Berg, for instance, also considered the application of *adat* norms in *penghulus'* judgments to be 'anomalies' to Islamic doctrine, but permissible so long as the Javanese had not fully received Islamic law.

3.3.3 Van den Berg's 'anomalies' (1892) as part of the Javanese *penghulu* courts' tradition

In 1798 the VOC went bankrupt and the Dutch government decided to take over the administration of its territories. As we have seen in Chapter 2, the colonial government set up a legal system for the Netherlands Indies (1819), introducing a proto-constitution (1855) and making the Dutch criminal code applicable to the indigenous population (1873). The chief *penghulus* were made advisers of the *landraad* (1819) and the *penghulu* courts were gradually formally recognized as part of the colonial legal system. This recognition of the *penghulu* courts also meant a limitation of their jurisdiction, including their dependence on the *landraad* to enforce their judgments (1835). The 1882 Priest Councils Regulation unified the *penghulu* courts under the administration of the colonial government. With regard to substantive law, the Dutch did not interfere, but Dutch scholars like Van den Berg, Snouck Hurgronje, and Van Vollenhoven acted as advisers on Islamic matters to the Dutch government and monitored the development of Islamic law in the archipelago.

In the nineteenth century, academics like Van Nes (1850), Keijzer (1853) and Meurenge (1884) published works about Islamic law in Indonesia. The common trait of their works is that they supposed a full applicability of Islamic legal doctrine to the Muslim population of Java. In their conception, which has become known as the *receptio in complexu* theory, a person on Java who considered himself to be Muslim implicitly subjugated himself to this doctrine. They considered practices which were not found in the *syafi'ite fiqh* books as anomalies.

The best-known proponent of the *receptio in complexu* theory was L.W.C. van den Berg, an Islamic law professor who had been appointed by the colonial government as the first Official for the Practice of 'Netherlands Indian' Languages and Adviser for Eastern (*Oostersche*) Languages and Muslim Law (1878-1891) and in this position had been responsible for drafting the 1882 Priest Councils Regulation. In 1892, Van den Berg published the article 'the anomalies within Muhammedan family and inheritance law on Java and Madura' (*De afwijkingen van het Mohammedaansche familie- en erfrecht op Java en Madoera*). Like his predecessors, Van den Berg considered that all Muslims on Java by pronouncing the *shahada* had accepted sharia as the ultimate legal source and therefore he considered *adat* norms to be anomalies. However, if

one reads his work carefully, it seems he held a much more nuanced view of the legal implications of taking *reception in complexu* as a starting point, more so than the well-known criticisms of his argument by Snouck Hurgronje would suggest (e.g. Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-934; see also 3.3.3 below).

Van den Berg's article was based on his own field research in Java in the years 1884-1886 during which he visited Javanese *penghulus, ulamas* and *kyais* and, additionally, built on accounts by Dutch observers of Javanese customs such as C.F. Winter, G.A. Wilken, P.J. Veth and others. Surprisingly for an alleged supporter of the *reception in complexu* theory, he very much recognized the role of *adat* law in Javanese family law matters. In 1882 he had already written that on Java the 'customary law (*adat,* Arab *adat*) in this country has a position which one will not find in other Muslim countries' and that sharia predominates only in family and inheritance law (Berg 1882: 12-13). In his article concerning the anomalies to Islamic law, Van den Berg compared the Dutch accounts of Javanese marriage and divorce practices with his interpretation of *syafi'ite fiqh* norms. Van den Berg distinguished seventeen *fiqh* books that were used as legal sources by *penghulus.* The comparison of the Javanese practices with the *syafi'ite fiqh* revealed the 'anomalies' in these practices. Three main 'anomalies' Van den Berg found concerned the *taklik al-talak*, *syiqaq* and joint marital property.

Van den Berg considered the *taklik al-talak* procedure to be *adat* law rather than Islamic doctrine, even if *penghulus* on Java generally recognized it in their judgments. Without denying the lawfulness of the practice, Van den Berg himself did not much value the *taklik al-talak* contract, because of its similarity with the *fasakh* grounds for a marriage annulment in *syafi'ite fiqh*. He found a clear correlation between the number of *fasakh* and *taklik al-talak* divorce suits registered in the Islamic courts: in the areas on Java where *taklik al-talak* was widely practiced it formed the main part of the Islamic courts' case load, whereas in areas where *taklik al-talak* was less common, the main case load of the Islamic courts consisted of *fasakh* divorce cases (Berg 1892: 486-487).

A second 'anomaly' described by Van den Berg was the *syiqaq* divorce procedure, based on continuous discord. According to Van den Berg the *syiqaq* procedure was commonly practiced at that time. He mentioned two varieties of *syiqaq*: first, the case in which the *penghulus* took part in the whole *syiqaq* process, including their efforts to reconcile the couple and in case of failure their subsequent divorce of the couple; second, the case in which reconciliation was left to both families of the spouses, after which if reconciliation failed divorce depended on the willingness of the husband to pronounce the *talak*. As we have seen, the second case represents the most established interpretation of *syafi'ite fiqh.* Nonetheless, the apparent commonness of the first variety of *syiqaq* in nineteenth century Java suggests that the *penghulus* of that time were lenient in interpreting such *fiqh* norms.

Joint marital property is the third 'anomaly' Van den Berg describes. He observed that in most areas on Java, all property acquired by both spouses during their marriage was considered to be jointly owned. In addition to this joint marital property, both spouses continued to individually own the property they brought into the marriage. He explained that on Java a marriage was a partnership or in Arabic a *sharikah*, in which an increase of property was seen to be the reward of the work of both spouses. Van den Berg argued that the Javanese Islamic courts as a rule recognized the *adat* norms concerning marital property. In their judgments the *penghulus* divided marital property of the husband and wife on a 2 : 1 ratio based on the inheritance provisions in the Qur'an (Berg 1892: 475-476).

As mentioned earlier, other than what the concept of *reception in complexu* and the term "anomalies" might suggest, Van den Berg very much recognized the lawfulness of the application of *adat* norms by the *penghulus*. Van den Berg's nuanced view becomes even more evident in his interpretation of Article 75 of the 1854 RR, which stipulated that the Islamic courts' jurisdiction consisted of 'those civil disputes, which according to their religious laws or customs should be decided by their priests.' According to Van den Berg, the *penghulus* did not have to apply doctrinal Islamic law, but:

> 'Muhammedan law, so far as it has penetrated into the legal consciousness of the population, [...].' '[...] therefore the judge should consider the mentioned anomalies, in so far as they indeed are part of customary law, and not the result of individual arbitrariness or ignorance.' (Berg 1892: 454)

Van den Berg's anomalies reveal continuity in the Islamic courts' application of substantive divorce norms in Indonesia. *Taklik al-talak*, joint marital property and *syiqaq* are customary norms that were long applied by Javanese *penghulus*. The Dutch have had some influence on the development of a distinctive substantive Muslim family law within the Islamic court tradition, by subsequently listing the anomalies within Islamic doctrine, describing their general application by the *penghulu* courts, and offering formal legal legitimacy for that application.

3.3.4 Snouck Hurgronje's influence on the *penghulus*

By the end of the nineteenth century, Van den Berg received severe criticism from Christiaan Snouck Hurgronje, the famous Islamic law scholar who formulated the reception theory and is considered the 'founder' of *adat* law scholarship. In 1884, even before he went to the Netherlands Indies, Snouck Hurgronje published the article 'L.W.C. van den Berg's practicing of Islamic law' in which he questioned Van den Berg's knowledge of *syafi'ite fiqh* and Arabic, pointed out flaws in his interpretations, and challenged the *fiqh* books

he had used as legal sources for his handbook on Islamic doctrine (Snouck Hurgronje 1884).[9] After he had succeeded Van den Berg as adviser on Arabic and Islamic law in the Netherlands Indies in 1889, Snouck Hurgronje continued to criticize his predecessor in his *Ambtelijke Adviezen* (official advices). This time, his criticism was not limited to Van den Berg's knowledge of *fiqh*, but also concerned his ideas about the position of the *penghulus* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-934). Snouck Hurgronje listed five flaws in Van den Berg's ideas concerning priest councils.[10]

Although a thorough analysis of Snouck Hurgronje's advices concerning the *penghulu* courts (See Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 916-1018) is beyond the scope of this research, I do discuss them here as it is likely that they have influenced the *penghulus'* adjudication of that time. In this respect, it is important to note that Snouck Hurgronje could call for disciplinary measures against *penghulus* in cases where someone had filed an official complaint against a *penghulu's* judgment and that he did process such complaints.[11] His opinions could have a real impact on the career of *penghulus*, because he advised the Governor-General and *residenten* in matters pertaining to the *penghulus*' promotion and demotion. As I have done in the case of Van den Berg, I will focus on Snouck Hurgronje's opinions regarding *taklik al-talak*, *syiqaq* and *harta bersama*.

Taklik al-talak is described in Snouck Hurgronje's book *De Atjehers* (1893-1894) as a practice which is very common in many parts of Indonesia. Snouck Hurgronje disagrees with Van den Berg in that he considered the conditions in *taklik al-talak* not to be similar to *fasakh* divorce. Snouck Hurgronje argued that in Islamic doctrine *fasakh* grounds are very limited and apply to exceptional cases only. According to Snouck Hurgronje, the outward similarities between the two procedures on Java were a consequence of the *penghulus*' lenient interpretation of *fasakh* and pertained mainly to cases in which the *taklik al-talak* had not been pronounced during the marriage. According to Snouck

9 It concerned the handbook Berg, L. W. C. van den. 1878. *De beginselen van het Mohammedaansche recht*. Batavia: Ernst & Co. Snouck Hurgronje criticized among others Van den Berg's use of the term 'anomaly' as he argued that all over the Muslim world *adat* is a recognized legal source.

10 First, the term 'priest' was inaccurate since there is no priesthood in Islam. Secondly, priest councils were not responsible for administrating mosques, concluding marriages, or collecting *zakat* taxes, since those tasks were performed by *penghulu* with different specializations. Thirdly, priest councils traditionally were not councils, but consisted of a single *penghulu* judge assisted by a number of other clerks and Islamic scholars, and thus the three-headed judge stipulated in S 1882/152 was neither in accordance with Islamic doctrine nor, and fourthly, would it lead to a more independent administration of justice as Van den Berg had claimed. Finally, S 1882/152 had not improved the workings of the priest councils as they were allegedly still characterized by dependency on informal fees (which led to corruption) and incompetence as regards *syafi'ite fiqh* (which led to legal uncertainty).

11 A number of official opinions concerning such complaints are included in Ambtelijke *Adviezen van C*, Snouck Hurgronje 1889-1936.

Hurgronje, the *penghulus*' lenient interpretation constituted an anomalous application of a clear *fiqh* norm, and therefore should not become standard practice in the Netherlands Indies (Snouck Hurgronje, G 1957-1965: 973-974). Rather surprising for the founding father of the *adat* law school, Snouck Hurgronje's opinions concerning application of *fasakh* here were prescriptive rather than descriptive. An interpretation more in line with the reception theory would be that the the *fasakh* procedure had become lenient after its reception into Javanese *adat*.

With regard to syiqaq, Snouck Hurgronje's opinion was also prescriptive. Snouck Hurgronje considered that according to Islamic law the Islamic judge has no power to divorce spouses in a *syiqaq* procedure in case the spouses' representatives had failed to reconcile them. In his opinion, divorce in a *syiqaq* divorce depended fully on the husband's willingness to either pronounce the *talak* or authorize a representative to arrange a *khul* divorce and pronounce the *talak* in his name. Moreover, in Snouck Hurgronje's view the *syiqaq* was no alternative for the *taklik al-talak* because he considered few people in the Netherlands Indies to meet the strict requirements prescribed by the *syafi'ite fiqh* in order to be eligible to become a representative in a *syiqaq* divorce (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 974-975). Again, this shows that according to Snouck Hurgronje the *syiqaq* norms in *syafi'ite fiqh* books held primacy over their traditional application by *penghulus*.

Third, with regard to joint marital property, Snouck Hurgronje observed that the *penghulus* generally recognized the *adat* practice. However in his advice to the Governor-General of 6 October 1900, he argued that after a divorce the division between husband and wife of the property should not necessarily be based on a 2 : 1 ratio or a 1 : 1 ratio, but that divisions based on an estimation of both spouses' contributions to their income were also possible. Moreover, Snouck Hurgronje stressed that *adat* was not fixed but changed over time, and that as the result of processes of Islamization in some areas joint marital property had even ceased to exist (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 1001-1002). Thus, Snouck Hurgronje refused to standardize marital property, even on Java, making it a right not only dependent on the *adat* of a certain locality and time, but also on the private context, thus effectively undermining the predictability of court judgments.[12]

12 Van Vollenhoven, like Van den Berg, considered joint marital property to be a local customary practice and as such part of *adat* rather than *fiqh* since the practice could not be found in the Arabic *fiqh* sources. According to Van Vollenhoven, the Islamic term '*sharikah*' was an invention designed to legitimize the *adat* practice religiously: 'when he [the Javanese *penghulu*] felt the need to reconcile it [the custom of joint marital property] with Muslim laws, than he would presuppose – as likewise in Aceh, Minangkabau or elsewhere – a partnership, *sarikat* or *sirkat*, contracted between the husband and the wife' (Van Vollenhoven 1928: 584). Contrary to Snouck Hurgronje, Van Vollenhoven claimed that *penghulu* courts in Central Java would generally divide the joint marital property on a 1 : 1 ratio, and less frequently on a 2 : 1 ratio, depending on the region or even locality (Van Vollen-

A fundamental and reoccurring inconsistency in Snouck Hurgronje's opinions has become visible. On the one hand, he considered the colonial 'creation' of priest councils a mistake, for which he blamed Van den Berg, and he preferred the *adat* applying *landraad* as the single court for the indigenous population. He complained that the unification of *penghulu* courts on Java had established a distinctly Islamic judicial institution which increasingly distanced itself from *adat* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 943).

On the other hand, his opinions with regard to the content of judgments of *penghulus* reveal a prescriptive and puritan stance on Muslim family law issues. Snouck Hurgronje's official advices challenged the *penghulus'* traditional lenient interpretations of *syiqaq* and *fasakh* and were more in line with the ideas of contemporary *ulamas* (Snouck Hurgronje, Gobée & Adriaanse 1957-1965: 970-977).[13] Thus, Snouck Hurgronje, the renowned *adat* law scholar, actually promoted Islamic law at the expense of traditional practice, whereas Van den Berg tended to recognize the judicial tradition of the *penghulus*.

Van den Berg's and Snouck Hurgronje's calls to improve the colonial government officials' knowledge of Islam led to a training program for colonial officials which, according to Laffan, 'naturally leant towards the same scripturalist approach of the *Kaum Muda*', the latter term referring to the 'young believers' or Muslim reformists (Laffan 2003: 173-174). In the end the official advices of these antagonists both reflected the development within the judicial tradition of the *penghulu* courts: one that was moving towards a stricter 'scripturalism' in marriage and divorce procedures, whilst respecting *adat* law in other, especially property, matters.

3.3.5 Normative debates on Muslim family law in the early twentieth century

In the first decades of the twentieth century, other members of the so-called *adat* 'law school', such as Van Vollenhoven, Ter Haar and Holleman, even more fiercely defended the reception theory and promoted an *adat*-centered policy for the indigenous population of the Netherlands Indies. This second and third generation of *adat* law scholars lacked Snouck Hurgronje's strong interest in *syafi'ite fiqh* and Muslim family law, and had an anthropological interest in *adat* with a strong focus on land rights. Based on '*adat* mapping' by their Indonesian students, they divided the Netherlands Indies into nineteen *adat* law areas, 'each defined usually by the relative mixture of kinship and territoriality used to create social units – clan, villages, clan-villages, and so forth' (Bowen 2003: 47).

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hoven 1928: 584).

13 Snouck Hurgronje indeed had sympathy for the reformist Muslim movement, as he observed that compared to the *ulama* in Indonesia, those in Turkey, Egypt and Syria had made significant adaptations to modern times (Laffan 2003: 186).

Accordingly, in their works on *adat* law, they treated matters of Islamic justice and Islamic law (which were more universal in character and thus not signifiers of difference) only as a smaller sub-category of *adat*. Furthermore, while Snouck Hurgronje accounted for the flexibility of *adat* in family law matters, which could mean that local instances of Islamization had to be recognized by the *penghulu* courts or *landraad* as a consequence of a reception into *adat*, Van Vollenhoven viewed the stronger penetration of Islam in Indonesian society as an outside threat to *adat* and the interests of the indigenous population of the Netherlands Indies (Vollenhoven 1931: 70).[14]

Concurrently, under the influence of the emergence and growth of reformist Islam in the Muslim world, Muslim organizations such as *Sarekat Islam* (1911), *Muhammadiyah* (1912) and *Persatuan Islam* (1923) were established in Indonesia. The rise of reformist Muslim organizations was countered by 'traditionalist' organization *Nahdlatul Ulama* (1926), which represented the *ulamas* who adhered to *syafi'ite fiqh* doctrines more strictly. The growing influence of a reformist Islamic discourse challenged the authority of *adat* institutions and *adat* norms in marriage and divorce matters, as well as the authority of *adat* leaders in the outer Islands at a time when the *adat* law school had just gained the upper hand in the colonial policies of the Netherlands Indies. With regard to Muslim family law this was reflected in Article 134(2) of the *Indische Staatsregeling*, which made the legal applicability of Islamic law norms formally dependent on their reception into the local *adat*.[15] There was little room for the aspirations of this growing Muslim reformist influence in the ideas of *adat* law scholars, since they continued to focus on the traditional power and kinship relationships in the regions (Prins 1951; Otto 2010: 441).

Challenging the official *adat* policy, Muslim reformists in many areas outside Java established new Islamic courts, arguing that Islamic judges ought to decide on Muslim family law and inheritance matters. New Islamic courts outside Java, however, were not recognized by the colonial government, nor were most of the established ones. Formally this was as that they had not traditionally been part of *adat* (Velde 1928), but more likely the policy arose due to a preference for a non-Islamic administration of justice in the outer islands as also appears from the advices of Snouck Hurgronje. In this administration of justice, minor cases were tried by *adat* courts presided over by local *adat* elites loyal to the colonial government, and other cases by the *landraad.* In order to maintain an *adat*-based indirect rule by loyal traditional elites, the colonial government hoped to prevent the strengthening of Muslim political movements that could challenge (and in Aceh and Minangkabau indeed had challenged) traditional rule.[16]

14 See section 2.2.6.
15 See section 2.2.6.
16 The South Sulawesi case is discussed in Chapter 6.

The attraction of reformist Islamic discourse was its relatively individualistic character as compared to *adat.* Prins has described how young couples in several areas outside Java had been tried before the *adat* court because they had transgressed *adat* prohibitions on in-clan marriage. They unsuccessfully defended themselves using Islamic norms concerning permissible marriages. On the other side of the spectrum, local pro-*adat* counter-movements sprang up in defense of *adat,* which posed the argument that women were better off under the *adat* norms of the community concerned (1954: 73-76).

Lively debates about the position of women in the Netherlands Indies took place among the different ethnic and religious groups: the *priyayi* elites, members of the nobility who ruled on the basis of their traditional position in *adat*, but who also included *penghulus* who were appointed based on their knowledge of *syafi'ite fiqh*; the representatives of the mostly urban-based reformist Muslim organizations, who challenged the legitimacy of *adat*-based rule; representatives of the Javanese and rural based traditionalist *ulamas*; and European and indigenous social-democratic, Protestant and Catholic representatives. One of the pressing issues concerned family law and women's rights in marriage and divorce (Prins 1951; Blackburn & Bessel 1997).

3.3.6 The 1938 women's congress' agenda on Muslim family law reforms

Under the influence of the ethical policy first formulated by the Dutch government in 1901, the discourses of the colonial government, media and the public were increasingly concerned with the fate of the population of the Netherlands Indies (Blackburn 2004: 17). A decade after the ethical turn women's rights organizations appeared as new and important players in the political arena, and women's rights in marriage and divorce became another issue in those debates. In 1912 the first Javanese women's organization was founded. *Putri Mardika* consisted of *priyayi* women and took up issues like forced marriage, child marriage and polygamy. Many women's organizations followed in the years to come. Most were branches of, or affiliated to, the emerging political and religious organizations of that time. The ideological differences often proved irreconcilable among women affiliated to this variety of organizations: Muslim, Christian and the Catholic organizations; the secular nationalist PNI; and the communist PKI, to name a few. For instance, whereas some feminist organizations were in favor of far-reaching family law reforms, the *Muhammadiyah*-affiliated *Aisyiyah* declared that it would only support those reforms that remained within the limits of Islamic law (Blackburn 2004: 17-21; see also Robinson 2008).

In 1937, the colonial government proposed a reform that proved to be highly controversial. If the Bill had been passed, it would have offered the legal option, though not the obligation, for all citizens of the Netherlands Indies, including Muslims, to conclude a civil marriage. Thus, couples from

any religious background would have the option of marrying at the civil registry, thus sidelining registration by the *penghulus* – or registering an existing marriage under the provisions of the Bill. As we will see below some of these provisions were clearly at odds with traditional *syafi'ite fiqh* norms.

According to Van Wichelen (2010: 73), one of the main intentions of the Bill was to protect European women in mixed marriages from certain 'uneuropean' norms. Its provisions were based on the Civil Code,[17] which since 1848 had applied to Europeans in the Netherlands Indies. After registering the marriage at the civil registry, both spouses were considered to have agreed on a monogamous marriage, which could only be ended through a divorce before the *landraad*, based on one of eight divorce grounds: adultery; abandonment; incarceration for two years or more; violence that inflicted severe injury; a mental or physical condition which disabled the execution of marital duties; two months of insufficient maintenance; continuous strife; and finally, polygamy. After divorce the judge could oblige the husband to pay spousal alimony until his ex-wife remarried or died.

As the Bill could also apply to marriages among Indonesian Muslims who voluntarily subjugated themselves to its provisions, all Muslim organizations opposed the Bill. In the end the government of the Netherlands Indies withdrew it. According to Prins the Bill was controversial because Muslim organizations opposed the very idea that the substance of sharia law could be regulated by national legislation (Prins 1951: 293-294). In my view, however, a more plausible explanation for their opposition was that in their eyes the provisions of the Bill challenged traditional Islamic norms. As would become clear in the upcoming years, substantive Muslim family law reforms could be acceptable to the reformist organizations, even the traditionalist *Nahdlatul Ulama*, if they were based on respect for and built upon norms that were part of the Islamic tradition, including the judicial tradition within the *penghulu* courts (see Chapter 4). This marriage Bill was primarily based on *adat* law and Dutch civil law and hence integrated what the *ulamas* perceived to be two major threats to Muslim family law.

The 1937 Bill controversy proved that it was not easy to find common ground in family law matters. Nonetheless, during the Indonesian Women's Congress of 1938, Maria Ulfah Santoso, a nationalist and one of the first Indonesian women lawyers with a degree from a Dutch university, successfully set an agenda for Muslim Marriage law reform that was accepted by all organizations. The agenda made the following recommendations: (1) before a husband could repudiate his wife, the couple had to appear before the *penghulu*, who would attempt to reconcile them; (2) the *penghulu* court could annul a *talak* divorce which was not brought before a *penghulu* for reconciliation; (3) during the marriage ceremony the Muslim marriage registrar had

17 S 1847/23.

to explain the implications of the *taklik al-talak*; and (4) the *taklik al-talak* had to become a comprehensive basis for divorce for women and should include 'insurmountable disagreement between the parties' (Robinson 2008: 45-46). The acceptance of an agenda for Muslim marriage law reform in 1938 by the Muslim women's organization *Aisyiyah*[18] was a first indication that reforms, such as the limitation of the male *talak* right, could be accepted by mainstream Muslim reformist organizations, even if such reforms had no clear base in the Qur'an and Sunna.

The 1938 Women's Congress' reform agenda tested the limits of traditional Muslim marriage law, especially the provision that sought to limit the absolute *talak* rights of the husband under *syafi'ite fiqh*. The proposed obligatory reconciliation effort would effectively turn the male right of *talak* into a *syiqaq*-like procedure. Proposing standard inclusion of continuous discord as one of the conditions in the *taklik al-talak* proves that the women's organizations considered the current divorce rights under *taklik al-talak* and *syiqaq* not comprehensive enough for women to escape unhappy marriages.

In the late 1930s, the political atmosphere proved to be conducive to progressive reforms. In 1938, the congress of the Association of *Penghulus* and their Staff (PPDP; see section 2.2.6) had reaffirmed the applicability of the lenient interpretation of *syiqaq* in the *penghulu* courts, meaning that continuous strife could be grounds for a judicial divorce by the *penghulu* courts. In a decision of 1938 the newly established Islamic High Court (in 1937; see section 2.2.6) followed and recognized *syiqaq* divorce based on irreconcilable differences.[19] This meant a return to the *penghulus'* traditionally lenient application of the *syiqaq* procedure adopted in *Compendium Freijer* of 1760, and had been described by Van den Berg in the 1880s.

With regard to *taklik al-talak*, however, the Islamic high court issued rather conservative decisions. For example, in two cases it judged that *taklik al-talak* divorce should not be granted when the wife had been disobedient (*nusyuz*) by leaving the husband's house, even if a condition in the *taklik al-talak* had been met.[20] Possibly, the urgency of the inclusion of continuous marital strife

18 *Aisyiyah* was affiliated to the reformist Muslim organization *Muhammadiyah* and generally followed the opinions of its male leadership. Since the *taklik al-talak* and *syiqaq* provisions were controversial from a *syafi'ite fiqh* point of view, they initially were less acceptable to traditionalist *ulamas* of the *Nahdlatul Ullama.*

19 In a judgment the Islamic high court gave a husband the opportunity to divorce his wife. If he refused, the court would declare the divorce itself. A year later the same court divorced the couple. Decisions of the Islamic high court of 24 October 1938b and 12 January 1939. Source: Tan (1976).

20 Decisions of the Islamic high court of 24 October 1938a and 30 March 1939. The Islamic high court decided that since the *taklik al-talak* did not include a statement that the conditions would also apply in case the wife had been disobedient (*nusyuz*), the divorce request could not be sustained. On the other hand it ruled in a case of 20 April 1939 that a wife was not *nusyuz* if she refused to live in one house with her mother-in-law. Source: Tan (1976).

as a condition in the *taklik al-talak* was due to this and similar judgments of the *penghulu* courts.

3.4 Conclusion

In this chapter I have sketched the characteristics of the substantive norms that the *penghulu* courts applied in their adjudication, the debates surrounding those Muslim family law norms, and the political landscape in which those debates took place. I have made three major observations.

First, the perspective of a *penghulu* judicial tradition proved to be a useful analytical tool to place the legal changes and continuities regarding substantive Muslim family law in their right historical and political context. I have demonstrated that in the pre-colonial Sultanates the Javanese *penghulus* applied a blend of *fiqh* norms, norms derived from *adat* and sultanic ordinances. My main argument is that this traditional adjudication in family law matters developed into a distinctive judicial tradition, which, much more than changes in the methods and substance of *fiqh* interpretations by the Indonesian *ulama*, facilitated substantive legal changes in Muslim family law. If one compares present-day divorce rights of women with the traditionally lenient interpretations of *taklik al-talak, syiqaq*, *khul* and *fasakh* and the *penghulu*'s application of state law and *adat* norms in Van den Berg's nineteenth (and probably even Freijer's eighteenth) century, one is struck by how many of those traditional norms are still applied by the Islamic judges today.

Secondly, I have shown how the Women's Congress of 1938 developed an abstract model for Muslim family law reform in Indonesia. In this model, practices that are based in the 'traditional' judicial practice of the Javanese *penghulu* courts rather than in *syafi'ite fiqh,* such as a lenient interpretation of *syiqaq* and *taklik al-talak*, are restated and standardized. Moreover, Islamic norms, such as the *talak*, can be reformed by first adopting them and subsequently adjusting their meaning by making them conditional to other legal provisions. An example of such technique in the Women's Congress agenda was the provision which made the *talak* conditional to a compulsary reconciliation attempt. As we will see in the next chapter, the New Order regime ultimately would resort to ta similar model in an attempt to generate sufficient support from Muslim organizations for its agenda to establish a national and Indonesian Muslim family law.

Thirdly, this chapter has shown continuity in the judicial practice within the *penghulu* courts, in spite of the changes in government policies and discourses. In the colonial period, a major discourse shift took place in the political debates about Muslim family law. The old paradigm centered on the opposition between a lenient application and a strict doctrinal application of Muslim family law norms. This paradigm dominated the debates about family law before the time of Snouck Hurgronje, which was characterized by the increas-

ing influence of reformist Islam and the newly (in 1910s-1920s) established Muslim organizations *Sarekat Islam, Muhammadiyah* and NU. In this paradigm, lenient administration of justice by *penghulus* was the subject of criticism by the traditionalist NU and the reformist *Muhammadiyah*, which both preferred a more strict application (of their concept) of Islamic law.

By the early 1930s, under influence of the *adat* law scholars Van Vollenhoven and Ter Haar, the paradigm was replaced by an *adat*-Islam opposition. The 1931 *Penghulu* Courts Regulation, of which Ter Haar had been one of the drafters, limited the jurisdiction of the *penghulu* courts and brought inheritance and property issues, formally under the authority of the *landraad* and under the legal regime of *adat.* As reflected in the debates surrounding the 1937 Civil Marriage Bill, the debates about family law reforms between the colonial government officials, secular-minded *priyayi,* socialists, women's organizations and Muslim organizations, developed into a new discourse shift, centering around the secular family law versus Muslim family law opposition. As this new discourse posed a real threat to Muslim family law, it created a stalemate, rendering any reforms impossible until the year 1974 when the Marriage Law would be adopted.

The two discourse shifts finally united the *ulamas* and *penghulus,* who increasingly stood side-by-side to defend the judicial tradition of the *penghulus* against the threats of an *adat* and civil law-based family law. As I will show in the next chapter this support from Muslim organizations and *ulamas* would finally result in the adoption of the 1991 Compilation of Islamic Law, which was presented as the consensus (*ijma*) of the Indonesian *ulamas* and an innovative Indonesian *fiqh*, but which in fact reflected the *ulamas'* acceptance of the continuation of the judicial tradition of the Indonesian Islamic courts.

4 The development of an Indonesian Muslim family law after independence

> 'Whatever the reasons may have been, family law remained the primary aspect of Shari' a that successfully resisted displacement by European codes during the colonial period, and survived and outlasted various degrees or forms of secularization of the state and its institutions in a number of Islamic countries, As such IFL [Islamic Family Law] has become for most Muslims the symbol of their Islamic identity, the hard irreducible core of what it means to be a Muslim.' (An Na'im 2002: 9)

4.1 Introduction

In this chapter we turn to the development of Muslim family law after the proclamation of independence in 1945. In Chapter 3 we have seen how in the Indonesian Islamic courts a judicial tradition developed which in addition to norms derived from the Islamic tradition adopted *adat* and norms of other origin. In this chapter I will describe how this judicial tradition developed into Indonesian Muslim family law when the legislator codified it. I argue that in order to render reforms legitimate the legislator had to build on and remain within certain boundaries of the existing judicial tradition within the Islamic courts.

This focus on Muslim family law in Indonesia as result of the Islamic courts' judicial tradition which the Indonesian legislator continued and reformed, differs from Hooker's *fiqh*-centered concept of an Indonesian *maddhab* or Islamic school of law (Hooker, M.B. 2003; Hooker, M.B. and Lindsey 2002). Islamic doctrine (*fiqh* is typically developed by *ulamas*) within a *maddhab*, not judges or legislators. Hooker has demonstrated that a distinctive Indonesian school becomes visible when the *fatwas* (legal opinions) of the twentieth century *ulamas* are placed within the great Islamic legal tradition: a creative scholasticism that allows for 'adaptation of classic scholasticism' (Hooker, M.B. 2003: 45). I will demonstrate that rather than being developed by *ulamas*, Indonesian Muslim family law has much more been the result of a double movement: on the one hand the continuation of a judicial tradition developed by Islamic courts' judges, and, on the other hand, a process of reforms that were the result of deliberations within the legislative about the modern family.

4.2 Marriage law reforms after independence

The Japanese invasion of the Netherlands Indies in 1942, brought the agenda of Muslim family law reform to a standstill (see 3.3.6). However, in 1946, only a year after the end of the Japanese occupation (1942-1945) and the proclamation of independence on 17 August 1945, the first Indonesian Women's Congress took place. The independence war (1945-1949) was still raging, and in the interest of unity in the independence struggle against the Dutch, the women's organizations decided to put Muslim family law reform on hold.

After the Dutch official transfer of independence in 1950, marriage law reform was once again on the political agenda, but since the religious and political organizations had become rival political parties in the young republic, the ideological differences between the Muslim and non-Muslim parties reemerged. The secular and socialist parties preferred a unified and general administration of justice in Indonesia, whereas the Muslim parties wanted to retain Islamic courts applying Muslim family law for Muslims. As a consequence, the factions in parliament each drafted their own Bill instead of seeking consensus. Under the influence of secular and socialist parties, the debates shifted from whether the character of Muslim family law ought to be traditionalist or reformist to whether Indonesian family law ought to be Muslim at all.

As we will see, in this polarized political situation the Ministry of Religious Affairs appeared as an important player and platform for Muslim organizations to promote their ideas about Muslim family law reform. Moreover, as the traditionalist *Nahdlatul Ulama* (NU) became a political party in 1952, its policies were increasingly formulated by NU-politicians rather than the old-school *ulamas* (Feillard 1999), which made the NU more amenable to Muslim family law reforms.

4.2.1 The Ministry of Religious Affairs and family law reform

As we have seen in Chapter 2, the Ministry of Religious Affairs was established in 1946 to appease Muslim organizations disappointed with the removal of the Jakarta Charter from the Constitution. In the same year, the Ministry was granted administrative control over the *penghulu* courts on Java and *qadi* courts in South Kalimantan, and started to supervise their judgments. As a bastion of traditionalist *Nahdlatul Ulama* supporters, the Ministry was well-rooted in the *syafi'ite* Islamic tradition and one might expect that this traditionalism would be reflected in its policies (Lev 1972: 50-53) However, it effectively started to initiate small scale reforms, which indicates that limited reform was acceptable to the members of the Muslim organizations it sheltered.

A first reform was the issuance of Law 22/1946 on the registration of marriage, *talak* and *rujuk* on Java and Madura, which resulted in an enormous

expansion of the Ministry and enabled it to place a significant number of local *ulamas* and other religious actors under its wings. In the Netherlands Indies Muslim divorce and marriage registration on Java had already been regulated by the 1895 Regulation on Muslim Marriage and Divorce[1] and the 1929 Marriage Ordinance,[2] and Law 22/1946 was a substantive continuation of these colonial regulations. The main difference was the centralization of Muslim marriage and divorce registration, as the Offices for Religious Affairs (*Kantor Urusan Agama*; KUA), responsible in each sub-district for marriage and divorce registration, were placed under the Ministry's centralized control (Huis & Wirastri 2012). As a result of its new powers, the Ministry became simultaneously 'a battleground for Islamic groups' and a 'shelter for a large number of Islamic politicians', mainly from the NU (Lev 1972: 52).

The Ministry in the 1950s introduced a number of small but important regulations to unify the application of substantive Muslim family law norms throughout Indonesia. First, Decree 4/1952 introduced the institution of the *wali hakim* outside Java, a procedure in which an Islamic court judge acts as the wife's custodian in marriage when no other legal custodian is available. Second, Decree 15/1955 stipulated the inclusion of the *taklik al-talak* procedure (see 3.2.3) in all standard Muslim marriage contracts of the Ministry. Four grounds for a wife to divorce her husband were standardized throughout Indonesia: desertion by the husband for six consecutive months; poor maintenance by the husband for three consecutive months; physical abuse by the husband; and neglect of the wife by the husband for six consecutive months. Third, by Circular Letter B/1/735 1958, 13 *shafi'ite fiqh* books were declared the standard legal sources to be applied in the Islamic courts. The three regulations show that the Ministry built on the former Javanese *penghulu* courts to unify the Islamic courts and their legal sources.

The Ministry also introduced the *taklik al-talak* throughout Indonesia, including in regions where this was not necessarily part of the local *adat*. This unification was a break with the former *adat* policy. The support for a wide application of *taklik al-talak* reflected the attitude of NU-affiliated officials within the Directorate of Religious Justice (*Badan Peradilan Agama,* Badilag) of the Ministry, which 'tend[ed] to be far more open even to what seems to be radical change' than the *ulamas* of the NU had been before (Lev 1972: 139). Badilag's relative progressiveness was apparent in the appointment of fifteen female honorary judges and one fully-fledged judge, the first of whom was appointed in 1957. These were the first female Islamic judges in the Muslim world. The Ministry legitimized this step on grounds of emergency caused by a lack of qualified judges. A number of *ulamas* and judges at the Islamic courts protested the move, as they considered female judges to be contrary to *syafi'ite fiqh*, but to no avail (Lev 1972: 110).

1 S 1895/198.
2 S 1929/348.

In 1958 Badilag submitted a Muslim Marriage Bill to parliament which was mostly based on Islamic marriage and divorce norms in the judicial tradition of the Javanese *penghulus*, but which also included a number of reforms resembling those put forward in the agenda of family law reform of 1938. First of all, the *talak* divorce right of the husband was made conditional to six divorce grounds. These were: adultery (*zina*); disobedience (*nusyuz*); alcoholism, gambling, or addiction of the wife; the wife suffers from amnesia; the wife's imprisonment for two years or more; and other strong reasons why the wife would not be able to keep an organized household with her husband (Hanstein 2002: 206-207). Secondly, the husband needed his wife's consent if he wanted to take her back (*rujuk*) during the waiting period (*iddah*). Thirdly, the wife and husband had the option to make an agreement stating that the husband would not enter a polygamous marriage. Fourthly, the division of joint marital property was to be based on the contribution of each spouse, rather than the 2 : 1 ratio.

Perhaps remarkably, the draft was well-received by the Muslim parties. Opposition to the Muslim Marriage Bill from the nationalist and socialist parties, which supported a national Marriage Bill they were preparing themselves, was the reason that these far-reaching reforms did not gain sufficient support (Hanstein 2002: 210). Nonetheless, the proposed reforms illustrate what kind of family law reforms the Ministry had in mind. The draft was temporarily shelved and its revision appeared three years later.

In 1961, a very similar Muslim Marriage Bill was submitted to Parliament by the Ministry of Religious Affairs. The same Maria Ulfah Santosa, who had prepared an agenda of family law reforms in the Indonesian Women's Congress of 1938 (see 3.3.6) was a member of the drafting team. The main changes as compared to the Muslim Marriage Bill of 1958 were that the 1961 Bill adopted the registration requirement in Law 22/1946, stipulating that all marriage, divorce and *rujuk* decisions had to be registered at the KUA. Moreover, polygamy would require 'a compelling reason' and the first wife's permission and all disputes concerning marriage and divorce would have to be brought before the Islamic court unless stated otherwise in the law.

Considering the ties that the Ministry of Religious Affairs had with the main Muslim political parties, there was a considerable chance they would have accepted the 1961 Bill, including restrictions on the traditional male rights of *talak* and polygamy. This means that in the 1950s all parties, Muslim and non-Muslim, agreed that family law reforms were necessary, but that the political situation was such that a large secular nationalist and communist faction in parliament favored a secular-based marriage law, which was unacceptable to Muslim parties. Ironically, by rejecting reforms within an Islamic framework, the secular factions halted any reforms from taking place. It was not until 1974 that family law reforms very similar to the 1961 Bill were finally introduced into the Marriage Law.

4.2.2 The 1974 Marriage Law

As mentioned in Chapter 2, the Ministry of Justice drafted the Marriage Bill of 1973, which if passed by Parliament would have more fundamentally unified and secularized Indonesian family law. In the end it was rigorously revised due to opposition from Muslim organizations. The end result, the 1974 Marriage Law,[3] is still in force today. It is not a Muslim marriage law, but a national and plural marriage law, meaning that different legal regimes apply to persons of different religious backgrounds. It contains general provisions applying to all religious groups, some of which are at variance with *syafi'ite fiqh*, but which – as we will see – remained within the boundaries of the Muslim reform agenda adopted by the Ministry of Religious Affairs in the 1950s. Because a radical unification and secularization of marriage law proved impossible, the reforms that were retained built on the judicial tradition within the Islamic courts, as successor of the Javanese *penghulu* courts.

Hence, to appease Muslim opposition, the most controversial articles of the 1973 Bill were removed (Katz & Katz 1975). The provision concerning interreligious marriage was omitted, and the administrative requirement of the registration of a marriage was made conditional to the religious requirement to marry according to the religion of the spouses. As we have seen, this registration requirement is a continuation of colonial regulations and Law 22/1946 (Huis & Wirastri 2012; Bedner & Huis 2010). Nonetheless, marriage remained primarily a religious act without the legal possibility of a purely civil marriage. Another important continuity is that the Islamic court, rather than the civil court as stipulated in the 1973 Bill, held jurisdiction in matters of Muslim marriage and divorce, including polygamous marriages.

The 1974 Marriage Law included both reforms and codification of the Islamic courts' judicial tradition. A first set of reforms aimed at reducing instances of both child and non-consensual marriages. Before the Marriage Law, a Muslim girl in Indonesia could be married off without her consent by her custodian (*wali*), usually the father, or if he was unavailable another male relative from her father's side. Such arranged marriages were common and, like child marriages, permitted under *syafi'ite fiqh* and recognized by the Islamic courts. The 1974 Marriage Law stipulates that marriage is based on the consent of both parties (Article 6(1)) with the intention to create a happy family (General Elucidation). Moreover, it establishes the minimum age for marriage at 16 for women and 19 for men (Article 7(1)).

A second set of reforms concern grounds for divorce. The introduction of judicial divorce and divorce grounds for men mainly aimed at decreasing the instances of *talak* divorces in order to combat the high divorce rates in Indonesia (Prins 1954). By the 1960s these had reached 40 percent on Java

3 Law 1/1974.

(Jones, G.W. 2001). Such high divorce rates were typically blamed on men, as the vast majority of divorces were male *talak* registered in the KUA offices, whereas a relatively small number concerned judicial divorces by an Islamic court judge. However, as Nakamura demonstrated in research at KUA registers in Yogyakarta prior to 1974, it is likely that more than half the registered *talak divorces* concerned divorces to which the wife had stated her consent or even had been the petitioner (Nakamura 1984). One must realize that the *taklik al-talak* divorce was commonly petitioned by the wife, but registered as a 'male' *talak* divorce.

The 1974 Marriage Law restricts the *talak* rights of men and stipulates that both husband and wife must petition the court for a divorce (Article 39(1)) and both are required to provide sufficient grounds (Article 39(2)). These grounds are listed in the General Elucidation to the Marriage Law later laid down in Article 19 of Government Regulation 9/1975 on the Implementation of the Marriage Law (1975 Government Regulation). They comprise the following: a. one of the spouses commits adultery, or becomes a drunk, addict, gambler or something similar; b. one of the spouses leaves the other party for more than two years, without consent of the spouse and without valid reason; c. one of the spouses is imprisoned for five years or more; d. one of the spouses inflicts severe violence which is life-threatening to the other spouse; e. one of the spouses suffers from a handicap or disease such that he or she cannot fulfill his or her marital duties; and finally; f. continuous discord between the spouses.

Although the divorce grounds constituted a radical reform of the previous absolute male *talak* right, it was acceptable to the Muslim organizations at that time simply because the husband's *talak* pronunciation was still required to effectuate the divorce, and in the words of Mark Cammack:

> '[…] because the statutory rules are viewed as 'administrative' regulations addressed to controlling events rather than meanings, they represent a legitimate exercise of the government's *siyasa* power to prescribe regulations for the administration of *hukum* [law]' (Cammack 1989: 62).

Thus, the divorce grounds were presented as mere administrative regulations, similar to the registration requirement of marriage and divorce, not as secularizing the act of *talak* itself. Moreover, the men's divorce grounds were very similar to those proposed in the Muslim Marriage Bills of 1958 and 1961 drafted by the *Nahdlatul Ulama* and *Muhammadiyah* dominated Ministry of Religious Affairs.

Women's divorce rights in the 1974 Marriage Law were substantively very similar to those that had developed within the judicial tradition of the Javanese Islamic courts. As mentioned in the previous chapter, the *penghulus'* lenient interpretations of *fasakh, taklik al-talak* and *syiqaq* in practice provided relatively broad divorce grounds for women and the more conservative interpretations

had been side-lined by the standardization of a judicial *syiqaq* divorce by the PPDP in 1938, as well as by the standard inclusion of *taklik al-talak* in the marriage contract by the Ministry of Religious Affairs in 1955. Moreover, the 1974 Marriage Law treats consensual divorces the same as non-consensual divorces in requiring that one of the formal divorce grounds is met, limiting both men's and women's possibilities to divorce. Women also lost the opportunity to negotiate a consensual and relatively uncomplicated out-of-court *talak* divorce with their husband, as for each case the Islamic court judge had to establish that a divorce ground of the Marriage Law had been met. In Chapter 9, I will provide an analysis of case law of the Islamic courts on this matter.

A third set of reforms concerned restrictions on men's rights to polygamy, an issue that had typically divided women's organizations in the colonial period. The Muslim Marriage Bill of 1961 drafted by Ministry of Religion already indicated a more reform-minded attitude from the Muslim organizations and included restrictions on polygamy that were very similar to those in the 1974 Marriage Law. According to the Marriage Law, marriage is basically a monogamous institution (Article 3). Polygamous marriage requires prior permission of the Islamic court which may only allow it when the following conditions are met: the wife cannot carry out her conjugal duties; she has become crippled or terminally ill; or she is infertile. In order to obtain the permission of the Islamic court the husband must provide evidence of the first (and second or third) wife's consent to the marriage, sufficient means to support all his wives, and a statement that he will treat all his wives and their children fairly (Article 4-5). Thus, the Marriage Law finally settled the polygamy debate through a similar technique as it used to reform the *talak*: continuing the practice while introducing strict administrative requirements.

Along with these substantive reforms, the 1974 Marriage Law instigated legal changes through codification of the judicial practice within the Islamic courts. This codification process was a next step in the development of an Indonesian Muslim family law. The first example concerns child support. In the *penghulu* courts child support was hardly ever claimed and enforced (Snouck Hurgronje, Gobeé & Adriaanse 1957-1965: 857-915), even if the duty of the father to support his children is a clear *syafi'ite fiqh* norm. According to the 1974 Marriage Law, the father is obliged to support his children financially until they are legal adults or married, irrespective of who holds custody.

Through codification, the traditional right to child support was restated, probably with the intention to stimulate the use of this right, but also to settle the debate about the duration of such child support obligations in order to create more legal certainty. According to the most established interpretation in *syafi'ite fiqh*, childhood ends when a girl has her first menstruation and a boy his first semen discharge. The Marriage Law brought this in line with the age of legal adulthood in the Civil Code and puts an obligation on the father to provide support until the child is 21 years old or gets married. Unfortunate-

ly, as we will see in Chapter 6 and Chapter 8, legislation alone is not enough to stimulate a better implementation of child support rights.

The 1974 Marriage Law does not explicitly recognize spousal support as a general post-divorce right for women. Post-divorce spousal support rights were traditionally neither recognized by the administration of justice in the *penghulu* court nor in *syafi'ite fiqh*, which holds that the wife's right to maintenance ends after the divorce has become final. Unsurprisingly, the provision concerning spousal support in the Marriage Law is very ambiguously worded, stating that the court can order maintenance (*biaya penghidupan*) or other legal action from the husband towards his former wife, as well as an act of the wife towards her former husband. As we will see, the Islamic courts of Cianjur and Bulukumba do not recognize spousal support outside the three months waiting period (*iddah*) as a post-divorce right in their judgments, as this is not considered to be part of Muslim family law.

A second codification of Muslim family law norms concerned the inclusion of joint marital property into the 1974 Marriage Law. As described earlier, joint marital property was well-rooted in Javanese *adat*. As we have seen in the accounts of Van den Berg and Snouck Hurgronje, the *penghulu* courts generally recognized the concept of joint marital property, but had to base their judgements on local *adat* concerning the question of whether a 2 : 1 or a 1 : 1 ratio applied. In a case that originated in the general court, a Supreme Court judgment of 1956[4] declared that the concept of joint marital property was applicable throughout Indonesia, and that throughout Indonesia a 1 : 1 ratio applied for dividing joint marital property among the spouses (Katz & Katz 1975: 679). The 1974 Marriage Law followed this Supreme Court judgment and stipulates an equal division of joint property between husband and wife.

In summary, some 'reforms' in the Marriage Law can actually be regarded as a codification and thus a continuation of norms traditionally applied by Islamic court judges. However, like all codification processes, it included a selection and restatement of those norms as well as a synchronization process to make the Marriage Law compatible with other laws, such as the Civil Code. Thus codification made significant legal change possible within a traditional paradigm and without changing the essence of the traditional norms. Some reforms went beyond such standard processes of codification and needed a different approach. The reform of *talak* divorce and the polygamy restrictions are illustrative of a rule production technique similar to the one employed in the family law reform agenda of 1938: an unambiguous Islamic norm is formally and symbolically preserved, but made conditional to other provisions to such an extent that a completely new legal situation is created.

In this way, the legal changes with regard to *talak* and polygamy could be presented to conservative Muslims as being in accordance with Islamic law,

4 Supreme Court judgment 51/K/Sip/1956 of 7 November 1956.

and even as a concession by secular-oriented lawmakers to Muslim organizations (see Cammack 1989: 62-63). It is important to note that, as the Muslim Marriage Bills illustrate, prior to 1973 the Ministry of Religious Affairs had already been inclined to reform, which meant that within the *Nahdlatul Ulama* there were voices in support for changes that can be considered far-reaching from the perspective of traditional *syafi'ite fiqh*.

Moreover, to render both reforms legitimate in Islamic terms, the lawmakers built on the judicial tradition within the Islamic courts in general, and three of its characteristics in particular: a lenient application of *syafi'ite fiqh* divorce norms, the recognition of certain *adat* norms, and the application of administrative and procedural regulations of the government concerning marriage, divorce and the judicial process itself. The drafters of the 1974 Marriage Law adopted these three characteristics and stretched them to the very limit.

4.2.3 Case law concerning Marriage Law provisions

Although the focus here is on Muslim family law, we must bear in mind that the 1974 Marriage Law is a law for Indonesians of all religious affiliations, and is pluralistic in nature. Its provisions apply to different legal regimes and therefore often lack legal specificity. Supreme Court judgments[5] play therefore an important role in generating a minimal amount of legal certainty – even in a country in which judges often consider themselves unbound by precedent, hence contributing to legal uncertainty (see Pompe 2005: 425-470). For instance, with regard to relative jurisdiction, in 1979 the Supreme Court ruled in two separate cases[6] that in the absence of presidential implementation of regulations concerning spousal or child support, child custody or division of marital property, such matters remained under the jurisdiction of the regular courts (Cammack 1989: 66).

I will briefly discuss three examples of how, after the 1974 Marriage Law came into force, the Supreme Court's case law has or has not been decisive in creating more consistency in substantive family law matters: first, the issue of *taklik al-talak*; second, the issue of interreligious marriage; and third, the issue of the lawfulness of unregistered Muslim marriages. Of course, since the Marriage Law came into force the Supreme Court has issued many more judgments concerning substantive family law issues (see Bowen 2003 and 2000; Cammack 2007; 1989; Nurlaelawati 2010), and I will discuss a number of recent

5 As we have seen in Chapter 2, in 1970 the Islamic court was formally brought under the aegis of the Supreme Court and from 1978 onwards the Supreme Court took up the task of deciding appeals in cassation.

6 Supreme Court judgments 1/K/Ag/1979 and 14/K/Ag/1979.

cases in Chapter 8. I discuss these three issues here to illustrate how the Islamic courts are influenced by the other branches of Indonesia's legal system.

One of the first cases[7] taken up by the the Supreme Court after it obtained cassation powers over Islamic courts' judgments (see 2.4.2) concerned the conflicting norms of the two year desertion divorce ground adopted in the 1974 Marriage Law and the six-month desertion condition of the in 1955 standardized *taklik al-talak* formula in the marriage certificates of the Ministry of Religious Affairs. The Supreme Court argued that the 1974 Marriage Law provision had invalidated the six-month desertion condition in the *taklik al-talak* – even when the couple had been married on those terms. This judgment is dubious at best, as the 1974 Marriage Law neither formally abolished existing nor regulated new *taklik al-talak* procedures, meaning that its conditions should still have been lawful at that time. In reaction to this decision, the Ministry of Religious Affairs decided to change the standard *taklik al-talak* accordingly, by adopting the two-year desertion condition (Cammack 1989: 74-75).

A second issue was the absence of a stipulation concerning interreligious marriage in the 1974 Marriage Law. Article 66 provides that preceding legislation still applies in all matters not regulated by the Marriage Law, which in case of interreligious marriages should formally mean that the relevant provisions of the 1886 Mixed Marriage Ordinance[8] remained in force. In 1979, the Supreme Court decided a case[9] accordingly, and argued that the interreligious marriage concerned was legally valid. In the following years, however, after in 1980 the Indonesian *Ulama* Council issued a *fatwa* that declared interreligious marriages *haram*, nearly all Muslim marriage registrars halted the registration of interreligious marriages. The only options left to those who wanted to marry interreligiously were civil marriage or marriage abroad. In 1987 the Ministers of the Interior, Justice and Religious Affairs decided in a working meeting that civil marriages were no longer to be concluded by the civil registry (Pompe 1988: 272). As a result, only a minority of marriage registrars were still willing to register interreligious marriages. Clearly the political sensitivity of the issue meant that the Supreme Court judgment was not followed (Otto and Pompe 1990; Pompe 1988). After the 1991 Compilation of Islamic Law prohibited interreligious marriages for Muslims, it became even more complicated for Muslims to marry interreligiously, even if there were still a small number of authorized officials willing to register them (Butt 1999).

A third issue concerned the marriage registration requirement in the 1974 Marriage Law. Article 2(1) stipulates that 'a marriage is valid if concluded according to the religious requirements of the spouses.' The subsequent Article 2(2) imposes the obligation to register the marriage according to the current legislation. The relation between the two stipulations has generated a debate

7 Supreme Court judgment 13/K/Ag/1979.
8 S 1886/98-158
9 Supreme Court judgment 1650/K/Sip/1974 of 13 September 1979.

centering on the following question: is the registration clause a secondary requirement to make a marriage lawful, or is it a separate and purely administrative obligation? In fact, this was an old question that reappeared after the Marriage Law came into force. Under the previous legal regime, the Islamic High Court had argued in 1963 that the registration requirement in Law 22/1946 had no consequences for the lawfulness of an unregistered marriage, on the condition that it was concluded according to the religious requirements (Tan 1976).

Several scholars have pointed at the Supreme Court's inconsistent judgments regarding the marriage registration requirement (Bowen 2003; Butt 1999). In my view, however, the Supreme Court judgments they have analyzed are simply not apt to research the issue. Bowen has looked at complex criminal cases in which the Supreme Court judge had to weigh three norms: criminal provisions concerning legal barriers to a marriage in the Criminal Code, the validity of an unregistered marriage, and the polygamy restrictions of the 1974 Marriage Law. It is important to note that Islamic courts have no jurisdiction in criminal matters and that the polygamy cases originated in the general courts. It follows that these cases concern polygamous marriages which were reported to the police, after which the prosecutor pressed criminal charges.

The first case is Supreme Court judgment 2147/K/Pid/1988, decided in 1991, in which a man married a second wife without asking his first wife's permission (Bowen 2003: 184). The first marriage had been registered, whilst the second marriage had been concluded according to the religious requirements but remained unregistered. The first wife reported the case to the police. The prosecutor pressed charges based on Article 279 of the Criminal Code which stipulates that anyone entering a new marriage whilst an existing marriage constitutes a legal obstacle to it shall be punished with a maximum of five years imprisonment. The Supreme Court found the husband guilty based on the following legal justifications: first, the husband should have known that the second polygamous marriage required the permission of an Islamic court, and second, the fact that the marriage had not been registered did not mean that no marriage had been concluded. In short, the Supreme Court viewed the second, unregistered marriage as a new marriage in the sense of Article 279.

O'Shaughnessy argues that in this case 'the issue at stake for the court was not so much the legality of what constituted a valid marriage, as the symbolic significance of citizens who failed to conform to the state's ideological prescriptions' (O'Shaughnessy 2009: 68). In other words, the Supreme Court punished the intention to circumvent the stipulations of the 1974 Marriage Law. I agree with O'Shaughnessy that the Supreme Court wanted to uphold the state's ideological prescriptions, but disagree that the validity question was secondary to the symbolic value of the punishment. After all, it was a criminal case in which the Supreme Court had to establish whether the defendant *in a specific case* had committed a criminal act under Article 279 of

the Criminal Code. The two issues at stake were, first, whether a lawful first marriage existed which formed a legal barrier to a second marriage and, second, whether a second marriage in the sense of *Article 279* had been concluded. Because there was convincing legal proof of the first marriage in the form of a marriage certificate, the whole case evolved around the Supreme Court's interpretation of *a marriage in the sense of Article 279.*

It is likely that in this specific case the Supreme Court considered the confession of the defendant that he had married religiously without registering it to be sufficient proof of such a marriage in the sense of Article 279. One must realize that the Supreme Court only verified whether the application of the law of the first-instance general court in the criminal case had been correct. Hence, the husband was incarcerated because the Supreme Court considered that the first instance general court had provided sufficient reasons to justify that the act of marrying for a second time constituted a criminal act and was thus illegal. Since the general court had no jurisdiction over civil Muslim family matters, it established neither that the marriage had been lawful, nor valid. Such questions are part of the Islamic courts' jurisdiction.

In the second case, decided in 1993, the Supreme Court argued that the unregistered marriage could not be considered lawful because it lacked a marriage certificate as legal proof.[10] Bowen claimed that this second case 'presented precisely the same set of facts as the first case' (Bowen 2003: 184), but in fact there is an essential difference between the two. Contrary to the first case, here it was the second marriage that was registered and the first marriage that was not. Thus, while sufficient legal proof had been provided for the defendant's marriage, the prosecutor built a case based on a first marriage, whose status was unclear. In this case, the act of marrying alone was considered insufficient to constitute a legal barrier to a new marriage – the current status of the marriage had to be proven first, as its validity was uncertain. It is likely that the Supreme Court also took into consideration that the prosecutor, before pressing criminal charges, could have advised the first wife to establish the status of the first marriage beforehand through a civil procedure at the Islamic court.

In short, the two cases are fundamentally different. In the first case the act of marrying for a second time is a criminal offence as it did not take account of the provisions of the 1974 Marriage Law, whereas in the second case the act of marrying alone is not a legal barrier: it only becomes one when the first marriage has ongoing civil law consequences. In the first case current validity and lawfulness of the marriage do not matter, whereas in the second case they are essential.

This automatically brings us to the next point: in my view the cases that Bowen analyzed are too complex and dissimilar to draw any conclusions about

10 Bowen states that this case originated from a lower court in Aceh in 1990, but he does not provide a case number.

the validity of unregistered Muslim marriages in general. By contrast, these cases are very useful in analyzing the Supreme Court's stance on the validity of *polygamous* unregistered marriages between Muslims. Elsewhere, I have discussed a recent Supreme Court judgment[11] in the light of Bowen's analyses and have formulated two hypotheses (Huis & Wirastri 2012). First, unregistered polygamous marriages are not regarded as valid by the Supreme Court, since they lack the legally required court permission. Second, the non-recognition of an informal polygamous marriage still makes the deliberate intention to enter an unregistered marital union in order to circumvent the legal barriers to an official polygamous marriage a criminal offence. Article 279 of the Criminal Code still applies (Huis & Wirastri 2012: 14).

With regard to the Islamic courts' general stance on unregistered marriages, I believe it makes more sense to look at uncomplicated cases than at those very specific and complex cases that involve polygamy and criminal charges. Today, the large number of marriage registration (*isbath nikah*) requests approved by the Islamic courts every year indicate that an unregistered marriage is still considered valid when the marriage is concluded according to religious requirements (Huis & Wirastri 2012; Nurlaelawati 2010; Bedner & Huis 2010). As a result of an *isbath nikah* judgment, the marriage can be registered on the date that it actually took place, *not* the date of the court's judgment. This is important for the legal status of children and other legal consequences resulting from the marriage.

It is also vital to look at the Islamic courts' treatment of unregistered marriages in marriage annulment cases on the ground of informal polygamy. Article 24 of the Marriage Law clearly offers women the legal possibility to annul their husband's second marriage: 'Anyone who is bound through marriage to one of the spouses, can request an annulment of the new marriage, based on the ground of the existence of an ongoing marriage, without invalidating [the official conditions for polygamy in] Article 3(2) and Article 4 of this law.' Thus, in all polygamous marriages described earlier, besides reporting her husband's marriage to the police the first wife could also have requested that the Islamic court annul her husband's second marriage. Based on the *isbath nikah* practice, Marriage Law Article 24 and the complex criminal cases described above, a second condition to the general rule can be added: *an unregistered marriage is valid, but only on condition that the marriage is concluded according to the religious requirements and that a previous, lawful marriage forms no legal barrier to this marriage*.

The analysis in this section has shown that, even if in Indonesia's legal system lower courts do not necessarily follow precedents, Supreme Court

11 Judgment 2156 K/Pid/2008 of 12 April 2009. Like in Bowen's first case above, the marriage of the first wife was registered and that of the second wife not. The Supreme Court – as in Bowen's case – considered an unregistered second marriage to be a marriage in the sense of Article 279. The Supreme Court sentenced the husband to six months' incarceration.

judgments have the potential to change the legal doctrine within the Islamic courts. The *taklik al-talak* case, in which the six months desertion divorce ground was replaced by a two year desertion, illustrates that a Supreme Court decision can change the content of substantive norms that used to be standard practice, without abolishing the essence of the norm itself. However, when it concerns sensitive issues like interreligious marriage, political resistance from *ulamas* and Muslim organizations can effectively reduce the value of a Supreme Court judgment. Secondly, regarding the issue of the lawfulness of unregistered marriages, I have demonstrated that some plain, uncomplicated cases originating in the Islamic courts are almost never appealed in cassation. Those cases that have reached the Supreme Court were criminal cases originating in the general courts, and not civil cases to establish the legality of a marriage.

Put into the perspective of the development of substantive Muslim family law in Indonesia, the analyses above provide two insights. First, Supreme Court judgments did provide a number of interpretations of open norms in the 1974 Marriage Law, potentially resulting in more consistency in the Islamic courts' adjudication. I have argued that only research into their application by first-instance judges can establish whether the Islamic courts generally followed those interpretations. In Chapter 9, therefore, I will assess the value of Supreme Court judgments as part of my analysis of their application by the Islamic courts of Cianjur and Bulukumba.

Second, these cases have shown that Muslim family law norms do not operate in isolation, as the Indonesian Islamic court is very much part of, and increasingly interacts with, the other branches of the legal system. In complex cases involving family law issues, such as criminal prosecution based on Article 279 of the Criminal Code in polygamous marriages, it can be prudent for the Prosecutor to let the local Islamic court establish the lawfulness of a first marriage first, before starting a criminal suit at the general court. Conversely, criminal prosecution of informal polygamy, rather than a civil suit, may influence the legal position, attitudes and strategies of women whose husbands intend to engage in a polygamous marriage.[12]

The next section provides yet another example of the interaction and overlap of state regulations with the judicial tradition of the Islamic courts. In 1983, a special regulation was introduced for civil servants concerning marriage and divorce, the provisions of which apply to Muslim civil servants. The actors behind the law were the wives of civil servants who wanted to be protected from the threats of divorce and polygamy.

12 In the next chapters I have limited myself to the relation between polygamy and divorce. More comprehensive research about informal polygamy and its social consequences would be very welcome.

4.2.4 The 1983 Governmental Regulation concerning Marriage and Divorce for Civil Servants[13]

Because of their alleged affiliation with socialist ideology, the New Order regime of Suharto had disbanded Indonesia's most vocal and feminist women's organization the Indonesian Women's Movement (*Gerakan Wanita Indonesia*, *Gerwani*). In its stead, the New Order promoted a female citizenship centering on women's wifely and motherly duties. Hence, it attempted to replace the women's organizations with 'the wife's organizations' (Robinson 2008: 25). The main ones were the Family Welfare Movement (*Pembinaan Kesejahteraan Keluarga*, PKK), and the *Dharma Wanita*, nation-wide bodies in which wives of civil servants were organized in line with their husband's position in the government institution concerned and to which membership was compulsory. Through the PKK and *Dharma Wanita,* the New Order's ideology of *ibuism* or motherhood was promoted (Suryakusuma 1996). The organizations were also utilized to promote development policies, especially the family planning program. Ironically, many women used these organizations that were primarily established to promote the ideology of women as obedient wives, mothers, and citizens, to discuss and even resist the (im)moral behavior of their husbands. In order to ensure their husbands' good behavior, some felt it was necessary to regulate marriage and divorce in a stricter way. They managed to get the support of *ibu* Tien, the wife of President Suharto and, eventually, of President Suharto himself (Wichelen 2010: 74). The end result of their lobby was the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (the 1983 Civil Servants Regulation).

The 1983 Civil Servants Regulation stipulates that the private matters of marriage and divorce of civil servants require permission from their superior. The permission requirement is in line with the New Order's family-based ideology, in which civil servants were expected to be role models for society at large and divorce was discouraged. As a consequence, polygamy also requires a superior's permission. The superior is only allowed to give permission for the polygamous marriage when the first wife has stated her agreement and after the civil servant concerned can show legal proof, in the form of a doctor's statement that the condition of the wife is such that she cannot perform her marital duties or is infertile. It is important to note that after the superior gives permission the Islamic court once again has to establish whether a polygamous marriage is permissible.

A major difference between the 1983 Civil Servants Regulation and the 1974 Marriage Law concerns the consequences of divorce. The 1983 Civil Servants Regulation contains a much stronger protection of wives against the financial consequences of divorce, but only if it is petitioned by the husband.

13 GR 10/1983 Jo. 45/1990. Similar regulations had been issued by the Ministry of Defense for Military Personnel (KEP/01/I/1980) and the Police (JUKNIS/01/I/1981).

In male-petitioned divorces concerning civil servants, the wife has the right to one third of her husband's salary as spousal support until she remarries. In comparison, the Marriage Law neither specifies the procedure nor the amount of spousal support, whereas in the Islamic courts' judicial tradition, the *fiqh*-based rule applied that the wife has maintenance rights during the *iddah* waiting period of three months.[14] When a female civil servant or a civil servant's wife petitions the divorce, she loses her right to spousal support altogether, unless she proves that her husband committed adultery.

Thus, both male civil servants and their wives are discouraged to divorce under the 1983 Civil Servants Regulation through negative financial incentives: husbands lose a third of their salary, and wives their right to maintenance. Moreover, if the couple has children, another third of the husband's salary will be designated to child support, no matter who petitions the divorce. In comparison, the 1974 Marriage Law only establishes the father's obligation to provide support for his children, but does not specify the amount. As we will see in Chapters 6 and 8, the Islamic court generally does not order high amounts of child support in non-civil servant cases, and at one third of a salary the standard for civil servants is set relatively very high.

Although on paper state control of marriage and divorce of civil servants is strict, in practice the implementation of the 1983 Civil Servants Regulation has been lax. Many civil servants have concluded unregistered marriages to which their superior often turned a blind eye when the marriage was discovered (Suryakusuma 1996). In addition, as we will see in Chapter 6 and Chapter 8, many civil servants, both male and female, petition for divorce. In Chapter 9, I will demonstrate that many judges in the Islamic courts are reluctant to implement the provisions of the 1983 Civil Servants Regulation. All matters concerning Muslim marriage and divorce fall under the jurisdiction of the Islamic courts. However, in the specific case that the disputes concern the action or inaction of a civil servant's superior, the jurisdiction lies with the administrative courts (Bedner 2001: 141-144). Islamic courts' judges interpret this overlap to mean that in divorce cases that involve civil servants the Islamic courts lack competence to establish post-divorce rights on the basis of the 1983 Civil Servants Regulation and apply the provisions in the 1991 Compilation of Islamic Law in its stead.

4.2.5 The 1991 Compilation of Islamic Law

The 1974 Marriage Law, as a law for all religious entities, left substantive Muslim family law issues unregulated. For instance, it did not specify detailed requirements for a Muslim marriage, let alone Muslim engagement, and was

14 This *fiqh* norm is adopted in the Compilation of Islamic Law of 1991.

not specific concerning spousal and child support rights after a divorce. As early as 1976 a commission of the Supreme Court and the Ministry of Religious Affairs prepared a plan to compile Islamic substantive family and inheritance law to be applied nationally by Islamic courts (Hanstein 2002: 377-378), with the intention of codifying and unifying the family and inheritance law that applied to Muslims in Indonesia.

I have discussed the background and development of the combined drafting process of the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law in the previous chapter, so I will only provide a summary here. Key to the drafting process was the cooperation between Busthanul Arifin, judge at the Supreme Court and advocate of a strong position for Islamic family law in Indonesia, and Munawir Syadzali, Minister of Religious Affairs. In 1984 they succeeded in convincing Suharto to implement their plan, which was illustrative of a more general shift in the New Order policies. The secular-oriented *Pancasila* state of the 1970s and early 1980s gradually turned into a *Pancasila* state which allowed for Islamic expressions such as the veil (Wichelen 2010: 54-55; Brenner 1996), and in which the state incorporated Islamic norms and put them under state control (Otto 2010; Wichelen 2010: 9-10; Hefner 2002; Bruinessen 1996). With regard to Muslim family law, a discourse shift took place: the secular-Muslim debate of the 1950s – 1970s changed into a debate between reformists and traditionalists, and was cast in Islamic terms only .

To provide the Compilation of Islamic Law with Islamic legitimacy it was set up as a process of attaining *ijma*, which means a consensus among the main Muslim scholars. This is one of the five traditional sources of Islamic law.[15] Sources for the Compilation were *syafi'ite fiqh* works,[16] interviews with judges, Muslim scholars and 166 *ulamas* and Islamic court judges,[17] case law, national legislation, foreign codes, conferences and public debates. The variety of sources consulted demonstrates that the Compilation's aim was to codify a substantive Muslim family law that was in compliance with national legislation, and acceptable to Islamic court judges, Indonesian *ulamas* and Indonesia's civil society. In 1988, after the drafting process had been finalized, the draft Compilation was submitted to the president. Through a semantic exercise, by which it turned the provisions of the Compilation into *fiqh*, the Indonesian government claimed that because the selected *ulamas* had stated their agreement to the Compilation – a national consensus of Indonesian *ulamas*, or *ijma*,

15 Islamic doctrine (*fiqh*) is developed by *ulama*, rather than judges who (according to the majority of Sunni *maddhab*, including the *syafi'i maddhab*) apply the sources of law in the following order: the Qur'an, the Sunna and Hadith, *qiyas* (analogy), *ijma* (consensus) and *ijtihad* (independent reasoning).

16 For a thorough discussion of the *fiqh* books consulted, see Nurlaelawati (2010).

17 Technically speaking the 166 interviewed Muslim scholars were not all *ulamas*; some were judges of Islamic courts, three female judges (Hanstein 2002: 385).

had been reached. Hence, the Compilation was formally presented as the 'living *fiqh* of Indonesia'[18] and thus as a unique Indonesian Islamic doctrine.

The drafting commission's claim that the Compilation reflected 'a living *fiqh* of Indonesia' points to two of its characteristics: first, '*fiqh*' points to codification of traditional Islamic norms, and, second, the labels 'Indonesian' and 'living' point to codification of current social practices different from *fiqh*. Bowen argues that the use of the term 'living *fiqh*' must be seen as a symbolic Islamization of the concept of 'living law' and thus of '*adat*' (Bowen 2003: 190). It was probably used to conceal the difficult fact that a substantial number of 'living' norms in the Compilation actually had their origin in *adat* and the 1974 Marriage Law. In the Compilation's official commentaries those *adat* norms, which were part of the Islamic courts' judicial tradition, but not of *syafi'ite fiqh*, were symbolically restated, explained and framed as *fiqh*. However, as appears from Nurlalelawati's study about the legal sources of the Compilation, this was not done very convincingly. As a result, many Indonesian *ulamas* (and Nurlaelawati herself) do not agree with the claim that such *adat* norms are part of *fiqh*, which does not necessarily mean they object to the application of certain *adat* norms by Islamic courts. Disagreement among *ulamas* especially appears when *adat* norms are clearly at variance with Qu'ranic rules (Nurlaelawati 2010: 110-117). Such disagreement eventually may undermine the government's claim of a consensus as well as the legitimacy of the *adat* -based norms.

As a codification of Indonesian Muslim family law the 1991 Compilation of Islamic Law consists of books, chapters, articles, and paragraphs. Nonetheless, formally it is not an Act, as it has never been passed by Parliament. Initially, its introduction was postponed because the 1989 Islamic Judiciary Law had to be passed by Parliament first. As we have seen (see 2.4.6), the original Islamic Judiciary Bill met opposition from the secular-oriented PDI party and was protested outside Parliament by secular and non-Muslim religious organizations. Only with the interference of the military faction in Parliament was a compromise reached. To preclude discord in Parliament, which would destroy the carefully created image of a consensus or *ijma* among Indonesian Muslims, the government in 1991 eventually chose to issue the Compilation of Islamic Law as part of a presidential instruction.[19]

This, of course, had consequences for the legal status of the Compilation. It is clearly designed as a statute, but from a formal legal perspective it does not have such status. In practice, however, Islamic court judges apply the

18 The terminology used seems inspired by the Supreme Court ruling of 1960 – infamous from a conservative *ulama* point of view but well-known – in which it first used the term 'the living *adat* law throughout Indonesia' to justify a ruling contrary to *fiqh* that a widow has the right to inherit from her husband's estate (so *not* joint marital property). See Lev 2000: 115.

19 *Instruksi Presiden* 1/1991.

Compilation as if it were a statutory law, even if they frequently make reference to additional *syafi'ite fiqh* sources and justify some judgments solely through *fiqh* (Nurlaelawati 2010: 135-142; Lubis 1994: 321-322). The Minister of Religious Affairs in Decision 154/1991 was very clear on the application of the Compilation: all institutions falling under his powers, including the Islamic courts,[20] should to the largest extent possible rely on the Compilation as the primary legal source.

The Compilation's main intention was to unify Muslim family law norms throughout Indonesia. An analysis of the Compilation's substantive norms reveal their hybrid origin. If one reads the substance of the Compilation carefully, it in fact for a large part constitutes a continuation of the existing judicial practice within the Islamic courts including their applicatition of the reforms in the 1974 Marriage Law. However, as a consequence of the new jurisdiction of the Islamic courts under the 1989 Islamic Judiciary Law, new substantive norms had to be included as well.

The Compilation adopted all relevant stipulations in the 1974 Marriage Law, often reformulated or 'vernacularized' into more Islamic language, with the intention of making them more acceptable to *ulamas*.[21] The Compilation adopted the polygamy conditions and specified post-divorce rights of women and children on the basis of *syafi'ite fiqh*. Thus, in case of a non-final divorce, the husband has the obligation to provide a consolation gift (*mut'ah)*. In final divorces the *mut'ah* gift is only a recommended act (*sunnah)* and thus voluntary. Only ex-wives in non-final divorces petitioned by the husband have a right to maintenance during the waiting period (*iddah*), provided that the divorce is not caused by their disobedience (*nusyuz*). There are no spousal support rights when the divorce is final.

The Compilation has also specified joint marital property rules, and rules concerning child support and child custody. The Compilation provides that the father has the legal obligation to financially support his children until they reach the age of 21 years, or are married. Custody for infants under the age of 12 years in principle will be designated to the mother, above 12 years the child's preference will be the main consideration in custody designation. The codification of custody and child support terminated a situation in which unclarity existed regarding the age of maturity and the age a child is considered dependent on the mother. In that sense it greatly improved legal certainty and the custody rights of mothers.

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20 Until 2004, when the administration and supervision of the Islamic court was brought under the Supreme Court (see Chapter 2).

21 Sally Engle Merry (2006) has argued that human rights need to be 'vernacularized' or adapted to local understandings and conditions in order to become meaningful at local levels. In the same manner, Indonesian reforms often are linked to Islamic doctrine in order to make them acceptable to local power holders. For examples of the latter practices on the local level, see Van Doorn-Harder 2007.

The Compilation adopted traditional divorce norms, which the 1974 Marriage Law did not regulate, but had not annuled either (see Article 66 of the 1974 Marriage Law). Two divorce grounds and one divorce procedure were added to those listed in the 1974 Marriage Law: the *taklik al-talak* and apostasy (*murtad*) as divorce grounds and the *khul* as divorce procedure. As we have seen in the previous chapters, *taklik al-talak* and *khul* were the procedures that women used most in order to obtain a divorce. *Khul* in principle is a consensual divorce in which women offer their husband to return part of their dower (*mahr*) in return for a divorce. The 1974 Marriage Law and the Compilation of Islamic Law do not allow for a consensual divorce and require a judicial divorce in which divorce grounds are being met. The inclusion of *khul* in the Compilation shows that although the practice *khul* perhaps has lost its legal relevance in social practice it may very well be the only socially acceptable way for women to divorce. The inclusion of apostasy as divorce ground reflects the growing opposition to interreligious marriages within the Ministry of Religious Affairs and follows the position of the Indonesian *Ulama* Council on the matter. The prohibition against men marrying non-Muslim women, even Christians and Jews, must be seen in the same light (Manan 2006a; Butt 1999; Pompe 1991).

In areas where the Islamic courts held new jurisdiction, the Compilation generally codified rather conservative *syafi'ite* norms. Those include the provisions that stipulate unequal inheritance shares for male and female heirs (ratio 2 : 1), the prohibition against Muslim women marrying non-Muslim men and the different treatment of adopted children.[22]

Some significant observations can be made if we consider the substantive norms of the 1991 Compilation of Islamic Law and the 1974 Marriage Law in their respective historical contexts and compare the results. While the Marriage Law included some far-reaching reforms, all reforms of the Compilation fell neatly within the limits of the current Islamic courts' judicial practice. The innovative aspect of the Compilation was not its substantive law but its drafting process, which, in an attempt to create consensus (*ijma*), included the vernacularization of *adat* norms into a traditional Islamic language. Ironically, those *ulamas* and other *fiqh* experts who opposed a number of provisions in the Compilation did *not* necessarily do so because *adat* and secular norms were applied in the Islamic courts, but because *adat* norms had been restated as *fiqh* when in their eyes they were clearly not part of it (Nurlaelawati 2010: 110-118). According to this conservative view, *adat* norms and state law can never become *fiqh*. However, they *can* become part of substantive Muslim family

22 Contrary to *syafi'ite fiqh,* adopted children have been granted inheritance right in the Compilation of Islamic Law, yet unlike biological children they can only inherit a maximum of one third of an estate (Article 209). However, this must not been seen as a reform, since in many areas in Indonesia, especially on Java, adopted children are traditionally treated as biological children by their parents. See for instance Nurlaelawati 2010 and Lukito 2012.

law so long as they do not fundamentally affect the essence of those interpretations of rules in the Qur'an and Sunna that are traditionally considered unambiguous.

4.3 Three Bills on substantive Muslim family law after *Reformasi*

Since the fall of Suharto and the beginning of the *Reformasi*, both liberal and orthodox Muslim voices have pressed their agendas freely and vigorously. The period saw the political success of a new conservative Muslim party, the Welfare and Justice Party (*Partai Keadilan Sejahtera*; PKS), as well as the advancement of a Liberal Islam Network (*Jaringan Islam Liberal*; JIL) promoting Muslim feminist ideas based on *ijtihad* (individual interpretation) of the sources of Islamic law. Against the background of the greater advancement of orthodox and liberal interpretations of Islamic law, the administration of *Megawati Sukarnoputri* decided in 2002 that it was essential to raise the legal status of the 1991 Compilation of Islamic Law from an executive order promulgated through a presidential instruction to that of a statute passed by the legislature. As a result of this perceived necessity, three bills on substantive Muslim family law were drafted and presented to the public: the Bill on Substantive Muslim Family Law of 2003, the Counter Legal Draft [to the Compilation of Islamic Law] (CLD) of 2004 and the Bill on Substantive Muslim Family Law of 2010.

4.3.1 The first Bill on Substantive Muslim Family Law of 2003

In 2003, the Ministry of Religion presented the Bill on Substantive Muslim Family Law (the 2003 Bill) to parliament. The committee that drafted the bill was chaired by Taufik Kamil of the Ministry of Religious Affairs, with the former head of the Office of the Religious Courts, Mochtar Zarkasyi, and Supreme Court Judge Rifyal Ka'bah as vice-chairs. The committee also included retired Supreme Court Judge Bustanul Arifin, who in the 1980s had played a leading role in the creation of both the 1991 Compilation of Islamic Law and the 1989 Islamic Judiciary Law, and Abdul Gani Abdullah of the Department of Law and Human Rights who had also taken part in the drafting of the Compilation.

The stated goal of the Bill was to raise the status of the Compilation from a presidential instruction to statutory law. The core members of the drafting committee had been involved in producing the Compilation and therefore it is not surprising that the bill proposed by the committee did not include substantial changes to the law. This disappointed more liberal Muslims who felt the Bill should better reflect the developments within Indonesian Islam. Indonesian Muslim scholars had produced a wealth of scholarship that paved the way for reinterpretations of traditional Islamic doctrines (Feener 2010),

and women's rights activists within the main Muslim organizations of NU and *Muhammadiyah* had long promoted gender-sensitive reinterpretations of Islamic law (Doorn-Harder 2007). Protests came from both women's rights groups and moderate Muslim organizations. In the face of this criticism further consideration of the 2003 Bill was put on hold.

4.3.2 The Counter Legal Draft of 2004

Although it was never acted on by the legislature, the 2003 Bill proved to be important in another way. In 2000 the administration of President Abdurrahman Wahid established a program of gender mainstreaming to promote women's interests across the full range of government institutions and programs. In response to the proposal to solidify the status of the 1991 Compilation of Islamic Law, the gender mainstreaming team within the Ministry of Religious Affairs initiated a project to produce an alternative to the Compilation, which it labeled the Counter Legal Draft (CLD). The drafters aimed at producing a radical revision of the Compilation, and approached Islamic norms from a democratic, pluralistic, human rights and gender-sensitive perspective (Wahid 2008).

The drafting team was headed by Siti Musdah Mulia, who was special advisor to the Minister of Religious Affairs for gender-mainstreaming. She was also a lecturer at the Islamic University Syarif Hidayatullah and a well-known women's rights activist. In explaining the CLD she wrote that the Compilation was not adapted to the needs of Indonesia in the light of the dynamic social changes taking place in the country:

> The existence of a single uniform reference has stymied creativity and adaptation within the law. Because the answers to legal issues are readily available in the Compilation, judges no longer feel the need to engage with the rich literature of the Islamic legal tradition. This in turn has stultified the exercise of independent reasoning (*ijtihad*) and effectively imprisoned Muslims in a legal straightjacket. (Mulia 2007: 131)

The CLD, which was presented to Parliament in October 2004, proposed a range of reforms that would have significantly increased the gender equality of Indonesian personal status law. The proposed marriage law reforms included changing the minimum age of marriage to 19 for both husband and wife (at present the minimum age of marriage is 19 years for the husband and 16 years for the wife); eliminating the requirement of a marriage guardian for women who have reached the age of 21 and thereby giving them more autonomy in choosing a spouse; making the payment of *mahr* (dower) a marriage requirement for both spouses instead of limiting it to a gift by the husband's family to the wife, which is often conceived of as payment for the wife's obedience; extending the principle of *nusyuz*, a term often translated as disobedience of

the wife, to both spouses thus creating more equal and mutual marital duties and obligations; and imposing a waiting period (*iddah*) on husbands as well as wives following divorce. Finally, the CLD proposed eliminating the inequality between men and women under the law of inheritance, by granting daughters the same share as sons, a clear break with prescriptions in the Qur'an.

In addition to the reforms aiming at increasing gender equality, the CLD proposed four other changes that might be considered in conflict with traditional Muslim norms. First, all marriages would have to be registered to be valid (*sah*). As discussed earlier, this has long been the subject of controversy in Indonesia, and making registration a requirement for a marriage to be valid could be seen as secularizing the institution of marriage. At present, Indonesian Islamic courts generally regard compliance with religious stipulations to be sufficient for a marriage to be recognized by the state. This is true, however, only insofar as there are no legal impediments to the marriage, such as contracting a polygamous marriage without permission of the religious court (Huis & Wirastri 2012). This brings us to the second change commonly regarded as contrary to Muslim norms: the CLD would prohibit polygamy entirely. Lastly, the CLD would eliminate difference of religion as a bar to marriage. Likewise, the CLD would have also eliminated religious difference as an impediment to inheritance by stipulating that heirs of any religion are equally entitled to inherit from a Muslim.

Considering the number and scope of the proposed reforms it is hardly surprising that the CLD was not well received. Criticism of the CLD was not limited to conservative Muslims, representatives of moderate Muslim organizations were quick to voice their disapproval as well. The Indonesian *Ulama* Council issued a statement calling for the withdrawal of the CLD and the Council's vice-chair, Ali Mustafa Yaqub, declared it the work of the devil (*hukum iblis*). Din Syamsuddin, the Chair of the Central Board of *Muhammadiyah*, deemed the proposed reforms absurd, and Huzaemah Tahido Yanggo of the *Syariah* council of the NU stated that the CLD 'damaged Islamic teachings' (Wahid 2008; Mulia 2007; see also Nurlaelawati 2010: 125-129).

The polygamy provisions of the CLD became the focus of particular controversy. Previous efforts to limit or prohibit polygamy had been supported by many Muslim women's organizations. However, the *Reformasi* era witnessed the emergence of a pro-polygamy discourse with a broader than usual base of support, expressing strong resistance to prohibiting the practice. This included well-known public figures such as businessman Puspo Wardoyo and *dangdut* star Rhoma Irama, as well as a group of 'hip' young preachers unwilling to condemn the practice. This change in discourse was further facilitated by the adoption of an attitude of resignation by upper middle-class women involved in polygamous marriages. This acceptance of polygamy stood in stark contrast to the response of women from an earlier era, (and as we will see in the next chapters, of most lower and lower middle-class women

today) such as Soekarno's first wife, Fatmawati, who left the palace after Soekarno took a second wife (Wichelen 2010: 75-91).[23]

As a result of the controversy over the CLD, the Ministry of Religion formally withdrew the proposal from consideration within a few weeks of its presentation. In 2005 the gender mainstreaming team in the Ministry of Religion was abolished, due to the breadth and depth of opposition to the proposal and opposition from conservative forces within the Ministry.[24] From a purely formal-legal perspective the CLD is not only acceptable but legally required, since it harmonized Muslim family law with constitutionally guaranteed equality for women. But the fact that the CLD was formulated in an Islamic idiom and applied Islamic sources and modes of deduction did not prevent its rejection by even most representatives of the so-called 'moderate Islam.'

Hooker has argued that from the perspective of traditional *fiqh*, the broad rejection of the CLD was 'wholly understandable' (Hooker, M.B. 2008: 48). But perhaps it is more accurate to state that the CLD did not fit in the tradition of Islamic law and Islamic courts in Indonesia, as many substantive *adat* and Dutch civil law norms that are adopted in the Marriage Law and the 1991 Compilation of Islamic Law are also in direct conflict with traditional *fiqh*, let alone procedural norms. Those reforms have been accepted by most of the Indonesian *ulamas* for decades, if not centuries. The CLD, however, was a bridge too far in the gradual development of Muslim family law in Indonesia, even if it waged the struggle in Islamic terms and presented its changes as logical outcomes of this development.

4.3.3 The third Bill on Substantive Muslim Family Law of 2010[25]

The fact that the CLD project had been halted by the Ministry of Religious Affairs did not discontinue the project to further regulate substantive family law as applied in the Islamic courts. In 2010 a new revision of the 1991 Compilation of Islamic Law, the Bill on Substantive Muslim Family Law (Bill of 2010), was presented to the public. The Bill of 2010 reflects the original objective to upgrade the Compilation to become a statute. Unlike the CLD, and much like the 2003 Bill, the 2010 Bill for the most part is a copy of the current Compila-

23 Van Wichelen also offers the example of some businesswomen who argue that entering into a polygamous marriage enables them to have a career outside of the household. She further draws attention to the fact that it is very difficult for secular women's organizations to take on conservative interpretations of Islam, because they have no authority in this matter.

24 For a description of the conservatism within the Ministry of Religion, see Federspiel 1998.

25 I base this argument on the text of *Rancangan Undang Undang Hukum Materiil Peradilan Agama bidang Perkawinan* 2008.

tion. However, other than the 2003 Bill it also proposes a number of controversial reforms.

The reforms that have attracted most attention in the media are those that would turn unregistered marriages, informal polygamous marriages and temporary marriages (*nikah mut'ah*), as well as unauthorized *talak* divorces, into a felony. Initially, it seemed that Indonesian women's organizations applauded the proposed criminalization of unregistered marriage when The National Commission against Violence Against Women (*Komisi Nasional anti-kekerasan terhadap Perempuan, Komnas Perempuan*) stated its support,[26] but soon a coalition of women's organizations pointed to the gender-neutral character of the provisions. The coalition realized that wives in informal marriages would face the same legal consequences as the husband, and in order not to jeopardize the wives' status as 'victims' of such detrimental marriages, *Komnas Perempuan* changed its stance and came to oppose the 2010 Bill (Huis & Wirastri 2012).[27] The second reform that attracted media attention was the stipulation that a foreign man who wants to marry an Indonesian woman would have to deposit Rp 500 million at a sharia bank account as a financial guarantee for the wife. The stipulation was criticized as it would infringe on the freedom to choose a spouse, and because of the negative image it might create of Indonesian Muslim brides as commodities.[28]

A third large reform in the Bill, not treated in the Compilation at all, did not attract media attention even though it concerns a 'sexy' and controversial subject: forced marriage in the case of extramarital pregnancy. When a woman is found pregnant as a result of an extramarital sexual relationship (*zina*), she can be married to (*dapat dikawinkan dengan*) the man who impregnated her. If he refuses the marriage, he can be punished with a maximum sentence of three months' imprisonment. The provision is intended to protect the child's interests as the marriage is to be held in the early stages of pregnancy. If the child is born more than 180 days after the day of marriage, it will be considered a child born in wedlock and thus will automatically have a civil legal relationship with his father in addition to the mother. In case of pregnancy after a rape, a woman is allowed to marry a man other than the rapist during the pregnancy in order to prevent the child from being born out of wedlock.

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26 'Ayo Sosialisasikan Pidana Kawin Siri' [Let's socialize the criminal character of unregistered marriage], Kompas online, 15-2-2010; 'Nikah Siri: Perempuan Lebih Banyak yang Rugi' [Unregistered marriage: women bear the negative consequences], Kompas online, 16-2-2010.

27 The more fundamental question whether the Islamic court should have jurisdiction in criminal cases at all, is absent from the debate. The Bill of 2010 provides that the Islamic court adjudicates the criminal cases involving illegal Muslim marriage and divorce only after the prosecutor has taken up a case based on a police investigation. The entry of the police and the prosecutor into the Islamic court would mean a significant change to the traditional civil law character of the Islamic court.

28 E.g. 'Perkawinan Seharga Rp 500 Juta' [A marriage for the price of 500 million] Kompas online, 24-2-2010.

The Bill does not establish whether the girl has to give her consent to the marriage in a 'normal' *zina* case, but the wordings of the rape clause indicate that marrying someone else is allowed as an exception only, and, hence, that these marriages are in fact forced marriages. This would be a strong transgression of the principle of marriage by consent of both spouses as stipulated in Article 6(1) of the Marriage Law.

In addition to the three innovations above, the 2010 Bill contains a number of reforms which are less spectacular but which constitute important revisions of Muslim family law provisions. Worth mentioning is the proposed increase of the marriage age from 16 to 18 years for women and from 18 to 21 for men. The General Elucidation explains that this is intended to ensure the spouses are mature enough to enter a marriage. In Indonesia many women still marry below the age of eighteen (Jones, G.W. 2001; see also Chapters 6 and 8) and potentially the reforms could have significant social consequences. Second, the 2010 Bill proposes that both men and women can be *nusyuz* (disobedient) when they fail to fulfill their marital duties. Women can file a divorce on the basis of their husband's *nusyuz*. This would provide a new ground for divorce in addition to those included in the 1991 Compilation of Islamic Law. Thirdly, if the wife is pregnant during a divorce the husband still has to provide for her during the waiting period, no matter whether it is a final divorce or whether she had been disobedient. A third addition to existing regulations concerns a change in the polygamy procedures. The Bill provides that a wife would not have the right to appeal if a judge has decided to grant the husband permission for a polygamous marriage, even if she had not approved it. This provision might undermine the legally required permission of the wife to the husband's polygamy, as it would provide the judge with a broader discretion in polygamy cases.

The fate of the Bill of 2010 is uncertain. Following its presentation it attracted a lot of media attention with heated debates as a result, but at present the Bill is surrounded by silence. The CLD had proposed major reforms and a totally gender-equal Muslim marriage law. The drafters had based all provisions on reinterpretations of Islamic law, but the scope of the reforms proved unacceptable to even the moderate Muslim organization and consequently formal deliberation of the CLD was almost immediately halted. The 2010 Bill, in contrast, is for the most part a restatement of the 1991 Compilation of Islamic Law and its formal deliberation process is still ongoing. The long deliberation process again show how difficult it is to reform Muslim family law in Indonesia and because of the controversies typically attached to such reforms it is not unlikely that the 2010 Bill will be shelved again.

4.4 CONCLUSION

In this chapter I have outlined the development of a substantive Muslim family law in Indonesia after its proclamation of independence in 1945. In Independent Indonesia, major family law reforms primarily took place through the Marriage Law (1974). Those reforms in turn were adopted in the 1991 Compilation of Islamic Law. Even though the Compilation of Islamic Law was presented as a consensus among the Indonesian *ulamas*, and indeed the *ulamas* voted in favor of it, *ulamas* were not the main actors who had developed its content. The Compilation of Islamic Law (1991) was formost a codification of the current judicial practice in the Islamic courts, which by that time applied the reforms of the Marriage Law rather consistently.

My focus on the judicial tradition within the Islamic courts has enabled me to shed new light on the law-making process that took place after independence. The protests surrounding the Marriage Bill of 1973 indicate that in order to render the in marriage law reforms legitimate the legislator could not simply replace the Muslim family law norms with a secular family law, even if the majority in Parliament was in favor of it. The Marriage Law had to build on the traditional application of law by the Islamic courts' judges.

Thus, I have taken a different starting point from Hooker (Hooker, M.B. 2008, 2003) and Nurlaelawati (2010), who each took traditional *fiqh* as main point of reference in their analyses of the development of Islamic law and its legal practice in Indonesia, in their impressive studies of Indonesian Islam (or Indonesian sharia) and the Compilation of Islamic Law. Hooker identifies a unique Indonesian Islamic doctrine through this *fiqh* framework, whilst Nurlaelawati provides a convincing analysis of the many discrepancies between the Compilation and *syafi'ite fiqh* and their impact on the behavior of *ulamas*, conservative judges and society at large in West Java and Banten. While I recognize the significance of the findings of both authors, I believe that in this study, the choice of traditional *fiqh* as a benchmark would have put too much emphasis on differences between *fiqh* and the judicial practice. A focus on Indonesian Muslim family law as part of a judicial tradition depicts continuity, as within a judicial tradition the rule is that all legal change will build on the current legal practice, and all reforms must remain within the limits of the judicial tradition. Thus, I have been able to explain how continuity and change took place and what the possibilities of change were.

Different bench marks produce quite different findings. Nurlaelawati argues that the 1991 Compilation of Islamic Law has an innovative character because of the incorporation of substantive reforms based on *adat* norms, rules that stress government control, and rules that increase women's rights. However, according to her the most innovative and thus controversial aspect of the Compilation is its method of rule production: the application of such broad

Islamic principles as *ijtihad* and *maslahat*.[29] On the contrary, I argue that generally speaking the Compilation is *not* innovative. My analysis demonstrates great continuity. In the areas in which the Islamic courts already held jurisdiction prior to the 1989 Islamic judiciary Law, the Compilation continued the amalgam of relatively progressive norms that were applied by the Islamic court judge at that point in time. In this light we must see the adoption, reformulation and further specification of the 1974 Marriage Law's provisions, and the inclusion of *syafi'ite fiqh* and *adat* norms in areas which the Marriage Law had not regulated. The Compilation was a product of normal legal change within the Islamic courts' judicial tradition and even 'conservative' if compared to the changes that the 1974 Marriage Law had introduced. Almost all of its reforms took existing judicial practice as a legal base and as such were rather codifications of judicial practices.

Especially the 1974 Marriage Law introduced far-reaching reforms. The provisions that limited polygamy and the husband's absolute *talak* rights, and those that established the minimum age of marriage and the requirement of consent of the wife to the marriage, are all major reforms from a *fiqh* perspective. However, these reforms all followed a certain technique of rule production already noticeable during the 1938 Women's Congress agenda of Muslim family law reform. Reforms pertaining to unambiguous *fiqh* norms symbolically preserve their essence, but subsequently make them conditional to several strict legal provisions, thus severely limiting their legal applicability. Viewed in this way even the reforms of *talak* divorce remained within the limits of the Muslim family law tradition, as the husband still divorces his wife in a traditional Islamic way by uttering the *talak*, albeit before the judge. The *talak* is symbolically and technically preserved in name (*cerai talak*) and procedure, even if a *talak* divorce is limited by the same divorce grounds and more or less the same procedures that also apply to women.

The *ulamas* had a much harder job to legitimize the provisions in the 1991 Compilation of Islamic Law than the Islamic court judges, since *fiqh* and the Islamic courts' judicial tradition had diverged over time. As I have argued in the previous chapter, the Islamic courts' judicial tradition originates in the pre-colonial Islamic courts. The *penghulus* already applied legal norms based in *adat* and *siyasa* (state regulation). Over the years, and in the context of shifting paradigms as a result of changing ideologies, government policies and changing social norms, colonial regulations, Ministerial Decrees, state legislation, case law of the Supreme Court, interaction of judges with the civil courts and legal scholars, have all influenced this judicial tradition. Codification of these norms, which created an Indonesian substantive Muslim family law, inevitably unveiled and exposed these historically grown and sometimes

29 See Feener 2010 and Hooker, M.B. 2003, 2008 for a thorough account of the development of Islamic doctrines in Indonesia.

fundamental differences between the norms that Islamic judges apply in judicial practice and traditional *syafi'ite fiqh* norms in the books.

I argue that many of the substantive legal 'reforms' in Muslim family law that required innovative and controversial rule production methods by the *ulamas* actually concerned a mix of traditional uncodified Muslim family law norms already applied by Islamic court judges, as well as norms already laid down in the Marriage Law. I do not challenge the argument that the method of rule production by the Indonesian *ulamas* has been innovative, other scholars have also pointed at the innovative methods of rule production by the Indonesian *ulamas* (Feener 2010), or even hinted at the development of an Indonesian Islamic school of law (*maddhab*) in this regard (Hooker, M.B. 2008; Lindsey and Hooker, M.B. 2002). I do argue, however, that what is a reform from a traditional Islamic doctrinal perspective is for the large part in line with the traditional application of law by the Islamic courts' judges.

Codification of the legal practice in the Islamic court through the 1991 Compilation of Islamic Law may have frozen substantive legal norms and limited the possibilities of legal change within the judicial tradition, as Siti Musdah Mulia has complained. However, the negative consequences must not be overstated. The selection and consequent temporary freezing of legal norms is not necessarily a bad thing and is inherent to codification processes. The Compilation may have limited innovative interpretations of *fiqh* by judges, but at the same time its codification constrains judges who prefer more conservative *fiqh* interpretations in issues such as the age of marriage, the wife's consent to marriage or joint marital property. Codification of substantive family law has the theoretical advantage that legislators can introduce reforms that go beyond traditional Islamic doctrines. However, this historical overview has demonstrated that respect for the Islamic courts' tradition has been key to successful reform and, as the debate surrounding the Counter Legal Draft has demonstrated, that radical changes which depart from tradition have proven infeasible. Many issues that had been controversial at the time of the *penghulu* courts have remained controversial ever since. Hence, I have demonstrated that although important legal changes have taken place, and Muslim family law is far from frozen, the balance between Islamic law, state law and *adat* law has not – and can not be – fundamentally altered in the Indonesian context.

The next chapter provides a historical and cultural context for the Islamic court in Cianjur. As the court is located in the province of West-Java, its historical legal trajectory was the same as that of the *penghulu* courts described in the previous chapters. However, I suggest that because of the particular position of the *Preanger* region in the colonial history of West Java, the region developed a unique political economy in which *ulamas* operate rather independently from the central state, including its Islamic courts.

5 Cianjur and the historically central position of the *ulamas*

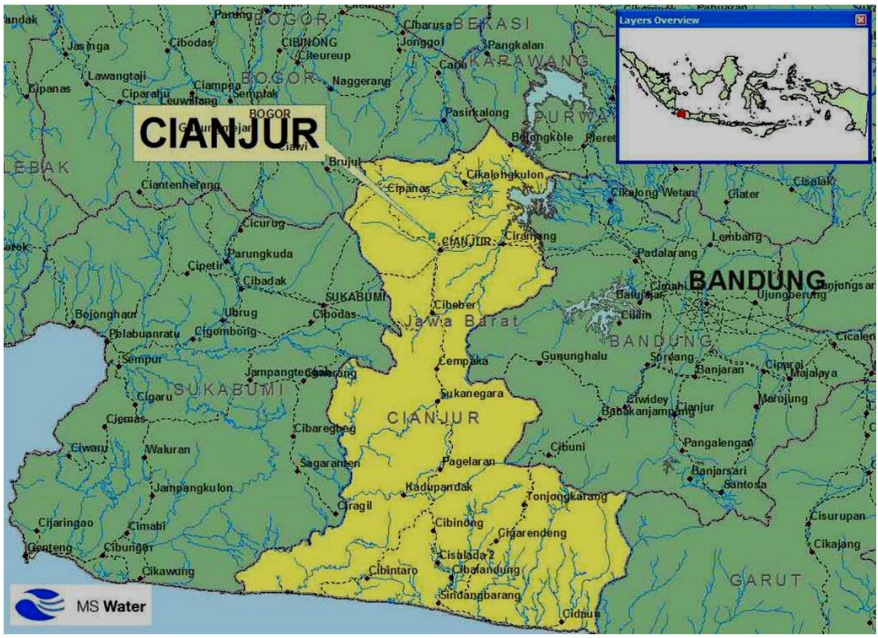
> 'Indeed, the Sundanese in rural West Java fervently consider themselves to be as Muslim as they are Sundanese. This Muslim identity provides a strong and direct contrast with the Christian religion of the Dutch who colonised them for 350 years and of those Chinese who converted to Catholicism after the troubles of 1965. Moreover the strength of this identification implies that, while the Javanese are also Muslim, the Sundanese are more so. Being Muslim for the Sundanese, then, is associated with being indigenous to West Java, where affiliation with Islam tends to suggest a certain ethnic purity.' (Newland 2000: 203)

5.1 Introduction

In the previous chapters I have discussed the legal history of the Islamic courts on Java and Madura (Chapter 2), and family law for Muslims in Indonesia (Chapters 3 and 4). In this chapter I turn to the history of the district of Cianjur in West Java's *Preanger* region, one of my two field research sites, in order to assess how the performance of the Islamic courts has been influenced by their historical, political, and socio-economic context. Whereas the history of the Islamic courts on Java, which also covers the *Preanger* region, has already been discussed in Chapter 2, the focus in this chapter is on the historically strong position of the *kyais*, leaders of Islamic boarding schools, and *ulamas* in West Java. They are the actors who have traditionally contested the authority of the state in religious affairs, and by extension of the Islamic courts in marriage and divorce affairs. I will confirm Nurlaelawati's finding that most *ulamas* in West Java support the validity of Muslim marriage or divorce outside the realm of the state, and that as a result of their influence on local communities, out-of-court Islamic marriage and divorce remains widespread. This chapter will delve deeper into the origins of these *ulamas*' autonomous stance, depicting the historical trajectory of the Islamic courts in Cianjur society, which as we will see in Chapters 7 and 8, has been fundamentally different in Bulukumba.

5.1.1 A short description of Cianjur

Cianjur is the name of both a rural district (*kabupaten*) in the province of West Java and of its capital town. It is located between the cities of Jakarta and Bandung. The district has a population of 2,122,756 (2007). The vast majority of the 2.1 million inhabitants of Cianjur is Muslim and ethnic Sundanese, and the town of Cianjur, with a population of 150 thousand, considers itself the centre of Sundanese language and culture. The Islamic court is located in Cianjur town, which lies in the northern part of the district at the crossroads to Jakarta, Bandung and Sukabumi. North and south are separated by a mountain range, which makes travel to the south coast, over the long and winding road, a time-consuming operation.



The district of Cianjur is the number one rice-producing province of Indonesia and has West Java's highest percentage of people working in the agricultural sector. In 2005, 61 percent of the working population was made up of farmers, 15.4 percent of small business owners and 6 worked in industry.[1] Although I have not found specific unemployment figures for Cianjur, official statistics by the Central Agency of Statistics (*Badan Pusat Statistik*; BPS) indicate unem-

1 Penyusunan Sosial Ekonomi Daerah (Suseda) 2005, BPS Provinsi Jawa Barat dan Bapeda Propinsi Jawa Barat [The 2005 Regional Socio-Economical Survey, Central Bureau of Statistics and Regional Spatial Planning Bureau, Province of West Java].

ployment for West-Java of 14.5 percent, relatively high compared to the whole of Indonesia (9.7 percent in 2007).[2] A different figure is available at the district's official website for non-working heads of household in Cianjur for 2007. Unlike the unemployment statistics, this figure is based on households rather than individuals, and includes those heads of household who are not considered part of the Indonesian labor force, such as people above sixty years. I have calculated that a total of 24 percent of heads of household in Cianjur was not working.[3] Both figures indicate a relatively high number of households in Cianjur without stable income from labor. According to official figures by the BPS, in the year 2007 18.5 percent of Cianjur's population was poor,[4] slightly higher than the national poverty rate in the same year, 16.6 percent.

If we look at religious affiliation, 99 percent of Cianjur's population is Muslim. Cianjur's self-image of piety and 'Sundaneseness' is reflected in the first part of the district's motto *maos, mamaos, maenpo. Maos* is Sundanese for reciting the Qur'an, *mamaos* is performing traditional poetry and *maenpo* is the martial artform *pencak silat.* The Muslim character of Cianjur is also reflected in the number of Islamic schools. In present-day Cianjur there are 328 *madrasah* (Islamic day schools) and 67 *pesantren* (Islamic boarding schools), on a total number of 1819 schools.[5] These Islamic schools are led by local Muslim scholars referred to as *kyai, uztad* or *ulama*, who have considerable authority in their community in Islamic matters. In Cianjur there is much variation in the religious affiliation of these Islamic boarding schools and their leaders. The traditionalist *Nahdlatul Ulama,* and modernist *Muhammadiyah* and *Persis* all have considerable support, as well as smaller Muslim currents and sects. As a consequence, many competing interpretations of Islamic law exist in Cianjur.

In the *Reformasi* era, national developments also influenced Cianjur's political landscape. For supporters of a sharia-based Indonesian Republic *Reformasi* meant, among other things, the freedom to publicly propagate their cause. In the year 2000, a national gathering in Yogyakarta established the Indonesian Mujahideen Council (*Majlis Mujahidin Indonesia*). The gathering included Fuad Amsyari, the chairman of a respected organization as ICMI (see 1.1.1), but also the formerly banned radical Abu Bakar Ba'asyir, the alleged leader of the *Jemaah Islamiyah* who in the following years would be linked to several terrorist activities in Indonesia (ICG 2008). The gathering proclaimed

2 http://jabar.bps.go.id/templates/BRS/2009/FEBRUARI/BRS%20Ketenagakerjaan%20022008.pdf, last accessed 19-03-2012.

3 Calculation of figures from the table '*Kepala keluarga menurut jenis kelamin, pekerjaan, dan perkawinan*' [Household heads according to sex, work, and marital status] published on www.cianjurkab.go.id. 142,802 non-working households divided by 594,323 (total households) multiplied with 100 percent equals 24 percent.

4 http://cianjurkab.bps.go.id/tabel_kemiskinan.php.

5 Figures from http://schomap.ditpsmk.net/schomap/report.php?Rep=tsissmksemuamts&IdKabR=0205.

the Yogyakarta Charter, calling for the obligatory implementation of sharia in Indonesia and rejecting man-made laws. The Yogyakarta Charter also formulated the way to achieve this: by targeting local bureaucracies throughout Indonesia and converting them into a support-base for Islamic law (Hilmy 2010: 110-111).

In the following years Cianjur and many other districts introduced sharia-based regulations, for the most part aimed at the behavior of civil servants (Bush 2008; Buehler 2008a). Moreover, all over West Java radical organizations sprang up with the mission to defend Islamic interests, if necessary with violence. Most notorious is the Islamic Defenders Front (*Fron Pembela Islam*; FPI), but on the local level many affiliated organizations operate under different names. In the case of Cianjur, the Islamic Reformist Movement (*Gerakan Reformasi Islam*, Garis), founded in 1998, has been involved in several incidents against Muslim minorities such as the *Ahmadiyyah*. Most of the radical organizations find their following outside the community of established organizations like *Muhammadiyah* and NU, but some overlap has been reported (Setara Institut 2010).

The local sharia-based regulations were decrees issued by the former district head (*bupati*) of Cianjur Wasidi Swastomo (2001-2006) from the *Golkar* party, who made Islamization (*syariasasi*) a mission of Cianjur's government. The Institute of Islamic Study and Development (*Lembaga Pengkajian dan Pengembangan Islam,* LPPI) was established in Cianjur in order to prepare the further implementation of sharia on all aspects of life, including civil and criminal law (Tanthowi 2008: 27). In addition, the Movement to Create a Society with High Morals (*Gerakan Pembangunan Masyarakat Berakhlakul Karimah*, Gerbang Marhamah) intended to bring about a society in Cianjur that is 'both wealthy and Islamic' (*Sugih Mukti Tur Islami*). These institutions, however, did not lead to more Islamic law-based regulations; District Regulation 3/2006, which at the very end of Swastomo's term was adopted by Cianjur's district parliament, merely formalized already existing decrees of Swastomo. Cianjur's district head in office when I conducted my fieldwork, Tjetjep Muchtar Soleh (2006-2011), did not issue new sharia-based decrees at all.

The rules in such regulations and decrees mostly concern Muslim civil servants. They consist of a dress code for civil servants with compulsory veils for Muslim female civil servants and long-sleeved *batik* blouses for males. Muslim civil servants are encouraged to pray five times a day and improve their skills in reciting the Qur'an. The district government's formal policy, aimed at society at large, does not to go beyond soft persuasion to live according to Muslim norms. Exemplifying this are billboards carrying slogans like 'wearing a veil is a characteristic of a pious Muslima.' As I observed during my eight-month stay in Cianjur, both in the towns and villages, this state advice can be ignored without consequence and a large portion of Muslim women still choose not to wear a veil – not even, as I observed on numerous

occasions, in the Islamic court. On the other hand, as a result of this persuasion, many schools have made veils compulsory for girls.

5.2 The colonial history of Cianjur

5.2.1 Cianjur and forced coffee production at the time of the VOC

In the sixteenth century, the area of present-day Cianjur was located in *Prahyangen* (in Dutch: *Preanger*), Sundanese for 'empty land', and battleground of the Central Javanese Muslim Sultanates of Demak (1500-1550) and Mataram (1588-1681) in their wars with the West Javanese Sultanates of Cirebon (1445-1667) and Banten (1527-1813). The colonial period started in Cianjur in 1677, when the Sultanate of Mataram and the VOC signed a treaty that brought large parts of the empty lands in West Java, including the area of Cianjur, under the authority of the VOC. Cianjur became part of the indirectly ruled Territory of Batavia's Surroundings (*Bataviasche Ommelanden*). In 1691 the VOC reorganized its territory administratively, creating the district (*afdeling*) of Cianjur. In 1707 the town of Cianjur became the chief town of the district after the regent moved the district government's office there, and ever since the town of Cianjur has been the capital of district Cianjur (Suryaningrat 1982).

In 1711, Cianjur was the first district to supply the VOC with coffee. This proved to be a lucrative business for the Dutch, and in 1723 the VOC claimed a monopoly on coffee trade in the region and introduced a system of compulsory supplies by the regents. Thus, a system of forced coffee production, the *Preanger* system[6] had been introduced in West Java more than a century before the similar and notorious Cultivation System (*Cultuurstelsel*) was introduced in the rest of Indonesia by Governor-General Van den Bosch in 1830. In 1726, only three years after the VOC had established the monopoly on coffee trade, the company unilaterally decided to pay a price for coffee four times lower than before. This created great turbulence. The *regent* of Cianjur was even killed by one of his subjects, who was outraged by the low prices. Nonetheless, order was soon restored.

From the perspective of the VOC, the *Preanger* system was a success. Cianjur's great economic significance for the VOC at that time is reflected in the trade figures for 1726, the year Cianjur's regent was murdered. They reveal that at the start of the *Preanger* system the VOC controlled three-quarters of global coffee trade, half of which was being produced in Cianjur (Breman 2010: 74). In the early eighteenth century the VOC rewarded the regent of Cianjur twice for his loyalty and achievements in the coffee production by increasing

6 I follow Breman (2010) by setting the birth of the *Preanger-stelsel* around the early 1720s, when the monopolization of the coffee trade and the forced production of coffee by the VOC started.

Cianjur's territory at the expense of a neighboring district less loyal to the VOC (Breman 2010; Dienaputra & Gunawan 2004). Because of its central position in the coffee production, Cianjur was made the capital of the province of the *Preanger* regencies in 1816 and became an important colonial administrative centre. This was short-lived, however, as in 1864 the provincial capital of the *Preanger* regencies was moved to the fast-developing regency of Bandung (Dienaputra & Gunawan 2004: 41-50). Although this meant a substantial decrease in administrative importance, Cianjur remained one of the major coffee production centers of the Netherlands Indies.

5.2.2 Landlords, land-laborers and forced labor

The success of the forced coffee cultivation relied heavily on the cooperation of local power-holders. In eighteenth century Sundanese society, the aristocracy (*menak* in Sundanese, better known by the Javanese term *priyayi*) ruled the administrative centers, but their authority in the country side depended on the loyalty of the class of landowners. The latter originated from the *jalma bumi*, clans who claimed to be descendants of the founders of the towns and villages in West Java, who had organized clearance of the lands and the construction of irrigation networks, mainly for the rice fields (Ensering 1987).

To maintain relations with the local power-holders, the indigenous district administration traditionally recruited local officials, including religious officials, from the ranks of the local *jalma bumi*. The VOC's system of indirect rule left most matters concerning lower officials to the indigenous rulers. In practice this meant that the religious bureaucracy which already existed in the *Preanger* continued to operate. This religious bureaucracy was headed by the chief *penghulu*, who was usually of aristocratic origin and related to the ruling elites. Lower-ranking officials in the villages came from *jalma bumi* families. In the intermediate ranks intermarriages between family members of *penghulus* and prominent *jalma bumi* were quite common (Ensering 1987).[7]

A third class was formed by peasants who owned a house on a small parcel of land (*tanah pekarangan*), but mostly worked the land of the *jalma bumi*. The fourth landless class comprised of land laborers (Dienaputra & Gunawan 2004: 21-22). The small landed and landless farmers were the ones who had to work in the coffee-plantations as service for their landlord and ultimately for the VOC (*herendiensten*), whereas their local landowners and the district's aristocracy were rewarded by the VOC for the coffee produced. In fact, the whole agricultural economy in the *Preanger* relied on the landowner-farmer relationship in the labor-intensive wet-rice cultivation. This existing relationship was used in the *Preanger* system of forced coffee-production.

7 See 2.1 for a description of the Islamic bureaucracy on Java.

Because in the early eighteenth century a large part of the *Preanger* was uncultivated, a considerable part of the population had the option to open up land themselves and to live as slash and burn farmers, not tied to any landowners. Hence they were able to operate largely outside the *Preanger* system. In order to tie more *Preanger* farmers to local landlords and thus increase the potential labor-force in the coffee plantations, in 1706 the VOC urged the Sultan of Cirebon as the suzerain of the *Preanger* districts at that time, to increase the number of settlements based on wet-rice cultivation. In addition, the VOC organized the regencies (*regentschappen*) into fixed territories, ending the situation in which their boundaries were elastic and dependent on the ever-changing loyalties of the landlords to a regent. As a result of these VOC policies Cianjur's society gradually became more hierarchically stratified, consisting of patron-client networks in which the commoners paid taxation in tribute and labor to the landlords , who in turn deferred to the regent (Breman 2010).

5.2.3 The role of Muslim officials as colonial after the demise of the VOC

When the VOC went bankrupt in 1798, the Dutch Republic took over the administration of its territories. Herman Willem Daendels (1808-1811) is the most renowned, and notorious, Governor-General of the early period of Dutch colonial rule. In Indonesia Daendels is especially known for building the *Grote Postweg* (main postal road) on Java by forced labor. One of his other measures was to make the *Preanger* Muslim religious officials responsible for the organization of a population administration. Daendels decided to employ the indigenous Muslim bureaucracy in order to increase Dutch control and checks over the forced coffee cultivation, because they could read and write well and were already experienced as registrars of the religious *zakat*.

The colonial government asked the Muslim bureaucracy to keep local population records which were used to determine the number of peasants that could be recruited for forced labor. As a reward for their services, Daendels increased the tax tribute local peasants had to pay to the religious officials from one-twentieth to a tenth of their rice production. As a result of this colonial policy, which remained in force until 1870, many higher religious officials in the *Preanger* became wealthy landlords, and acquired a central position in the rice-trade (Breman 2010: 279; Ensering 1987).

In the 1830s the interests of the colonial government and the land-owning *Preanger* class began to diverge. The taxation and labor service of the *Preanger* system relied heavily on religious officials' population reports. The wet-rice land-owners, however, were also in need of laborers. The colonial government paid relatively low prices for coffee and the increase in rice revenues for the local level religious officials had made rice production twice as lucrative to them compared to the coffee incentives (Breman 2010). Religious officials began

to under-register the number of peasants as a strategy to evade the extraction of labor from the rice-fields to the coffee plantations (Nitisastro 1970).[8] This had no effect on the interests of the land-owners themselves, as the collection of their portion of the rice harvest relied on their personal relation with the farmers rather than on the population registration. To the colonial government, however, fewer registered people meant a smaller work force for the benefit of coffee produce and less income.[9]

The Dutch responded in 1839 by making forced labor applicable to every peasant household rather than to every landlord. Nonetheless, a stricter control and new methods of population surveying (rather than self-reporting by the religious officials) did not halt the practice of under-registration, since due to a lack of staff the colonial government's reach remained limited. For example, in the 1890s Dutch research assistants reported that it was fairly common that upon the examination of a location peasants simply 'disappeared' in order to evade taxation in labor service (Nitisastro 1970: 52).[10]

5.2.4 The end of local land-owners' involvement in the colonial administration

Until the late nineteenth century the colonial government ruled the *Preanger* through the indigenous rulers and only exercised secondary control over the religious officials, who were put under the supervision of the indigenous authorities who had to keep a register of them.[11] On the most local level, implementation of colonial policies relied on the partnership between the *priyayi* aristocracy in the district capital and the land-owning *jalma bumi* in the towns and villages. In order to maintain the partnership, members of the indigenous administration had incorporated local landowning families into the Muslim bureaucracy headed by the (*priyayi*) *penghulus* as local-level religious officials and tax collectors.

The end of this cooperation between the Dutch colonial government, the *priyayi*, and the local landlords in the *Preanger* is marked by the abolishment of the *Cultuurstelsel* policy of forced production in 1870. From this time onwards, the official policy of the colonial government was that the religious officials had to limit themselves to religious matters and thus refrain from agrarian exploitation through the one-tenth standard on the rice harvest, or

8 As a result of competing interests, the accuracy of the population reports throughout the colonial time was low 'especially because of the direct relation between the collection of population data and the levying of taxes' (Nitisastro 1970: 26).

9 Although *herendiensten* in the form of forced labor in the coffee plantations had been abolished in 1870, forced labor in the national interest (e.g. infrastructural projects) was continued.

10 The report is discussed in 'Volkstellingen op Java en Madoera', *Tijdschrift voor het Binnenlandsch Bestuur*, XVIII (1900).

11 S 1820/122; Article 124 RR.

any other economic activities. However, in practice the policy was not enforced. Even the highest officially appointed Muslim officials, the chief *penghulus* could ignore the formal restrictions without Dutch repercussions. For example, in the early nineteenth century the chief *penghulu* of Cianjur was reported to be the main creditor of the district, with outstanding loans totaling more than 200,000 guilders (Breman 2010: 331).

As we have seen, long before the end of the *Cultuurstelsel* in 1870, the interests of local land-owners had moved away from those of the colonial government, and the former rice traders competed to a certain degree with the colonial project of forced production. In response the colonial government increased its control over the indigenous administration, which modified the colonial policy of rule through the regents, but more importantly simultaneously altered the partnership between *priyayi* and local landowners, many of whom had become *ulamas* and *kyais* (see 5.2.5 below). From that time on, the colonial government increasingly relied on the *priyayi* class rather than on the Islamic class of local landowners and their followers (Newland 2000).

The colonial government placed the chief *penghulus* under the direct authority of the colonial authorities. S 1867/125 made the chief *penghulu* a salaried official of the colonial government. Subsequently, S 1870/122 stipulated that *penghulus* would no longer be appointed by the Javanese regents, but by the Governor-General. The Governor-General primarily appointed persons from the class of the *priyayi*, to the office of chief *penghulu,* who in turn often selected their relatives for other positions in the Islamic bureaucracy. As the new Dutch policy also sharply reduced the number of officials in the Islamic bureaucracy of West Java by setting a quota, many members of the class of local landholders lost their position in the bureaucracy.

Similarly, the 1882 Priest Council Regulation placed the Islamic courts under control of the colonial government (see Chapter 2). Lev has argued that this 'laid a basis for greater autonomy of Islamic courts and, equally important, for a more supra-local orientation by Islamic officials' (Lev 1972: 16). This supra-local orientation of religious officials, and the increasingly *priyayi*-heavy composition of the Islamic courts and bureaucracy, was viewed by many *ulamas* as collaboration with the colonial authorities, at their expense. This further undermined the existing partnership between the *priyayi* and the class of local landowners.

Another attempt to increase control over the *ulamas* and *kyais* was the introduction of the so-called *guru* ordinance of 1905, which held that all religious teachers, including *kyais* and *ulamas,* had to be licensed and were no longer allowed to be involved in agrarian and political matters, nor to levy agrarian taxes (Ensering 1987). This policy only broadened the gap between the colonial government and local religious elites, increasingly pushing the latter to operate autonomously from the policies of the state, while continuing to serve as the local authority in religious matters.

As a result of the attempts of the colonial government to regulate their activities, the local class of landowners, of whom many became independent *ulamas* and *kyais* (see 5.2.5 below), increasingly challenged the authority of the colonial state and its *priyayi* 'vazals' (Newland 2000). The *priyayi penghulus,* heads of both the Islamic bureaucracy and the Islamic court, not only became 'caught between [the] three fires' of God, the colonial government and society (see Hisyam 2001), but also between the interests of the colonial government, those of their own class of *priyayi* administrators, and those of the independent *ulamas* who competed with them for authority. This competition had consequences for the functioning of the Islamic courts. On the one hand, the *penghulus*' intermediary position enabled them to maintain an administration of justice that traditionally left ample room for *adat* and state law norms. On the other hand, it made them and the substantive norms they applied vulnerable to criticism from local *ulamas* and *kyais*. Moreover, *ulamas* and *kyais* provided similar services with regard to marriage and divorce, giving people the option to arrange their private affairs closer to home.

Since 1870, the colonial government had removed many formal powers of local landowners (now *ulamas* and *kyais*) and in response the latter applied a dual strategy to preserve their position as local power-holders. First, they used the benefits of the rice-trade for land acquisitions in order to increase wet-rice cultivation. In 1932, rice fields in Cianjur doubled the area of 1864, despite the fact that the region of Sukabumi, formerly part of the district of Cianjur, became a district of its own in 1921. The increase in farmland meant increasing revenues to the class of religious landlords. Many used their increasing wealth to complete the *hajj*. Upon return from Mecca, many *hajis* founded religious boarding schools (*pesantren*), thus becoming *kyai*. Through the expansion of their lands, their religious standing as *hajis* and *kyais*, and their position as main creditors in their area, the religious landowning elite managed to bolster their position and to gain autonomy from the colonial state (Ensering 1987: 272).

In the end, then, Dutch attempts to increase control over religious actors backfired. The alliance between the *priyayi* aristocracy with the local land holders, many of whom were *ulamsa* and *kyais*, was undone. While the *priyayi*, which included the *penghulus*, maintained their position, the religious lower middle class of landowning *ulamas* lost much of its formal political power. The removal of the *Cultuurstelsel* led to the introduction of the land taxation system in force in the rest of Java. From tax collectors, the land-owning *ulamas* became tax payers. All these developments gradually created a West Javanese middle class of local land-owning religious actors who challenged the colonial regime and its indigenous *priyayi* 'vazals', including the *penghulus* of the Islamic courts (see Svensson 1991).

5.2.5 The growth of Muslim education in the *Preanger*

The infrastructure in the *Preanger* area changed profoundly during the nineteenth century. In the early nineteenth century, Cianjur became connected to Jakarta and Bandung by the Great Postal Road (*Grote Postweg*), which was completed in 1808. Smaller trading roads to Sukabumi and Sindangbarang in the south had been built within Cianjur. Still, under the *Preanger* system and *Cultuurstelsel* travel was severely restricted. This was done in order to keep smugglers and 'provocateurs' away, including traveling *muballigh* (Islamic preachers) from other regions (Breman 2010).

When the *Cultuurstelsel* came to an end in 1870, local travel restrictions were also lifted, and the Dutch allowed more freedom of movement to the population as a whole. After Cianjur in 1883 became connected by train via Sukabumi to Batavia and in 1884 to Bandung,[12] trade and travel became much faster, which promoted the spread of new ideas about Islam. Moreover, the *hajj*-permits for pilgrimage to Mecca were made a lot cheaper in 1859, which resulted in a significant increase of the number of *hajis*. In 1851, only 71 pilgrims from the *Preanger* made the *hajj*, while in 1862 the number increased to almost five thousand, the highest figure for Indonesia at that time. The opening of the Suez canal in 1869 made the *hajj* even more accessible to the land-owning class (Breman: 2010: 330).

An important development for the *Preanger* in the late nineteenth century was the increase in the number of religious schools founded by local landlords who hade made the *hajj*. At the end of the nineteenth century, the number of *pesantren* in Cianjur increased dramatically. By 1857, there were 27 *pesantren* with 1090 students. In 1874, this increased to 174 *pesantren* with 3881 students. In comparison, in 1885 there was only a single Dutch school with 46 students, only three of whom were classified as 'indigenous or foreign oriental' (Dienaputra & Gunawan 2004).

In the early twentieth century religious schools were put under administrative control through a licensing system under the abovementioned *guru* ordinance of 1905. At the same time, under the influence of the 'ethical policy' and in order to educate the indigenous bureaucracy of the expanding colonial state, the number of colonial state schools did increase, with students mainly coming from the *priyayi* upper classes. For the lion's share of the people living in the countryside Islamic schools headed by *kyais* and *ulamas* remained the only accessible education. Thus, notwithstanding the colonial policies, the *kyais* and *ulamas* managed to maintain and perhaps even increase their social standing in the local communities concerned.

12 The number of train passengers in Cianjur increased from 35 thousand per year in 1884 to more than 450 thousand in 1910 (Dienaputra & Gunawan 2004: 129).

5.2.6 The rise of the *Sarekat Islam*

As we have seen in 5.2.4, colonial policies of the late nineteenth and early twentieth century brought 'the atypical coalition between the *priyayi* and the local religious leaders in the *Preanger*' to an end (Ensering 1987: 270-271). Resistance to the attempt of the colonial government to reduce the political influence of *ulamas* and *kyais*, however, only partly explains the rise of Muslim movements in the early twentieth century. Alternative visions of Islam and the ideal society aired by a wide range of political and religious movements, were just as important as protection of local interests. Those Muslim movements found solid ground in West Java and in Cianjur in particular.

In 1911 the Muslim Trade Union (*Sarekat Islam*, SI) was founded to protect and stimulate business and trade interests of Muslims. In 1913 a local SI division was founded in Cianjur. In 1916, SI membership within Cianjur reached 8,000 persons, the largest SI-branch in the *Preanger* of that time. In the same year, Bandung, generally considered one of the centers of the SI movement, only listed 1,500 SI members (Dienaputra & Gunawan 2004: 140-141). By 1918 SI had developed into a more general political organization, placing sensitive issues on its agenda such as self-government and the right to vote. Both European merchants and the indigenous *priyayi* felt threatened by the rise of the SI and their agenda of emancipation (Ensering 1987: 279-280).

What is more, within SI a socialist (but still Muslim) faction gained prominence, influenced by the Indies Social Democrat Association, the predecessor of the Indonesian communist party. This socialist agenda temporarily pushed a more Islamic one to the background. In response a group of local *ulamas* and *kyais* established an underground militant wing of the SI, the *afdeling B*. This more radical opposition materialized in a retreat by the *tarekat* or brotherhoods. Civil disobedience and resistance towards *abangan* civil servants pertaining to tax-collection, rice monopolies, and the obligatory services for the colonial government were part of the strategy of this more radical faction within the SI. Consequently, the grip of the *kyais* and *ulamas* on their communities was maximized and conversely that of the state on them minimized.

The colonial government employed the tensions within SI for a divide and rule strategy. De Stuers, the Dutch Resident of the *Preanger*, on the one hand presented the *afdeling B* as proof that SI was involved in a religious conspiracy against the colonial state, while on the other hand, with the support of European businessmen and the local aristocracy, he started a campaign against the socialist character of the SI. In reaction, in 1921 the SI board decided to expel the socialist faction and promote a more moderate agenda. Freed from religious and socialist radical elements, the SI managed to restore internal order and its relations with the colonial government.

The expelled socialist faction of the SI established the *Sarekat Rakyat*, absorbed into the PKI in 1924. When in 1923 the land tax in the *Preanger* was increased by 100 percent, the *Sarekat Rakyat* became one of the main players

in local protests. It is important to note that other than what the term 'socialist' might suggest, the core of the *Sarekat Rakyat* were not landless peasants but small landowners, including *kyais* and *ulamas*. The target of the 'socialist' protests at this point in time were not the 'bourgeoisie' of Dutch entrepreneurs, but the local administration and the local religious officials which competed for power with the independent *kyais*. The *priyayi* class in the *Preanger* reacted by organizing *Sarekat Hijau* groups, attacking *Sarekat Rakyat* members and destroying their houses (Cheong 1973: 33). When a prominent member of the SI in Cianjur questioned the validity of the practice of asking God's blessing for the *bupati* of Cianjur in Friday-prayer sermons, SI members in Cianjur became target of attacks by *Sarekat Hijau* groups too. Thus, tensions between *priyayi*, SI *ulamas*, and leftish *ulamas* mounted.

Ensering concludes that from 1910-1930 the emergence of the more radical factions that grew out of the SI in the *Preanger* were the result of

> 'neither a conflict between landless peasants and landowners, nor of communists against non-communists, but much more a conflict between local elite groups, that is between wealthy *kyai* and middle-sized farmers against government officials and religious officials as representatives of the colonial regime.' (Ensering 1987: 281-282)

This period marks the start of often violent conflicts between local *ulamas* and the local *priyayi* officials, including *penghulus* who acted as Islamic judges in West Java. As we will see, these lasted until the 1960s.

5.2.7 Political movements in the late colonial period

We have seen with the case of the SI that in the late colonial period the emergence of 'national' political movements fed tensions in West Javanese society. The rise of *Sarekat Islam* coincided with the foundation of large Muslim movements (*Nahdlatul Ulama, Muhammadiyah, Persatuan Islam*), the Nationalist Party (PNI) and the Communist Party (PKI). The political differences and hostilities between them would dominate the political field for decades to come, tearing communities and even families apart.

The *Muhammadiyah* in 1912, *Al-Irsyad* in 1915 and *Persatuan Islam* (Persis) in 1923 are all considered Muslim reformist movements: they want to modernize Indonesian Islam, do away with un-Islamic traditions of worship (*bid'ah*) in society, reform the traditionalist *ulama's* strict adherence to traditional Islamic legal doctrine (*taqlid*), and instead create a modern Islam based on its original sources, the Al-Qur'an and Hadith. The main targets of reformist movements were thus the traditional *ulamas*, the *penghulus*, and local customs. Moreover, they drew on a strong anti-colonial discourse. The core of the SI

movement was reformist, and its large following in West Java is also reflected in the popularity of *Muhammadiyah* and *Persis* in the *Preanger*.

In 1926, the *Nahdlatul Ulama* (NU) was founded in response to the new Muslim reformist ideas that threatened the traditionalist *ulamas* and their teachings. The NU's agenda consisted of six points: tightening relations between *ulamas*, monitoring the religious books used in the *pesantren*, spreading the Muslim religion based on *syafi'ite* Islamic doctrine, increasing the number of Islamic day-schools (*madrasah*), monitoring of Mosques, *mushollah*, boarding schools, etc., and finally, founding bodies to advance farming, trade, and manufacturing, in accordance with Islamic teachings. The NU had no nationalist agenda but many NU *kyais* were involved in anti-colonial activities and by 1940 its leadership started to prepare for independence (Feillard 1999: 19-30). As the *Preanger* was a large base for traditionalist *ulamas,* many communities in the *Preanger* became divided religiously between traditionalists and modernists and they still are (see Newland 2000).

The Indonesian Communist Party (*Partai Komunis Indonesia*/PKI; founded in 1920) was very active in grassroots politics, supporting the work of unions, women's rights organizations, and land reform. The PKI was not anti-Islam, as can be seen from the involvement of some of their leaders in the SI. The organization was not as influential in the rural areas of West Java as Central Java, but in the 1920s their anti-tax, anti-colonial program appealed to small land-owners and, as the PKI presented itself as a Muslim communist movement (and had not yet developed a more feminist agenda) it also appealed to *ulamas* and *kyais* (Williams 2010: 44-45). However, in the 1940s until the 1960s, the PKI's aim to reform traditional Muslim life in a radical way (as well as the PKI's ties with strictly secular communist parties abroad) made both reformist and traditionalist Muslim movements strongly opposed to the organization.

In 1927 the Indonesian Nationalist Party (*Partai Nasional Indonesia*/PNI) was founded, with in its ranks Soekarno, the future first President of the Republic of Indonesia. The PNI was led by well-educated *priyayi* and envisaged the creation of a modern independent republic. It supported an agenda of legal and administrative unification and was in favor of the abolishment of the Islamic courts and the Islamic bureaucracy. Due to this unification agenda and its *priyayi* base, the PNI often came into conflict with Muslim organizations and the PKI.

Returning to the subject of the Islamic courts, a common trait of all political movements was their skepticism about the performance of the Islamic courts in general and the capacities of *penghulus* to act as an Islamic or modern judge in particular. According to the traditionalist Muslim critics, the *penghulus* lacked traditional Islamic knowledge, and modernists disapproved of their traditionalist administration of law, whereas the nationalist and socialist movements wanted to get rid of the old-fashioned institution altogether and wished to create a unified and more gender-equal family law (Hisyam 2001). Only when the colonial government as part of an *adat*-based policy in 1937

formally transferred the jurisdiction over inheritance and marital property matters from the Islamic courts to the *landraad*, did the Muslim organizations start supporting the traditional *penghulu* courts.

By the 1930s the colonial government had managed to get a strong grip on the formal Indonesian political movements. It had banned the PNI and PKI and exiled their leadership, but it had not curbed nationalist, socialist and Islamic aspirations. To be sure, all parties managed to obtain a large following in West Javanese society and issues as the position of Islam and traditional leaders, land reform and women's rights penetrated into the countryside of West Java and built up tensions that would explode after independence.

5.2.8 The *Masyumi* and West Javanese Muslim militias under the Japanese (1942-1945)

The Japanese period had two important consequences for the position of Islam in the early Independent Republic of Indonesia in general and in West Java in particular. First, it united all Muslim movements, whether the traditionalist NU or the reformist *Muhammadiyah* under the *Masyumi*, which created an Islamic party larger than the nationalist and communist parties. To its supporters, the idea of an independent Indonesian Islamic state seemed more realistic than ever before.

Secondly, the Japanese made Kartosuwirjo the *Masyumi* commissioner of West Java. This former secretary general of the Indonesian *Sarekat Islam* party, from which he had been banned because of his radical idea of a total retreat (*hijrah*) from the colonial state, would later become the leader of the *Darul Islam* rebellion. Kartosuwirjo also joined the *hokokai*, the mass movement the Japanese created to prepare the Indonesian masses for warfare, and he regularly met Sukarno and other nationalist leaders who also joined the *hokokai*. As part of this strategy, the Japanese allowed and trained *Hizbullah* militias in West Java which would play an important role in the independence struggle and the *Darul Islam*. As the *Masyumi* leader of West Java and a prominent *hokokai* member, Kartosuwirjo managed to create a large network of militant *kyais* in West Java who were willing to support the *Hizbullah* militias (Ensering 1987).

5.3 THE *ULAMAS*, THE STATE AND THE ISLAMIC COURTS IN WEST JAVA AFTER INDEPENDENCE (1945)

5.3.1 The *Darul Islam* rebellion in West Java (1945-1962)

On 17 August 1945, shortly after the Japanese surrenderd, Soekarno proclaimed the independent Republic of Indonesia. In October of the same year a social revolt swept over West Java, including the *Preanger*, 'in which *priyayi* were

sacked, killed or forced to flee'(Dijk 1984: 21). The leaders of this revolt typically were local *ulamas* and *kyais*, who managed to mobilize the community against the former members of the colonial administration. The newly established Republican government and its national army were quick to act and managed to bring the uprising under control in 1946.

In 1947 the Dutch launched their first military campaign to reestablish authority within Indonesia. They soon pushed the Indonesian army back into guerilla warfare. Under the Renville treaty of 17 January 1948, the Indonesian government, including representatives of the *Masyumi* and the Indonesian army, agreed to retreat to Central Java. As a consequence, West Java came under colonial rather than Republican rule. Nonetheless, the independence struggle in West Java was continued by *Hizbullah* and *Sabili'llah* militias under the command of Kartosuwirjo. In February 1948, Kartosuwirjo led a conference that suspended the *Masyumi* in West Java, and organized the formation of the Islamic Army of Indonesia (*Tentara Islam Indonesia*). Hence, the perceived 'betrayal' represented by the retreat of the provisional Indonesian Government to Central Java – which led to the reinstitution of colonial rule in West Java – marked the birth of the *Darul Islam* movement (Temby 2010: 4). The Islamic Army soon controlled most rural areas of West Java, while the colonial troops only took command of the main towns (Kilcullen 2000: 50)

When Soekarno and Hatta were arrested in December 1948, the momentum of the independence struggle initially seemed to slip out of their hands. However, in January 1949 the Security Council of the UN condemned the Dutch military actions and called for a peaceful resolution of the conflict. With the UN on their side and justified by the fact that Soekarno and Hatta's arrest had been a violation of the Renville treaty, the National Army decided to continue its struggle beyond the borders of Renville and returned to West Java. From then on, the Islamic Army fought against both the Dutch and the National Army, with much success as most areas in West Java remained under its control (Kilcullen 2000: 50-51).

Under pressure from the UN, and especially the United States, the Dutch started negotiations about Indonesian independence. In May the Dutch representative and his Indonesian counterpart Mohammed Roem signed the Van Roijen-Roem declaration, which included a ceasefire and the release of Soekarno and Hatta (July 1949). In response Kartosuwirjo proclaimed the Islamic Republic of Indonesia (*Negara Islam Indonesia*, NII) on 7 August 1949. This was just a few months before the Republic and the Dutch would reach an agreement about Indonesian independence, which was set on 27 December 1949. It must be remembered that Kartosuwirjo's proclamation of NII happened at a time when the *Darul Islam* controlled most of the Southern part of West Java, from Banten to the *Preanger* and enjoyed considerable support from the local population and local *ulamas*, which made possible the organization of a shadow government in the *Darul Islam* areas. In 1956, when the *Darul Islam* rebellion

was still ongoing, Wertheim explained this support of the local population as follows:

> 'The traditional leaders of village society are embittered at a process which is gradually robbing them of their authority. They are able to gather a following of poor peasants who fear their age-old way of life endangered by processes they cannot understand and who are increasingly resentful of what they feel to be an exploitation by the ruling class, which is mostly of *priyayi* origin.' (Wertheim 1956: 228 as cited in Kilcullen 2000: 54)[13]

Targets of the *Darul Islam* included the *priyayi* class, including *penghulus* of the Islamic court. To provide a picture of the scope of the violence: in 1952 the district of Garut, which neighbors Cianjur, recorded 5,000 incidents involving the *Darul Islam*, killing 443 officials and commoners and resulting in the displacement of 83,000 people (Newland 2000: 210). In the national parliament *Masyumi* successfully blocked a large-scale military intervention in West Java for a significant period. It was not until 1959, after President Sukarno had dissolved the national parliament and started 'Guided Democracy', before there was sufficient political backing to launch a military campaign to suppress the *Darul Islam* (Kilcullen 2000: 51).

As a result of the National Army campaign (1959-1962) the Islamic Army was forced to retreat to the mountains in southern West Java to fight a guerilla war. The targets of the guerilla were 'disloyal' *ulamas* and their communities, government officials, military posts, buses and trains. Because of the violence and the raids of the Islamic Army, the popularity of the *Darul Islam* decreased and many *kyais* started to voice their support for the national government. The armed rebellion continued another three years until 1962, when Kartsuwirjo was captured, tried and executed by the Indonesian army. This effectively meant the end of the *Darul Islam* rebellion in West Java, but not of the *Darul Islam* movement.

The total number of fatalities attributed to *Darul Islam* is estimated at 40,000 persons. Hundreds of thousands of people were displaced (Newland 2000: 210). Nonetheless, in order to secure support in the rural areas of West Java, within a year the Indonesian government offered amnesty to 32 *Darul Islam* leaders who in return pledged their allegiance to the Indonesian Republic (Temby 2010: 6). Hence, the leaders of *Darul Islam* were more or less rehabilitated into West Javanese society and, as we will see, remained influential.

13 Kilcullen adds that this antipathy does not explain why some of those *kyais* and *ulamas* decided to support the *Darul Islam*, while others did not.

5.3.2 Political fragmentation in the independent Republic of Indonesia (1950-1965)

In West Java the support for a sharia-based state was strong, as appears from the the general elections results of the Muslim political party *Masyumi*, the most fervent supporter of a state based on sharia, and a strong political opponent of Soekarno's PNI. Despite the fact that the NU had withdrawn from *Masyumi* in 1952 and attracted many of the former *Masyumi* supporters elsewhere on Java, *Masyumi* succeeded in securing the largest share of the votes of West Java in the general elections of 1955: *Masyumi* won 27 percent of the votes and the NU 10 percent. Support for the non-religious parties was also strong, equaling the support for the Muslim parties in West Java: PNI obtained 23 percent of the votes, PKI 11 percent and the social democrats PSSI 6 percent. Although the PKI's vote share in West Java was less than half that of Central Java (26 percent) and East Java (24 percent), it was still larger than the NU's.

As mentioned earlier, in 1959 Sukarno ended the party democracy and founded the Guided Democracy. Parliament was made up of representatives of functional groups, rather than political parties. The official ideology of the Guided Democracy, 'Nationalism, Religion and Communism' (*Nasionalisme Agama Komunisme*, Nasakom) was an attempt to bring together the oft-polarized political currents of that time. However, the ideology achieved quite the opposite. Because of the growing cooperation of Sukarno with the communist party (PKI), tensions between the Muslim parties and Sukarno mounted in the late 1950s. Sukarno banned *Masyumi* in 1960, because of the support of its leadership for the *PRRI* rebellion in Sumatra.[14]

The NU, which took part in the subsequent governments of Soekarno's Guided Democracy, started a secret collaboration with anti-PKI segments within the army (Feillard 1999). The end of the armed *Darul Islam* rebellion in the 1960s had not diffused the tense revolutionary political atmosphere in Indonesia. Much like in the *Preanger* of the 1920s, actions in the name of the land reform agenda of the PKI regularly led to battles between communist supporters and Islamic youth organizations. Although NU's support for Soekarno's subsequent governments had been rewarded with ministerial posts, with the fast-growing Ministry of Religious Affairs dominated by NU-supporters (Lev 1972: 50-53), both the Army and the NU opposed the socialist-inspired land reforms of 1960, as they would negatively affect the interests of landlords, and thus many members of the Islamic elite in the countryside (Feillard 1999).

After the alleged Communist coup of 1965 and the subsequent intervention of the army led by General Suharto, youth organizations affiliated to the NU

14 The revolutionary government (*Pemerintah Revolusioner Republik Indonesia;* PRRI) rebellion of 1958 was led by generals disappointed with the change of Indonesia into a centralist (rather than federal) Republic and the incorporation of communism in the state ideology of *Nasakom*, but was crushed by the national army in the same year.

and other Muslim organizations supported the army in crushing the PKI cadres. In Indonesia hundreds of thousands of alleged Communists were killed by the army and Muslim youth groups. In West Java, the killings were not of the same scale as in Central and East Java, probably because the Indonesian government was reluctant to organize military support for Muslim youth groups in a region where the *Darul Islam* had only been defeated three years earlier. Nonetheless, many alleged PKI followers were killed or arrested in West Java too (Cribb 1990). This caused yet another violent episode in West Javanese history. This time the allegedly anti-Islamic forces of the PKI[15] were silenced, and with them the main propagators of land-reforms in the countryside.

5.4 West Java under Suharto's New Order

5.4.1 West Java in the context of national politics (1965-*1984)*

Soon after the 1965 coup, Soekarno was sidelined. In 1966 he was forced to step down, and Suharto's New Order formally began. Anticipating an Islamic turn in government policies following the ban on the PKI in 1966 and the cooperation of Muslim organizations in the brutal effectuation of that ban from 1965-1968, a number of districts in West Java introduced local sharia-based regulations that referred to the Jakarta Charter. In the early 1970s, however, the New Order government made clear that sharia-based regulations were out of the question, there would be no return to the Jakarta Charter and, moreover, it would not allow *Masyumi* to make a comeback in Indonesian politics (Hefner 2000).

In 1971, the first general elections of the New Order era were scheduled, and the NU seemed to have a strong position. *Golkar*, the party supported by President Suharto, was new and had no grassroots base. *Parmusi* the Islamic party, established with the permission of the New Order to replace *Masyumi*, lacked the latter's popular support. Hence, all three traditional political opponents of NU, i.e. *Masyumi* and the secular parties PNI and PKI, were out of the way. However, things turned out differently than might be expected. *Golkar* managed to win 63 percent of the national votes compared to only 19 percent for NU. NU also made little headway in West Java, as it only won 13 percent of the votes there while *Golkar* took 76 percent. The new regime and its new party had succeeded in attracting the support of former *Masyumi*, PNI and PKI voters whereas NU's support had not changed much since the 1950s.

Golkar's victory in West Java and elsewhere can partly be attributed to Ali Moertopo, personal advisor to Suharto and head of the Special Operations intelligence organization *Opsus*, who employed a dual strategy to attract

15 However, the PKI leadership had not been overtly anti-Islamic, and supported Soekarno's ideology of *Nasakom*, a mix of Nationalism, Religion and Communism.

potential NU voters. First, through expanding the GUPPI association (*Gabungan Usaha Perbaikan Pendidikan Islam*; Corporation for the Advancement of Muslim Education) from a local West Javanese organization established to counter *Darul Islam* into a national organization, which provided substantial financial support to *pesantren* on Java. On the eve of the 1971 elections, *Opsus* literally bought the support of influential *kyais* for *Golkar*. The second strategy was the state's cooptation of *Darul Islam.* In fact the contacts between *Opsus* and some *Darul Islam* elements went back to 1966, when the latter were secretly used to target regime enemies. In April 1971, however, a reunion was held attended by hundreds of *Darul Islam* members with government participation. This effectively provided permission for a revival of a non-violent *Darul Islam* movement in return for *Golkar* votes (Temby 2010: 8-13).

However, those who had hoped for an Islamic turn in governmental policies after the elections were disappointed as in subsequent years the *Pancasila* ideology would leave little room for political Islam (Hefner 2000: 80). To begin with, the *Darul Islam* revival proved to be short-lived. In 1976, the *Komando Jihad*, a faction of the rejuvenated *Darul Islam*, turned to violence and carried out a number of bombings. The New Order realized that *Opsus* had lost control over the operation and reacted with mass arrests of *Darul Islam* leaders, which pushed the movement underground once again. Furthermore, as we have seen in Chapter 2, in the mid-1970s and early 1980s the New Order frequently came into conflict with the large Muslim organizations NU and *Muhammadiyah*.

Three political events illustrate this divergence between Golkar and the main Muslim organizations in the mid-1970s and early 1980s . First, the forced merging of the remaining Muslim parties into the single Muslim party PPP in 1973 was strongly opposed by Muslim organizations, even if, for pragmatic reasons, in the end they chose to comply with this instruction of the New Order regime. Secondly, the Marriage Bill of 1973 was too secular in the eyes of the PPP and Muslim organizations, and only with the mediation of the military could a compromise be reached, resulting in the withdrawal of the most controversial provisions in the Law. Thirdly, in 1983, Muslim organizations were legally required to adopt the state ideology of *Pancasila* as the sole basis (*azas tunggal*) of their statutes, which was in direct conflict with the Islamic pillars of the Muslim organizations. These three events fueled the image of a New Order which ran counter to the aspirations of Muslim organizations.

While the political aspirations of Muslim organizations were significantly tempered in the first two decades of the New Order, this did not halt the further Islamization of West Javanese society. Contrary to what one would expect from a former *Darul Islam* region with strong support for modernist movements like *Muhammadiyah* and *Persis*, a large part of *Preanger* Muslim society in the early 1970s practised a syncretic form of Islam (Newland 2000). In the New Order era, the stigma attached to the allegedly atheist PKI put enormous pressure on these citizens to behave as more puritan Muslims.

Moreover, with the PKI out of the way, and with the backing of the Ministry of Religious Affairs, seemingly nothing stood in the way of Muslim organizations to increase their role in West Javanese society.

As a result of the strong presence of NU, *Persis* and *Muhammadiyah*, syncretic practices indeed decreased. The result, however, was not the unity the Ministry desired, as the communities in the *Preanger* became increasingly grouped into reformist *Persis* and *Muhammadiyah* followers on the one side, and traditionalist NU followers on the other. While the reformist movements shared the developmental agenda of the New Order, the NU build their support on those parts of society who were more traditional in outlook. The differences between the reformist movements and NU also touch on such essential issues as praying and the relation with the deceased, resulting in a relationship between the two groups that 'in the villages is often volatile' (Newland 2000: 214).

As we have seen in Chapter 2, during Soekarno's presidency (1945-1966) the NU managed to gain control over the Ministry of Religious Affairs, and had become the single Islamic political party after the ban of *Masyumi* in 1960. All over the country Offices of Religious Affairs (*Kantor Urusan Agama,* KUA) were set up as they were seen by the Ministry 'as the essential instrument for achieving uniformity in Islamic Affairs' (Lev 1972: 76). Many local *ulamas* and their family members had the opportunity to fill those new positions in the Islamic bureaucracy.

In theory this incorporation of local *ulamas* into the Islamic bureaucracy could decrease the competition between the Islamic courts and the KUAs on the one hand and the local *ulamas* on the other. However, *ulamas* in West Java had developed an ambivalent position towards the state, and because of their traditionally strong position in local affairs, had managed to maintain rather independent. As these independent *ulamas* had been the local religious authorities for many generations, it was not self-evident that they would give up this authority even if they were formally incorporated into the state bureaucracy. As we will see in the next section, the result in West Java was the development of a new competition between the Islamic courts on the one hand, and the KUA and local *ulamas* on the other.

5.4.2 West Java and the second phase of the New Order politics (1984-*1998)*

The second phase of the New Order again saw a change in the political landscape. Under the leadership of Abdurrahman Wahid, the NU decided to withdraw from the PPP in 1984. It was not a total retreat from politics, as the NU would adopt the strategy of the *Muhammadiyah* and would try to increase its influence through establishing relations with *Golkar*, the PDI and the military (Feillard 1999).

After its retreat, the NU had to share control of the Ministry of Religious Affairs with the *Muhammadiyah*, which made it more receptive to modernist

ideas. Simultaneously under the influence of its involvement in the state's development policies and the open-minded leadership of Wahid, the traditionalist NU also reformed to a certain extent, and as a consequence the line between modernist and traditionalist on the national level blurred (Feener 2010; Nurlaelawati 2010). However, the modernist turn by the NU leadership may have alienated them from their traditional supporters in the country side:

> 'If at the national level, the modernist religious vision of the future has had much in common with the state's push for modernisation, nationalism, industralisation, and rationalisation, the traditionalists are highly suspicious of these changes, seeing them as close to Westernisation, an immoral way of life closely aligned with the colonialism of their past. By contrast, it is the traditionalists' spirits and mysticism that the modernists try to exorcise leading to enormous antagonism between the two groups […]. Because the volatility between the organisations is not just about competing claims to authority but indicates differences at the much deeper level of cosmology, the NU followers among whom I lived and studied felt under threat in almost every aspect of their lives' (Newland 2000: 214, 217).

At the same time, for many women in West Java state development projects meant an opportunity to work in factories, which meant a break with the traditional patriarchal gender roles in the Sundanese rural areas. The earnings of those women factory workers became essential contributions to the family income, many women earning the same or more than their husbands (Hancock 2000: 11, see also 2001).[16] In Cianjur, however, there are few factories and thus taking an industry job often means moving out of the community.

State development programs penetrated into society in Cianjur. Every year thousands of Cianjurese women become domestic workers in the Arabian Peninsula. From the early 1980s onwards the Indonesian government started to encourage women to work abroad as domestic workers in order to increase state revenues (Silvey 2004; Hugo 1995). Ever since, the number of migrant workers has increased: in the Five Year Plan of 1979/1984 the state set a target of 95 thousand workers, a decade later this target had increased to 600 thousand workers, and the target for the Five Year Plan of 1994-1999 was set at 1.5 million (Hugo 1995: 276). According to the BPS the official number of placements rose to more than 2.6 million in 2010 (BPS 2011).[17] The official statistics of migrant workers' placements of Bank Indonesia concerning migrant

16 57% of the women surveyed by Hancock stated that they earned the same or more than their husbands. In case of nuclear families, the number of women who stated they earned the same or more than their husbands increased to a staggering 73%.

17 BPS stated that 1.5 million Indonesian migrant workers worked in Saudi Arabia on a total of 2.6 million. Source: Detik.com (28-06-2011). BPS: Jumlah TKI Arab Saudi capai 1,6 juta orang. http://us.finance.detik.com/read/2011/06/28/195709/1670973/4/bps-jumlah-tki-arab-saudi-capai-15-juta-orang

workers still working abroad reveal an even much higher number of 4.2 million migrant workers in 2010.[18]

In a reaction to numerous media reports of sexual assaults against female migrant workers, the Indonesian *Ulama* Council issued a fatwa in 2000[19] stating that it is *haram* for women to work abroad unaccompanied by their husband or a relative. However, it is likely that besides the safety of the women, *ulamas* also took into consideration concerns within their community about a situation of 'women's not needing men' which in their eyes potentially leads to a breakdown of the family (Adamson 2007: 21; Bedner & Huis 2010: 189, 190). Indeed, based on research in West Java, including Cianjur, Nurlaelawati observed that many women migrant workers took the initiative to divorce their husband, when upon return they found that their husband had simply spent the money they had sent, or, worse, had used it to marry another woman (Nurlaelawati 2010: 210).

Nurlaelawati makes another important observation: women in West Java often prefer to arrange their divorces and remarriages at the KUA rather than in the Islamic courts, even if the marriage certificates technically are forgeries (Nurlaelawati 2010: 193; see also Huis & Wirastri 2012). This automatically brings us back to the relationship between the Islamic courts, the KUA and the local *ulama.*

5.4.3 The relationship between KUA and the Islamic courts in West Java

As we have seen in Chapter 4, the 1974 Marriage Law stipulates that all divorces have to be brought before the Islamic courts. This effectively means that from 1974 the traditional role of both local KUAs and local *ulamas* in divorce matters has been taken over by the Islamic courts. Nurlaelawati has demonstrated that many local KUA officials and independent *ulamas* in West Java and Banten opposed the Marriage Law reforms and continued to process divorce and marriage matters that should be handled by the Islamic court. She gives the example of KUA officials in Cianjur who spread rumors about exorbitant fees at the Islamic court, while in fact their own fees are sometimes higher (Nurlaelawati 2010: 187).

Elsewhere, Bedner and I have argued that this situation of semi-formal marriages and divorces is not necessarily disadvantageous to individuals in rural regions, and in fact may increase the freedom of individuals to engage with the other sex, because marriage and divorce are relatively easy to arrange (Bedner & Huis 2010). Nonetheless, when one focuses on the relation between the state, the Islamic court and the *ulamas,* one must conclude that in West Java the strategy of incorporating local religious actors into the Ministry of

18 http://www.bi.go.id/seki/tabel/TABEL5_30.pdf, last accessed 10 July 2013.
19 Fatwa 7/MUNAS VI/MUI/2000.

Religious Affairs has not realized its objective of unifying marriage and divorce practices under the law. Significantly, this is not so much due to conservative or radical autonomous *ulama*, who challenge the authority of the KUAs and the Islamic courts, but much more due to local KUA officials, in many cases relatives of local *ulamas*, who do not want to give up their authority in marriage and divorce matters.

We can draw a parallel with the colonial period: when the state reduces the role of local religious actors in West Java out of concerns of state formation, rationalization, taxation and anti-corruption, those actors will create a state within a state, and compete with the national government for authority. In present-day West Java, local religious actors incorporated in the KUAs, sometimes working in coalition with autonomous *ulamas,* compete with the Islamic courts in family law and inheritance matters. In so doing they transgress statutory law on the matter (Huis & Wirastri 2012). This competition between the local-oriented KUAs and the national-oriented Islamic courts, is a manifestation of a more fundamental and structural tension between the state's need to involve local elites in the national state-formation project by considering their specific local interests, and the nature of the state formation project itself, which primarily advances processes of rationalization and unification.

5.5 Conclusion

In this chapter I have described how in the *Preanger* in West Java a class of *ulamas* and *kyais* could develop, who were influential in local affairs but remained rather independent from the colonial, and later the national, government. In the long run this independence from the colonial government turned into competition, including with the *priyayi* dominated state bureaucracies. I hold that this historically developed competition and distrust between the national state and the local *ulamas* and *kyais* in the countryside of West Java still resonants, and argue that it is very likely that it affects the behavior of local communities in West Java towards the Islamic courts today.

I started the historical part of the chapter by discussing how in the *Preanger* system of compulsory coffee production (1720-1870) the VOC heavily relied on the existing relationship between *priyayi* ruling elites with the local class of landowners. The ability of the landowning class to organize labor and their position in the local Islamic bureaucracy made them key actors in the country side of the *Preanger,* where they dominated local religious, administrative and economical affairs.

By the 1860s the local land owners of the *Preanger* had developed a lucrative rice trade and were less interested in the cultivation projects of the colonial government. Moreover, many landowners made the *hajj* and upon return opened Islamic boarding schools. The colonial authorities increasingly perceived the independent *ulamas* and *kyais* as a threat and attempted to reduce

their privileges and powers through regulations and a licensing system. By the early twentieth century the colonial government decided to almost exclusively rely on loyal *priyayi* families for local governance, including for staffing the Islamic courts. As a result a relation of mutual distrust developed between autonomous *ulama* and the colonial. State policies pushed the West Javanese *ulamas* back to their 'grassroots' power base in the country side and they reacted with a persistent, strong challenge to the state.

In the early twentieth century, many *kyais* in West Java took part in the *Sarekat Islam* emancipation movement, of which the more radical factions were involved in violent attacks – including 'communist' ones – against *priyayi* bureaucrats in the 1920s. *Penghulus* were among the targets of those verbal and physical attacks, probably more because of their *priyayi* origin and colonial affiliation than for their positions as Islamic court judges. These attacks not only foreshadowed the start of a violent era in the *Preanger*, which lasted to well into the 1960s, but they also indicated the future complex relationship between the local *ulamas* and the Islamic courts in West Java.

During the independence struggle many *Preanger kyais* and *ulamas* seem to have initially supported the *Darul Islam* rebellion, but when it became clear that President Soekarno's Republic of Indonesia prevailed, many turned their support to the West Javanese branch of the Islamic political party *Masyumi*. The failure of the *Darul Islam* uprising and the ban on the reformist Muslim political party *Masyumi* in 1960 drove the supporters of both movements to a policy of 'returning to the community' which was focused on *dakwah:* religious outreach and proselytizing (Temby 2010: 27).

At the same time, the ban on *Masyumi*, the defeat of the *Darul Islam* (1962) and the eradication of the PKI (1965-1966), meant that the state-formation process in West Java could take off. Through the KUAs, which were established in each sub-district in Indonesia, the Ministry of Religious Affairs was able to incorporate many of the local *kyais* and *ulamas* into the state system. The idea behind this was that through the KUAs and the local traditional Islamic elites incorporated in them, the state would finally be able to penetrate into the local communities and establish its authority in the field of Islamic law.

The 1974 Marriage Law proved to be a litmus test for the KUAs. Its legal requirement of a judicial divorce meant that authority over an essential element of Muslim family law was now entirely transferred from the *ulamas* and the KUAs to the judges of the Islamic courts. As history has taught us, the *ulamas* and *kyais* of West Java do not give up their position easily and many still perform their traditional roles in marriage and divorce, including those who are now formally working for the state as KUA officials.

This brings me to the main argument of this chapter. Just as in colonial times, many local religious actors in West Java today perceive the modern state as a threat to their authority. The unification and centralization of Muslim family law has took authority away from local *ulamas*. Therefore, in order to retain their authority, local *ulamas* and KUA officials have created competing

authorities in family law matters resembling states within the state and challenging the authority of the Islamic courts. This has led to a paradoxical situation in which those actors in West Java, who traditionally vocally supported the Islamization of the state and a national imposition of sharia-based legislation, are in fact denying the state authority in the most essential Islamic matters. Hence, in the historical context of West Java, the unification and centralization of Muslim family law matters under the authority of the Islamic courts seems to have negatively affected the state-formation process.

As we will see in Chapter 7, the case of Bulukumba demonstrates that a very different historic trajectory of Islamic courts, *ulamas* and the state in South Sulawesi has resulted in a more entrenched authority of the Islamic courts. But before we turn to Bulukumba, the next chapter will first look further into the position of the present day Islamic court in Cianjur, West Java, and assess the role that it plays in women's divorce and post-divorce matters.

6 Cianjur's Islamic court and women's divorce and post-divorce matters

> '[...] Effective family law systems aim to provide outcomes that reduce the incidence of children and former spouses living in poverty following divorce. Whether the poor are able to access formal family law systems in the first place is therefore a key element in determining whether such systems can contribute to the alleviation of poverty. (Sumner 2008: 8)

> We should keep in mind however, that dissolution of marriage does not result in so-called 'broken homes' in the Western sense, because the divorced wife and her children can always return to her family. For a Sundanese woman there is no stigma attached to being a divorcee, nor to having married several times. On the contrary, this is an asset, because it indicates that she is a desirable woman.' (Tan et al. 1970: 32)

6.1 Introduction

In this chapter I leave behind the history of the Islamic courts in Indonesia and West Java, and turn to the present-day Islamic court of Cianjur. Based on empirical research conducted in Cianjur between November 2008 and June 2009, I assess the role that the Islamic court of Cianjur plays in realizing women's legal divorce and post-divorce rights. Chapter 4 discussed the introduction of similar divorce grounds for men and women and the legal obligation for all citizens to divorce before the Islamic courts, which were legal reforms that not only strongly limited the absolute right of men to divorce their wife by pronouncing the *talak*, but also formally made the Islamic courts central in divorce matters at the expense of KUAs and local *ulamas*. This chapter assesses the extent to which divorce practices in Cianjur reflect the substance and purposes of those legal reforms.

The second focus of this chapter is on the legal consequences of a divorce and, more specifically, three post-divorce rights for women and children: firstly, spousal support for the wife during her three-month waiting period before a *talak* divorce is final, which includes maintenance (*nafkah iddah*) housing (*maskan*) and clothing (*kiswah*); secondly, child support (*nafkah anak*), and, thirdly, the wife's right to her share of the joint marital property (*harta bersama*).

As I have argued in Chapter 1, a legal analysis of court judgments alone does not suffice to assess the position of the Islamic court in society; such

assessment requires empirical research into the practice of divorce in the pre-trial, trial and post-trial phases (Benda Beckmann, K. 1984). Therefore this chapter looks beyond the specific cases and trial phase alone. Based on an access-to-justice approach (Bedner and Vel 2010), it examines the factors which have influenced women's behaviour pertaining to divorce matters and the Islamic court.

6.1.1 A short description of the Islamic court of Cianjur

An important part of my research consisted of courtroom observations. This not only enabled me to observe what happened in the courtroom, but also gave me a reason and opportunity to spend time in and around the court which facilitated contact with court personnel and court clients. The impression of the Islamic court of Cianjur I give below, is an impression of the court in the years 2008-2009. Much has changed since, as in 2010 the court has moved from the small office described below, to a large and standard court building.

At the time of my fieldwork, the Islamic court of Cianjur was located along the busy road to Bandung, on the complex of the district branch of the Ministry of Religious Affairs. After entering the complex one found the Islamic Court on the left-hand side a small office-like building with a small porch, half of which was used as parking area for motorcycles and half of which was arranged as a provisionally covered waiting area for court clients. Two larger buildings housing the District Office of the Ministry of Religious Affairs, the office of the district branch of the Indonesian *Ulama* Council (MUI) and a mosque were also situated on the complex .

Every morning before the start of the court sessions twenty to thirty persons, the majority of whom were women, would gather on the wooden benches on the porch in front of the small court building, waiting to be called in for a court session or to register their case. There was much interaction between the assistant clerks and the court clients, since both the main entrance of the court building and the separate entrance of the registration office led to the waiting area. Occasionally an assistant clerk would help a court client filling in forms on the porch, but usually registration was taken care of in the registration office.

From time to time, an assistant clerk would call a person who had approached the court with the intention to file a case and ask him or her to take a seat at his or her desk. Subsequently, the assistant clerk registered the personal details of the court client as well as the broad outline of the divorce case that he or she wanted to bring before the court, and whether he or she wanted to petition any additional post-divorce claims. In the vast majority of cases people were unrepresented by a lawyer, and had come to the court themselves or accompanied by a family member. In a number of cases the vicinity head (*kepala RT*), or a village official assisted the clients. In the lion's

share of the cases the assistant clerk would informally advise the clients how to fill in the documents, and more importantly what claims to make and how to frame them. This kind of assistance by staff of the court is prone to solicit 'voluntary gifts', or 'cigarette money', but from a court client's perspective the amount of money involved, if any, is very small compared to a lawyer's fee. Moreover, the assistant clerks undeniably filled in the need for legal assistance from the perspective of the typically unrepresented court clients. Their legal advices have a potentially strong impact on court clients' claiming behavior.

The registration office was small, approximately five by six meters, a smoky room consisting of five wooden desks facing each other. Three desks belonged to assistant clerks (*panitera muda*) responsible for the registration of cases, one desk to the assistant clerk responsible for the intake and release of marriage and divorce certificates and one to the assistant clerk responsible for the filing and storage of court files. These files were stored in two cabinets in a small area at the back of the registration office – the most recent ones at least, as the files dating back more than three years were stored in boxes in another building due to a lack of space. Court clients, judges, assistant clerks and myself walked in and out of the room for professional reasons, but in the afternoon, when the 10 to 12 court hearings had been dealt with, the registration office also was the place where court personnel would gather to chit chat, smoke, and have a coffee or *bakso* soup. This gave the office a very informal character. Behind the registration room was another space reserved for the assistant clerks, a room with three or four white tables where they could work more privately.

The private office of the chief court clerk (*panitera sekretaris*, Pansek) was located between the registration office and the main entrance. The office could be accessed through the corridor that led from the backdoor of the registration office to the main entrance. The *Pansek* is in charge of all administrative affairs including the enforcement of court decisions. In accordance with his status, the *Pansek*'s office was suitably decorated with leather couches, fitting to receive official guests. Left of the main entrance, at the end of the corridor one found the small treasurer's office. I had been introduced to the Islamic Court via the brother-in-law of the current treasurer, who was also a member of a well-respected family of *kyais* and *ulamas* from the sub-district Karangtengah in Cianjur. Court clients did not have to pay the court fees directly to the treasurer, since they had to make an advance payment of anticipated costs to a special bank account. If the advance payment exceeded the actual court fees, clients should turn to the treasurer to reclaim their share.

Facing the main entrance was the door leading to the single courtroom. The court clerk on duty would call in court clients and witnesses through the intercom and an assistant- clerk behind a small desk in front of the courtroom was responsible for letting them in and out. Entering the courtroom one would walk towards the platform bench with the three judges and the clerk con-

veniently placed between two large air-conditioning machines. The plaintiff would sit on a chair on the right in front of the judges, and the defendant on a chair to the left. Behind these chairs five rows of wooden benches were available for the public. In divorce cases they remained empty during the court hearings as these are closed.[1] Only the reading of the judgment is public, but most commonly only the plaintiff and his or her representative (if any) and the defendant, if present at all, would attend the public sessions.

During my field work, every day of the week saw a different panel of three judges, one acting as chair, and a clerk, handling all the court hearings of that day. I noticed that their style differed considerably, especially the way they interacted with the court clients. Some judges were very formal, showing their authority by lecturing the court clients about how to behave in court – for instance, by remarking on inappropriate clothing, or telling them to sit up straight – while other panels had a very informal approach, making jokes with the clients, 'to make them feel comfortable' as one judge told me. The language used in court was Indonesian, the national language, but usually both clients and judges switched regularly to Sundanese. The four non-Sundanese judges, all but one from a Javanese background, had therefore clearly mastered some Sundanese during their stay in Cianjur. Although according to the judicial rotation scheme judges are replaced once in every three to five years, this meant that in Cianjur about two-thirds of the judges were Sundanese, indicating that much rotation takes place within the jurisdiction of the Islamic high court of West Java.[2] Since the lower-level clerks typically are also recruited within Cianjur, the majority of the court staff has the same ethnic background as most court clients.

The Islamic court of Cianjur employed twelve judges, three of whom were women. Two female judges acted regularly as chair of a court panel. On Tuesdays, the panel of judges was female-dominated, consisting of a female chair, a female judge, a female clerk and a single male judge. In contrast, on Wednesdays there was an all male panel, which, perhaps by chance, was chaired in a rather formal way. The male judge of the Tuesday female dominated panel of judges was also a member of the Wednesday male dominated panel. The composition of the bench clearly had an influence on his behavior, as on Tuesdays he would be informal, joking around with court clients, while on Wednesdays he behaved formally, much like the chair of that day. Based on these observations it could be tempting to make generalizations about different styles of approaching court clients between male and female judges.

1 The head of the Islamic court of Cianjur, Dr. Abdul Muin, had given me and my assistant Syaiful Rijal Al-Fikri permission to attend all closed sessions of the court on the condition that both the plaintiff and the defendant did not object. In practice no one ever objected, which considerably facilitated the courtroom observation part of the research.

2 In Bulukumba, the same trend is visible as three-quarters of the judges were originally from South Sulawesi.

Yet as the third female judge – the chair of a Monday panel with two male judges and a male clerk – had a rather formal approach, such generalization would be premature.

6.2 Divorce in Cianjur

In this section I will focus first on plain divorce cases, by which I mean divorce cases without any post-divorce claims, before proceeding with post-divorce matters. I take as a starting point the idea that in such cases the Islamic court has a dual function: firstly, the judicial function of a court that provides final judgments regarding marriage and divorce matters, and, secondly, the important role of divorce registrars in Muslim population registration.

6.2.1 Divorce procedures

As mentioned in Chapter 4, ever since the enactment of the Marriage Law in 1974, Muslims in Indonesia must bring their divorce before the Islamic court, in order to have it legally recognized by the state. When filing a divorce case, the plaintiff must include one of the legal grounds of the Marriage Law in the subject matter of the petition. An analysis of the nature of the divorce grounds in the administration of justice of the Islamic court will be provided in Chapter 9, and therefore it is not discussed any further here.

The divorce process at the Islamic court involves at least five trips to the court. The plaintiff must go to the court in person to file a divorce. After filing the divorce, the plaintiff will have to appear at least three times before the presiding judge until the court comes to judgment. In addition, in order to give a judgment on whether the case meets the grounds for divorce, the court is under the legal obligation to try to reconcile the couple at every stage of the court process. However, in many cases the defending party chooses not to appear before the court. This not only means that no reconciliation attempt can take place, but if the plaintiff had not notified the court beforehand, this will mean two extra visits to the court before it will proceed with the case in absence of the defending party, a so-called *verstek* case.[3]

In divorces petitioned by women, the divorce takes effect the moment the presiding judge reads the verdict. However, when the husband is the petitioner (*cerai talak*) he has to come to the court once again to pronounce the *talak* before the judge in order to effectuate the divorce. Finally, the former spouses must go once again to the Islamic court to collect the divorce certificate. I underline the number of trips to the court, because apart from court fees, travel costs

3 *Herziene Indonesisch Reglement*, Article 125. *Perkara verstek* is the term generally used in the Indonesians courts for cases conducted in the absence of the defendant.

form a substantial part of the costs of a divorce (A.C. Nielsen & World Bank 2006).

6.2.2 Divorce statistics

The starting point for an analysis of divorce in Cianjur are statistics in the annual reports of the Islamic court of Cianjur from the years 2006-2008, which are subsequently placed in local historical, social and cultural contexts. This contextualization of divorce statistics will give a nuanced view about a number of changes in divorce statistics that took place in Cianjur's recent history. If we look at the statistics for the Islamic court of Cianjur, the court registered 465 divorces in 2006, 445 in 2007, and 549 in 2008 (see Table 2). Judges and clerks of the Islamic court most commonly considered this to be a large number of divorces. They explained the frequency of divorces to me in terms of the moral degradation of society. According to them, this had materialized in either 'women becoming more materialistic', which resulted in a tendency to divorce their husband in times of economic hardship, or the other way around, in men who 'treated women as milking cows' (*sapi perah*). I was told that there were plenty of cases in which the husband sent his wife to the Middle East to become a domestic worker,[4] in the meantime married a second wife without the first wife's knowing, while enjoying the money the first wife sent home. Not surprisingly, many of those cases ended in a divorce suit petitioned by the first wife.[5]

If one looks at the number of divorces in Cianjur between 2006-2008 in a national or local historical perspective a very different picture emerges, very much contrasting the image of a recent rise of divorces. If we divide the number of divorces a year by the number of marriages, we can calculate the divorce to marriage ratio, an approximate divorce rate, for lack of a more accurate one. For the year 2007, 21,744 couples in Cianjur registered their marriages and 445 filed for divorce, which means a divorce rate of two percent.[6] This figure is much lower than the ten percent national divorce to

4 In 2007, an estimated 540 thousand Indonesian female migrant workers worked abroad, mainly as domestic workers. Cianjur is one of the main districts where recruiters are active. See Novirianti 2010. Despite a moratarium some 30,000 women in Cianjur (of a total of approximately 500 thousand women in the age group 21-59 years) worked abroad in 2012. Source: Radar Sukabumi, 'Minat TKI Cianjur Masih Tinggi' [Interest in becoming a female migrant worker is still high in Cianjur], www.radarsukabuki.com, accessed 5-12-2012.

5 I heard many stories about these kind of practices during my stay in Cianjur. In court, too, I have observed a number of divorce cases involving female domestic workers. Those cases will be discussed in Chapter 9.

6 *Laporan Tahunan 2007 Pengadilan Agama Cianjur* [Annual Report 2007 of the Islamic Court of Cianjur].

marriage ratio of 2007.[7] Furthermore, compared to Cianjur's divorce rate in 1981, when 696 divorces and 11,520 marriages were registered (corresponding with a divorce rate of six percent), one can only conclude that the divorce rate of 2008 is three times lower than in the early 1980s (*Kantor Statistik Kabupaten Cianjur* 1982). Thus, although official statistics may indicate a rise in the divorce rate after the fall of Suharto in 1998 (see Cammack & Heaton 2011), it is still much lower than in the period 1978-1981 (Table 3), let alone than in the period from the 1940s to 1960s when West Java had an estimated divorce rate of more than 40 percent (Jones, G.W. 1994). Hence, if divorce rate negatively corresponds with social morality, the present-day state of morality in Cianjur could be said to be much higher than in the early 1980s and in most of its modern history.

A second remarkable outcome of the comparison of the divorce figures of 2006-2008 with those of 1978-1981, is the huge difference in the proportion of *talak* divorces. In the years 2006-2008 the percentage of *talak* divorces decreased from 23 percent in 2006 to 14 in 2008, while from 1978-1981 the percentage of *talak* divorce accounted for a staggering 95 to 98 percent. Compared to the national figures (Table 4), the percentage of women initiated divorces (*gugat cerai*) in Cianjur is also high. In 2008 *gugat cerai* in Cianjur accounted for 87 percent of the divorce cases, while the national figure in 2008 was 65 percent.

Table 2: Divorce figures for the Islamic court of Cianjur 2006-2008

	2006		2007		2008	
Gugat cerai	356	77%	373	84%	478	87%
Cerai talak	104	23%	72	16%	71	13%
Total	460	100%	445	100%	549	100%

Table 3: Divorce figures for the Islamic court of Cianjur 1978-1981

	1978		1979		1980		1981	
Gugat cerai	19	2.4 %	20	2.6%	32	4.7%	12	1.7%
Cerai talak	785	97.6 %	750	97.4%	650	95.3%	684	98.3%
Total	804	100%	770	100%	682	100%	696	100%

Table 4: National divorce figures for the Islamic court, 2008 (Badilag 2009)

Gugat cerai		Cerai Talak		Total	
126,065	65.2%	67,124	34.8%	193,189	100%

7 Figure retrieved from the website of the Islamic chamber of the Islamic court, www.badilag.net, accessed 12-06-2012.

These statistics seem to signify that Muslim divorce in Cianjur has undergone a remarkable transformation, which has turned divorce initiatives from a mainly male practice into a primarily female one. The divorce survey that was part of my field work confirms that many women in Cianjur no longer consider divorce an absolute male right, but it does not at all point toward a total transformation of Muslim divorce. Respondents to the divorce survey consisted of 120 women in Cianjur who considered themselves divorced, and included women who divorced informally out of court, or religiously as they call it. The respondents were asked to indicate the extent to which they agreed with a number of statements concerning divorce and gender. Regarding the statement 'divorce is only the husband's right' (*hak cerai hanya ada pada suami*) 69 (57.5 percent) of the 120 women agreed, while 44 (36.7 percent) disagreed, of which 2 (1.7 percent) strongly disagreed. On the reverse statement 'women have the right to divorce their husband' (*Istri memiliki hak untuk menceraikan suami*) 58 (48.3 percent) of the 120 women agreed of which six (five percent) strongly agreed. 42 (35 percent) women did not agree while 17 women (14.2 percent) did not have an opinion and three women did not want to answer the question. Thus, the divorce survey indicates that although half of the women in Cianjur indeed agree they have the right to divorce their husband, more than half of them still consider divorce to be primarily a male right.

How then can we explain the high number of *gugat cerai* cases? If we look at the research by Nakamura in Central Java, it becomes clear that part of the answer can be found in changes in the way divorces are registered (Nakamura 1983). Before the 1989 Islamic Judiciary Law, standardized registration of divorces as either petitioned by the wife or the husband, many Islamic courts in Indonesia did not only register the *talak* repudiations by the husband as *talak* divorce, but also most of those initiated by the wife: *taklik al-talak, syiqaq* and *khul* divorces that technically still require a proclamation of *talak* by the husband (see Chapter 3). In case of *taklik al-talak*, the conditional *talak* is pronounced by the husband in advance as part of the marriage ceremony, whereas in *khul* divorce the wife negotiates a *talak* by her husband. As a consequence, only *fasakh* divorces were effected without the husband's *talak,* by the judgment of the Islamic court and only the latter *fasakh* divorces were subsequently registered as *cerai* cases (see Table 5). In contrast, the 1989 Islamic Judiciary Law only differentiates between the sex of the person who files the divorce: when a man files for a divorce, it is registered as a *talak* divorce (*cerai talak*) and if a woman files a divorce it is a *gugat cerai*.

Table 5: Marriage dissolution in Islamic doctrine[8]

Traditional means of marriage dissolution	*Intervention of the judge*	*Final action*
Talak *Khul*	Without intervention	Marriage is dissolved by proclamation of divorce by husband
Talak through *syiqaq* *Khul* through *syiqaq* *Taklik al-talak*	With intervention	Marriage is dissolved by proclamation of divorce by husband
Fasakh *Fasakh through syiqaq* *	With intervention	Marriage is terminated by judge

* This form of *syiqaq* is not included in Nakamura's table. I added it, regardless its controversial character, because the *penghulu* courts on Java did apply a *syiqaq* procedure in which the judge dissolved the marriage if the arbiters (*hakam)* considered the marriage irreconcilable, but the husband did not pronounce the *talak*.

Hence, one must realize that before the reforms in the Marriage Law, a substantial part of divorces registered as *talak* were actually petitioned by the wife. Nakamura has analyzed the *talak* divorce registers of Kotagede, Central Java, from 1964-1971 and found that of the 537 *talak* divorces, 37 percent were petitioned by the husband, 33 by husband and wife together, and 29 percent by the wife alone. Those numbers indicate that at least 29 percent of those divorces concerned divorces based on the *khul, syiqaq* or *taklik al-talak* procedures, but probably much more because 62 percent of the *talak* divorces were petitioned by both husband and wife (Nakamura 1983: 40). In present day Indonesia all cases based on these three divorce procedures would have been registered as *gugat cerai*, since they would be petitioned by the wife. In short, a significant part of the decrease in the percentage of *talak* divorce statistics since the 1970s can be attributed to changes in divorce registration: a large number of female-petitioned divorces which used to be registered as male *talak* divorces, are registered as female *gugat cerai* divorces today.

A second explanation is that nowadays almost all divorces at the Islamic court of Cianjur are registered according to the formal divorce grounds of the Marriage Law and, as we will see in Chapter 9, are mostly based on the grounds of 'continuous marital strife' and 'broken marriage',[9] meaning that the terms *khul*, *taklik al-talak* and *syiqaq* become increasingly rare in Islamic courts' judgments. The Islamic court requires women in Cianjur to frame their divorce according to the formal divorce grounds in the Marriage Law, and

8 Taken from Nakamura 1983, pp. 40.

9 'Broken marriage' is not a formal divorce ground in the Marriage Law but as Chapter 9 demonstrates, in most cases based on the divorce ground GR 45/1975 Article 19 (f) 'continuous marital strife,' the judge in fact argues that the marriage has been 'broken.'

as a consequence traditional Muslim procedures hardly ever play a role in the courtroom.

An example of how the Islamic court places Marriage Law norms above the traditional Islamic norms, is a case in which the husband demanded Rp 50 million from his wife as compensation for the divorce she had filed. Although such negotiations are very common in a traditional *khul* divorce, the court argued that this divorce suit had been solely based on the divorce ground 'continuous strife' in the Marriage Law, and was not a *khul* divorce. Therefore the court rejected the husband's counterclaim of Rp 50 million in compensation.[10]

Besides the administrative and legal changes with regard to divorce, another factor that may explain the high number of *gugat cerai* divorces relates to the fact that the legal changes are not fully accepted within society and as a consequence many men in Cianjur still feel that they have the religious right to divorce their wife without involvement of the Islamic court. Various informants in Cianjur indeed have told me that in Sundanese culture it is customary that if a husband wishes to divorce his wife, he returns (*nyerahken*) her to the parents and proclaims the *talak*. I have observed in the courtroom that many women who petitioned a *gugat cerai* divorce had actually already been divorced by their husband out of court. For example, in one *gugat cerai* case the wife had been returned to the parents by her husband and been divorced with three *talak* in a row, thereby making a reconciliation (*rujuk*) impossible. The social divorce in this case was the *talak* pronounced by the husband, but the formal divorce, and the registered divorce, is the court divorce petitioned by the wife.[11]

Nurlaelawati has made a very similar observation about divorce practices in West Java and Banten. A divorce at the Islamic court often is merely considered an administrative matter that may be postponed until the moment someone needs a clear marital status for administrative reasons (Nurlaelawati 2010: 223-224). Many of the same out of court divorces that before the 1974 Marriage Law simply would have been registered at the KUA as *talak* divorces petitioned by the husband nowadays are informal divorces that still require a formal divorce process at the Islamic courts. Hence, if a woman in such a case seeks to formalize her *de facto* social status of divorcee at the relevant Islamic court, in the process the social male *talak* divorce transforms into a female *cerai gugat* divorce, and this is how the divorce will be registered by the Islamic courts.

10 Case 554/Pdt.G/2008/PA Cianjur, judgment on 13-01-2009, of which I attended three court hearings, including the judgment.

11 Case 564/Pdt.Ag/2008/Cjr, of which I attended the last court hearing and the reading of the judgment that took place on the same day, 23-12-2008. This case is for other reasons interesting as according to one of the witnesses, the real cause for the divorce was actually the difference in opinion between the spouses concerning how to raise their children religiously, whether this should be according to the rituals of the *Muhammadiyah* or NU.

6.2.3 Out-of-court divorce

As I emphasized in the previous section and elsewhere (Huis 2010), many couples do not divorce at the Islamic court, but decide to divorce out of court or 'religiously' (*secara agama*), thereby violating the Marriage Law and the 1989 Islamic Judiciary Law. Cammack et al. (2007), based on comparison of divorce statistics of the Office of the Religious Court (*Badilag*) and BPS, have calculated that in the 1980s, informal divorces made up around 50 percent of all Muslim divorces in Indonesia. The divorce survey indicates that the number of informal divorces in Cianjur is much higher. Of the 120 respondents only seventeen (14 percent) were divorced by the Islamic court. That means that 86 percent of the women interviewed had divorced out of court.

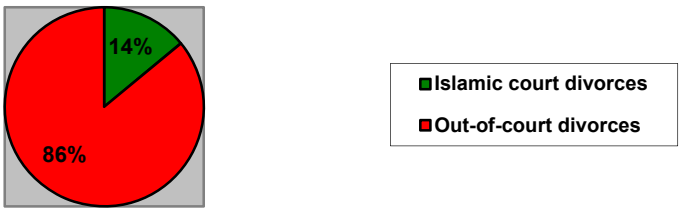


Figure 1: Percentage out-of-court divorces in Cianjur (Divorce Survey; N=120)

The divorce survey assessed possible reasons why people in Cianjur do not go to the Islamic court to divorce. One of the obvious reasons can be that many couples do not register their marriage and thus do not have the possibility to divorce formally. However, this is not the case, as many couples who had registered their marriage at the KUA do not go to the Islamic court to divorce. The 20 percent of all respondents who according to the divorce survey had not registered their marriage,[12] can not explain the 86 percent of out-of-court divorces. Moreover, it appears that 73 percent of the respondents who divorced out of court had registered their marriage at the KUA. Moreover, the larger number of informal divorces as compared to informal marriages indicate that many couples can register their remarriage despite their informal divorce and, thus, that the sub-district KUAs facilitate the out-of-court divorce practice. Because many remarriages after an out-of-court divorce are registered by the KUAs, but the out-of-court divorces themselves are obviously not registered by the Islamic court, the divorce to marriage ratio decreases and does not reflect local divorce practices. In other words, the divorce rate in Cianjur becomes much higher when out-of-court divorces are taken into account.

The young age of marriage may also explain the prevalence of informal divorces. Jones has demonstrated that divorces usually take place shortly after

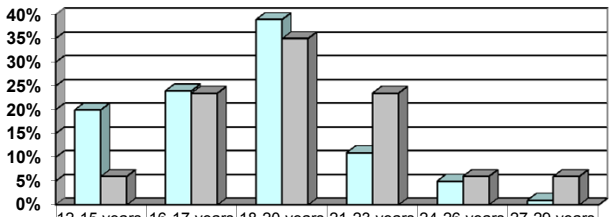
12 Five percent of the respondents did not answer this question.

the marriage (Jones, G.W. 2001). Young marriage is one of the main predictors of a short marriage, also in Indonesia (Guest 1992: 95). The marriage age of Sundanese women traditionally has been among the youngest in Indonesia. According to data of *Komnas Perempuan*, the average first marriage age in Cianjur is 18.3 years,[13] while the 2005 Social Economic Survey (*Survei Sosial Ekonomi Daerah*, Suseda) establishes the average age of first marriage in Cianjur at 17, the youngest in West Java.[14] The respondents in the divorce survey were on average married at the age of 18, which confirms *Komnas Perempuan*'s findings.

An explanation for young marriage is that parents traditionally encourage their daughters to marry young, in order to prevent extramarital pregnancy and sin (Smith-Hefner 2005). Hence, even though marriage in West Java is nowadays ideally based on romantic love and often preceded by courtship (*pacaran*), even in some Islamic boarding schools in West Java (Kholifah 2005; Jones, G.W. 1994), young marriage is still very common in Cianjur.[15]

An average age of first marriage at 17 or 18 indicates that many marriages take place under the legal age of 16. According to the *Suseda* 2005 almost 30 percent of the first marriages of women in Cianjur took place before they had reached the legal age. The divorce survey shows a lower percentage of marriages below the legal age. Of the 103 respondents in the divorce survey who had divorced out of court, 20 percent were married below the legal age of 16 and 44 percent were married before they were 18 years old, whereas only six percent of the women divorced at the Islamic court had been first married at an age below 16 and 29.5 percent at 18 (see Figure 2). One can conclude that the differences between the two groups with regard to young marriages are too small too explain the total of 86 percent of out-of-court divorces. The practice of young marriages cannot provide a satisfactory explanation for the high proportion of out-of-court divorce in Cianjur.

Figure 2: Age at first marriage



	12-15 years	16-17 years	18-20 years	21-23 years	24-26 years	27-29 years
Women divorced out of court (N=103)	20%	24%	39%	11%	5%	1%
Women divorced at the Islamic court (N=17)	6%	23,5%	35%	23,5%	6%	6%

13 Komnas Perempuan 2009.

14 *Survei Sosial Ekonomi Daerah 2005 Jawa Barat*. Source: http://www.bapeda-jabar.go.id/docs/publikasi_data/20080408_163140.pdf

15 Although an 'Islamic' marriage without prior courtship seems to be emerging as a new trend among some university students. See Smith-Hefner 2005.

6.2.4 Strong competition from other Islamic institutions

The 86 percent of out-of-court divorces is so high that it is unlikely that all of these couples did not know about the judicial divorce requirement. The most sensible explanation is that religious divorces, without Islamic court involvement, are simply socially accepted in Cianjur. As I have explained in the previous chapter, the Islamic courts in West Java meet strong competition in family law matters by KUAs, *ulamas* and *kyais*, and those competitors are willing to arrange remarriages after informal divorces despite the fact that this is against the law (see also Huis & Wirastri 2012). Alternatives to the Islamic court are thus available and for many those alternatives are closer to home and can be arranged more easily.

As already mentioned in the previous chapter, some local religious actors have a personal interest in arranging informal marriages and divorces and overstate the fees of the Islamic court in order to scare off its potential clients. In an interview, a local KUA official (*amil*) in the sub-district Sayang in Cianjur stated that the divorce fees 'of Rp 1.2 million' were too high for many people and he admitted that he sometimes concluded out-of-court divorces for lower prices.[16] The official court fees at that time, however, were about Rp 400 thousand. Judge Dedeh Saida complained to me about similar practices. She said that some local actors deliberately spread rumors in the villages about high court fees and subsequently offer their help while charging those high prices, paying the much lower court fees and keeping the rest.[17]

Pak Agus Yaspiain, assistant clerk of the Islamic court, made clear that assistant marriage registrars (*amils*) and other officials of a number of KUAs in Cianjur, are involved in arranging out-of-court divorces and subsequent remarriages. He illustrated their unwillingness to promote a formal divorce at the Islamic court with the following example: a staff member of the Islamic court had placed a poster on the wall of a KUA office with information about the Islamic courts' fees and procedures, but the next time he went there it had been removed. He believed this was no accident.[18]

Another indication of the common disregard of state legislation on Muslim family law matters in Cianjur and the strong position local religious actors have, is the prevalence of informal polygamy. The Indonesian legislator has limited polygamy, making it conditional on a number of factors, including consent of the wife and permission of the Islamic court.[19] The year reports of the years 2006-2008 show that the Islamic court of Cianjur seldom receives requests for such permission, eight in total.

16 Interview with *Pak* Hermansyah an *amil* in sub-district Sayang, district of Cianjur, 22-5-2009.
17 Interview with judge Dedeh Saida, during a circuit court journey to sub-district Sindangbarang, district of Cianjur, 25-11-2008.
18 Personal communication from *Pak* Agus Yaspiain, Islamic court of Cianjur, 18-12-2008.
19 See Chapter 4

The divorce survey found, however, that more than one third (42 out of 120) of the respondents listed a polygamous marriage or a prospect of a polygamous marriage as one of the reasons for their divorce. This discrepancy suggests that most polygamous marriages were concluded informally and are a further indication that many religious authorities, in case of involvement of a KUA even state officials, promote traditional West Javanese Islamic norms, rather than state law and hence create a sort of state in a state, where men still have their *talak* and can decide by themselves to marry polygamously.

Those local religious actors are counteracted by Indonesian women's rights organizations, but also international donors like AusAid, UNDP and the World Bank. These organizations encourage women to marry and divorce according to national legislation. They do so by listing the advantages of clear personal status that a divorce at the Islamic court would provide: post-divorce rights that are enforceable through the court system, access to a formal remarriage and division of marital property. Yet, the high number of informal divorces indicates that the influence of those organizations remains limited. As the following example of W. illustrates, women may actually have heard about the supposed advantages of a formal judicial divorce, but do not feel much urgency to act upon it.

W. lived in the district capital town of Cianjur and her husband had divorced her through an out-of-court *talak* divorce. She knew about the requirement of a judicial divorce from an acquaintance who worked at the Islamic court and said that eventually she intended to file a divorce suit at the Islamic court. However, she would wait until a serious marriage candidate showed up, and there had to be a real prospect of remarriage first. When I asked her whether she encountered any problems due to the fact that she was not formally divorced by the Islamic court, she replied: 'No, according to Islam I am already divorced, all neighbors know that I am divorced.' In daily life she experienced no difficulties with her informal status and had found a job as an insurance sales representative after the divorce.[20]

W.'s case shows how out-of-court *talak* divorce is socially accepted in Cianjur, as it is considered to be in accordance with Islamic doctrine. However, W. was also aware that such a divorce could turn into an administrative problem in case of a remarriage and she planned a future formal judicial divorce. In case of a remarriage, she intended to conform to the formal requirements of the 1974 Marriage Law.

20 Personal communication with *Bu* W. in the town of Cianjur, 9-2-2009.

6.2.5 Court fee waivers and circuit courts

An access-to-justice report commissioned by the Supreme Court and AusAid (Sumner 2008) argues that compliance with statutory marriage and divorce requirements, i.e. registered marriage and judicial divorce, brings many benefits to women. It argues that out-of-court divorces lead to unregistered remarriages, with the negative consequence that children born out of such second marriages cannot obtain birth certificates.[21] Out-of-court divorce and unregistered marriage 'affects the inheritance rights of children, as well as the legal responsibility for the financial care of former spouses and any children of the marriage' (Sumner 2008: 7-8). The report concludes that the main barriers for women to access the Islamic courts are financial, combined with a lack of legal knowledge. Waiver of court fees (*pro deo*) and circuit courts (*sidang keliling*) combined with better legal knowledge provided by paralegals can tackle those problems, the report argues.

Waiver of court fees (*pro deo*) can potentially increase access to the Islamic courts for women for whom court fees are too high. To be eligible for a *pro deo* process someone requires a statement of the neighborhood and vicinity heads (*kepala RT* and *kepala RW*) that the plaintiff indeed is poor and will be formally registered as such. In the years 2007-2008 about ten percent of all cases (thus not only divorce cases) at the Islamic court of Cianjur consisted of *pro deo* cases. In 2007, 72 out of a total of 862 cases were *pro deo*, and in 2008, 96 out of a total of 914 cases. In those two years, only a single case out of 168 *pro deo* cases in total concerned a man, the other 167 were court waivers for women. Thus, it is safe to conclude that the Islamic court of Cianjur gives women precedence over men in *pro deo* cases.

The problem is that for many of the people who belong to the lower classes, but are not registered as poor, the court fees still equal their monthly income or more, making a trip to the Islamic court unattractive – especially since an out-of-court 'religious' divorce is socially acceptable. The divorce survey found that among the respondents who divorced at the Islamic court a relatively large portion had an income of more than Rp 500 thousand compared to those who had been divorced informally.

21 Sumner does not consider the possibility that remarriages after an out-of-court divorce can be registered by corrupt KUA officials anyway, which in turn means that birth certificates are accessible for the children concerned.

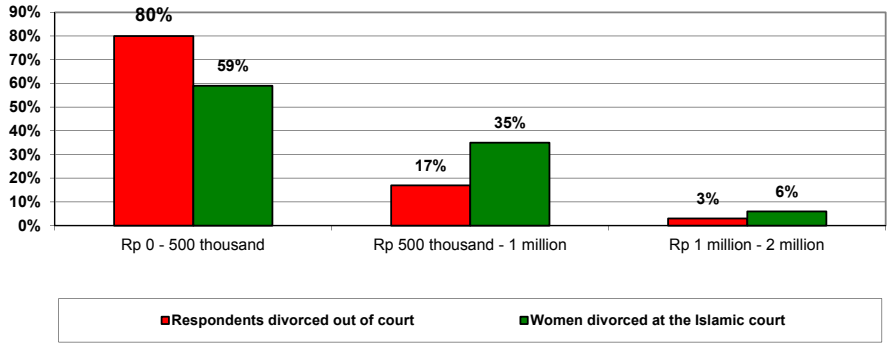


Figure 3: Respondents' monthly income

Another way to bring the court literally closer to the people is by organizing circuit courts. Distance between a person's residence and the court is certainly a practical barrier for many potential court clients. Most divorce cases in Cianjur (72 percent in 2007) involved couples who lived within 30 kilometres of the Islamic court, while only 28 percent of the cases involved couples who lived further away.[22] Circuit courts were initiated to tackle this problem. In 2008, 18 circuit court sessions were held in Pagelaran and Sindangbarang, small towns in the south of the district of Cianjur a three to four hour car ride from the Islamic court. A Supreme Court budget cut in 2009 reduced the circuit court sessions to monthly sessions in Pagelaran. All in all, the circuit courts only offer some relief for court clients, since they are still required to travel to the court several times given that a single divorce case will involve at least registration, a minimum of three court hearings, and collection of the divorce certificate. Usually only a single hearing can be handled through the circuit court, and the remainder of the divorce process still requires one or several trips to the district capital Cianjur.

The Sumner report of 2008 underlines the importance of the barriers that women face in accessing the Islamic court. Better access to the Islamic court is important for women and their children in obtaining a legal family status and the rights that are attached to it. Furthermore, access to the Islamic court opens up opportunities for women to claim those rights. The role the Islamic court in Cianjur plays in post-divorce matters is assessed below.

22 My own analyses of *Laporan Tahunan Pengadilan Agama Cianjur* 2007 and *Register Pengadilan Agama Cianjur* 2007.

6.3 The Islamic court and post-divorce rights[23]

6.3.1 Post-divorce claims hidden in the registers

We have seen that divorce at the Islamic court in Cianjur is increasingly becoming a women's affair, and the bulk of the divorces are petitioned by women. The 1989 Islamic Judiciary Law allows a party to include a claim regarding spousal support, child support or marital property in their divorce suit, or a counterclaim when the husband is the petitioner of the divorce.[24] For women, this has the obvious advantage of not having to pay the fee for a new court process when they intend to claim post-divorce rights.

One would expect that an increased agency of women in divorce matters would also result in a high number of post-divorce claims, as women are the ones that mostly benefit from such claims and they can be included in the divorce suit. Surprisingly, this is not the case. During my fieldwork I have counted the number of post-divorce claims that women made in both *talak* and *gugat cerai* divorces. The vast majority of post-divorce claims are indeed included in the divorce suit. They are not listed separately in court registers, as the entire case will only be listed as a divorce case petitioned by the husband (*talak*) or the wife (*gugat cerai*). As a consequence, these claims do not show up in the statistics and annual reports of the Islamic courts. Therefore, the figures presented here differ considerably from those that appear in the annual reports of the Islamic court of Cianjur.[25]

6.3.2 Spousal support

The 'bundle' of spousal support rights is based on the 'open' provision in the 1974 Marriage Law that the court may establish an obligation for the former husband to his former wife,[26] which has been specified along the lines of *fiqh* in the 1991 Compilation of Islamic Law (see Chapter 4). This 'bundle' includes four obligations of the husband: maintenance (*nafkah iddah*), clothing (*kiswah*) and housing (*maskan*) for the duration of the waiting period of the wife (*iddah*); and a consolation gift (*mut'ah*). As a policy, the Islamic court of Cianjur puts

23 Parts of this section were published in the journal for Law, Social Justice and Global Development Journal (LGD), see Van Huis 2010.

24 Article 66(5).

25 The annual reports of the Islamic court of Cianjur 2006-2008 list no child and spousal support cases (all were part of a divorce suit) and the number of joint marital property cases listed is about half of the total number I found in the books. If one wants to check the numbers presented, one must go through the register books of the court of the years 2006-2008 and count the post-divorce claims that are listed under *cerai talak* and *gugat cerai* one by one.

26 Article 41(c).

pressure on the husband to hand over the total sum of those four rights to the court first before the pronunciation of the talak.

As a rule, women can claim spousal support rights in the following two cases: first, when the divorce is not final (*ra'ji*), and the marriage still can be reconciled (*rujuk*) during the waiting period of 90 days; or, second; in final (*ba'in*) and non-final divorces, when the wife is pregnant, which extends the waiting period until the point of delivery of the baby. The Islamic court of Cianjur considers all divorces petitioned by women as final divorces.[27] Thus, in practice Muslim women in Cianjur only have spousal support rights if their divorce was petitioned by the husband (*cerai talak*) and they are limited to the 90-day waiting period. Only when the Islamic court establishes the wife's disobedience (*nusyuz*) will she also lose her spousal support rights in *cerai talak* cases.

The court files of 2006 till 2008 reveal that all claims on spousal support in *talak* divorces were granted. This implies that in not a single case the court denied a spousal support claim on the basis of the wife's disobedience. In fact, many husbands did accuse their wife of disobedience and made statements about their wife 'often leaving the house without permission' or 'not performing her marital duties', both traditional instances of *nusyuz.* The fact that there was not a single case in which the court held a wife to be *nusyuz* indicates that the Islamic Court of Cianjur has reinterpreted the traditional concept of *nusyuz* and narrowed its boundaries.[28]

A thorough analysis of spousal alimony cases distorts this positive picture somewhat. In 2007, in all but one case the amount of spousal alimony to be paid by the husband was much lower than the wife had requested. Moreover, in all but one court judgment the amount of support to be paid was much closer to the husband's statement about what he was capable to pay than to the wife's original claim. For instance, in one case the wife claimed spousal support of Rp 7.5 million during her waiting period, five million *mut'ah* and 25 million overdue maintenance payments.[29] The husband said he was only capable of paying Rp 1.5 million in maintenance during the waiting period, one million in *mut'ah* and five million in overdue maintenance payments. The amount of spousal post-divorce rights that were included in the court order, rather followed the husband's than the wife's claims: 1.5 million spousal support, 3.5 million *mut'ah,* and five million in overdue maintenance payments. Thus, the wife claimed a total sum of Rp 37.5 million, the husband claimed

27 For example, in case 381/pdt.Ag/2007/Cjr the wife claimed spousal support for the time of the waiting period. However, this was refused on the basis that this was a *gugat cerai* case resulting in a final divorce *talak ba'in*.

28 In Chapter 9 I will discuss the concept of *nusyuz* and its application by the Islamic courts of Cianjur and Bulukumba in more detail.

29 Case 215/Perd/Ag/2007/Cjr.

he was capable of paying 7.5 million and the court ordered a payment of 10 million.

The explanation for the courts' tendency to follow the husband's claim about his financial capacity is that court judgments typically are not based on written evidence, but are negotiated in the courtroom, since judges are convinced that there is a better chance that ex-husbands implement an agreement than a court order. Only if negotiations fail will the court decide. If the wife cannot prove that her demand is reasonable – something which is difficult when the husband is not a salaried employee – the court will often accept the husband's statement of what he is capable of paying.

A judge explained to me that he considered it better if the husband agrees to the judgment, so he will pay the sum and proclaim the *talak*. He revealed that there is a legal loophole, which husbands are able to exploit. As mentioned earlier, after the Islamic court has established the amount of spousal support and *mut'ah*, the husband still has to pronounce the *talak* in order to give the divorce legal status. Thus, in *talak* divorces it is not the court judgment that brings the divorce into effect. The court only gives the husband *permission* to pronounce the *talak* in the court, with the judges being the witnesses. If after six months the husband has not done so, the case will expire, together with the decision regarding spousal support and any other post-divorce claims. This means that if they consider the amount of support or *mut'ah* they have been ordered to pay too much, husbands can decide to halt the divorce process by not pronouncing the *talak*.[30]

An analysis of the register books from the years 2006-2008 resulted in the following number of spousal support claims made at the Islamic court of Cianjur (see Table 6). In 2006 a total of 28 women out of a total of 460 divorces claimed and were rewarded spousal support, equaling six percent. In 2007 and 2008, this percentage dropped to 2.7 percent and 2.9 percent respectively. However, since the court only granted spousal rights claims in men-petitioned *talak* divorces, I have also calculated the percentage spousal divorce claims as part of *talak* divorces. As could be expected, a much higher percentage emerges: 28 rewarded claims out of 104 *talak* divorces in 2006, or 27 percent. Because the total number of *talak* divorces were also lower those years, the percentage of spousal support claims as part of *talak* divorce cases does not drop as much: to 17 percent in 2007 and 22.5 percent in 2008.

The fact that between 2006 and 2008 73 to 83 percent of the women did not claim spousal support rights in *talak* divorces may relate to a lack of knowledge about their rights. The divorce survey therefore asked the respondents to what extent they agreed with the statement 'the wife has the right to receive support from her husband after he divorced her.' On a total of 120 respondents 109 respondents agreed (90.8 percent), of which 28 re-

30 Personal communication with Judge Isak, Islamic court of Cianjur, 18-12-2008.

spondents (23.3 percent) very much agreed, and only eight respondents (6.7 percent) did not agree. This demonstrates that women in Cianjur know their spousal post-divorce rights well.

The divorce survey shows that more than a fifth of the respondents reached an agreement about post-divorce financial arrangements with their former husband. A considerable number of 21.7 percent of the total respondents had done so, 54.2 had not and 24.2 percent chose not to answer the question. The divorce survey indicates that most of those agreements were not put on paper. Of the 36 respondents that answered the question about whether they had made a verbal or written agreement, 29 respondents or 80.6 percent answered they had made a verbal agreement and only seven respondents or 19.4 percent had made a written one. However, according to the divorce survey, such agreements are only followed through in 10 percent of the cases.

All in all, the Islamic court of Cianjur's performance in providing women with spousal support in *talak* cases is considerable. About 20 percent of women are granted spousal support claims, and since the court insists that spousal support is paid in one sum prior to the husband's proclamation of the *talak*, most court orders seem to be implemented. The most negative aspect from a women's perspective is that the husband has an advantage over his wife in the courtroom as the judge tends to follow his claim about his financial capacity.

Table 6. Post-divorce claims at the Islamic court of Cianjur

	2006		2007		2008	
Spousal support	28	6.1%	12	2.7%	16	2.9%
In talak divorces	28	27%	12	17%	16	22.5%
Child support	16	3.5%	12	2.7%	11	2%
Joint marital property	No data	No data	9	2%	10	2%

6.3.3 Child support

The second post-divorce matter I have explored is child support. As explained in Chapter 4, Islamic courts have a legal mandate to establish the amount of child support to be paid by the father. This mandate is based on the 1974 Marriage Law, which provides that a father is obliged to provide maintenance for his children, no matter which of the spouses petitioned the divorce, nor to whom custody of the children is designated. The obligation has been adopted by both the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law. In the judicial process, the Court must consider the financial capacity of the father. For fathers who are civil servants and do not have the custody over their children, the amount of child support is fixed at one third of their salary under the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (see 4.4.4). In all other cases the manner of

establishing the amount of child support is entirely left to the discretion of the judge.

One would expect a higher number of child support claims than spousal support claims, since child support can be claimed in *talak* divorces and *gugat cerai* divorces. In fact, the number of child support claims are actually lower. In 2006, only 16 child support claims were made on a total of 460 cases, which equals 3.5 percent. In 2007 and 2008 respectively, there were 12 child support claims (2.7 percent) and 11 claims (2 percent).

One of the explanations for this low number of child support claims could be women's lack of knowledge about child support rights. However, as was the case with spousal support, the divorce survey shows that women in Cianjur are well aware of their child support rights. Of the 120 respondents, 116 agreed to the statement that the husband should provide child support until the child is an adult (96.7 percent), of which 35 respondents (29.2 percent) very much agreed. Another explanation could be that a majority of the women concerned did not have any children with the husband concerned. Yet, I think this is unlikely, as in Indonesia the birth of a child usually follows soon after marriage.[31] Moreover, traditionally women in Cianjur will take care of their children after divorce, especially of the younger ones. In case of a dispute they have a large chance to winning because of the statutory provision that in principle mothers will be assigned custody over children below 12 years old. A more plausible explanation for the low number of child support claims is the fact that the Islamic court discourages women from claiming child support and tries to press the spouses to reach an agreement among themselves.

It is of course also possible that in Cianjur fathers have the inclination to give child support voluntarily without court involvement. For this reason, the divorce survey assessed the number of agreements concerning child support. Of the 113 respondents who answered this question, 34 (30 percent) had reached an agreement, whereas 59 (52.2 percent) had not.[32] Agreements between the spouses, and the discouragement from claiming support in the divorce process, are thus important explanations for the non-claiming behavior of women.

To examine the nature and frequency of this child support based on agreements, the divorce survey asked how often the father provided specific forms of child support. As Table 7 indicates around 50 percent of divorced fathers in Cianjur occasionally give some forms of child support voluntarily, but only few do so regularly. Unsurprisingly, more than 80 percent of respondents

31 In Indonesia the mean age of mothers at the first birth and the mean age of women at their first marriage are not far apart. According to the WHO's *Indonesian demographic and health survey 2002-2003* WHO the numbers were an age of 21.9 years at first birth and 20.2 at first marriage. Source: www.ino.searo.who.int/en/Section3_158.htm.

32 Twenty respondents filled in 'no answer.'

indicated that they were dissatisfied with the child support from their former husband (see Figure 4).

Table 7: Frequency that fathers provide specific forms of child support (N=120)

	Very often	Often	Occasionally	Seldom	Never
Buying supplies (clothing, toys, etc)	2.5 %	3.3 %	49.2%	42.5 %	2.5 %
Money to the mother	1.7 %	2.5 %	35.8 %	60.0 %	0 %
Educational costs	3.3 %	2.5 %	42.5 %	50.0 %	1.7 %
Pocket money to the child	5.0 %	3.3 %	45.8 %	43.3 %	2.5 %
Money or clothes for Islamic holidays	8.3 %	9.2 %	31.7 %	49.2 %	1.7 %

When a woman is persistent and submits a child support claim, however, the court will order the husband to pay a monthly child support contribution. Very much like spousal support, the amount of child support the wife claimed was generally not followed by the court when the husband objected to it. The wife usually had to accept the amount her husband says he was capable of paying. As one woman put it: 'I thought I'd better take this money rather than not get any money at all.'[33]

As mentioned earlier (see 4.4.4), civil servants are subject to a special regulation and as the next case illustrates this facilitates an execution mechanism that runs through the office of the father concerned. *Ibu* N. was 31 years old when her husband, a civil servant decided to petition for a *talak* divorce. She and her husband had three children together: a girl of one year old, a boy of three and a girl of five. At first she did not want to divorce because of the children's young age, but her husband, who later appeared to have secretly married another woman, was persistent and in the end she felt she could not do otherwise than go along with the divorce. He obtained the required permission from his superior, which at first was refused considering the age of the children. He then petitioned for a *talak* divorce at the Islamic court.[34] The court's judgment was as follows: the court gave permission to the husband to utter the *talak*; it ordered the husband to pay spousal support in the form of Rp 1.5 million maintenance in the waiting period (*nafkah iddah*), and another Rp 750.000 as consolation (*mut'ah*); finally, the husband was ordered to transfer one third of his salary as child support to his former wife.

Ibu N.'s former husband paid the spousal support and *mut'ah* at the Islamic court, but did not pay the established amount of child support. 'Mostly he gave some pocket money (*uang jajan*), about Rp 50,000, each time he came to see our children.' It took *Ibu* N. a few months to decide to go to her hus-

33 Interview with *Ibu* I., Cianjur, 29-03-2009.
34 Case 307/Pdt.G/2007/PA Cianjur.

band's superior to complain, because 'I wanted to give him a fair chance first to show before God that he is a good person.' Yet, initially her husband's superior's reaction went beyond what she had wished for, so she backed off: 'he said he was going to fire him. That was not my intention.' Only after she heard from a friend that she could ask the treasurer to get her former husband's state child allowance directly transferred to her account did she decide to go to her husband's office again. 'The treasurer was very cooperative. It was not difficult.' Not long after, *Ibu* N. automatically started receiving one million *Rupiah* in state child allowance transferred to her account, which equals more or less one third of her husband's salary.[35] *Ibu* N.'s case shows that enforcement mechanisms and women's knowledge of them are vital. Even when child support rights and enforcement mechanisms are in place, as is the case for civil servants, one still needs to know how to get the machinery going, otherwise nothing will happen.

6.3.4 Joint marital property

The third post-divorce matter I have examined is joint marital property. In all marriages, except those in which the spouses have made different arrangements through a prenuptial agreement, the property that both spouses have obtained during the marriage is joint marital property. Property that each spouse owned before the marriage remains their own property. After a divorce husband and wife both have a right to half of the joint marital property. Joint marital property claims can be included in a divorce petition as claim or counterclaim, or be claimed in a separate case.

The number of joint marital property claims filed at the Islamic court in Cianjur is low. In 2007 there were nine joint marital property cases and in 2008 there were ten. Here too the court encouraged couples to make an agreement, which in turn could have discouraged potential claimers. Moreover, since 2008, and based on a regulation of the Supreme Court,[36] the Islamic court of Cianjur made joint marital property agreements one of the possible aims of the compulsory mediation process. Previously this mediation process was, at least formally, exclusively aimed at reconciling the spouses, that is at preventing divorce, and not at making arrangements pertaining to the consequences of a divorce. This policy change may have encouraged couples to resolve the issue together as well.

Moreover, the court files show that generally a considerable amount of property was at stake in joint marital property cases. They typically concerned large plots of land, houses, cars and large amounts of cash. The parties involved in such a property dispute usually were from the middle and higher

35 Interview with *Ibu* N., Cianjur, 30-03-2009.

36 Supreme Court Regulation 1/2008 concerning Mediation Procedures in the Courts.

classes and often they were represented by a lawyer. The high stakes at play in joint marital property cases increases the chances of appeal, but also leads to non-implementation intended to frustrate the enforcement process. The latter is illustrated in the next case.

In this divorce case *Ibu* D. claimed child support and joint marital property.[37] Her husband had left her for another woman and no longer provided maintenance. Her husband, however, did not want to divorce. She went to the Islamic court herself, without help from the KUA or a legal representative, where she found court clerks willing to help her with her suit. She claimed Rp 500,000 per month in child support for her daughter, and the court ordered the father to pay Rp 300,000. However, her main priority was the joint marital property. It consisted of 2070 square meters of wet rice fields, 1900 square meters of land, two houses, two tractors and a motorcycle, all registered in her husband's name. In its judgment the court ordered that the joint marital property had to be divided equally among the spouses.

However, after the court judgment her husband only handed over the smaller house of the two to live in and a plot of one hundred square meters to her and her daughter. Until that point he had not provided any child support. All other land and the larger house remained in his possession. Subsequently *Ibu* D. tried to solve the case through family negotiations, to no avail. In the end she decided to call in the police, but her husband was not intimidated and the police could only try to negotiate as there was no formal execution order from the Islamic court. Thus, she turned to family negotiations again as for the moment she had not sufficient means to pay the court fee required for a formal request for a court execution order. However, she said that she was saving money for it, in case the family negotiations failed.[38] This case illustrates that in joint marital property disputes a court judgment often is not the end of the legal process and if you do not have the financial means, enforcement can be difficult.

Even if the petitioner has sufficient resources to set the enforcement mechanisms in motion, violent resistance can be an effective means of frustrating the process. In 2011, the former head of the district branch of the political party PDI-P, Dedeh Saryamah, divorced her husband. He claimed the marital property, which included the office of the PDI-P that had been registered under his wife's name. The Islamic court granted the claim. When the property was not handed over voluntarily, he requested an execution order. Eventually a team of the Islamic court and the police attempted to execute the court judgment. However, a crowd of about a hundred PDI-P supporters was waiting to fight them. They attacked the Islamic court staff and the police, who were

37 Case 358/Pdt.G/2007/PA Cianjur.

38 Interview with *Bu* D., sub-district Cugenang, Cianjur 29-03-2009.

forced to retreat.[39] This case was not an isolated incident, as an Islamic court official told me anecdotes about how the court had been visited on a number of occasions by *jawara*, local mafia-like clans that rule a number of areas in the southern part of Cianjur, to intimidate officials and influence the process.[40] For this reason, he explained, the circuit court that visits South Cianjur regularly does not handle joint marital property cases, or other cases where the stakes are high.

The cases above show that there are three ways to frustrate enforcement of marital property cases: prolong the process through appeals or other legal actions, frustrate the process by not implementing the court order, and threaten with violence. Still, many people in Cianjur do not have a lot of property and they will not bother to go through a complicated and oftentimes frustrating process. Of course, there are also couples who divorce rather peacefully and implement their agreements; however, the divorce survey indicates that these are a minority.

If we compare the three kinds of post-divorce matters, Islamic spousal support, child support and joint marital property (see Table 6) we can identify substantial differences between them. First, the percentage of spousal support claims is higher compared to other post-divorce rights, especially when you keep in mind that only women in *talak* divorces have a right to spousal support. Thus, in the year 2008 three percent of the total number of divorces included spousal support claims, which is only slightly higher compared to the two percent of women that claimed child support or joint marital property in 2008. When women who are defendants in a *talak* divorce case are singled out, however, it appears that around a fifth of them claimed spousal support rights.

6.4 Possible explanations for the low number of post-divorce claims

6.4.1 The role of the enforceability of judgments

In this section I attempt to clarify the amount of agency and costs women must put into a claiming process of, respectively, spousal support, joint marital property, or child support. In order to do so, I have subdivided the judicial process into the stages of claiming and enforcement. For each type of claim, I look at how much effort, in terms of agency and costs, is required to go through both stages of the judicial process. Additionally, I will look at the

39 The case took place after my field research, but caught my attention because it was national news. See for instance http://news.liputan6.com/read/274508/eksekusi-tanah-kantor-pdip-ricuh.

40 Personal communication with *Pak* Agus Yaspiain, Cianjur, 10-01-2009. See also Nurlaelawati (2010: 191-192) on the issue of *jawara* in Banten province.

chances that the entire process will be completed successfully and that redress will be obtained. I argue that the amount of effort required in the judicial process and the chance of success may partly explain the differences between the number of spousal support claims, joint marital property claims and child support claims.

In spousal support cases achieving redress is relatively easy in terms of costs and agency and the chance of redress is high. Since women only have spousal support rights in *talak* divorce cases, the husband has to pay the court fees. This makes claiming spousal support rights free of charge. In the enforcement stage, women do not require much agency either. The presence of a policy at the Islamic court in Cianjur which pushes the husband to pay the entire sum of spousal support first, before being allowed to pronounce the *talak* (*ikrar talak*) very much facilitates the implementation process. It is almost as if payment of the spousal support order has been made a requirement for the effectuation of the divorce itself. As a consequence of this pressure, almost all spousal support orders are implemented without women having to go through the extra effort and costs in the enforcement procedure. In fact women bear no procedural costs at all in both the claiming and the implementation stages.

People who claim joint marital property require a lot of agency from the start since it is vital to get legal proof of joint marital property, a matter I discuss in more detail in Chapter 9. Moreover, there are possible costs in the claiming stage: if it was the wife who petitioned the divorce she bears the court fees; court fees are higher when the court must conduct a field investigation; and there are extra costs if one of the parties appeals the judgment. When after a successful claiming process the defendant does not hand over half of the joint marital property voluntarily, the claimant will have to go to the trouble and bear the costs of an extra procedure at the Islamic court to request an execution order. These are all factors which influence women's decision whether to include the joint marital property claim or not. As most families in Cianjur have little or no property, few women make the claim.

Even so, execution only concerns a single act of transferring property to the rightful claimant and in that sense, even if it sometimes has to be done by force, it is relatively easy to enforce, especially if compared to those monthly child support payments for which no execution mechanism exists. Finally, because of the high amount of agency and costs required in the claiming process there is a considerable chance that the 'haves' are separated from the 'have-nots' and that the amount of property concerned is substantial. Litigants who already successfully made a joint marital property claim at the court are only one step away from a substantial amount of property, and therefore there is a fair chance that they will go all the way to the enforcement stage.

Child support, like spousal support, requires agency in the claiming process as women must defend their claim against the husband's counterclaim of ability to pay. As in spousal support cases, no additional court fees are

involved. With the exception of women falling under the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants, or similar regulations for the police and military, the implementation process is complicated, and enforcement mechanisms are absent. This is partly due to the nature of child support orders. In contrast to joint marital property and spousal support claims, for which implementation is relatively simple as it only involves a single transfer of property or money, child support is a long-term obligation of monthly payments. Each payment itself is a relatively small one, but they add up to a large amount of money. Court files in Cianjur reveal that child support usually concerns a monthly amount of between Rp 300,000-600,000. Interviews with women who obtained a court order for child support indicate that although there are good examples, most men pay far less than the court judgments ordered them to, if they pay at all.

Women who wish to seek enforcement of a child support judgment must go to the trouble and cost of filing an execution request at the Islamic court (in 2008 a minimum court fee of Rp 800,000, plus costs for travel a lawyer, etc). The periodical nature of child support makes enforcement complicated. One or two months of unpaid support is not worth the Rp 800,000 in court fees. The amount of unpaid child support must be substantial for women to take action. Even if the court were able to force the former husband to pay the residual support, each subsequent payment remains uncertain. Moreover, proving the default of the husband and the remainder is not easy, as the husband can claim that he no longer has the capacity to pay. Women who seek enforcement need a lot of agency, and the outcome of the implementation process is uncertain.

According to the 2006-2008 annual reports of the Islamic court of Cianjur, no women in Cianjur listed a child support execution request at the Islamic court and to the memory of the current judges no woman had ever done so. When asked about how he would treat an execution case if it were brought before court, judge Munawar answered that he would not automatically accept the case. He was of the opinion that the difference between the amount of child support ordered by court and the actual amount paid by the former husband does not automatically constitute a debt, as every case has to be seen in its context. His reasoning is in accordance with a Supreme Court ruling on the matter, discussed in Chapter 9. Judge Munawar therefore thought that confiscation of goods was too heavy a measure (*berlebihan*) in the context of unpaid child support.[41] Hence, there is a considerable chance that if women in Cianjur will file an execution request of due child support, their efforts will remain fruitless.

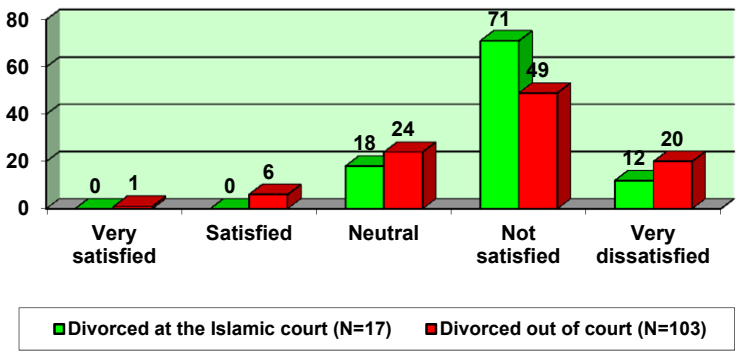
41 Personal communication with judge Munawar, Sindangbarang, district of Cianjur, 24-11-2008.

6.4.2 Socio-economic and cultural factors

Although a cost-benefit model can partly explain the low numbers of child support and joint marital property claims, the local socio-economic and cultural context also plays an important role. In addition to the effort, the costs and chance of success of a court process, a number of cultural factors may also explain why women do not claim post-divorce rights during a court divorce. First, it is considered socially preferable to resolve post-divorce matters out of court within the family sphere. Indeed, during my courtroom observations I noticed that judges of the Islamic court of Cianjur often encourage spouses to 'arrange such matters peacefully.' Therefore it is important to know how former spouses in Cianjur arrange post-divorce matters informally. If former husbands voluntarily provide post-divorce support and women are generally speaking satisfied with this, there is simply no need for most women to claim post-divorce rights in court.

If we look at the outcomes of the divorce survey, the image regarding voluntary post-divorce support becomes clear. About 30 percent of the respondents answered that they had reached an agreement with their former husbands about child support, and 23 percent said that they had reached an agreement about their own financial rights. However, the former husband executed the agreement in fewer than 10 percent of cases. Thus, former spouses make agreements about post-divorce rights in only a minority of cases and former husbands are lax in executing them. Not surprisingly, dissatisfaction is high among all respondents, whether divorced at the Islamic court, with 83 percent dissatisfied, or out of court, with 69 percent dissatisfied (see Figure 4).

Figure 4: Satisfaction concerning the father's child support (percentage)



Second, interviews in Cianjur indicate that after a divorce women want to live their lives as independently as possible from their former husbands. When I asked why they did not claim child support, some women replied that they wanted to be independent from their husband. Child support, consists of

monthly payments and, especially when the money does not come easily, requires a lot of involvement with the former husband, more than some women would like. Psychological factors, thus, play a role. Many women do not feel comfortable confronting the former husband or his family with the lack of child support they receive; 'I do not want to make any trouble' (*saya tidak mau bikin ribet*) and I will just accept it (*saya pasrah*) were the reasons women gave in the open question about this subject in the divorce survey. Some women who ended a marriage because of economic hardship tended to show empathy for the difficult economical situation of their former husbands. Moreover, most women considered non-payment by the husband a religious sin, and not a legal offence that requires legal action.

Thirdly, most divorced women in the sample – including the 'poor' – successfully managed to live their lives independently of their former husbands. One of the most surprising outcomes of the survey is that in the respondents' view, divorce does not seem to have major negative economic consequences for the women involved in the majority of cases. 39 Percent of officially and unofficially divorced women state that there is no change in their economical position, while 26 percent state that their economical position is better than before they were divorced. This means that in the perception of 65 percent of the women, divorce had no negative economic consequences. There are no differences between women who went to court and those who divorced out-of-court. Explanations for this are that 50 percent of the respondents earned an income and two thirds lived with their parents and thus were supported through their family network. These women do not have to rely on support of their former husband and presumably are less inclined to put much effort into bringing a support claim before a court. Still, for 27 percent of the respondents, all women with children, the divorce meant a worse economic situation.[42] Those families would theoretically benefit most from the regular support payments the Islamic court in Cianjur can impose on the ex-husband, but only if its court orders would be made enforceable. Unfortunately, enforcement of post-divorce court orders is the Islamic court's weak point.

6.5 Conclusion

The divorce survey indicates that in Cianjur a large majority of 86 percent of women does not access the Islamic court to divorce, but divorce informally, out of court. Moreover, an analysis of the court files of the years 2006-2008 reveals that about 90 percent of the women who divorced at the Islamic court did not claim any post-divorce rights. It appears that the Islamic court of

42 Eight percent of the respondents did not answer the question.

Cianjur is above all a divorce court and not so much a court where women realize their post-divorce rights.

This observation can be explained by three factors. First, the Islamic court faces competition from local alternative authorities in Islamic matters. Many local religious actors, including government officials connected to KUAs, have an interest in providing their services to people who consider divorce at the Islamic court too much of a hassle. Because of the support of these religious actors, out-of-court *talak* divorces remain socially accepted in Cianjur.

Second, implementation and enforcement of court judgments is problematic. This is especially the case where child support is concerned. Child support court orders can easily be ignored as they are not considered to be enforceable through the court. In joint marital property cases the claiming and enforcement stages require considerable knowledge about procedures, agency and costs and as a consequence very few small claims are brought before court. As most joint marital property cases involve relatively large amounts of property, the chances that the defendant appeals the case, or frustrates the case by not executing the court order, is considerable. This in turn increases the efforts and costs of the process.

All in all, I argue that there is no indication that better access to the Islamic court alone – that is, more women divorcing in the Islamic court instead of out of court – will automatically lead to better access to justice for the majority of lower class and lower middle class women and their children in post-divorce matters. Civil servants have their own regulation and enforcement mechanisms, and therefore have a more privileged position, but for the majority of litigants the Islamic court cannot guarantee that they will obtain the child support or joint marital property that they are legally entitled to.

Thirdly, the local socio-economic and cultural context is such that a claim at the court is not looked upon favorably and not deemed necessary. Women generally know what their rights are but there is no claiming culture. On the contrary, there is a cultural preference towards resolving matters privately, and towards preventing private disputes to become public, which also is reflected in the attitude of the court when it encourages couples to arrange their matters informally. Moreover, some women considered the former husband's failure to fulfill his spousal and child support obligations a religious sin rather than a violation of a legal obligation.

Other women expressed psychological motivations why they do not want to claim their rights. For instance, they do not want to have too much involvement with their former husband as they do not get along at all, or, conversely, they have empathy for him and understand his troublesome economic situation. Indeed, often the reality is that the former husband is poor and has no property. The husband's dire economic situation in many cases was one of the main reasons to divorce in the first place. The effort of claiming post-divorce rights in such situations will be fruitless, as the former husband has

nothing to offer. Even a waiver of court fees will be of little importance in this regard.

That automatically brings me to one of the most remarkable findings of this study. According to a majority of 65 percent of the mothers surveyed, the divorce did not result in a worsening of their economic situation and 26 percent of those 65 percent even stated that their economic situation had improved after divorce. Thus, not only must one be careful not to overstate the role of the Islamic court in society as regards post-divorce matters, one must also be careful not to overstate the role of post-divorce rights in poverty reduction. Many women have their own income and are furthermore supported by their parents or other family members. However, for those women who do not have such safety-nets, post-divorce rights can be potentially important, provided that court orders can be enforced. Of course, this would require that women in Cianjur would obtain a divorce at the Islamic court in the first place.

7 Bulukumba: Noblemen, Islam and the Islamic court

> 'Elsewhere outside of Java, as in Java itself until the nineteenth and twentieth centuries, Islamic courts depended on the pleasure of local sultans, even more so perhaps than in most Islamic countries. These sultanates – in East Sumatra, West and East Kalimantan, parts of Sulawesi, and the lesser Sundas – were 'self-governing' in the colony, and Islamic courts there were independently regulated by agreements between the sultans and the colonial administration. The result was some variation and, more significantly for the emergence of national Islamic institutions, a lack of supra-local orientation among religious officials who were closely linked to local authorities.' (Lev 1972: 78)

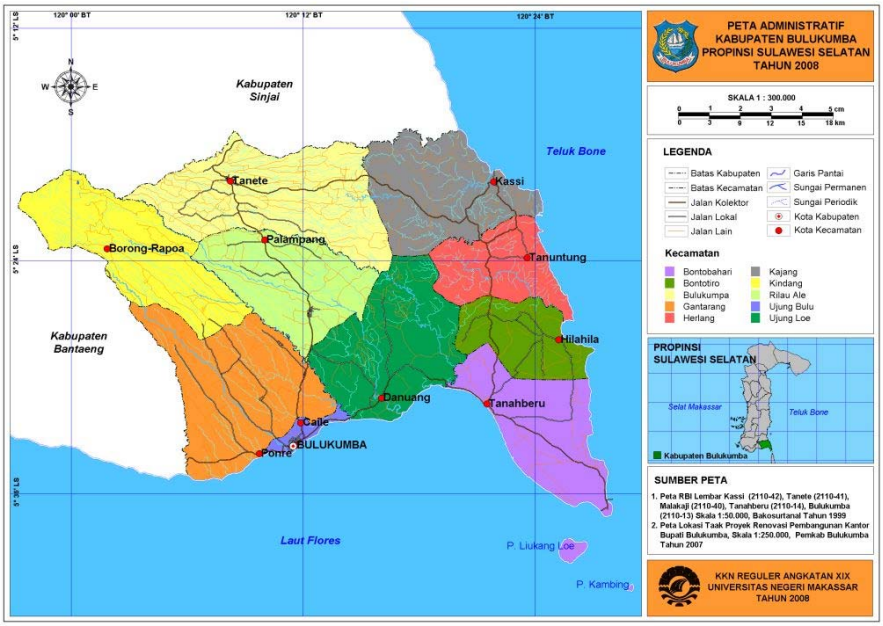
> 'The weakness of the rule of law, which is a deliberate strategy within the indirect rule system, strengthens the dependency of the poor on their patrons. When the patrons experience crisis, their sense of insecurity spreads around the patronage network. This insight helps explain why moments of political transition in Indonesia – the independence struggle of 1945-49, the creation of the New Order 1965-66, and the demise of the New Order in 1998 – are experienced by the poor as moments of communal tension.' (Klinken 2003: 11)

7.1 A SHORT DESCRIPTION OF THE DISTRICT BULUKUMBA

Bulukumba is the name of both the district and its capital town. The district Bulukumba is located on the south-eastern edge of the province of South Sulawesi. The Islamic court is located in the capital town Bulukumba, sub-district (*kecamatan*) Ujung Bulu. From Makassar, the capital city of South Sulawesi, it is a 153 kilometre or four hour ride to the East along a sometimes bumpy coastal road. In 2009, the district Bulukumba had 394,746 inhabitants, of whom 394,397 were registered as Muslim. At present, the 1,155 square kilometre area consists of ten sub-districts 27 town quarters (*kelurahan*) and 99 villages (*desa*). Bulukumba is a largely agrarian district: 67 percent of the working population are farmers; 14 percent are involved in trade; eight percent work in (governmental) services; and only five percent in industry (*Bulukumba dalam Angka* 2010).

The majority of Bulukumba's population speaks Konjo. Konjo speakers form the majority in the sub-districts Kajang, Herlang, Tiro and Tana Beru.

Buginese speakers form the second largest group and a majority in the sub-districts Bulukumpa, Ponre and Barabba. Gantarang, Tanete and Ujung Bulu are more mixed and also have significant Makassarese-speaking minorities (Hassanudin et al. 2007). In the past Konjo was considered a dialect of Makassarese, but it is presently regarded as a distinctive language of Konjo ethnicity within the larger Buginese-Makassarese 'cultural family' (Friberg 1993). Or in the terminology of Van Vollenhoven, Konjo is part of the Buginese-Makassarese *adat* law circle (*adatrechtskring*).



7.2 South Sulawesi and Islamic courts before independence

7.2.1 South Sulawesi before the arrival of the VOC

The history of South Sulawesi was dominated by rivalry and constant warfare between the kingdoms of Goa and Bone. By the sixteenth century, Goa had become the main kingdom of the ethnic Makassarese, and Bone of the ethnic Buginese. At that time, the area now comprising the district of Bulukumba was the territory of smaller principalities such as Gantarang, Bira and Kajang, which subsequently became tributaries to the larger kingdoms of Luwu, Goa and Bone. The early history of these domains is not well-documented and only known in as far as it concerned their involvement and ever-shifting alliances with Goa or Bone (Hasanuddin et al. 2007). The kingdoms and principalities

predate the Islamization of South Sulawesi (1600) and have animist origins. Wet rice cultivation was introduced in South Sulawesi around 1400, and there are even earlier reports of Buginese trade in the archipelago. The Makassarese and Buginese developed a unique script and from the fourteenth century onwards left a large legacy of literature. The most prominent example is the ancient local epic poem I La Galigo which consists of an estimated 6000-8000 pages.

I La Galigo dates the introduction of kingdoms to South Sulawesi at around 1300 AD (Caldwell 1995). According to legend, the gods in the Upperworld decided to send kings to rule the people of South Sulawesi, who had been living in lawlessness, disorder and cannibalism. I La Galigo describes the task of the kings vis-à-vis local *adat* leaders as follows: '[…] to deal with disputes between communities over land rights, inheritance, and other matters of custom and practice (*adat*) that the leaders as guardians of the *adat* could no longer resolve among themselves' (Andaya 1984: 26). This divine origin of the kings still plays an important role in Makassarese and Buginese societies today. Traditionally, these societies were strictly stratified into classes: high noblity, lower noblity, commoners and slaves. Social status was traditionally primarily based on the amount of royal 'white' or 'milky' divine blood one possessed. This white blood was passed through both the male and female line (Idrus 2003; Chabot 1996).

Although male kings were more common, female nobles regularly became 'king.' Until the early twentieth century, long after South Sulawesi's conversion to Islam, queens still ruled kingdoms in South Sulawesi. In Buginese-Makassarese *adat* there is generally a strict division of the sexes; yet, when a woman possesses 'male' qualities she may be treated as a man. Before the Islamization of South Sulawesi and Dutch interference in succession, it was not customary for kings and queens to be automatically succeeded by their offspring. Each time a king died, *adat* elders from the higher nobility would hold a ceremony in which the gods would nominate the new king from the ranks of the nobles. As a result, the king's relatives were not of much higher standing than the other nobles in the *adat* council. The bonds of the king with the different principalities that made up the kingdom were primarily strengthened through marriages between male family members of the high nobility and female relations of the local *karaeng* or 'princes' (Pelras 2000; Caldwell 1995; Andaya 1984).

Unlike on Java, where a Hindu bureaucracy was in place, the pre-Islamic kingdoms in South Sulawesi lacked a bureaucracy and therefore, according to Caldwell 'hardly can be characterized as states' (Caldwell 1995: 398). After the kings of Goa and Bone became Muslim, they increasingly modeled themselves on other great sultans in the archipelago and beyond. Hence, Islamization introduced the idea of a powerful sultan who controlled an Islamic bureaucracy – a government system that was also preferred by the VOC as

it made enforcement of its contracts with local rulers easier (Pelras 2000; Caldwell 1995; Andaya 1984).

7.2.2 The Islamization of South Sulawesi

According to the local chronicles, Islam was brought to South Sulawesi by three Muslim preachers, the three *Datos*. One of them, *Dato* Tiro, preached a *sufi* form of Islam and was buried in sub-district Tiro in Bulukumba, where his grave is still visited by pilgrims today. First the *Datos* went to the king of Luwuk, who converted to Islam in February 1605. The next step was the conversion of the king of the twin states Goa and Tallo, which took place only seven months later. In 1607, the renamed Sultan of Goa invited neighboring kings to convert to Islam. On their refusal, he staged the so-called Islamic wars. Within three years all kingdoms in South Sulawesi, except the Toraja, were defeated by Sultan Abdullah and converted to Islam, the rival kingdom of Bone being the last one in 1611 (Pelras 1993).

However, Pelras also described how Islam had been introduced to the area long before the conversion of the kings, as the coastal area was part of a large trade network involving many Muslim merchants. After the town of Melaka had been conquered by the Portuguese in 1511, a large community of Muslim Malays from Melaka settled in Makassar, and successful *dakwah* activities took place, reaching even the principality of Bira, now located in east Bulukumba (Pelras 1993). Moreover an alternative Muslim trade route was established in response to the Portuguese presence in the archipelago, which ran from Aceh via Makassar to Ternate and beyond, deliberately bypassing Melakka. As a result of the Muslim presence in Makassar and the trade involved, Goa and its main city Makassar flourished (Andaya 1984).

7.2.3 The VOC's presence in South Sulawesi

The VOC realized that the area of South Sulawesi in general, and the town of Makassar in particular, were of strategic importance as links in alternative spice trade routes from the Moluccas, and that taking control of the kingdom of Goa would mean eliminating the main competition in the lucrative spice trade. Moreover, in the early seventeenth century the VOC was at war with the Portuguese, and control over Makassar would mean a significant blow to this competitor.

Although Makassar was part of the Muslim trade route, the Makassarese kings and sultans allowed European traders including Dutch, Danish, English and Portuguese to settle in the town. The Portuguese settlement within Makassar was established in 1558, and included a few missionaries. In the early seventeenth century Makassar's community comprised more than 3000 Cath-

olics, only 500 of whom were Portuguese. Prior to the official Islamization of Makassar in 1607, some members of the Makassarese nobility also converted to Catholicism (Pelras 1993). Hence, it was not self-evident that Goa would become the kingdom that Islamized South Sulawesi.

The Portuguese presence would become one of the main reasons for the relatively early and intense involvement of the VOC in South Sulawesian affairs. In 1637 Governor-General Van Diemen (1636-1645), succeeded in forcing the king of Goa to sign a contract concerning trade privileges for the Dutch and protection of Dutch trade ships. Nonetheless, Goa continued to trade with parties other than the VOC, including the Portuguese. On top of this, Goa's conquering of territories in South Sulawesi and beyond (Sumbawa, Buton) had made the kingdom itself a main actor in the region. When Goa reached a trade agreement with the Sultan of the main Javanese kingdom of Mataram, Makassar became a direct threat to VOC interests in Indonesia (Rijneveld 1840: 45). The Dutch decided that the free flow of merchants and goods to and from Makassar had to be brought to an end, and in 1660 sent a fleet of 22 ships and 2700 soldiers to Makassar to force the king of Goa, Sultan Hasanuddin, to sign a contract with the VOC and to ensure that the VOC became the sole trade partner. After a Dutch victory, Sultan Hasanuddin unwillingly signed the contract and expelled the Portuguese community of Makassar to the island of Timor.

Only a few years later Goa's trading practices threatened VOC interests again. This time the Dutch, under Governor-General Cornelis Speelman, wanted to settle the matter for good and decided to play out the hostile feeling within Goa's tributary, the kingdom of Bone. With the help of Arung Palakka, successor to the throne of Buginese Bone, and of troops from the Sultanate of Ternate, Goa was attacked in 1667 from land and sea. Makassar was destroyed the same year and the Sultan forced to sign the so-called Bungaya treaty (*Bongaais Tractaat*) that would become the basis of Dutch political relations in Sulawesi and the Moluccas (Kroef 1961).

The treaty established that the parties would allow no trading-partners other than the VOC, and all international merchants were to be banned. Inter-island trade required licenses from the VOC. The kingdom of Goa had to allow a Dutch presence in Makassar (the fortress of Ujung Pandang was renamed Fortress Rotterdam). A number of principalities previously falling under Goa's influence became VOC territory, including Bulukumba, while the main kingdoms maintained a status of vassal states (*bondgenootschappen*; later called *zelfbesturende landschappen,* or self-governing kingdoms).

Much like in the territories on Java the VOC ruled its territories indirectly through the nobility and establishd a parallel colonial administrative structure in order to be able to exercise control over the indigenous rulers. Hence, the VOC established the province (*residentie*) Makassar, which was divided into four regencies (*onderresidenties* or *afdelingen*), all of them headed by an *assistent-resident*. Bulukumba for most of colonial history was an district (*onderafdeling*)

headed by a *controleur*, who formally could only act as a representative of the *assistent-resident*, and as such formally had no specific powers of his own, but in practice he had a lot of discretion in administrative matters. Fortifications were built in the coastal VOC territories in order to protect VOC trade, including the fortress Boele Comba. However, the *Bungaya* treaty and the presence of the VOC in South Sulawesi did not bring the peace and order the VOC had hoped for, and hostilities between the kingdoms regularly broke out.

In the British period (1811-1816) the kingdom of Bone successfully increased its influence in the area, and even managed to defeat British troops that attempted to stop its expansion into the former VOC administered territories that had become territory of the Netherlands Indies. When the Dutch returned to power, they were anxious to restore 'the balance of power.' Governor-General Van der Capellen decided that the region had to be 'pacified.' The importance of South Sulawesi for the Dutch as a gate to the Moluccas is exemplified by the large number of troops that were sent to war in the years 1824-1825 (Rijneveld 1840: 8).[1] A large part of the troops and arms were shipped in from the fortresses in Bulukumba and Bantaeng to attack Bone over land from the south, while a fleet attacked from the sea. Bone was defeated after a two-year-long intensive war, during which, in an ironic twist of history, Goa soldiers fought alongside the Dutch. Two further wars with Bone broke out in the next 40 years. In fact, it was not until 1906, when the Governor of Sulawesi issued a regulation concerning the administration of the self-governing kingdoms[2] that the Dutch decided to take more control over the self-governing kingdoms. As a result, local warfare in South Sulawesi came to an end.

7.2.4 The Islamic courts in South Sulawesi under the VOC and in the Netherlands Indies

With the intention of increasing control over the principalities within their territory, in the eighteenth century the kingdoms of Goa and Bone created an Islamic bureaucracy directly accountable to the Sultan. This move was purportedly supported by the VOC, which favored a more integrated kingdom over a loose bond between the various kingdoms and the local principalities (Röttger-Rössler 2000).

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1 In his account of the military campaign in Celebes of 1825-1826, Van Rijneveld suggested that Prince Diponegoro knew about the weak Dutch military presence on Java when he started the Java war against the Dutch (1825-1830) and that the successful and the relatively swift military campaign in South Sulawesi was essential to the Dutch victory in the Java War, as it meant that a large part of those troops could be send back to Java. He claimed that the Java War could have ended in defeat for the Dutch if the campaign in South Sulawesi would have lasted even a few months longer (Van Rijneveld 1840: 327-328).

2 Decision of the Governor of Sulawesi 123/7 of 8 January 1906. See *Adatrechtbundel* 5: 375-437.

The Islamic bureaucracy changed the feudal relation between the kings, the principalities and the old local *adat* councils dramatically as it penetrated into the formerly relatively autonomous principalities and villages, making the relationship between the king and the local nobles more hierarchical. As a result, the role of *adat* councils was increasingly restricted, and only the local nobles that were part of the sultanate's bureaucracy could transcend village level affairs. The high nobility related to the 'royal clan' headed the Islamic bureaucracy and became the main actor in a further Islamization of society, initially propagating a *sufi* form of Islam (Andaya 1984).

Islamic courts were set up as part of the Sultan's Islamic bureaucracy. Like on Java they were referred to by the Dutch as priest councils and headed by the highest local official for Islamic affairs, the chief *penghulu.* These courts assumed jurisdiction over marriage, divorce and inheritance affairs.

7.2.5 The Islamic courts in the territories under colonial government

At that time the involvement of the colonial government with the local administration in its territories increased significantly. In 1824, prior to the war with Bone, the colonial government issued the Regulation concerning the Organization of the Police and the Civil and Criminal Administration of Justice in the Province of Makassar,[3] which applied to its territories in the province of Makassar, including the district of Bulukumba (but not the territories of self-governing kingdoms). This regulation attempted to control the movement of the inhabitants and introduced a judicial system. All persons had to report their movements to the hamlet head, non-locals (*vreemdelingen*) had to ask permission from the government to settle in the area, and night patrols and other measures were introduced in order to ensure security, peace and order.

The 1824 Regulation also introduced a new judicial system. Depending on the severity of the crime or the value of the disputed property, the indigenous population (*inlanders*) could bring a crime or dispute before the hamlet head, the *adat* council, the regular court (*landraad*) and finally, as appellate court for certain *landraad* cases, the high court (*Raad van Justitie*). *Penghulus* were part of the council of judges as experts of Islamic law on all these levels. In general, local indigenous and religious law should apply. In major criminal cases in which *adat* financial penalties were considered 'no longer sufficient' Islamic law would apply, and only in the absence of suitable Islamic provisions, the Dutch law (Article 37(4)).

S 1824/26 did not regulate Islamic courts, but that does not mean that Islamic courts were abolished. Correspondence between the Governor-General in Batavia and the Governor of Sulawesi reveals that there were Islamic courts

3 *Reglement op de Administratie der Policie en op de Civile en Criminele Regtsvordering in het Gouvernement van Makasser* (S 1824/26).

in South Sulawesi, but, importantly, that the Governor of South Sulawesi was not sure what the jurisdiction of these courts was. In 1851 the Governor-General addressed the Governor of Sulawesi, stating that the status of the Islamic courts was sufficiently defined in Article 3 of the 1847 Regulation on the Organization of the Judiciary and the Administration of Justice in the Netherlands Indies (S 1847/25) and that he deemed further regulation unnecessary. This means that in 1851 the Governor-General considered that the Islamic courts in Sulawesi had equal status to the *priesterraad* on Java, a fact that would be denied in later years when the official position of the colonial government was that there never had been Islamic courts in South Sulawesi.

In fact, Islamic courts operated in all directly ruled areas of South Sulawesi. In 1877 a report commissioned by the Department of Justice in Batavia concerning Islamic justice in the directly ruled areas of the Outer Islands found that Islamic courts were found in every district and principality in South Sulawesi, including in the *Eastern Districts* where the area of the present-day district Bulukumba was part of (Adatrechtbundel I: 225-34).

Through the 1882 Regulation on the Judicial System in the Province of Sulawesi (S 1882/22)[4] the colonial government harmonized the administration of justice in its territories of Sulawesi[5] with S 1847/25, but it also included some 'special provisions that would make the regulations that had been designed for Java and Madura applicable to Sulawesi.'[6] It established procedures for the high court in Makassar, which was also the first-instance court for Europeans, the *landraad* in each district, the prosecutor and police, and the village and *kampong* (hamlet) heads.

If we look at the jurisdictional areas of the different courts in the territories of Sulawesi it becomes clear that in 1882, the districts of Bulukumba and Kajang had their own *landraad*, which were placed under the administration of the *controleur*. S 1882/22 neither regulated nor abolished Islamic or *adat* courts. The 1882 Priest Court Regulation was introduced in Java and Madura. In South Sulawesi, therefore, formally Article 3 of S 1847/25 still applied, which stipulated that the 'priests' had jurisdiction in civil cases that according to custom and norms of the community concerned were part of religious justice.

7.2.6 The Islamic courts in the self-governing kingdoms in South Sulawesi

The self-governing kingdoms in South Sulawesi were subject to different colonial administrative regulations than those discussed above that only

4 *Reglement op het Rechtswezen in het Gouvernement Celebes en Onderhoorigheden*.
5 S 1882/22 did not apply to the self-governing kingdoms.
6 This phrase is part of S 1882/17, the regulation that endorsed the promulgation of S 1882/22.

regulated the broadest outlines of indigenous justice. The 1906 and 1910 decrees of the Governor of South Sulawesi regulated the administration of justice in South Sulawesi's self-governing kingdoms.[7] An indigenous court (*inheemse rechtbank*) was to be established in the capitals and every other place considered necessary by the Governor of Sulawesi. The Governor-General also appointed the head of the *inheemse rechtbank.* Hence, even in the so-called self-governing kingdoms, part of the indigenous justice system was put under colonial control. The *inheemse rechtbank* generally applied *adat* and religious law and the civil code and penal code only as a 'guideline' in relevant indigenous civil and penal law cases, conditional to the principles of reasonableness and justice (*billijkheid and rechtvaardigheid*). Execution and enforcement of all but minor cases required permission from the colonial administration, in practice the *assistent-resident*.

The original 1906 decree did not contain any provisions concerning the Islamic courts, but the 1910 amendment mentioned Islamic courts. Article 7 stipulated that marriage and inheritance law was determined by the relevant *adat*. When the clients were Muslim and a 'priest council' existed in the jurisdiction concerned, then the priest council had to decide the case at hand; if not, the *adat* court held jurisdiction. All cases could be appealed to the *inheemse rechtbank*, which in such appellate cases had to investigate the case all over again. This amendment indicates that the Governor had received requests from the *assistent-residents* and *controleurs* of the lower levels of administration to regulate the relative jurisdiction between the *adat* and Islamic courts, and it is proof that separate Islamic courts existed in South Sulawesi in the early twentieth century which, significantly, were not part of the *adat* courts. By providing an appeal possibility to the *inheemse rechtbank*, the Islamic courts were made part of the colonial legal system – in fact very much as the 1882 Priest Council Regulation had done regarding the *penghulu* courts on Java.

However, only a decade later colonial policy regarding the Islamic courts in Sulawesi and Java began to diverge. A first sign of this is a circular issued by the Governor of Sulawesi in 1919[8] instructing the Dutch administrative heads (*assistent-residenten*) of the self-governing kingdoms not to establish new Islamic courts, and seriously consider the abolition of Islamic courts that 'were established under Dutch influence.' The following phrases demonstrate that the Governor was aware of the sensitive nature of the issue: 'if serious objections are to be expected with regard to the dissolution of Islamic courts (he uses the term *syarat*), then a further regulation concerning its jurisdiction and composition might be considered' (Adatrechtbundel 31: 431-433). The circular demonstrates that the Dutch colonial government (or even further back, the

7 Decree by the Governor of Sulawesi 123/7 of 8 January 1906 and its amendment Decree 5499/7 of 25 July 1910. See *Adatrechtbundel* 5: 375-437.

8 Circular by the Governor of Sulawesi 22/IV of 11 March 1919 addressed to the *assistent-residenten* of Mandar, Paré-Paré, Boné, Loewoe and East Sulawesi.

VOC) had allowed the founding of Islamic courts in South Sulawesi up to that time, and moreover, that by the second decade of the twentieth century the colonial policy in this regard suddenly changed.

7.2.7 The Islamic courts in South Sulawesi in case law of the *landraad*

In the 1920s and 1930s, it was through *landraad* cases[9] that the Islamic courts' jurisdiction in South Sulawesi was redefined. To start with, in 1929 the Bulukumba *landraad* ruled that the local Islamic court concerned did not possess independent jurisdiction to settle disputes (*zelfstandige rechtsmacht*).[10] Similarly, in 1929 the *landraad* of Selayar, a district adjacent to Bulukumba, even ruled that 'after 1824, in the colonial territories of Makassar, at least in Selayar, legally speaking no administration of justice by priests had ever existed.'[11] The *Raad van Justitie* of Makassar endorsed this decision in appeal.[12] A year later, the same *landraad* of Selayar argued it could not issue an *executoirverklaring*, a declaration required in order to enforce the judgments of the Islamic courts,[13] since the Islamic courts never had been part of the Buginese-Makassarese *adat* and thus they were not part of the Dutch judicial system.[14] Whereas on Java and Madura the judgments of the *landraad* limited the jurisdiction of the Islamic courts to declaratory judgments only,[15] they in South Sulawesi went further and denied the Islamic courts any judicial powers.

The *landraad's* judgments were based on two flawed opinion: firstly, that Islamic courts had never been part of the Buginese-Makassarese *adat*, even in divorce matters; and secondly, that Islamic courts in South Sulawesi never had been part of the judicial system of the Netherlands Indies. There is sufficient proof to the contrary. With regard to Selayar, old local records show that in Selayar an Islamic court had existed long before it became a directly ruled area of the VOC by the treaty of Bungaya in 1667 (Heersink 1999: 57 and 253). Furthermore, there are Dutch accounts from the late nineteenth century (so after 1824) that the chief Islamic judge (*kali* or *opperpriester*) of Makassar was a respected head of the *priesterraad*, who had separated hundreds of couples at the wife's initiative (Matthes 1875: 45-46). This judge had not simply been a registrar of out-of-court *talak* divorces, but performed the judicial role of issuing judgments in divorce cases petitioned by women and based on Islamic doctrine.

9 All following cases in this section are taken from Tan 1976.
10 Judgment of the *landraad* of Bulukumba of 20-9-1929.
11 Judgment of the *landraad* of Selayar of 8-8-1929.
12 Judgment of the *Raad van Justitie* in Makassar of 2-5-1930.
13 See Chapter 2.
14 Judgment of the *landraad* of Selayar of 26-10-1931.
15 See Chapter 2.

Moreover, the abovementioned report on Islamic justice of 1877, 50 years after the coming into force of the 1824 Regulation concerning the Organization of the Police and the Civil and Criminal Administration of Justice in the Province of Makassar, to which the *landraad* of Selayar referred in its 1929 judgment, clearly stated that Islamic courts with jurisdiction over marriage, divorce and inheritance matters operated all over the colonial territories of South Sulawesi, and specifically named Selayar as one of those territories.

The letter from the Governor-General to the Governor of Sulawesi on this matter[16] indicates that in 1851 the Governor-General himself considered that S 1847/25 applied to the Islamic courts in South Sulawesi and needed no further regulation. This would support the argument that S 1824/31 had not abolished the Islamic courts at all. All this indicates that the judgments of the colonial judiciary were not much concerned with formal legal proof, and, like the policymakers at that time, simply had a preference for *adat* law to the detriment of Islam. The colonial regime, including the judiciary, had changed its policy with regard to the position of the Islamic courts in South Sulawesi and attempted to legitimize this in terms of *adat*.

7.2.8 Colonial Regulations concerning the Islamic bureaucracy

Despite this change in colonial policy, the Islamic courts in South Sulawesi continued to exist. While from the late 1920s onwards the colonial government did not formally recognize the independent judicial power of the Islamic courts in South Sulawesi, neither did they abolish them. They kept operating as a kind of *fatwa* institution. At the same time, all other positions in the religious bureaucracy became increasingly subject to regulation. As on Java, high officials in the Islamic bureaucracy of South Sulawesi were appointed by or with the approval of the colonial administration and all Muslim institutions required a license to operate legally.[17]

In 1912 the Governor of Sulawesi issued the Regulation concerning Muslim Marriages in the Outer Islands,[18] in which the highest-ranking Islamic functionary on the hamlet (*kampong*) level, the *imam* on the village (*desa*) level,[19] and the *khalif* on the district level were made responsible for marriage and divorce registration in the directly-ruled areas outside Makassar, including Bulukumba. In Bulukumba the marriage official concerned was allowed to charge ten percent of the bride price in marriage cases, to a maximum of 16

16 See Section 7.2.3.
17 S 1910/669, Article 2 (2).
18 Decision by the Governor of Sulawesi 4701/64 of 21 August 1912. See *Adatrechtbundel* 31: 428-430.
19 Villages in South Sulawesi are very widespread, and in fact a *kampong* could correspond equally with a village as a *desa.*

guilders (Article 3, paragraph A (2)). A maximum charge of four guilders was set for divorce registration, while *rujuk* (reconciliation during the *iddah* waiting period) was free of charge. In case of inability to pay, the registration should be free of charge (Article 4). The marriage registrars had to keep registers according to specific templates in order to be able to provide legal proof of marriage, divorce and *rujuk* (Article 6).

In South Sulawesi most religious officials were part of a feudal system led by the nobility. Unlike in West Java, there were not many autonomous *ulamas* and until the 1970s few Islamic boarding schools (Buehler 2008b). Until the 1930s a majority of *ulamas* in South Sulawesi, most of them nobles with a *sufi* orientation, supported the powers-that-be (Pelras 2000). However, on the brink of World War II South Sulawesi's society was about to change.

7.3 THE POLITICAL INSTABILITY BEFORE AND AFTER INDEPENDENCE (1930-1965)

7.3.1 The emergence of an anti-feudal Muslim movement

In this section, we leave the Islamic courts behind temporarily to focus on the political developments during the revolution and civil war periods in South Sulawesi. These reveal the relations and tensions between different social groups as well as the changes in those relations, which influenced the future relationship between the State, the Islamic courst, the *ulamas,* the Muslim bureaucracy and society.

In the late 1920s, traditional *ulamas* associated with the nobility were seriously challenged for the first time by the rise of a more egalitarian, modernist Muslim movement. In Makassar a branch of the *Sarekat Islam*, which supported the cause of Muslim merchants, was established in 1916. The first South Sulawesian branches of the *Muhammadiyah* were set up in 1926 and 1928 in Makassar and Wajo respectively.[20] Noblemen from the ruling elites of Bone and Goa were openly opposed to the establishment of *Muhammadiyah* in South Sulawesi, as well as to the secular parties (Pelras 1993).

The communist PKI, which established a regional branch in Makassar in 1926, and the PNI, with its large following on Java, did not manage to get a similar amount of support in South Sulawesi. The PNI lacked the support-base of the *priyayi* in South Sulawesi. The communists' presence, however, played an important role in antagonistic Islamic (and Christian) discourses in South Sulawesi as being an outside threat from Java (Noor 2010). The relatively late entrance of the secular parties in South Sulawesi also meant the period in which they could operate openly was short, as the repressive colonial measures of the 1930s quickly forced them underground again.

20 Wajo, a kingdom with a modernist *wahabi* past, had a less feudal structure than common in South Sulawesi. See Pelras 2000.

Its late arrival and the opposition from the aristocracy did not stop the growth of the *Muhammadiyah*. In 1941 the 16th South Sulawesi regional conference succeeded in attracting 7,000 members and 30,000 sympathizers. *Muhammadiyah*'s presence in South Sulawesi became increasingly influential. Islamic day schools were established, providing modern education in a region where such education was almost absent, and taught a modernist and a more egalitarian form of Islam. In the 1930s the traditionalist NU also established a branch in South Sulawesi, but before independence it did not attract much support: its single branch in Makassar had only 50 registered members in 1941 (Juhannis 2006: 29).

The Islamic bureaucracy that was supported by and in return supported the high nobility in South Sulawesi at that time, started a traditional South Sulawesian Islamic counter movement, with considerable success. The traditionalists too established Islamic schools providing modern education, but with traditionalist Muslim teachings. Ironically, through this Islamic education the *adat* basis on which the high nobility's power had previously relied was undermined. Moreover, the increase in religious teachers reduced the role of the high nobility in religious matters. From the ranks of successful commoners and lower nobles a new Islamic elite gradually emerged that took neither the nobility's reign nor their *adat* rules for granted (Pelras 1993; see also Prins 1960).

7.3.2 The nobility's support for a return of the colonial government

The Japanese occupation, the struggle for independence (1945-1949) and the later *Darul Islam* rebellion (1950-1965) reshuffled South Sulawesi's stratified feudal social system. When Japan took over the Netherlands Indies in 1942, it attempted to unite the traditional South Sulawesian and national reformist movements under *Jemaah Islam*, just as it had done in the Western part of Indonesia through the *Masyumi*. More than on Java, however, *Jemaah Islam* was split by internal conflict, not only over Islamic issues, but also over the issue of feudalism.

The return of the Dutch in 1945 worsened the conflict, as many noblemen supported the Netherlands Indies Civil Administration, formed in Brisbane to restore Dutch rule in Indonesia. They did so in order to hold on to their privileged position, a strategy which came under fire from *Muhammadiyah* supporters at home. The 1955 election results reveal strong support for Muslim parties in South Sulawesi than on Java. *Masyumi* (five provincial seats in the national Parliament) won the elections ahead of the NU (two seats), the Christian *Parkindo* (two seats) and the Islamic PSII (one seat). PNI won only one seat, and the PKI none.

Thus anti-feudal rhetoric in South Sulawesi did not reflect secular liberal and socialist ideologies, but was an Islamic discourse, mainly propagated by

the *Muhammadiyah* (Pelras 2000). The noblemen had sufficient reasons to fear that an independent Indonesia would lead to an end to their rule, but their support for a return to colonial rule backfired as fighters for an Independent Indonesia in South Sulawesi, joined by Javanese fighters, became increasingly anti-feudal. The guerrillas attacked nobles, bureaucrats, Chinese and Christians, all seen as supporters of the Dutch. The Dutch reacted by sending in their Special Forces under the leadership of the notorious Captain Westerling. Westerling developed a brutal strategy, in which the Special Forces would surround a village suspected of harboring independence fighters and drive the entire male population to a remote location, where the suspects were executed. From a military standpoint the campaign was rather successful, but it came at a price. IJzereef estimates that 3,000 Indonesians were killed in in Westerling's campaign of 1946-1947 (IJzereef 1984). The Indonesian Republic even claimed that 40,000 people in South Sulawesi lost their lives.

Diplomacy was another arena where traditional leaders, nationalists and the Dutch fought their battles. In July 1946 the Malino conference was held in South Sulawesi, with the Netherlands represented by Governor-General Van Mook (Ricklefs 1993: 224). During the conference the Dutch tried to gather support for the idea of a federal Indonesian state, which would continue as part of the kingdom of the Netherlands. Soekarno rejected the idea, but many noblemen in Eastern Indonesia, including South Sulawesi, looked favorably on a federal state of East Indonesia (*Negara Indonesia Timur*, NIT). The Conference of Adat Rulers (*Hadat Tinggi*) of the NIT was installed in Makassar in November 1948, in anticipation of such federal state (Buehler 2008b).

In May 1949, under the Roem-Van Royen agreement, the Dutch recognized Indonesia's independence under the precondition that it would become a Federative Republic, administratively independent from, but still forming a union with the kingdom of the Netherlands. Thus, the NIT continued to exist after independence with a strong position for the traditional aristocracy in the *Hadat Tinggi*. However, as it appeared, in 1949 South Sulawesi and its high nobility were far removed from a restored traditional order. Many of the groups that fought in the independence struggle remained armed and kept fighting, but now against the NIT. Initially, many fighters were inspired by Soekarno's ideal of a unitary Republic, but many Muslim guerillas were rather fighting against feudalism. For others sheer opportunism played a role, as they saw the chance to take over local trade previously controlled by the nobility (Pelras 2000).

The NIT was short-lived, as in 1950 Soekarno abolished the Federation and declared the unitary Republic of Indonesia. Subsequently, many guerrilla groups that had rebelled against the NIT turned against the unitary Republic, partly because they were not incorporated into the National Army. Ironically, in their common struggle against the Republic, the previously anti-feudal guerrillas sought and managed to gain support from members of the nobility (Juhannis 2006: 56).

7.3.3 *The Darul Islam* and *Permesta/PRRI* rebellions

In the midst of this chaotic situation, Kahar Muzakkar came to the fore. Muzakkar was a *Muhammadiyah*-educated youngster from Luwu, who had been banished to Java by the *inheemse rechtbank* (*Hadat*) for publicly criticizing the feudal make-up and conservatism of the ruling elite (Pelras 2000). He joined the independence struggle on Java against the Dutch in 1945-1949, and as one of Soekarno's bodyguards personally met with nationalist leaders (Juhannis 2006: 38). In 1946 he became acquainted with General Sudirman, who also had a *Muhammadiyah* background and who gave him the task of setting up a Republican army unit, with the aim to fight the Dutch in South Sulawesi. In 1949 Muzakkar was involved in organizing military transports of Javanese soldiers into South Sulawesi.

In 1950 he returned to South Sulawesi as leader of the United Guerrillas of South Sulawesi (*Kesatuan Gerilya Sulawesi Selatan*); to his disappointment, not as the leader of the Republican army unit he had helped to set up. Muzakkar demanded that his fighters were incorporated into the Republican army, to no avail (Juhannis 2006: 42). These personal disappointments, as well as the fact that he was very anxious about the rise of communism on Java, made him rebel against Soekarno's Republic, which he once fought for. In 1953 he joined the *Darul Islam* rebellion raging in West Java and Aceh (see Chapter 5). *Darul Islam* managed to bring vast areas in South and Southeast Sulawesi under its control. It abolished all *adat* titles and introduced sharia-based law in those areas, including penalties for those who did not observe them. Law Enforcement Soldiers of the *Momoc Ansharullah* (Mobile Operation Commando of God's soldiers) watched over its implementation and held the triple function of police, prosecutor and judge. For the latter function specialized *ulamas* were recruited (Juhannis 2006: 140).

Bulukumba was also a *Darul Islam* stronghold. By 1953 the guerrillas had taken control over Bulukumba relatively easily, but met fierce resistance in the district Kajang, today part of the district Bulukumba. The Kajang community feared that the *Ammatoa*'s position – the local *adat* leader who is believed to be the descendant of the mythical ancestors of the Bugis, Konjo and Makassarese peoples – had come under threat from the Muslim puritan and anti-feudal *Darul Islam.* In 1954 they launched a fierce attack killing members of the *Darul Islam* and burned down mosques all the way to the coastal area of Bira. It took the much better armed *Darul Islam* fighters another year to defeat the Kajang. Indeed, they subsequently imposed sharia law and banned spirit cults. However, the institution of *Ammatoa* survived the *Darul Islam* period and is very much alive today.

In 1957 the South Sulawesi Republican forces themselves rebelled against Soekarno. The civilian government of East Indonesia with support of local military commanders, including those in Makassar, in 1956 asked Soekarno to grant the regions more autonomy in economic and political affairs. When

Soekarno refused they began the Universal Struggle (*Perjuangan Semesta*, *Permesta*) rebellion. In 1958 the Revolutionary Government of the Republic of Indonesia (PRRI) was declared in Sumatra and the *Permesta* joined the PRRI. Muzakkar was also approached and as a result he was now fighting with some of the Christian ex-KNIL officers he once rebelled against.

The National Army succeeded in defeating the *Permesta*/PRRI rebellion in 1961. The remaining rebel groups in Sumatra and Sulawesi, including the *Darul Islam*, proclaimed the RPI (*Republik Persatuan Indonesia*, United Republic of Indonesia). However, this time the National Army forced the *Darul Islam* onto the defensive. *Darul Islam* lasted until 1965, when Kahar Muzakkar was shot by the National Army (Buehler 2008b).

7.3.4 The rebellions of South Sulawesi and West Java compared

A comparison of the political relations, ideologies, and socio-economical tensions that lie beneath the respective *Darul Islam* rebellions of West Java and South Sulawesi, provides a valuable insight into the relations between the national state, the ruling noblemen, *ulamas* and society as they developed after independence. As we have seen in Chapter 5, those relations are important for understanding how the Islamic courts as state and religious institutions are viewed by society.

Like in West Java, the *Darul Islam* in South Sulawesi was an Islamic movement that started as a guerrilla war against the Dutch, but turned against the Republican forces. Likewise, it displaced tens of thousands of people who fled the violence. However, unlike in West Java, the *Darul Islam* in South Sulawesi was not an outcome of *ulamas'* attempts to retain or regain the influential position they traditionally held in society as a defense against the encroachment of the modern state. On the contrary, supporters of *Darul Islam* in South Sulawesi were the modernist Muslim threat to the traditional local landowning elites; they wanted to change society. The rebellion was supported by non-aristocratic landowners and merchants as well as local lower noblemen – in other words, the emerging Muslim middle class which wanted to move up the social latter.

Thus, whereas the West Javanese *Darul Islam ulamas* could retreat into their rural communities, those in South Sulawesi could not, as those communities were still under the influence of the nobility. If they wanted to increase their status they had no choice other than taking over, or taking part in, the government, the economy and civil society. It is likely that those different starting points for the *ulamas* rebellions in West java and South Sulawesi had their effect on society. The West Javanese *ulamas* could fall back on their traditional position by maintaining the status quo and apply a tactic of non-cooperation toward the state, which after independence was facilitated, paradoxically, by their incorporation into the religious bureaucracy.The modernist *ulamas* in

South Sulawesi had no such option and had to win both state and society for their Islamizing cause.

7.3.5 The process toward recognition of the Islamic courts

During the political chaos of the 1950s, the national government attempted to support nationalist forces through legislation, thus responding and contributing to anti-feudal feelings in society. It issued Emergency Law 1/1951 abolishing *adat* courts everywhere, which was applauded by anti-feudal forces in the Outer Islands. Importantly, Emergency Law 1/1951 made an exception for Islamic courts 'where according to the living law such justice forms an independent part of *adat* justice' (Lev 1972: 79). It also provided that Islamic courts would be further regulated by Government Regulation. The problem rose as how to establish the status of such 'living' Islamic courts before the Government Regulation was issued.

In Kalimantan the sultanates worked out a solution with the Ministry of Religion, by temporarily transferring judicial authority to the KUAs. In Sulawesi, however, the dissolution of a number of principalities and their *adat* courts was already a fact before any formal transfer of authority had taken place. In August 1952 the provincial Office of Religious Affairs urged the Ministry to set up new Islamic courts in South Sulawesi. By late 1952 the Governor of Makassar had taken powers into his own hands and seriously considered to establish Islamic courts by himself, as he had already drafted a Governor's Regulation on the matter. The urgency given to the issue suggests strong political and societal support for the Islamic courts in South Sulawesi, but perhaps must also be considered an attempt to adopt an Islamic agenda for political purposes. When the Ministry apparently gave little priority to the Islamic courts issue in Sulawesi, and did not respond to the request to establish them, the KUAs assumed a judicial role and temporarily handled all Muslim family law issues, including disputes (Lev 1972: 80).

In fact Soekarno's political party PNI did not favor a situation in which in Muslim regions all *adat* institutions with jurisdiction over family law issues were replaced by Islamic ones. In South Sumatra for instance, an alliance between state authorities and *adat* authorities managed to postpone the installation of Islamic courts for a number of years (Lev 1972: 86). By 1957 the political tensions between the national government and *Masyumi*-led opposition in the Outer Islands had deteriorated so much that the government had to make concessions to the Islamic cause. Finally, in 1957 a Government Regulation was issued, stipulating the establishment of Islamic courts all over the Outer Islands (GR 45/1957). A year later, the Islamic court of Bulukumba was established. The same year the Ministry of Religious Affairs issued decision 8/1958 regarding the establishment of the Islamic high court in Makassar with jurisdiction over Sulawesi, Bali, West and East Nusa Tenggara, the Moluccas and

Irian Jaya. The Islamic courts in South Sulawesi had become a recognized part of the judicial system again.

The Islamic courts history in South Sulawesi shows that, other than on Java, the introduction of the Islamic courts in the self-governing kingdoms and principalities was part of a dual process of modernization and Islamization of the traditional order (see Lubis 1994: 100-101), This process was mainly driven by modernist Muslim organizations and their supporters.

7.4 The New Order and old politics

As part of the national court system, the Islamic courts in South Sulawesi became subject to national legislation and supervision by the Ministry of Religious Affairs and the Supreme Court. Chapters 2, 3, and 4 have discussed the introduction of many substantive and procedural changes relevant to the Islamic court during the New Order, and, I need not repeat them here. I return now to the relation between the state, the nobility, *ulamas* and society. Despite the strong centralized military power on which the New Order relied, it also stimulated a return to clear patron-client relations that very much resembled the traditional *adat* structure in South Sulawesi.

The year 1965, when Suharto appeared as major military and political force, was also the year of *Darul Islam*'s defeat in South Sulawesi. It marked the beginning of the end for two of *Darul Islam's* main opponents: President Soekarno, symbolizing Javanese centralist policies; and the PKI, representing secularism. However, it did not mark the end for a third opponent: the aristocracy. The rebellions and the subsequent military control indeed resulted in a situation in which more positions, formerly exclusively reserved to the high nobility, became available to commoners. While noble birth continued to give one a head start, the new composition of social positions became far more diverse, as after the rebellion the military, businessmen, intellectuals and *ulamas* with no or little 'aristocratic blood' were able to enter the provincial, district and local administrations, including the religious bureaucracy. Many were incorporated into the political party *Golkar*, the political machine of President Suharto.

Ironically, soon the new elite members were incorporated into the old, aristocratic elite they previously opposed. Through marriages between kin of these new patrons and kin of the high nobility, the patron could become a 'blood' member of the aristocracy. Those commoners who managed to penetrate into the higher class adopted many of its old ways and became the new local patrons who bought the loyalty of their clients through the exchange of protection and favors (Pelras 2000) Subsequently, the New Order, through *Golkar*, built a symbiotic relationship with the new 'traditional' elite of South Sulawesi (Buehler 2008b). Thus, society's traditional clientelistic structure did not change as it was deliberately retained by the New Order.

Through *Golkar* the New Order established strong ties with the reshuffled elite in South Sulawesi. By granting the aristocratic and military elite central positions within the state bureaucracy, loyalty could be assured – in spite of the fact that through several pieces of legislation on local administration the New Order had formally done away with the feudal make-up of society (Antlöv 2003; Rössler 2000).[21] Van Klinken has argued that *Golkar*'s continued patronage system through the aristocracy 'in all arms of government,' might explain the typically large *Golkar* vote in the Outer Islands before *Reformasi* and just after it in 1999 (Klinken 2003: 11). Another explanation is that *Golkar* did not only successfully incorporate the aristocracy and its patron-client networks, but also the new *ulamas* of the reformist Muslim movement who had finally found a vehicle to exert influence on, or simply get a position within, the administration.

7.5 The Islamic revival during the *Reformasi*

7.5.1 The Preparatory Committee for the Implementation of Sharia in Indonesia

Suharto's fall from power and the subsequent *Reformasi* constituted a crisis in which insecurity spread around the patronage networks in South Sulawesi. However, unlike the post-colonial period, this time it did not result in large-scale violence by *guerrillas*, although here too serious violent incidents did take place, such as attacks on Chinese and bombings on symbolic targets. Similarly to the events in the 1940s and 1950s, during the *Reformasi* Islamist ideas came to the surface once again in South Sulawesi.

In 2000 the Preparatory Committee for the Implementation of Sharia Law in Indonesia (*Komite Persiapan Penerapan Syariah se-Indonesia*, KPSSI), which despite its name is a South Sulawesi-centered organization, was founded during a meeting in Makassar. Representatives of all major Muslim organizations and institutions (NU, *Muhammadiyah*, MUI, ICMI, and others) participated in the event, as well as a variety of prominent Muslim figures, including Jusuf Kalla (the future vice-president of Indonesia), the president of the *Partai Islam SeMalaysia* (PAS), the deans of *Universitas Muslim Indonesia* and the law faculty of *Universitas Hasanuddin*, and even the infamous Abu Bakar Ba'syir. In a symbolic act the participants in the meeting chose Abdul Azis Kahar Muzakkar, son of the executed *Darul Islam* leader of South Sulawesi, as head of the executive board of KPSSI.

21 Hence, Gerry van Klinken's (2003: 11) suggestion to follow Burhan Magenda by approaching the New Order as a 'revival of elements of Van Mook's Federal rule' may indeed be insightful.

Not surprisingly, the main point on KPSSI's agenda was the incorporation of sharia-inspired regulations into the legal system of South Sulawesi. Politically, the KPSSI took an anti-New Order and anti-corruption stance. It was argued that sharia would increase law and order and that the national government's sharia policy in Aceh had opened up the legal possibility for a further shariatization of regions with a traditionally strong Islamic character. The *Laskar Jundullah* was established as a paramilitary organization that could be used to put pressure on politicians to adopt sharia-inspired regulations and to oversee enforcement (Buehler 2008b).

This time the Islamists were not met with violence, but with a strategy of cooption, taking over the discourse of political opponents. After some members of *Laskar Jundullah* were convicted for their involvement in several bomb-attacks that hit Makassar in the years 2000-2004, the KPSSI lost much of its political momentum. The sharia agenda of the KPSSI was adopted by politicians from main-stream political parties *Golkar* and PDI-P who came most often from the ranks of the nobility (Buehler and Tan 2007). Besides the political strategy of cooption, clientelism also played a role. Through regulations concerning the management of Islamic charities (*zakat*), local governments could collect extra taxes that were used to establish new patron-client networks. In those networks, religious figures (*ustadz(a*) and *ulamas*) are expected to act as power brokers in return for prioritization of Islamic matters and an increase in funds. Qur'an recitation groups (*majelis ta'lim*) were especially important as they reach both male and female voters (Buehler 2008b: 30-31). Hence, much unlike the South Sulawesian aristocrats of the 1950s, the present-day representatives do not only take an Islamic stance in politics, they do so in order to win the Muslim constituency, as success in the present-day clientelistic politics of modern noblemen partly depends on support of the *ulamas'* networks.

7.5.2 Bulukumba's sharia-based regulations

In 2002 Bulukumba was the first district in South Sulawesi to introduce sharia-based regulations. These bylaws concern prohibitions on alcohol;[22] the management of Islamic charities (*zakat, infaq and shadaqah*);[23] Muslim dress codes in government buildings;[24] and the ability to recite the Qur'an as a requirement for marriage, secondary school and certain positions in the bureaucracy.[25] Since 2003, each of the ten sub-districts has at least a model village (*desa percontohan*) or Muslim village (*desa Muslim*), the apparatus of which is expected to encourage adherence to the sharia-based regulations

22 District Regulation 3/2002.
23 District Regulation 2/2003.
24 District Regulation 5/2003.
25 District Regulation 6/2005.

within the village and set an example for other villages in the sub-district. The introduction of sharia-inspired regulations in Bulukumba attracted considerable media attention.[26] The attempt in 2005 by the Muslim village council of Padang, a village in Bulukumba's sub-district Gantarang, to introduce and implement caning as a penalty for being in seclusion with the opposite sex without being married (*khalwat*) was even taken up by *Komnas Perempuan* (See *Komnas Perempuan* 2009).

The Bupati of Bulukumba (1995-2005), who actively promoted and introduced sharia-based regulations, is Patabai Pabokori of the *Golkar* party, a KPSSI member since its establishment in 2000. Students of the STAI Al-Ghazali told me that his successors (AM Sukri Sappewali (2005-2010) and Zainuddin Hasan (2010-present) have been more lax with regard to the implementation of the regulations. Although I had not been in Bulukumba before 2010 and I cannot compare the current situation with that in 2005, I did notice that in at least one Muslim village (*desa Muslim* Balong) women openly ignored the veiling regulation and, moreover, did not object to being interviewed by a male Western researcher and a male research assistant without a male relative being present.[27]

In 2007, Bulukumba's sharia politics reached the national newspapers once again when *desa* Padang wanted to introduce the punishment of amputation for theft. This time, the district government intervened and declared that caning and amputations are illegal under Indonesian law. The vice-Bupati stated that since 'Bulukumba is not an independent republic' such practices were illegal in Bulukumba.[28] According to a female activist from *desa* Padang, who had testified for *Komnas Perempuan* in one of the caning cases, no new caning punishments have taken place since that case in 2005.[29]

Such experiences give the impression that the height of the shariatization in Bulukumba lies behind us. Moreover, if Michael Buehler's analysis is correct, then the local elite was not so interested in Islamization itself, but more in the patronage networks they could build through the process. This is not to say that the sharia-based regulations are without effect. Government offices are instructed to refuse to help unveiled Muslim women.[30] Due to public

26 See for example Gamal Ferdhi, Nurul H Maarif , '*Depancalisasi Lewat Perda* SI', *The Wahid Institute edisi VII,* in: *Gatra*, edisi 24/XII, 29 April 2006; Subair Umam '*Formalisasi Syarat Islam Perjuangan Ahistori: Belajar dari Bulukumba dan Luwu*', *the Wahid Institute*, Edisi 1, November 2005-Februari 2006.

27 My own observation during an interview with *Bu* M. in *desa Muslim* Balong, *kecamatan* Ujung Loe, Bulukumba, 23-7- 2011.

28 Manan, & Irmawati, '*Bukan Republik Bulukumba*', *Tempo*, Edisi 41/ XXXVI/03, 3-9 December 2007.

29 Interview with *Bu* Esse of the local women's organization Sipakatua Sipakalebbi, 9-11-2010 in the town Bulukumba.

30 Interview with Nurlaila Umat, an official of the division Islamic Affairs (*Urusan Agama Islam*), of the District Office of the Ministry of Religious Affairs, Bulukumba, 3-8-2011.

pressure, the abovementioned female activist from *desa* Padang currently always wears a veil in public, while before 2003 she did not.

7.5.3 The Islamic court of Bulukumba and the sharia-based regulations

Although the Islamic court of Bulukumba is a national institution where national rules apply, it does implement the district veiling regulation, although no visible signs are displayed explicitly instructing women to veil themselves. During a pre-study, it became clear that Muhammad Rusydi Thahrir, the head of the Islamic court of Bulukumba during my field research in 2010-2011, was an outspoken proponent of sharia-based regulations. According to him, they will bring benefit to the community (*kemaslahatan*) as Allah will reward good conduct. He did not look favorably on gender activists and the researchers of *Komnas Perempuan*, who, according to him, came to Bulukumba for a few days in 2009 and, based on very little knowledge, wrote a long and judgemental report.[31]

As a consequence of the veiling policy, women who do not wear a veil on a daily basis will put on a veil before entering the court and take it off again on leaving. In the hundred plus hearings studied for this research, I observed only one occasion when an unveiled woman was able to enter the courtroom. It concerned a woman of high status whom the clerks and judges clearly did not dare to correct. On another occasion, an unveiled woman who came to the Islamic court as a witness and had not brought a veil was requested by the assistant-clerk to put on a *mukenah* (praying dress for Muslim women) instead, before he allowed her to enter the courtroom.

7.6 Conclusion

In the colonial part of this chapter I have analyzed the historical trajectory of the Islamic courts in South Sulawesi. Initially, the VOC preferred centralized sultanates with a religious bureaucracy under its control over the looser bonds between the different principalities and kingdoms under *adat*. I have shown that there are several indications that the VOC and later the Government of the Netherlands Indies, had indeed stimulated the establishment of local Islamic courts in the South Sulawesian districts under its control, before in the 1920s its Islam policy changed in an *adat*-centered one. The 1919 Governor's instruction not to establish new Islamic courts in South Sulawesi and to consider abolishing the ones established under Dutch rule implies two things: first that Islamic courts had been established with permission of the Dutch

31 Interview with *Pak* Muhammad Rusydi Thahrir, Head of the Islamic Court of Bulukumba, 9-11-2010.

before; and second, that as late as 1919 there was still a chance that new Islamic courts were established. The tone of the letter was still cautious, but some ten years later *landraad* case law was much more outspoken: Islamic courts were not part of the Makassarese-Buginese *adat*.

My analysis of the relation between the Islamic courts, nobility and the *ulamas* has shown that this relation was, and still is, very different from that described in Chapter 5 for Cianjur. On Java the *penghulus* were caught between three fires: the colonial regime, Muslim society (especially autonomous *ulama* and modernist Muslim organisations) and God (Hisyam 2001). In Bulukumba of the 1920s Islamic courts were not recognized by the colonial regime, and as a consequence their promotion became a symbol of reformist Muslim resistance against an alien government and the indigenous noblemen it relied on.

This brings me to the turbulent period of the *Darul Islam* rebellion. Despite its defeat, the rebellion did achieve some of its goals: first, communism did not get hold in South Sulawesi; second, the nobility, although still strongly present, had to accept commoners, including *ulamas* and supporters of Muslim organizations, into their patron-client networks and into the government; and third, *adat* courts were abolished whilst Islamic courts were established. The 1957 Government Regulation resulted in the establishment of Islamic courts in the districts of South Sulawesi one year later, including Bulukumba, meaning that the Islamic courts of South Sulawesi were finally recognized as part the judicial system. These were clear victories for the Muslim movements over the secular-nationalists and the nobility.

The short analysis of a return to a reliance on noblemen's clientelist networks under the New Order, with a place for Muslim actors in government and *Golkar*, clearly show a changed relationship between the nobility and *ulamas*. This change also becomes evident in my discussion of Michael Buehler's observation that in present-day South Sulawesi, the *ulamas* are recognized by the nobility as constituting an essential part of their patronage network. Now that the nobility has been Islamized, feudalism does not seem to be an important issue for the *ulamas* anymore, and cooperation with the state and nobility appear to be commonsensical.

In the next chapter, I will analyze the role and performance of the Islamic court of Bulukumba in women's divorce and post-divorce matters, in much the same manner as Chapter 6 has examined the Islamic court of Cianjur, and I will compare the findings of those chapters. As we shall see, some of the differences between the performance of those Islamic courts today can be explained by the historical differences in the development of relations among the state, Islamic court, the *ulamas*, and society.

8 The Islamic court of Bulukumba and women's divorce and post-divorce rights

> '(…) the Bugis consider divorce to be shameful, not only for women, but also for men. However, the stigma is greater for women, especially if a woman is divorced by her husband because of his infidelity, not to mention her infidelity. The infedility of the husband may lead to gossip which pushes a woman into a corner, since it is assumed that such wife did not 'serve' her husband properly, expressed in Bugis and usually uttered by elders as 'she is not capable of meeting her husband's needs'.' (Idrus 2003: 262)

8.1 INTRODUCTION

This chapter discusses the results of my empirical research concerning divorce and post-divorce rights, obtained during fieldwork in the district of Bulukumba in 2011.[1] Central to this research were the knowledge, experiences and actions of divorced women with children, regarding their divorce rights in general and the role of the Islamic court in particular. By linking their experiences with primary data from key informants, secondary statistical data and literature about divorce in Bulukumba, I examine what the role and performance of the Islamic court of Bulukumba is in protecting women's divorce and post-divorce rights.

8.1.1 Short description of the Islamic court of Bulukumba

The Islamic court of Bulukumba was established on the first of September 1958, but for a long time suffered from a lack of facilities and moved ten times in its first 20 years, administering justice from five different private homes, the sub-district office of Ujung Bulu, the office of the Red Cross, and a rice storehouse (*gudang dolog*), after which it was based in a very small office for 31 years (1978-2009).

However, since August 2009, the Islamic court of Bulukumba has been located on the Jalan Lanto Daeng Pasewang, one of the main roads in Bulu-

1 This Chapter has been published as a chapter in the Leiden University report 'Regime change, democracy and Islam. The case of Indonesia.' See Van Huis 2013.

kumba. Driving on the road, it is difficult to overlook the large white court building with its high pillared entrance – a striking contrast with the small building in which the court was located in Cianjur.[2] If one still fails to identify the function of the building, the large letters on the white stone fence make it clear: *Pengadilan Agama Bulukumba Kelas B* (Islamic court of Bulukumba, category B).[3] The two floors comprise an office space of 2,448 square metres on a 2,800 square metre plot of land, leaving sufficient space in front and to the sides of the court building to park cars or motorcycles and keep a small garden. On the compound behind the court building there is a tennis court used by the male judges and clerks for leisure time after working hours.

Court clients enter the air-conditioned court building through the pillared main entrance. To the right of the hallway is a small legal aid office, which at the time of my field research was not yet operational, because, I was told, the Islamic court of Bulukumba was still in the application process.[4] Straight to the left of the entrance is the window for the registration and administration of court cases. Large posters on the wall in the small hallway leading to the registry window announce detailed information concerning court fees. Separate posters announce court fees for first-instance cases, appeals and appeals in cassation. The court fees are broken down into administration costs, costs for summations subdivided into three zones according to distance from the court, and costs for the official seal (*biaya materai*). Small, modern metallic benches at the side of the hallway are used by those who line-up to register a court case or to arrange other administrative matters. At the end of the hallway, the single registry window physically separates the office of the court clerks from the court clients, increasing the formal atmosphere of the building.

Facing the entrance, after passing the fingerprint scanner used by court personnel to clock in and two large white stairways on both sides leading to the second floor offices, one finds the first of the two courtrooms. The courtroom has transparent glass walls, apparently designed to symbolise transparency in the court process, but at the same time giving the impression that the closed sessions are not as private as they should be (all divorce sessions except the reading of the judgment are closed). A clerk behind a wooden desk in front of the courtroom entrance oversees all who enter and leave the room. Litigants and defendants involved in a court case, as well as

2 In 2010, a year after my field research in Cianjur, the Islamic court of Cianjur also moved into a model court building.

3 The Islamic courts in Indonesia are subdivided into categories based on certain criteria, of which the main ones are the number of cases decided every year and the tidiness of the courts' administration. Category B is below the categories 1A and 1B, and since the higher the category of the court, the higher the standard salaries of court personnel, the Islamic court of Bulukumba was working and lobbying hard during my stay to have their court upgraded to 1B.

4 Legal aid offices within the Islamic courts are stipulated in the 2009 amendment on the 1989 Islamic Judiciary Law (Law 49/2009).

those accompanying them (witnesses, relatives and the occasional legal representative) sit on the metallic benches in the hallway between the first and the second court room, waiting for their or their relative's turn to be called in.

The courtrooms contain rows of modern blue chairs placed on the left and right side of the passage to the judge's bench – a large wooden desk covered with green cloth – with a single chair in front of the rows on each side for the litigant and defendant. The judge panel's bench is placed on a platform, symbolising the judges' authority, and behind the bench there is a prominent place for the Indonesian flag, the national symbol of the *garuda* (eagle) and a photograph of the president and vice-president of the Republic of Indonesia, all of them symbolising the authority of the state. The entrance to the clerks' office area is in the hallway between the courtrooms. In the joint office area the vice-chief clerk, three assistant clerks (*panitera muda*) and five substitute clerks (*panitera pengganti*) have several desks at their disposal, where they can fill in the register books by hand or work on their laptops. In a separate office are two PCs and a printer. The bailiff and two substitute bailiffs have a separate office with a PC. The chief clerk is the only one who does not work in the clerks' area, having a large office on the second floor.

While at first sight I found an equal number of male and female staff in the clerks' office area, this did not reflect their equality in terms of position within the office hierarchy. Higher positions are dominated by male clerks and the lower by female ones. The chief and vice chief clerks were male, whereas one of three assistant clerks, and even four out of five substitute clerks were female. If we look at the bailiffs, the chief is male and one of his two assistants female. Nonetheless, the fact that an equally divided female and male staff prepares court cases, writes the proceedings, conducts administration and handles the petitions of court clients, gives the sense that women staff do have considerable influence on the clerks' office as a whole.

On the second floor at the top of each white staircase, we find the large offices of the head of the Islamic court and the chief clerk (*panitera sekretaris*), both furnished with sofas to receive guests. The head of the Islamic court at that time, Judge Muhammad Rusydi Thahrir, did not have government housing at his disposal and preferred to spend the night in his court office. The second floor includes a larger meeting room, as well as a very orderly archive of recent court files. The court files older than five years are stored elsewhere, and are less accessible. Last but not least, all the judges' offices are situated on the second floor, thus physically separated from the court clerks. If we look at the sex of the judges, the same picture emerges as for other staff. The head and the vice head of the Islamic court, who also act as judges, were male, while five out of the seven other judges were female. However, even though the higher positions were reserved for male judges, this still means that half of the judges were female, which is a rather high number.

Every day ten to twenty court hearings take place. Some hearings, for instance those that have to be rescheduled because the defendant did not show

up, are very short and take only minutes, whereas others take much longer as they have reached the evidence and testimony stages of the process. As a rule, court hearings will be finished before two o'clock in the afternoon and then the Islamic court becomes a rather calm place; court files will be put in order and professional or more private matters are discussed. Around five, some of the male judges will go outside to play some tennis, while most of the court personnel heads home.

8.2 Divorce in Bulukumba

8.2.1 Divorce statistics explained

There are no recent divorce figures available for Bulukumba, so I have calculated an estimation of the divorce rate myself, in the same way I have done in Chapter 6 for Cianjur. Usually the divorce rate is defined as the probability that a marriage ends up in a divorce, and requires long-term surveys. Such population surveys clearly fall outside the scope of this research. Therefore, following Jones (Jones, G.W. 1994), I have used another, slightly less reliable way to estimate the divorce rate, by dividing the number of divorces with the number of marriages in a certain year. According to the 2008 annual report of the Islamic court of Bulukumba, 426 divorce requests had been registered and 3,700 marriages concluded that year (*Bulukumba dalam angka* 2011). Hence the divorce rate of Bulukumba in 2008 is approximately 11.5 percent. In 2009, 3,982 marriages and 447 divorces were registered, setting the estimated divorce rate at 11.2 percent. This figure does not differ much from the national estimated divorce figure for Muslims in 2009: 223,371 Muslim (formal) divorces divided by two million marriages in 2009 also gives a divorce rate of around 11.2 percent. The figure is however much higher than in Cianjur, where in 2007 21,744 couples registered their marriages and 445 divorces were processed by the Islamic court, equaling a divorce rate of around two percent.

The main explanation for the differences between Bulukumba and Cianjur is that while in both districts most couples register their marriages, in Cianjur a very high number of the divorces, 86 percent, takes place out of court through an unofficial *talak* (see Chapter 6), while in Bulukumba most couples choose to divorce at the Islamic court as required by the Marriage Law. The divorce survey carried out in the framework of this research found that 72.5 percent of respondents in Bulukumba had divorced at the Islamic court, compared to 25 percent that had not – while the remainder of the respondents did not answer the question.

The research assistants of the divorce survey told me that at least some respondents out of those 25 percent were not sure whether their former husbands had gone to the Islamic court, but if they did so it was without prior notice and they themselves had not attended the divorce process. In reality,

the percentage of formal divorces might be even higher as the question concerned was probably too ambiguously formulated; it could also be interpreted as asking whether the women themselves went physically to the court to divorce. Nonetheless, the figure of 72.5 percent already indicates that Bulukumba has a relatively low number of out-of-court divorces compared to an estimated 50 percent of out-of-court divorces for the whole of Indonesia (Cammack, Donovan & Heaton 2007) and 86 percent in Cianjur. Obviously, in order to be able to divorce officially one must be officially married first. In Bulukumba, 98.3 percent of respondents answered that they had registered their first marriage at the KUA, whereas in Cianjur this figure was 73 percent.

The numbers above indicate that women in Bulukumba know their divorce rights, as well as the fact that divorce has been turned into a judicial proceeding. This is reflected in the 91.7 percent of the respondents aware of the requirement to obtain a divorce certificate (*akta cerai*) to be formally divorced, whereas in Cianjur the figure was 60 percent. 25 percent of respondents in Bulukumba also answered that a formal divorce can be arranged at the KUA. This 25 percent probably reflects the local reality in which KUA or village officials in Bulukumba provide mediation and 'legal aid' services and help with the paperwork of a divorce process. Nonetheless, the number is much lower than the 74 percent in Cianjur. This all indicates that while women in Cianjur still consider the KUAs as the main institution for marriage and divorce, in Bulukumba it is the other way around; women know they ought to divorce at the Islamic court and approach it without consulting the KUAs first.

8.2.2 Women's reasons not to divorce out of court

Semi-structured interviews with divorced women confirmed a high awareness of divorce rights. Bringing a case to the Islamic court is considered the proper way to divorce by most informants. The latter is reflected in the following answer an informant gave to the question why she went to the Islamic court, and did not divorce out of court:

> 'The reason [to divorce] is that I wanted to be clean (*bersih*), if you only separate like that you will not be considered clean, will you?' (*Maksudnya kan mau bersih, kalau cuma pisah-pisah begitu saja kan tidak bersih namanya*). The divorce must be 'black on white' (*hitam di atas putih*), otherwise 'it will be difficult to remarry'.'[5]

Another woman linked the common practice to divorce at the Islamic court with custom (*adat-istiadat*):

5 Interview with *Ibu* R., Ujung Loe, Bulukumba, 28-07-2011.

'Researcher: Why did you divorce at the Islamic court and not outside? I ask this question because in a number of areas in Indonesia it is common (*cukup biasa*) to divorce [elsewhere] not before the Islamic court.
Informant: Do you mean divorce in the village (*cerai di kampung saja*)?
Researcher: Yes.
Informant: Because here that is not customary (*karena adat-istiadatnya disini kan ga begitu*). Here you have to divorce before the court. [...]
Researcher: Thus in the village there are no people who are willing to divorce a couple?
Informant: No, they would not dare (*Gak mau, takut*).'[6]

Even in cases in which the marriage was not registered, women prefer an official divorce in order to obtain clean status. *Ibu* K. had been married for nine years and two children were born from the marriage. The marriage remained unregistered because the KUA refused to provide the couple with a marriage certificate, as her husband still was married to someone else. *Ibu* K. clarified that her former husband had been married before, but that he had been divorced by his first wife through the Islamic court. According to *Ibu* K. , the first wife did not want to cooperate with the remarriage and kept the divorce papers to herself. When after nine years of marriage *Ibu* K. discovered that her husband had been unfaithful, she wanted to divorce him formally in order to obtain official divorce papers, so she would be able to remarry formally in the future. The Islamic court advised an *isbath nikah* procedure, where the marriage is formally recognised first, after which the divorce can take place.[7]

It remained unclear why the husband had not received a divorce certificate himself. To go deeper into this problem would be speculation, and beyond the point I wish to make: that formal divorces through the Islamic court seem to be the norm in Bulukumba, and that women divorced out of court are stigmatised. Women are made very much aware that they ought to divorce at the Islamic court, or their status is considered 'unclean' and inappropriate for remarriage.

Hence, in addition to its legal role in providing judgments, the Islamic court of Bulukumba is able to successfully fulfil two other important roles with regard to divorce; divorce registrar as part of state population registration, and provider of clear, 'uncontaminated', legal identities to women, so that they become appropriate marriage candidates in their communities. The stigma on informal divorce clearly has a cultural component, but the stigma is probably enhanced by the fact that the KUAs as a rule do not issue marriage certificates to men and women still registered as married. Through the stigma on informal divorce, a chain of formality is promoted: formal divorce enables

6 Interview with *Ibu* I., Ujung Loe, Bulukumba, 28-07-2011.
7 Interview with *Ibu* K., Ujung Loe, Bulukumba, 28-07-2011.

formal remarriage, which in turn facilitates birth certificates for children born out a remarriage, making the latter formal heirs with rights they can claim through a legal process (see also Sumner 2008).

8.2.3 Divorce practices at the Islamic court of Bulukumba

As in Cianjur, the statistics for the Islamic court indicate that women divorce their husbands far more often than the other way around. Most divorces registered at the Islamic court of Bulukumba are *gugat cerai* cases, petitioned by the wife. In 2008, 345 of 426 divorce cases, or 81 percent, were petitioned by the wife. This is not an incident as in 2009, 447 divorces took place of which 364 or (81.4 percent) petitioned by the wife and in 2010, a total of 519 divorces were registered at the Islamic court of which 392 (75.5 percent) petitioned by the wife. The Islamic court of Cianjur saw a similarly high number of female-petitioned divorces (86 percent in 2008).

These statistics suggest that women in Bulukumba are aware of their right to divorce their husband at the Islamic court. Indeed, the outcomes of the divorce survey demonstrate that a large majority of the respondents in Bulukumba did not consider divorce a male right. An overwhelming 86 percent of the respondents did not agree with the statement 'divorce is only the husband's right', of which 10 percent did not agree at all, compared to a mere eight percent in agreement. In Cianjur only 36.7 percent disagreed, of which 1.7 strongly, compared to a majority of 57.5 percent in agreement. Similarly, 97.5 percent of the respondents in Bulukumba agreed, of which 36.7 strongly, to the opposite statement 'women have the right to divorce their husband.' In Cianjur 48 percent agreed, of which five percent strongly. This again indicates that in Cianjur, traditional out-of-court *talak* divorce is much more socially accepted than in Bulukumba.

The divorce survey also assessed the position of the traditional *khul* divorce, in which women negotiate a *talak* divorce in return for a financial compensation to their husband. Most of the respondents in Bulukumba (66.7 percent) believe that they do not have to 'buy' a divorce through the *khul* procedure, compared to 16.6 percent believing it is the only means for women to divorce if the husband does not agree. In Cianjur, a similar number of respondents (61.7 percent) know other ways to divorce, whereas 23 percent agreed to the statement that they might only divorce through *khul.* This means that in both districts women know that several divorce options are available to them, despite their differences in opinion concerning whether a divorce is purely a male right. It may mean that women in Cianjur have the *taklik al-talak* in mind, which is technically a *talak* and thus a male divorce (see Nakamura 1984 and Chapter 6), but unfortunately the divorce survey did not assess respondents' knowledge of *taklik al-talak*, so I do not know.

When confronted with the high percentage of women petitioning for divorce Nurul Ilmi Idrus, professor of anthropology at Hasanuddin University in Makassar, explained that it is indeed common in South Sulawesi that women file for divorce. She related this to special features of the local *adat*; according to her, in Buginese culture women are considered the honor-bearers of the family, and if a woman is divorced by her husband, the *sirri* (honor, status, shame) of the wife, but also of her kin is affected, more than the husband's *sirri* when it is the other way around.[8] Indeed, the practice of women divorcing men in South Sulawesi seems to go far back. Matthes paraphrases the chief *penghulu* of Makassar, who asserted that during his career he had received dozens of men but hundreds of women who had come to him in order to divorce. Although at that time many men may have divorced their wives without the involvement of the *penghulu*, the enormous difference between male and female clients in this anecdote indicates that even in nineteenth century Makassar more women divorced their husbands than vice versa (Matthes 1875: 45).

The picture above reveals women's traditionally strong divorce rights in South Sulawesi. However, these strong rights are not correlated with the concept of equality between the sexes. Patriarchy is the norm, as appears from the staggering 97 percent of respondents that agreed with the statement that the husband is the leader of the family (Cianjur: 92.5 percent). In South Sulawesi, the husband and wife are expected to act according to their gender roles, with female leaders and kings the exception to that rule (Idrus 2003; Röttger-Rössler 2000; Chabot 1996). The husband must fulfil his role as the head and provider of the family, or women may leave him through divorce, as the next example demonstrates.

One of the divorced women interviewed as part of my qualitative research very much resented the passive and unambitious behaviour of her husband. After marriage, she and her husband had to live in the house of her parents-in-law, as they were still incapable of starting a household of their own. She was eager to move out some day, but her husband did not put much effort in establishing their financial independence. The couple lived mostly form support by her husband's parents, and to make matters worse her husband liked to gamble and drink *balo* (a locally-brewed palm wine). She had warned her husband that if he did not give up these money-wasting habits she would leave him. When one night he came home late, smelling of alcohol, she exploded: 'I caned him with a stick' (*saya cambuk dia, pake tongkat*), she said, not without pride. Not long after this incident she filed for divorce at the Islamic court.[9]

The story above is illustrative of the fact that generally speaking women in Bulukumba possess authority and independence within the family, regardless of the clear patriarchal division of roles between genders. A good Buginese

8 Interview with Prof Nurul Ilmi Idrus in Makassar, 16-06-2011.
9 Interview with *Bu* L. in Bulukumba, 23-06-2011.

or Makassarese husband is expected to be ambitious and to do all he can for the improvement of the family's status and position (Chabot 1996). Women, on the other hand, are the main decision-makers of the household and the family, especially in conflict situations (Rötgger-Rössler 2000). If the husband does not act as he is supposed to, women will stand up to him, often backed by their kin, and in the end even leave him.

Moreover, similar as in the Sundanese kinship system of Cianjur, in the Buginese-Makassarese bilateral kinship system, women do not have to depend economically on their husbands because in divorce situations they can always rely on support from their own families, and their own inheritance (Idrus 2003). Since women are considered to be the status-bearers of the kin-group, in the middle and higher classes the husband's status and position in fact may be jeopardized by divorce when his status and career was for a large part built through his wife's status and family network (Rötgger-Rössler 2000).

8.2.4 Women's reasons for divorce and the underlying causes

Let us now turn to the reasons for divorce. As we have seen in Chapter 6 regarding Cianjur, women's reasons for divorce do not necessarily correspond with the formal legal grounds noted in their divorce suits, as they subsequently appear in the statistics of the Islamic court. Court statistics are made by the clerks on the basis of a short scan of the court files. As we have seen in the case of Cianjur, 'continuous strife' is the most common legal ground for divorce, and not difficult to prove. I observed in both Bulukumba and Cianjur that all one needs is two witnesses who can confirm that the couple quarrelled a lot for a certain period of time. As a result, women will not base their case on any of the other legal grounds for divorce. Therefore, in court statistics 'continuous strife' has the potential to absorb all other reasons women have to leave their husbands, and the underlying causes for their marital quarrels.[10]

The divorce survey can provide a more reliable picture of the reasons for divorce. In the questionnaire I adopted a set of reasons for divorce similar to the standard grounds in the annual reports of the Islamic court ('no harmonious relationship', 'my husband had another woman or wife', 'economical reasons', 'domestic violence', 'no offspring', and 'pressure from a third party'). They were encouraged to give multiple answersin order to ensure that the specific reasons why women had chosen to divorce were not absorbed by the broad legal divorce grounds.

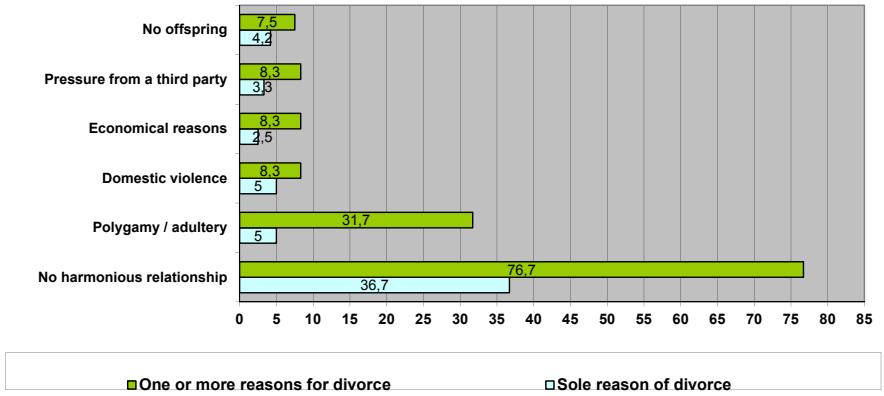
As appears from the outcome, 56.7 percent of respondents provided a single reason for divorce and 43.3 percent gave more than one reason. 'No harmoni-

10 In Chapter 9 I will provide a more detailed legal analysis of court judgments concerning divorces based on continuous strife.

ous relationship' tops the list with 36.7 percent of respondents giving it as their single answer. Another 40 percent mentioned it as one of the reasons, so a total of 76.7 percent. 'My husband had another woman or wife' is only provided as the sole reason for divorce by five percent, but another 26.7 percent mentions it as one of the reasons (total: 31.7 percent), mainly in combination with 'no harmonic relationship.' 'Domestic violence' is mentioned by 8.3 percent, as are 'economic reasons' and 'pressure from a third party.' Finally, 'no offspring' is at the bottom of the list of reasons, and is mentioned by 7.5 percent of the respondents.

Hence, from the divorce survey one may conclude that the two main reasons for divorce in Bulukumba are a lack of harmony between the spouses, followed by the husband's polygamous desires. The latter reason would have been hidden from view if one relied on court statistics only. Cianjur records the same top two; 62.5 percent of respondents mentioned a lack of harmony as the reason for their divorce, 35 percent polygamy. With 8.3 percent of respondents selecting them as their reason for divorce, it appears that economic factors are not a major reason for divorce in Bulukumba, although they play a somewhat more important role in Cianjur at 23 percent. This finding refutes the much-heard male complaint that Indonesian women today are materialists. Quite the opposite image emerges from the divorce survey; Indonesian women want a harmonious relationship and the undivided love of their husbands.

Figure 5: Reasons for divorce as mentioned by respondents in Bulukumba (percentage; N = 120)



I have also conducted qualitative research to assess the underlying causes for divorce, and the circumstances that according to my informants may explain local divorce practice in Bulukumba. The informants mentioned the following four local circumstances as having an impact on divorce practice in Bulukumba: working overseas (*merantau*), marrying at a young age, the practice of arranged (or semi-arranged) marriages and marriage by elopement.

The practice of *merantau*, or husbands seeking work overseas, contributes considerably to both the high divorce figure and the nature of divorce in Bulukumba. Judge Andi Djohar, one of the five female judges at the Islamic court of Bulukumba at that time, without any hesitation brought up *merantau* as one of the main underlying causes of divorce in Bulukumba: 'That [divorce] is caused by this, when the husband looks for work overseas, it is clear that often she [the wife] gets impatient and asks for it [divorce].' Nurul Ilmi Idrus, who conducted anthropological research on marriage and divorce in the Buginese village Kulo in the district of Sidrap in South Sulawesi, mentions the same cause for divorce: '[…] irresponsibility, which means that the husband neglected to provide living necessities to his wife and children, usually because of leaving the house in search of fortune, (Bug. Massompé) […]' (Idrus 2003: 272).[11]

Men who leave their community to *merantau* are expected to send money to their wives and return home once in a while. When that is not done frequently enough, women eventually lose their patience and file for divorce. According to judge Andi Djohar, *merantau* is also the cause for another reason respondents mentioned most in the divorce survey: 'Another reason is that because he works overseas, the husband marries again over there, under the pretext of looking for livelihood (*nafkah*).'[12] In other words, when the husband stays elsewhere for long periods, this increases the risk of him marrying a second time, and many women in Bulukumba will not accept that.

In the interviews I held in Bulukumba, several divorced women stated that they had divorced their husband for these reasons. An example is the story of H. (25 years old, one child) from the village Tamatto, whose husband left for Kalimantan in their third year of marriage:

> 'He said that he would leave for five to six months, but he did not come home. He did not send any support, it appeared that he was married there. […] In the end, I called him [and said] that if you love me more [than her], then you come home, but if not then you are hers, which means that I will petition for divorce at the court. He did not return within the term of two months, so I went to the court.'[13]

In the divorce process at the Islamic court (2008) H. was accompanied by her brother and cousin, and at the time of the interview (2011) she and her child still lived with her parents, relying on them for support and shelter. This shows that her family backed her decision to divorce.

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11 The other main reasons for divorce that the informants in Nurul Ilmi Idrus' research brought up were infidelity related to polygamy and informal marriage.

12 Interview with Dra. Andi Djohar, female judge at the Islamic court of Bulukumba, August 4th 2011.

13 Interview with *Bu* H., *desa* Tamatto, *kecamatan* Ujung Loe, *kabupaten* Bulukumba, July 28th 2011.

The example of H. illustrates how women in Bulukumba are empowered in divorce matters through their strong ties with their kin. A good husband seeks to improve the status of the extended family, and one way to achieve this is through *merantau.* When the husband leaves to *merantau*, his wife and children should have priority, otherwise his wife, backed by her kin, will end the marriage. When a husband does not behave as he is expected to, a divorce is socially acceptable. This social acceptance is further illustrated by the fact that, despite the divorce, the former in-laws of H. still tried to maintain good relations (*sillahturrahmi*) with her family three years after she had divorced her husband.

This can also indicate how in Bulukumba, husbands still break the marital relationship with their wives out of court by simply leaving and not returning. In this manner they force their wives to petition for divorce at the Islamic court in order to obtain a clear and 'clean' marital status and be eligible for re-marriage. Women have high legal awareness and a lot of agency in divorce matters, but the fact that many men still do not bother to go to the Islamic court as required by the Marriage Law remains somewhat hidden.

Furthermore, when men leave their families in order to find work, they do not necessarily have to formally divorce, since they are new to the area they moved to and no one, including the local Office of Religious Affairs, knows what their marital status is. The wives in many cases are left behind in their home community where people know of their marriage. Moreover, when men remarry without formal divorce papers this may be considered polygamy, which for men is acceptable according to custom and religious norms, but for women in South Sulawesi is shameful (Idrus 2003: 271). In short, the social consequences of an informal separation are less harsh for men than for women, which means that whilst many men can still remarry, for women that would be socially difficult.

Besides *merantau*, a second underlying cause for divorce is marrying at a young age. Research in Indonesia has indicated that an early marriage increases the chance of divorce (Jones, G.W. 2001; Guest 1992). Hence, the divorce survey assessed the age of the respondents when they married for the first time. In Bulukumba 12.5 percent of the respondents had been married before the legal age of 16. More than half had been married before the age of 20. Almost 90 percent of the respondents were married at the age of 25 years or younger. The mean age of first marriage in Bulukumba was 22.4 years, because of a number of women who married relatively late. Thus, it make sense to look at the median age, which was 19 years. This indicates a lower

mean age of first marriage in Bulukumba in 2011 than for the whole of South Sulawesi in 1990 (23.6 years; Jones, G.W. 1994: 80).[14]

Although many women in Bulukumba marry before they reach 16, the legal age of marriage, they do not seem to ask for dispensation (*dispensasi kawin*) at the Islamic court, as they are legally required to. In 2009 and 2010 not a single dispensation case was listed by the Islamic court. Still 15 out of the 120 respondents in the divorce survey had been married below the legal age, while only one of the respondents answered that the marriage had not been officially registered. There are three possible explanations: first, the underage marriages remained unregistered, but were registered the moment the legal age had been reached; second, the marriages had been registered by the KUA without prior dispensation from the Islamic court; or, third, the respondents concerned received a fake marriage certificate, but are unaware of it.

In the district Sidrap, South Sulawesi, Nurul Ilmi Idrus found that both the village apparatus and KUA marriage registrars are indeed willing to turn a blind eye when a marriage involves an underage girl. With the cooperation of such officials, the age of the girl will be registered as 16 years. The KUA officials in Bulukumba with whom I spoke denied this possibility, yet the story of *Bu* S.' arranged marriage below indicates that in Bulukumba as well underage marriages are registered by the village level official of religious affairs (*imam desa*) acting as the assistant marriage registrar (*pembantu petugas pencatat nikah*, P3N) of the local KUAs.

Underage marriages can also remain unregistered at first and be registered by the Islamic court when the couple have reached the legal age. As we have seen in Chapter 3, the procedure of *isbath nikah* provides a legal means to register informal marriages concluded in accordance with religious requirements. In 2010, the Islamic court of Bulukumba received 43 *isbath nikah* requests in a total of 499 cases. Most *isbath nikah* cases are related to a widow's pension, as she needs to be legally recognized as the wife when her husband has passed away. However, the procedure may easily be utilised to postpone the registration of underage marriages since few judges will refuse such registration, especially when children have been born from the marriage or when the couple needs the registration in order to obtain a formal divorce. In such cases, judges will appeal to *maslahat* (the public good), to justify their ruling (Nurlaelawati 2010: 192-203, see also Chapter 9).

14 There might be two reasons for this. Firstly, all respondents in the divorce survey had been divorced, and therefore the survey is not representative for all married women in Bulukumba. There is a considerable chance that women who married young are overrepresented, since they have had a greater chance to divorce. Second, there are no large cities in Bulukumba, and in large cities such as Makassar the age of first marriage is considerably higher than in the country-side.

In addition to marrying at a young age, arranged marriages can be an underlying cause for divorce. Marrying within the kin group traditionally assures the parents that there is no difference in status between the spouses, and that land will remain within the extended family. In the words of H.Th. Chabot, the goal of the practice of cousin marriage in South Sulawesi traditionally was 'keeping the blood pure and the goods together' (1996: 230). Moreover, a successful arranged marriage traditionally demonstrated that parents had an obedient daughter, a female characteristic looked upon favorably (Idrus 2003: 236-237). Arranged marriages in South Sulawesi do not appear to be more stable than other marriages. On the contrary, in the nineteenth century B. F. Matthes already gave an account of the *penghulu* of Makassar, who observed that forced arranged marriages, that is those undertaken without the consent of the spouses, often led to misery, adultery and divorce (1875: 45).

Today most marriages in South Sulawesi are ideally based on romantic love, or at least follow a dating (*pacaran*) stage during which the couple can decide whether there is a match (see also Idrus 2003). However, although I cannot present figures, I have noticed during interviews and courtroom observations that quite a few marriages in Bulukumba – even when they were preceded by *pacaran* – were actually arranged by the parents or other family members and concluded between (second, third, etc.) cousins. Often it is a relative who selects the candidates with whom someone may *pacaran.* Choosing your own partner against the wishes of the family may have the consequence of someone being ex-communicated and disowned, and although honor killings are less common than they allegedly were in the past (Chabot 1996), such a couple still might have to elope as they are not safe from the vengeance of their families.

The arranged marriages I came across in Bulukumba had been concluded at a very young age, thereby increasing the instability of the marriage. However, even in such arranged marriages women have enough agency to divorce if the marriage is unhappy. For example, S. had been married off to her first cousin at the age of 12, just after she had finished primary school. Her husband was only a few years older. Although she clearly was a minor at the time of marriage, and thus formally needed permission to marry from the Islamic court, the assistant marriage registrar (*imam desa*) gave her a marriage certificate (*buku nikah*), apparently without a court decision on the matter. The marriage lasted only a year, according to her because her husband 'still acted as a child' (*alasannya kayak anak-anak dulu, suamiku*) and always went out with his teenage friends, leaving her home with her parents. Only thirteen years of age, she and her family decided to go to the Islamic court to divorce. Although the marriage seemed to have been unconsummated, she did not have to return

half of the dower (*mahar*); her husband had not asked her to because 'she was still kin' (*masih saudara*).[15]

8.3 The Islamic court of Bulukumba and post-divorce matters

8.3.1 Court statistics

As I have argued in Chapter 1 and elsewhere (Huis 2010), the role and performance of Islamic courts in post-divorce matters is seldom fully researched. I have established above that more than 80 percent of the divorce cases at the Islamic court of Bulukumba were petitioned by women. The court plays an important role in providing women a formal divorce, which endows women and children with a clear family status as part of their legal identity. However, a good performance of the Islamic court in divorce matters does not automatically mean that its performance in women's post-divorce rights is similarly positive. In this section I examine the role of the Bulukumba Islamic court in securing women's post-divorce rights. The focus in this section is on the frequency of post-divorce cases being brought before the court, and the reasons why women brought a case to the court or not. As such I take an access-to-justice approach rather than a legal one. A legal analysis of post-divorce rights cases in Cianjur and Bulukumba follows in Chapter 9.

To start with, it is difficult to establish the number of post-divorce claims that women bring before the Islamic court. As I have explained in Chapter 6 concerning Cianjur, most post-divorce cases petitioned at the Islamic court are part of, and filed as, a divorce case. Thus, I had to go through the divorce register books to establish case by case whether post-divorce (counter-) claims were included.

Table 7. Percentage of post-divorce claims of the total number of divorces at the Islamic court of Bulukumba for the years 2008 and 2009

	Spousal support	Child support	Marital property
2008	3.3%	1.3%	2.0%
2009	3.1%	1.6%	1.6%

8.3.2 Spousal support

The spousal support claims can be subdivided into three components: unpaid due maintenance (*nafkah yang lampau*); maintenance, clothing and housing

15 Interview with *Ibu* S., STAI- Al-Ghazali, town of Bulukumba, 23-06-2011.

during the three-month waiting period; and the consolation gift (*mut'ah*). Chapter 3 and 4 discussed the substance of spousal post-divorce rights in Indonesia, so I will not treat them further here. According to the court register, in 2009 a total of 14 women made spousal support claims on a total of 426 divorce claims (3.3 percent). However, as I argued in Chapter 5, in practice spousal support claims are primarily substantiated in *talak* divorce cases filed by the husband, thus it makes sense to compare spousal support claims with the number of *talak* divorce cases. Looked upon in this way, the percentage of women making spousal support claims is significantly higher: 14 claims out of 81 *talak* divorces means 17.3 percent of the women claimed spousal support rights in *talak* cases.

In 2009, the total number of women who included spousal support claims in the divorce suit was also 14, but the number of divorce cases was slightly higher: 447 divorces in total, and 83 *talak* divorces. The percentage of women making spousal support claims at the Islamic court in 2009 was 3.1 percent of the total number of divorces and 16.9 percent of *talak* divorces.[16] These numbers, which are very similar to those of the Islamic court of Cianjur (where 2.9 percent spousal support claims were registered out of the total number of divorces in 2008, and 22.5 percent out of *talak* divorces) demonstrate that a relatively large percentage of women in *talak* divorces claim their spousal support rights.

The divorce survey also assessed women's claiming behaviour during the divorce process. 19 of the 87 respondents to the Survey who had divorced at the Islamic court answered that they had claimed spousal support rights. 16 of the 19 claims made by the respondents were granted by the court, although only five entirely, and 11 partially. The survey thus indicates a much higher percentage (22 percent) of women claiming spousal support rights than appears from the analysis of the 2008 and 2009 court registers (3.1 and 3.3 percent respectively).

A possible explanation for the large discrepancy between the number of formally registered spousal support claims and the number of claims in the divorce survey may be the tendency of judges to settle disputes informally during the divorce process. In other words, most claims will not become a formal part of the divorce suit. As I have observed in the courtroom on numerous occasions, informal settlements are not only reached during the mandatory mediation session but at every other stage of the divorce process. Such agreements between the parties are not registered in the court files, but are often reached following the intervention of a judge. Therefore, it is likely that many of the respondents made a claim during a divorce hearing at the Islamic court,

16 When the spousal post-divorce rights are subdivided the picture is as follows: in 2008 there were twelve unpaid due maintenance claims, and in 2009 seven. In 2008 there were six, and in 2009 seven claims concerning maintenance during the waiting period. Finally in 2008 there were two, and in 2009 six, *mut'ah* consolation claims.

which was informally mediated by the judge leading to an agreement between the two parties, but that was not formally part of the court judgment and not put down in the register books.

As we have seen, most women did not claim post-divorce rights at all. The divorce survey has assessed the reasons given by those respondents. 46 Respondents had not claimed spousal support rights and 35 of them gave a reason for this. Their reasons for non-claiming can be divided into five categories: firstly, they have 'no need for support.' 19 Respondents gave an answer that can be brought under this category. Seven answers can be brought under the second category: 'I did not want to delay the divorce process.' Four answers fall under the reason 'I did not want the trouble.' Four respondents replied that 'the claim would not have been endorsed.' Finally, in the category 'others', one of the respondents was in absentia during the divorce process at the court. These answers indicate that respondents who did not claim support rights can be divided into two main groups: a group of respondents who felt that they could manage well on their own, and a second group of respondents who primarily felt that a support claim would mean a more difficult divorce process and was not worth the effort. The latter group might very well have been discouraged by court officials from making formal support claims, as the following example illustrates.

A respondent I interviewed as part of the qualitative section of the research provided insights into why she had not claimed any post-divorce rights. According to her, one of the clerks who assisted her during the process had dissuaded her from claiming any post-divorce rights:

> 'There was a woman there, a clerk, she said it would be [a] long [process], since it had to be arranged first [with] the husband, [to know] whether he approved [of the claim] or not. We would have to meet each other first to mediate how much [support] I want. If we would disagree then it would become cumbersome. If there was no point of agreement, he wanted 300 and I wanted 500, the process would take much longer. It would constantly have to be dealt with, [and I would have to go] back and forth, back and forth [to the court].'[17]

The clerk clearly succeeded in discouraging her from claim post-divorce rights and it is likely that this often happens.

8.3.3 Child support

The second post-divorce right to discuss is child support (*nafkah anak*). As we have seen in Chapter 4, the father remains legally responsible for the maintenance of his legal children, no matter who has custody over them. Women can

17 Interview with *Ibu* L., Ujuung Bulu, Bulukumba, 23-06-2011.

make child support claims in divorce cases petitioned by themselves or by their husbands. According to the register books of the Islamic court of Bulukumba, in 2008 seven women claimed child support, or 1.6 percent of the total. In 2009 the numbers are slightly lower, six child support claims or 1.3 percent.[18] This number is lower in Cianjur, where the percentage of child support claims from 2006 to 2008 went down from 3.5 percent, via 2.7 percent, to two percent. The divorce survey reveals much higher numbers of women who stated they claimed child support rights at the Islamic court. 23 of the 64 respondents who had requested a divorce from the Islamic court and had children answered that they had claimed child support from the father. According to 21 of them their claims were endorsed by the court, although in 12 cases only partly.

The large discrepancy between formally registered claims at the Islamic court and claims in the divorce survey can be explained along the same lines as the similar discrepancy with regard to spousal support rights described above. The possible explanation is the same too. Since judges prefer to settle disputes informally during the mediation process and look for an agreement between the parties, most child support negotiations do not become part of the formal judgment of the court and are not formalised into court orders. The women involved, however, feel that the judge has listened to their case and has offered a solution.

41 Respondents of the divorce survey who went to the Islamic court to divorce and who had children did not file a child support claim. 33 Of them gave a reason for their decision not to claim. Eight respondents gave an answer that can be categorized as having 'no need for support.'[19] Four respondents thought that the claim 'would not be endorsed.' Four respondents 'did not want to go through the trouble.' Three respondents 'did not want to delay the process.' Falling in the category 'others', three respondents did not make a child support claim because the husband had custody over the children and one was in absentia during the divorce process.

Another reason for the low number of formal child support claims at the Islamic court may be that in practice fathers voluntarily support children residing with their mothers. In order to measure the extent to which fathers in Bulukumba support their children after divorce, the divorce survey asked the (female) respondents the frequency (always, often, seldom, never) that the father offered support to the children residing with the mother after divorce.

18 Those percentages are based on the total number of couples divorced at the Islamic court of Bulukumba. The percentages of 1.6 in 2008 and 1.3 percent in 2009 do not reflect the percentage of claims of women who indeed had children at time of divorce, for the obvious reason that not all of the couples had children when they divorced or their children had reached the age of 21. Still, I think the numbers give a good indication of the number of women in Bulukumba who make formal child support claims, since in Indonesia it is normal to have children shortly after marriage, usually within two years (Choe et al. 2001).

19 This was an open question. I have brought similar answers into a single category.

The six forms of support consisted of buying necessities for the children (clothes, games); money for the mother; educational costs; pocket money for the children; recreational activities; and money or clothes for holidays.

The picture emerging from the divorce survey suggests that about 30 percent of fathers are involved in the upbringing of the children residing with the mother after divorce, as 29.5 percent of the fathers in Bulukumba always or often buy necessities for their children and thirty percent contribute to the educational costs of their upbringing (see Table 8) Moreover, 26.3 percent of fathers always or often give pocket money to the child. These are much higher percentages than in Cianjur, where those numbers fall below ten percent.

Although 30 percent of fathers are involved in raising their children, only a few fathers (7.6 percent) invite their children regularly to spend leisure time with them. Islamic holidays see the largest involvement of fathers, as 36.9 percent always or often contribute to the costs involved. More importantly, regular payments to the mother are not a common form of child support (12.7 percent always or often), and this may indicate that fathers are more inclined to take responsibility for child support when the purpose of the support is specified.

A majority of divorced fathers seem to not, or only occasionally, contribute to the costs of raising children residing with the mother. In each form of child support listed, the percentage of fathers who never deliver them at all lies above 40. The additional percentage of fathers who only occasionally do so varies from 19.4 percent for educational costs to 26.3 percent for costs of daily necessities for the child. Taken together, the groups 'never' and 'occasionally' amount to 65.6 percent to 69.4 percent per category of support. Although fathers may give one form of support and not the other, which means that the actual number of fathers who regularly give some form of support is higher, I believe that the percentages still indicate that only a relatively small number of fathers give regular and substantial support to their children.

Table 8: Frequency that fathers provide specific forms of child support after divorce (N=95)

	Always	Often	Occasionally	Never	No answer
Buying supplies (clothing, toys, etc)	10.5%	19%	26.3%	42.1%	2%
Money to the mother	5.3%	7.4%	25.5%	57.4%	4.3%
Educational costs	14.0%	16.1%	19.4%	46.2%	4.3%
Pocket money to the child	10.5%	15.8%	30.5%	38.9%	4.2%
Invite children for leisure time	5.3%	2.3%	16.0%	73.4%	3.2%
Money or clothes for Islamic holidays	27.4%	9.5%	12.6%	46.3%	4.2%

The divorce survey asked whether the women concerned were satisfied with the contributions by the father towards their children in terms of child and spousal support. A mere 8.5 percent of the respondents were satisfied with the father's contribution, 40 percent were dissatisfied and 44.2 percent neutral (*biasa saja*). In Cianjur the numbers were not much better: 17.5 percent satisfied, 35 percent neutral, and 59.2 percent dissatisfied. Thus, although 25 to 30 percent of fathers support their children regularly, in general the fathers do not do support their children enough in the eyes of their ex-wives.

Even so, the background of this dissatisfaction appears to be more of a moral nature than an economic necessity: a remarkable 72.5 percent (in Cianjur 26 percent) of the respondents stated that their economic situation had actually improved after divorce, 22.5 percent (Cianjur 40 percent) that it had remained the same and only 1.7 percent (Cianjur 27 percent) considered it to have worsened. As in Cianjur, one of the main explanations for this high number is the bilinear kinship pattern that facilitates a return to the parents' home and care, but I cannot explain the large differences between Cianjur and South Sulawesi. The stronger kinship ties in South Sulawesi and the position of woman as honor-bearers may play a role, but I do not think that these factors can fully explain these numbers.

8.3.4 Joint marital property

The third post-divorce matter I have looked at is joint marital property (*harta bersama*): property acquired during the marriage (see Chapters 3 and 4). In Bulukumba the Islamic court registered seven *harta bersama* claims in 2008 and nine in 2009. This denotes a percentage of 1.6 percent in 2008 and 2.0 percent in 2009, a similar figure as for Cianjur in 2007 and 2008 (both two percent). All but one of these *harta bersama* claims were included in the divorce suit itself, rather than filed as a separate lawsuit after the divorce had come into effect.

The Supreme Court in 2010 attempted to encourage people who want to claim *harta bersama* to start a lawsuit after the divorce has been formalised. It issued an instruction in 2010 (*Petunjuk Teknis, Juknis*) in which the Islamic courts are requested to convince claimants to reach an agreement during the mediation stage, or make a separate claim after divorce. *Harta bersama* claims can potentially postpone the divorce itself when they become part of the divorce suit, since if they concern land the court is often required to conduct a field investigation in order to establish exact size and boundaries. Moreover, when a relatively large amount of property is at stake the chances of appeal increase, and consequently the chances of a postponed divorce. Whether the interventions of the court personnel will be successful remains to be seen. A

separate lawsuit after the divorce means that a claimant has to pay the court fees twice, which may be a significant obstacle.

Outside the realm of the court, only a minority of the divorced couples in Bulukumba make informal agreements on joint marital property. The divorce survey reveals that 15 or 12.5 percent of all 120 respondents had made an arrangement with their husband concerning marital property and 64, or 53 percent, had not.[20] 46 Respondents provided reasons for not seeking a marital property arrangement with their husbands. 19 Respondents answered that they 'did not need the marital property.' 13 Respondents said that 'there was no marital property.' Seven respondents gave the answer 'I did not want to delay the process.' Three respondents 'did not want to go up against their ex-husband.' Four claims fall under the category of 'other reasons,' including a respondent's statement that her children would get her part of the marital property in the future.

The latter kind of agreement is illustrative of other cases in Bulukumba, in which rights of the spouses themselves are made secondary to the rights of the children. In the following case the husband wanted to divide the joint marital property. According to the Marriage Law the husband indeed had the legal right to half of the marital property, but for the sake of the children the Islamic court decided that he had to refrain from his legal rights.

> 'Interviewer: so he turned up and then he asked for, he immediate asked for, eh, he claimed, joint marital property?
> Respondent: Yes, he asked to divide the property. But I resisted, because I have [custody of] our only child.
> Interviewer: And the property, [consisted of] a house or land?
> Respondent: a house.
> Interviewer: This house?
> Respondent: This one.
> Interviewer: Oh, so he wanted to sell this house and divide the money?
> Respondent: Yes, he said he wanted to divide it, he wanted to take it. But I resisted, persisted, I have our only child. And in court, eh, what is it (*bagaimana*), the judge, he said, the judge said it could not be divided because I have a child. In case we would have no children, then it could be divided. [...]
> Interviewer: So the marital property was not divided at all?
> Respondent: It was not divided.'[21]

Chapter 9 will delve deeper into the legal reasoning in the courtroom, but with this quotation I wish to demonstrate that the Islamic court is more inclined to grant women the house they live in when they have children. Similarly, women seem to consider property more essential for the future of

20 30 Percent of the respondents, for no clear reason, chose the 'no answer' option, and the other 4.5 percent did not answer at all.

21 Interview with *Bu* M., desa Tammato, sub-district Ujung Loe, Bulukumba, 23-07-2011.

their children than child support arrangements, as the latter depend on implementation by the ex-husband.

8.3.5 Implementation and enforcement of court judgments

If we examine the execution of court orders and their enforceability, a mixed picture emerges. With regard to spousal support for the three-month waiting period, the Islamic court facilitates implementation since, just like in Cianjur, the court puts pressure on the husband to pay the entire sum established in the court order before the divorce is uttered. In contrast, child support implementation depends on the ex-husband's goodwill and is difficult to enforce. Many women complained that their ex-husband did not provide the support established in the court order, but no one had considered to file an enforcement request at the Islamic court. Court enforcement is non-existent. Somewhere in the middle is the enforcement of court orders concerning marital property, which can be effective, but is relatively expensive. According to estimations by chief clerk Hasanuddin, enforcement requires about Rp one million in court fees, and depending on the expected resistance additional payments (to police, sometimes military) of at least Rp four million. According to Islamic court officials, the performance of the Islamic court of Bulukumba in enforcing property cases had improved significantly in the two years since 2009.

Chief clerk Hasanuddin has an especially good reputation for getting court orders enforced. According to bailiff Ambo, the Islamic high court of Makassar had sent Hasanuddin to the Islamic court of Bulukumba because of his reputation of being able to get execution orders enforced in the notorious district of Jeneponto,[22] while the Islamic court of Bulukumba had an enforcement problem.[23] In a personal interview chief clerk Hasanuddin was very open about his strategies and the use of his military network.[24] According to him, the military network of his father, a high-ranking officer, helped him get information about the expected resistance in the field. Moreover, he combines a tough appearance with a good understanding of the context.

He explained to me that because of the central importance of defending one's *sirri* (honor) in South Sulawesi, police force will often provoke a violent response: '[…] if we bring in the security apparatus their honor will be affected. That is what we call the honor culture, *masirri*. You have brought shame upon us, they will say, it is better to die than that I hand it over.' For this reason, chief clerk Hasanuddin used the strategy of always giving the person con-

22 When travelling from Makassar to Bulukumba and back people would time and again warn me to pass Jeneponto in daylight only, because of the dangerous conditions for travellers.
23 Interview with bailiff Ambo of the Islamic court of Bulukumba, Bulukumba, 02-08-2011.
24 Interview with chief clerk Hasanuddin of the Islamic court of Bulukumba, Bulukumba, 03-08-2011.

cerned another chance to save his honor in a non-violent way – even if the time to negotiate had passed according to legal procedures. He explained that together with two or three soldiers, in civilian dress and unarmed, he visited the location in person, and tried to convince the person who had been ordered to hand over the property to do so voluntarily. He said that many people respond to this last chance in order to avoid the shame of a forced foreclosure. Another example he gave was the case in which he – with the approval of the rightful claimant – postponed the enforcement of a court order to give the person, a farmer, the chance to collect the harvest first.

Farmers who have planted crops and worked the land are less willing to give up the land before than after the harvest. According to the chief clerk, such a personal approach that considers the honor and the private situation of the persons concerned has greatly facilitated the enforcement of court orders. He claimed that in the two years he had been the chief clerk in Bulukumba (since July 2009), he managed to get 16 property cases enforced, many of which had been unresolved for many years, and only four had required the use of force.

The latter four cases reveal that if in the end the personal approach fails, chief clerk Hasanuddin did not hesitate to resort to force. In order to make enforcement of property execution orders in Bulukumba more feasible, he had created a network involving court personnel, intelligence, the police and the military. In such execution cases he would contact the intelligence agents first, to assess the security situation in the field. During the forced execution itself chief clerk Hasanuddin relied on the military rather than on the police, although the formal coordination of security issues is always in the hands of the police, as is stipulated by law. According to him, the military are involved because they are more resolute (*tegas*) than the police, hence reducing the chance of casualties on the law enforcement side. The police also feel more secure with military backup, he claimed. Although this approach makes property cases enforceable, there are financial consequences: each of the persons involved has to be compensated by the claimant and therefore, although chief clerk Hasanuddin stated that he did not know what informal costs are involved, forced execution is not cheap.

8.4 Conclusion

If we look at divorce itself, women in Bulukumba show a strong awareness of their rights. They know that they can go to the Islamic court to divorce their husbands, and that the legal divorce grounds in the Marriage Law do not require them to pay compensation to their husbands, as in the *khul* procedure. It appears furthermore that although the division of gender roles is rather patriarchal in Bulukumba, there is nevertheless strong female agency in divorce matters, even within arranged marriages. This agency is reflected by court

statistics, the outcomes of the survey and interviews with divorced women, and can be explained by cultural factors. Bulukumba has a lineage system of bilateral family descent, in which children derive their status (degree of noble blood) from the father and the mother. In practice, this means that the relatives of the wife remain influential after a marriage. The husband marries into his wife's family just as much as she marries into his. Thus, the ties between a wife and her family remain strong; she will in principle be backed by her family in a conflict, and in the case of a divorce she can return to her parents. This ensures greater independence to women in marriage than one would perhaps expect, considering the traditional roles most Muslim women play in South Sulawesi. We must see the 75 to 80 percent of divorces in Bulukumba that are filed by women in this light of strong female agency.

An examination of the reasons for divorce reveals that they usually are personal rather than material or economic. Most divorces take place because spouses do not get along well, which results in quarrels. Those quarrels worsen in many cases due to the threat of polygamy or poor economic conditions, and frequently turn violent. Underlying causes for the problems in the personal sphere include immaturity due to a young age at marriage, and incompatibility in cases of arranged marriage, but the practice of *merantau* (working overseas) appears to be the largest cause of marital problems. This includes those related to polygamy and maintenance. Thus, women are assigned the role of household manager and are supported by their kin, maintaining a lot of agency in divorce matters and sufficiently empowered to break out of an unhappy marriage. However, in many cases it is the husband who intentionally brings the marriage to a breaking point by leaving his wife behind, subsequently ending maintenance payments or marrying someone else.

The qualitative data of the research reveal that in Bulukumba the only socially acceptable way to divorce is through the Islamic court. In interviews, women explained that through a divorce at the Islamic court they would become *bersih* or 'clean', indicating that they would be suitable marriage partners again. This implies that in Bulukumba there is a stigma attached to unofficial marital status, which may explain why a large majority of the respondents in the divorce survey divorced at the Islamic court. It also demonstrates that the Islamic court in Bulukumba has succeeded in obtaining its formal-legal position as the only legitimate provider of divorces, and performs much better than the Islamic court of Cianjur in this regard.

The performance of the Islamic court with regard to post-divorce rights is similar to that of Cianjur and much less positive. Few women make formal post-divorce claims, and the advice and interventions of actors within the Islamic court play an important role in this non-claiming behaviour by women. The Islamic court personnel have a preference for informal agreements, and push women's claims outside the realm of the court. Even when a claim is formally registered, the judge will insist on negotiations between the parties first. Judges claim that the chance of implementation of informal agreements

is larger than that of court orders. However, the divorce survey shows that in Bulukumba, much as we have seen in Cianjur, such agreements in most cases are simply ignored by the husband. Nonetheless, the main factor in the non-claiming behaviour of women appears to be the availability of support and shelter of their kin, which enables financial independence from an ex-husband and provides a roof over their head. Most women do not need support from their ex, and even feel that they are financially better off without him.

When women are persistent and do claim post-divorce rights in the divorce suit, the Islamic court generally endorses these claims, with the proviso that regarding spousal and child support the court tends to follow the husband's report of his financial ability, purportedly in order to increase the chance that the husband executes the court order, a practice I also observed in the Islamic court of Cianjur. There are also positive exceptions concerning the judge's role. Women who have custody over the children will sometimes be assigned a larger portion of the marital property by the judge, in order to ensure that the children at least have sufficient housing.

The actions of the Islamic court concerning the various post-divorce rights, as well as judges' rulings appear to be at least partly influenced by the enforceability of the court orders. While Muslim spousal support court orders are easy to enforce by requiring them to be paid before the divorce takes place, enforcement of child support orders is non-existent, and enforcement of marital property matters is relatively expensive. Hence, even if the track record for enforcement of executive court orders has improved greatly in the past few years by involving the intelligence service and the military, the role of the Islamic court regarding most post-divorce rights remains limited, and most court orders have no teeth.

In conclusion, we have seen that the Islamic court in Bulukumba has succeeded in becoming the sole authority in divorce matters. Compared to the 86 percent in Cianjur, 25 percent of out-of-court divorces in Bulukumba is very low. Out-of-court divorce is stigmatized and considered unclean. Those differences can be explained by the distinct historical trajectories of the districts' Islamic courts described in Chapters 5 (Cianjur) and 7 (Bulukumba). In Cianjur strong competition to the Islamic court developed from a network of KUA officials, *kyais* and *ulamas*, who wanted to retain their traditional authority in those matters, whereas in Bulukumba those same Islamic institutions refer people who want to divorce to the Islamic courts.

Regarding post-divorce matters, the performance of the Islamic courts of Cianjur and Bulukumba is very similar: there are few claims, and judgments are difficult to enforce, with the exception of spousal support in *talak* divorces. The judges and other court staff know this and because of that and cultural preference, they press for informal agreements that ironically are also rarely implemented. The concept of 'shadow of the law' (Mnookin and Kornhauser 1979) implies that each case in which the court endorses women's post-divorce

rights influences future negotiations that take place out of court. Thus, poor enforcement may very well have a negative shadow, one that falls beyond out-of-court negotiations, as it also affects the behaviour of the Islamic courts themselves.

In Chapter 9 I turn to the court judgments and legal justifications of the Islamic courts of Cianjur and Bulukumba. In my legal analyses of a number of legal concepts I will explain how doctrinal changes in the Islamic courts emerge out of the details of the every day adjudication processes.

9 Trends in present-day judicial divorce processes in the Islamic courts

> 'The past decades of Indonesian efforts to do so indicate that public reasoning about law and values can begin from different starting points – the fiqh of Umar, human rights, Gayo or Javanese adat – and approach a set of values and norms, such as gender equality, fairness and agreement.' (Bowen 2003: 257)

> 'Despite achievements women may have made in court, such achievements were ambiguous, because it was done consistently from 1974 to 2005 primarily by appealing to their fulfilment of the roles of obedient wife and self-sacrificing mother. […] [T]hey rarely presented themselves as the household leader or controller of finances in the absence of their husband's care, but rather dwelt upon their own religious morality and dedication to their husband and families.' (O'Shaughnessy 2009: 203)

9.1 Introduction

Chapters 2, 3 and 4 discussed the history of the Islamic courts and the Muslim family law they apply. In Chapters 6 and 8 I have analyzed the position of the Islamic courts of Cianjur and Bulukumba in divorce and post-divorce matters, as viewed from the perspective of their potential users and placed in their local and historical contexts. In this chapter, we turn to the Islamic court judge and his or her specific role with regard to women's divorce and post-divorce rights. Whereas the previous chapters focussed on the historical development of the Islamic courts and their position in the communities of Cianjur and Bulukumba, in this chapter I narrow down the research focus to the courtroom. More specifically, I will discuss how the Islamic courts apply legal substantive and procedural norms in particular cases, how they treat the claims of the parties involved, and how this affects women's divorce and post-divorce rights.

It is important to note that the analysis that follows draws just as much on courtroom observations and interviews with judges as on court records. In their legal justifications judges do not always refer to legal innovations in legal doctrine, as not al innovations are part of case law, but may be the result of a consensus judges reach in seminars or Supreme Court capacity-building programs. By combining a close reading of court files with court room observa-

tions, I have managed to detect a number of such legal innovations, which judges apply in the everyday judicial processes in the Islamic courts.

Most of the academic literature sustains the view that, generally speaking, the Islamic court has interpreted the 1974 Marriage Law and the 1991 Compilation of Islamic Law in a relatively liberal way.[1] This liberal attitude is said to have had considerable influence on the legal reasoning of Indonesian citizens in Muslim family matters. As John Bowen has remarked, the concepts of gender equality, fairness and consensus-seeking are an integral part of legal reasoning in Indonesia (Bowen 2003: 257).

Other, more recent studies indicate more conservative attitudes of Islamic court judges. Nurlaelawati convincingly demonstrates judges' strong adherence to traditional *fiqh* in issues like polygamy and inheritance, leading to conservative judgments that contradict the more moderate legal provisions in the 1974 Marriage Law and the 1991 Compilation of Islamic Law. In her study of divorce in Yogyakarta, Central Java, O'Shaugnessy even concludes that 'there has been little or no change at all in women's favor' since 1974, since women's subordinate position in marriage and divorce is systematically upheld in the Islamic courtroom' (O'Shaughnessy 2009: 202-203). In short, there are divergent opinions about the effects of the Islamic courts' rulings in terms of women's rights.

Below, I attempt to provide my own analysis of the nature of everyday adjudication by the Islamic courts in Indonesia, primarily based on court room observation and court files I have collected at the Islamic courts of Cianjur and Bulukumba. In addition, I discuss a number of related judgments of the Supreme Court, the Constitutional Court, and Islamic high courts. I will analyze the Islamic courts' interpretation of a number of legal issues pertaining to divorce, including the role of evidence and procedure, and I will assess the consistencies and inconsistencies thereof in the light of the potential impact on women's divorce rights. Moreover, I will reveal some dynamics between the spouses that are hidden behind the broad concepts of 'no-fault divorce' and 'broken marriage.' Thus, through the close reading of court files and analyses of everyday adjudication processes, I aim to provide an explanation of the reasons why academicians come to such divergent readings about the effects of the Islamic courts' judgments on women's rights.

9.2 Marriage registration

One of the legal requirements for Indonesian citizens is to register all important life events, including marriages. Donor organizations link this legal obligation with legal rights of women and children. By registering their marriage, women

1 See section 1.1 of the Introduction.

and their children become right-bearers, and are protected by law against the detrimental consequences of a divorce or a husband's death, so the argument goes (See Sumner 2008: 7-8; Sumner and Lindsey 2010: 20-27). I will reserve my opinion on this developmental argument, linking marriage registration with empowerment, for the next chapter. Here, I focus solely on the legal reasoning and treatment of evidence in marriage registration cases by the Islamic courts in Cianjur and Bulukumba.

As we have seen in Cianjur, and to a lesser extent in Bulukumba, and as Wirastri and I have explained elsewhere (Huis & Wirastri 2012), citizens do not always comply with the marriage registration requirement. In Chapter 4 we have seen that such marriages can be registered through the Islamic courts. Article 7 (3) of the 1991 Compilation of Islamic Law provides that this may only happen under specified conditions: 1. in order to make a formal divorce possible; 2. if the marriage certificate is lost; 3. if the legality of the marriage is in doubt; 4. if the marriage was concluded before 1974 (this provision derives from the Marriage Law); and 5. if there are no legal obstacles to the marriage.

Nurlaelawati has noted that these provisions are ambiguously worded and inconclusive as about to which of them apply for a marriage to qualify for registration through the Islamic court: one, all, or some of those conditions? She describes how judges often do not to read the provisions in a cumulative way and, for example, often register marriages concluded after 1974. Nurlaelawati is concerned that this lenient application of the marriage registration provisions works against the goal of marriage registration itself, as non-compliance can easily be repaired retroactively (Nurlaelawati 2010: 202-203). Here I will present a number of marriage registration cases from Cianjur and Bulukumba that confirm Nurlaelawati's observations concerning the non-accumulative nature of the marriage registration provisions in the Compilation of Islamic Law, and I will give insight in how the judges apply the conditions for marriage registration through the court.

9.2.1 Marriage registration in pension-related cases

Let us start with the provision which stipulates that someone may petition for a marriage registration case when he or she intends to divorce. Judges at the Islamic courts of Cianjur and Bulukumba do not interpret this provision as exclusive, and accept other reasons for marriage registration. I have witnessed several cases in which marriage registration was related to the pension rights of a widow after her husband had passed away, and hence

did not pertain to an intended court divorce.[2] Indeed, court clerks in Cianjur informed me that PT TASPEN, the pension agency for civil servants in Indonesia, only accepts court judgments as legal proof of an existing marriage in cases where the widow concerned does not possess an original marriage certificate. When the original marriage certificate has been lost, PT TASPEN does not accept duplicate marriage certificates issued by the KUA, allegedly because of the KUA's reputation for accepting bribes.

During my court room observations I noticed that the Islamic courts' application of procedure in marriage registration cases is also rather lenient, often out of sympathy with the elderly women concerned, and in view of the fact that they have outlived most of the wedding attendees and hence first-hand witnesses are hard to find. Other challenges to the judges and the elderly petitioners, who typically were unrepresented by a lawyer, were some of the petitioners' lack of knowledge of formal Indonesian; their dependence on their children during the court process; as well as their dependence on the advice and suggestions of court staff, including the judges.

The following case is an example of a lenient application of procedure in pension-related marriage registration cases. It concerned a 71 year old widow, whose husband, a teacher at an elementary school, had passed away the year before (in 2008).[3] The couple got married in 1973 and had four children, one of whom had passed away. The widow did not possess the original marriage certificate but a duplicate issued in 1982, which PT TASPEN did not accept as legal proof of the marriage. The marriage fulfilled three of the conditions for marriage registration: the marriage certificate had been lost, the legality of the marriage was in doubt, and the marriage was concluded before 1974. In the courtroom, as typical for marriage registration cases, the judges asked the widow the date she was married, who her guardian was, how much the dower (*mahr*) was, and who the two formal witnesses of the marriage had been. The court also asked whether her husband had been married to or involved with other women, in order to assess the chance of other wives emerging after the registration had been finalised. When the judges asked her who she had brought as witnesses, she replied that she brought two neighbors, one of whom was the neighborhood head (*Kepala RT*). Still, the Islamic court had some doubts about the witnesses, as neither of them had witnessed the act of marriage. As one of the judges stated to the widow: 'ideally a witness can give a testimony about the act of marriage itself.'

2 Thus, the Islamic court in Cianjur commonly accepts pension-related marriage registration cases. Interestingly, it does not accept marriage registration cases relating to inheritance claims. To me such division seems rather arbitrary as both pension and inheritance cases deal with the legal consequences of the spouse passing away.

3 Case 9/pdt.P/2009/PA.Cjr, based on the file and courtroom observations on 28 January 2010.

Nonetheless, the court decided to accept the witnesses and to proceed with the witness testimonies. Both witnesses stated that they were convinced that the widow had been married to the petitioner, and that they had four children together of which one had passed away. According to the *Kepala RT* they formed a single family living together in a single household (*sekeluarga dan serumah*), which might alleviate the judges' concerns about a polygamous marriage. In its verdict, the Islamic court argued that the testimonies of the witnesses, who were not first-hand witnesses, must be taken together with the statement of the widow and the duplicate KUA marriage certificate. In fact, the Islamic court argued that a duplicate of a marriage certificate is sufficient legal proof of a valid marriage:

> 'Considering that piece of evidence P1 is a photocopy of the duplicate marriage certificate of the petitioner and her husband […] which has been legalised and issued by the KUA in Cibeber, the Judge is convinced that the marriage between the petitioner and her husband has been concluded in the presence of, and registered by, a qualified official and fulfils the conditions and requirements of a marriage in accordance with Islamic law, as stipulated by Article 2 and 6 of the Marriage Law and Article 14 of the Compilation of Islamic law.'

Thus, an ironic situation occurs in which PT TASPEN does not accept a duplicate as legal proof and demands a court judgment, whilst in the subsequent judgment the judge accepts the same duplicate as main evidence of a valid marriage. One may be tempted to conclude that the whole court process was an unnecessary waste of time for both the petitioners and the court. However, one must not overlook an important part of the judge's inquiries in this case: through their questions they do try to assess the reliability of the marriage claim and to examine whether the marriage had been polygamous or not.

The next divorce case involves a forged duplicate of a marriage certificate. In a case originating from the Islamic court of Bulukumba[4] a woman wanted to divorce her husband because he had left her three years before after a serious fight. The husband's whereabouts were unknown and, as a consequence, the court process was conducted in the absence of the defendant. The couple married in 2000 and had a son together who was 6 years old during the court process in 2010. Since 2005 the couple had often quarrelled, allegedly because the husband drank and did not take responsibility for his son. During these quarrels the husband often became violent, as on the night before he left his family. The petitioner stated that her husband uttered the *taklik al-talak* during the marriage ceremony, and she handed over a copy of the marriage certificate as legal proof of the marriage. In his judgment, the judge found that the marriage certificate was indeed issued by the competent institution but the name on the certificate was that of another woman. It had been crossed

4 Case 43/Pdt.P/2010 PA Blk.

out and replaced by the petitioner's name. Therefore, the Court decided that the petitioner had never been married to the man concerned, and as a result her divorce case was rejected.

This case again illustrates that the Islamic court takes marriage certificates as the primary legal proof of a marriage. Since there was something wrong with the marriage certificate, the court considered that no marriage had taken place. Even though the non-married status also means a formal separation from her husband, it has legal consequences for the son, who is now considered born out of wedlock and consequently has no official relationship with his biological father (see below). It is unclear how the petitioner obtained the marriage certificate, whether she had changed the name herself, or whether another wife was in play. In Cianjur, judges told me that problems often occur regarding different spelling of names on legal identity cards, due to the sloppiness of bureaucrats and citizens. I have seen instances in which the judge simply advised the petitioner to withdraw a piece of evidence as the misspelling only complicated the court process and her divorce. In this particular case in Bulukumba, the petitioner was apparently unable to provide other convincing legal proof of the marriage, and concerns about her being an unofficial second wife were too serious. For these reasons the case was rejected.

Nonetheless, the Islamic courts do register marriages where no certificate is available at all, even when they were concluded after 1974 (see also Nurlaelawati 2010: 202-203). Thus it applies a double standard: on the one hand it considers marriage certificates as the only legal proof of a marriage, and strictly rejects problematic marriage certificates, while on the other it can be very lenient regarding witness evidence. Based on my court observations, I think it is even likely that if the petitioner in the case above had left out the falsified marriage certificate and asked for a marriage registration based on witness accounts alone, she most probably would be formally divorced by now, provided the witnesses accounts confirmed both that the marriage had been concluded according to the religious requirements of an Islamic marriage. As we will see in the next two cases, the latter issue of religious formality is a compelling reason for the Islamic court to reject the registration of sometimes long-lasting and socially recognized marriages.

9.2.2 Marriage registration cases rejected on religious grounds

Article 7(e) of the 1991 Compilation of Islamic Law states that marriages can be registered through the Court, provided there are no legal obstacles to the marriage. Based on Article 2(1) of the 1974 Marriage Law, which stipulates that a marriage must be concluded according to the religious requirements and the customs of the prospective spouses, the Islamic court typically interprets Article 7(e) to mean that marriage between Muslims must be concluded according to Islamic requirements. Thus, in marriage registration cases, the

judge typically checks whether the wife was represented by a male guardian, that is her father or another relative of his line, whether the bride's guardian made an offer (*ijab*) during the marriage ceremony, stating that he is willing to marry off the bride for a certain dower (*mahr*), whether the groom accepted this offer (*kabul*), and finally, whether the marriage was concluded in the presence of two formal Muslim, male witnesses. In most cases I witnessed in the courtroom the legal requirements were in order, at least according to the petitioners and witnesses, but I found two court files in which the registration was rejected as the marriage failed to meet the religious requirements.

The first marriage registration case[5] concerned a marriage concluded in 2001 from which one son had been born. In 2003 the husband of the 27 year old petitioner left for Malaysia to work, and since then she had had no contact with him, let alone received maintenance. She petitioned for formalisation of the marriage and a subsequent divorce at the Islamic court of Bulukumba. As she had no income of her own, she possessed a Statement of Insufficient Means (*Surat Keterangan Tidak Mampu*) from the village head and she was a registered recipient of subsidised rice under the government's RASKIN scheme (*Beras Miskin*, rice for the poor). She filed for a court fee waiver, which she was granted. It appears from her petition that according to her knowledge the marriage had fulfilled all religious requirements. No one in the family had objected, and there had been no other legal barriers to the nuptials. The village *imam* married the couple, two Muslim formal witnesses were present, the *mahr*, twenty palm trees, was offered by the groom and accepted by her guardian, her uncle. Her uncle was chosen to act as guardian as a stand-in for her father who had passed away. Unfortunately, although the witness testimonies confirmed that the couple were married, they also revealed that the uncle was the brother of the petitioner's mother and not of her father, meaning that one of the religious requirements was not fulfilled. The court then rejected the case on the ground that no Muslim marriage had taken pace .

For the woman and her son concerned, this judgment has possible legal and social consequences. First, the fact that the marriage is no longer recognized formally means that the son has no legal relationship with his biological father and therefore he would be considered born out of wedlock, which in turn bears social stigma. Second, the judgment may very well affect her prospects for remarriage. As discussed in the previous chapter, in Bulukumba an informal divorce has a stigma attached and the woman concerned did not obtain a divorce certificate. Although the court ruled her previous marriage invalid, meaning that she legally does not need a divorce certificate to remarry, the local community where she lives will probably perceive the issue differently.

5 Case 391/Pdt.G/2009/PA Blk.

In the second case,[6] the Islamic court of Bulukumba rejected a marriage registration on very similar grounds. However, in this case the *adat* practice of marriage by elopement (*kawin lari*) played a role. The petitioner was a woman, 31 years of age, who filed a marriage registration case in order to be able to formally divorce her husband. The marriage was concluded in the year 1996 in Malaysia, where both had migrated in order to find work. The couple had two sons together. In the first few years they lived happily together, but one day the petitioner asked her husband if he could help her with removing her head band (*sabuk kepala*) as she was tired after a day working in the coconut plantation. This request somehow upset her husband and he hit her. Following this incident, the marriage became problematic.

In 2007 the couple moved to Kalimantan for work. The behaviour of the husband did not improve, as he became very jealous. When the petitioner received an SMS from her cousin, he hit her and left, never to return. She returned to Bulukumba in 2010 and filed to register her marriage, in order to obtain a divorce. The marriage was never registered and thus the legal proof rested solely on the accounts of the petitioner and two witnesses. As in all marriage registration cases, the judge first inquired about the guardian, the *mahr*, and the formal witnesses. The marriage included all ingredients: a guardian, correct *mahr*, and two witnesses, but two matters were considered problematic by the court. First, according to the first witness, the guardian was not related to the petitioner. She defended herself by stating that this was because her family did not approve of the marriage. Second, both testimonies stated that the formal witnesses were Christians, not Muslims. The court rejected the case because the marriage failed to meet the religious requirements concerning the guardian and the witnesses in a marriage, and ruled the marriage invalid (*tidak sah*).

Thus on the basis of religious formality the Islamic court decided not to recognise a marriage that had lasted about 14 years and from which two sons were born. The sons consequently lack a clear legal relation with their father, which may have negative consequences regarding their legal rights. But another aspect plays a role here: it appears that the couple married without their parents' permission. As we have seen in Chapter 8, marriage by elopement (*kawin lari*) was traditionally a permissible but dangerous custom in South Sulawesi, for which the *adat* had developed means of reconciliation (see also Idrus 2003: 124-132). By insisting on the presence of a guardian, the Islamic court rules out cases in which no male relative in the father's line wants to become guardian of the wife. The only option left in such cases is to file a request at the Islamic court to marry under a guardian appointed by the court (*wali hakim*). This formal trajectory probably forms an additional barrier to those who intend to elope. In this way, the Islamic court complicates the

6 Case 72/Pdt.G/2010/PA Blk.

possibility of retroactive registration of marriages by elopement in cases were parents do not agree. Hence, it works both against the modern norm to choose your own spouse, and the old traditional *adat* norm of *kawin lari*.[7]

9.2.3 Marriage registration in polygamy cases

Before the 1974 Marriage Law came into force, polygamous marriages did not require permission of the Islamic court. Marriages, including polygamous ones, had to be registered, but registration was considered an administrative duty only, not a requirement for a valid marriage. Hence, when a widow petitions for marriage registration in a pension-related case, the Islamic court is very cautious about the possibility of other wives. In the previous cases, the judges typically asked the petitioner and two witnesses whether or not the husband concerned had been married to or involved with another woman.

Nonetheless, polygamous marriages concluded before 1974 can still be registered through the Islamic court, as the next case illustrates.[8] A 78 years old widow explained to the court that she had been married to a civil servant since 1956, and her husband had recently passed away. At the time of marriage the civil servant had been married to another woman, but according to the petitioner the first wife did not object to her husband's polygamous marriage with her. Moreover, she emphasized that her husband's first wife was infertile, thus providing social legitimacy to her polygamous marriage. The two witnesses, one of whom was still a minor at the time of the marriage, had both attended the ceremony and confirmed the widow's story. There was no formal legal proof of the second marriage other than the addition of her name to the original marriage certificate by the current village head. In the end, the Islamic court registered the marriage based on the testimonies of the witnesses and the petitioner herself.

As in most cases, the judges took a very lenient stance concerning witness accounts, making full use of their discretion in establishing the trustworthiness of the testimonies of the petitioner and her witnesses. The judges explained to me after the hearing that they felt they had to be lenient out of consideration for the conditions at the time of the marriage and the age of the petitioner, and they believed they were able to assess whether the petitioners and the witnesses were telling the truth in most cases. One must take into account that prior to 1974 there were few legal regulations concerning polygamy and

7 Judges in Bulukumba told to me another way to marry against the will of parents; by revealing that the appropriate boundaries of an extra-marital relationship have been transgressed. Thus, a couple present the parents the option to prevent a scandal by giving permission to marry. In this way, young people may also circumvent impossibly high *mahr* demands by the parents of the prospective bride.

8 Case 25/Pdt.P/2009/PA.Cjr, of which I observed a court hearing in the Islamic court of Cianjur on 10-2-2009.

therefore second, third and fourth wives have equal rights to marriage registration and pension as the first wife.

The situation is different for marriages concluded after the 1974 Marriage Law came into force. The Islamic court generally does not accept marriage registration cases concerning polygamous marriages concluded after 1974. The judges told me that since such marriages require prior court permission, retroactive registration would infringe upon the legal conditions for polygamous marriages in the Marriage Law. As a matter of fact, there is Supreme Court case law on the matter. In a case originating in the district of Tanjungkarang, Bandar Lampung, Sumatra, the first-instance Islamic court had validated a polygamous second marriage in 1994 on the grounds that it fulfilled the religious requirements of a Muslim marriage. The appellate Islamic high court overturned the judgment, because court permission is required for a polygamous marriage. The Supreme Court ruled in cassation that the legal argument of the Islamic high court was correct in this matter (Zein 2004: 30-46). In 2007[9] the Constitutional Court also sustained the restrictions on polygamy in the Marriage Law, stemming potential legal changes in this regard (Butt 2010).

The next case[10] illustrates a a very similar stance of the Islamic court of Cianjur regarding registration of polygamous marriages concluded after 1974. During the first hearing, the judge asked the petitioner, a man of 54 years old, to elucidate why he petitioned for a marriage registration case. The man explained that his second wife had passed away and that he wanted to register their marriage retroactively in view of their children's rights. The judge then asked whether the second marriage had been registered, which was not the case. Subsequently, the judge asked him about the first wife. The man responded that he was still married to her, and had children with her too. The judges deliberated with each other briefly, then responded with the advice to withdraw the case: 'you have to bring your first wife and children to the court first. It concerns the rights of the first wife and her children as well. You may proceed with this case, but there is a considerable chance that the registration of the marriage will be rejected.' In the end the man decided to follow the judge's advice, and withdrew his case.

The judge was clear that registration of a second marriage stood no chance in court, and that the only means he had to formally arrange the rights of his second wife's children was to come to the court with his first wife and children in order to come to an agreement. At that time, in 2009, an informal polygamous marriage meant that the children resulting from that marriage had only a formal civil relationship with the mother, not the father.[11] The follow-

9 Constitutional Court Case 12/PUU-V/2007.

10 Case 33/Pdt.P/2009/PA.Cjr, of which I observed the court hearing at the Islamic court of Cianjur on 10-2-2009.

11 Article 43(1) of the 1974 Marriage Law.

ing judgment by the Constitutional Court may have changed this legal situation.

9.2.4 Constitutional Court judgment on children born out of wedlock

In a high-profile case[12] petitioned by pop singer Machica Mochtar and her son, and involving a former State Secretary, the Constitutional Court ruled in 2012 that Article 43 (1) of the Marriage Law, which states that a child born out of wedlock has a legal relationship with the mother only, contravenes the rights of children to protection and equal treatment before the law, as stated in Article 28B(2) and Article 28D(1) of the Constitution. In its judgment the Court did not subsequently invalidate Article 43(1) based on a breach of the Constitution – which is the normal procedure – but offered, and ordered, the following revision of its content: 'a child born out of wedlock has a formal civil relationship with the mother and the mother's family, as well as with the man who is his or her father, and the father's family, when his or her blood relationship can be proven with scientific and technological evidence and or other legal proof.'

The judgment's effects are still pending awaiting its implementation by the Indonesian government. However, the Constitutional Court's judgment can be interpreted to imply that, provided the mother can legally prove that a man is her child's biological father, this legal status of father has the same implications as that of a father whose children were born in wedlock. This could mean that his children have support and inheritance rights (see Cammack, Bedner & Huis forthcoming).

The Indonesian *Ulama* Council (Majelis *Ulama* Indonesia/MUI) immediately rejected the idea that children's rights automatically flow from a natural blood relationship with the biological father, no matter whether born in or out of wedlock, as this conflicts with Islamic doctrine on the matter. The MUI issued a legal opinion (*fatwa*) to this extent, but it recognized the duty of the biological father to provide maintenance.[13] It is important to note that the MUI's *fatwa* only concerned children born out of 'adulterous relationships' (*anak zina*), whereas the Constitutional Court case was based on a case in which a child was born out of an informal marriage.

The content of the MUI *fatwa* is remarkably moderate, even if it strongly rejected the Constitutional Court's judgment that a civil father-child relationship can occur out of wedlock. The MUI does not object to a government regulation which put an obligation on a father to provide maintenance for his biological children *per se,* even when it concerns a child born out of an

12 Constitutional Court case 46/PUU-VIII/2010, decided on 13 February 2012.

13 Fatwa Majelis *Ulama* 11/2012 *Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya* (*fatwa* concerning the status of children born out of wedlock and their treatment).

adulterous relationship. The MUI even recommends the Indonesian Government to regulate the maintenance obligations of fathers, up to the inclusion of biological children in the will (*wasiat wajibah*). The main difference between the MUI's opinion and the judgment of the Constitutional Court is that according to the MUI, these obligations should be imposed as a penalty (*hukuman ta'zir*) for adulterous behaviour rather than be a natural right automatically flowing from the biological relationship between the father and child. In this way, such obligations will not infringe on clear Islamic prescriptions concerning blood relationships. The MUI even views these 'penalties' as part of the duty of the government to protect children rights, and uses the word obligatory (*wajib*) in this respect.[14]

The Constitutional Court judgment has another potentially major consequence, one which received much attention from neither the MUI nor the media. In my view, the judgment may undo some of the legal consequences concerning the restrictions on polygamy in the Marriage Law. The legal and financial result of unregistered polygamous marriage will be less profound for the family of an unregistered second wife when the rights of biological children are fully recognized. Hence, the right of the biological children from the father's informal relations will often be opposed to the rights of the formal wife and children, increasing the tensions within the family when the father is found to have a second wife, or a lover.

9.3 Disobedient wife, or irresponsible husband? Grievances in the courtroom

An analysis of the court files of the Islamic courts of Cianjur and Bulukumba reveals that the judge primarily decides divorces based on the divorce ground of continuous strife of Article 19(f) of the 1975 Government Regulation on the Implementation of the Marriage Law (see 4.4.2). In Cianjur, all 73 divorce judgments I collected, consisting of 48 husband-petitioned *talak* divorces and 25 wife-petitioned *gugat cerai* divorces, were based on this divorce ground.[15] In Bulukumba the picture is similar. Of the 43 divorce cases I collected in Bulukuma, only three were based on the divorce ground in Article 19(b), that one of the parties left the other for more than two years without notice. All other 40 cases, 20 *talak* divorce and 23 *gugat cerai* cases were based on Article 19(f).

14 See provision 2(5 and 6) and provision 3(3) of Fatwa 11/2012.

15 During my fieldwork I primarily collected court files in which the petitioner made claims pertaining to post-divorce rights. Typically, only in *talak* divorces can a wife claim *nafkah iddah* (spousal maintenance during the waiting period) and most commonly the right to *nafkah iddah* is not recognized by the judge in *gugat cerai* cases. As a result, I possess a relatively large number of *talak* divorce files.

However, as already discussed in Chapters 6 and 8, Article 19(f) tends to conceal other reasons behind the divorce and the respondents in the divorce surveys in Cianjur and Bulukumba mentioned many other reasons to divorce, including polygamy and economic reasons. Close reading of divorce court files reveals the genuine grievances between spouses as aired in the courtroom. Those grievances are captured in Table 9. Most frequently, a single spouse puts forward multiple grievances, resulting in a total number of grievances that exceeds the total number of files.

A close reading of court files does not necessarily reveal the actual reasons for divorce, but much more the strategies the litigants employed in playing up the norms in society concerning moral behaviour of a husband and wife (cf. Peletz 2003: 128-129). We must be careful not to take the grievances presented for granted, as it is well possible that one party to the dispute simply intended to make his or her case stronger by exaggerating, or even making up, negative behaviour of the other spouse. As I have observed, especially when custody, maintenance and marital property issues are involved the parties tend to turn to a mudslinging strategy accusing each other of immoral behaviour. Nonetheless, I do believe that the figures below can teach us a great deal about what underlies the judgments based on marital strife.

Table 9. Grievances and divorce reasons of the spouse as included in the court files

		Cianjur (N=73 files)		Bulukumba (N=43 files)	
		My husband:	My wife:	My husband:	My wife:
1	Disobedient/not performing duties	1 (1.4%)	27 (37%)		4 (9.3%)
2	Does not pray	1 (1.4%)			1 (2.3%)
3	Leaves house without permission		8 (11%)	1 (2.3%)	7 (16.3%)
4	Debts		2 (2.7%)	1 (2.3%)	4 (9.3%)
5	Lack of maintenance	19 (26%)		11 (25.6%)	
6	Adultery	6 (8.2%)	8 (11%)	5 (11.6%)	1 (2.3%)
7	Domestic Violence	12 (16.4%)	1 (1.4%)	13 (30.2%)	
8	Transgressed *taklik al-talak*			13 (30.2%)	
9	Does not want to live with parents-in-law			2 (4.7%)	3 (7.0%)
11	Jealous	3 (4.1%)	9 (12.3%)	3 (7.0%)	3 (7.0%)
12	Does not want to have sex	2 (2.7%)			1 (2.3%)
13	Sent away by parents-in-law	2 (2.7%)		3 (7.0%)	2 (4.7%)
14	Migrated elsewhere to work	4 (5.5%)	10 (13.7%)	5 (11.6%)	2 (4.7%)
15	Entered/intends to enter a polygamous marriage	22 (30.1%)		8 (18.6%)	
16	Does not respect parents-in-law			1 (2.3%)	3 (7.0%)
17	Drinks	2 (2.7%)		3 (7.0%)	
18	Materialistic		7 (9.6%)	1 (2.3%)	4 (9.3%)
19	Gambles	1 (1.4%)		2 (4.7%)	
20	Arranged marriage				4 (9.3%)

		Cianjur (N=73 files)		Bulukumba (N=43 files)	
		My husband:	My wife:	My husband:	My wife:
21	Impotence	1 (1.4%)		1 (2.3%)	
22	Maintenance for the first wife				1 (2.3%)
23	No offspring		2 (2.7%)		1 (2.3%)
24	Slander/ does not protect honor		2 (2.7%)		3 (7.0%)
25	Informal divorce	22 (30.1%)			
26	Did not marry 'the right one' (*jodoh*)	10 (13.7%)	10 (13.7%)		
27	Does not want to live near ex		1 (1.4%)		
28	Goes out at night	1 (1.4%)			
29	Is not assertive enough	1 (1.4%)			
30	Apostacy	1 (1.4%)			
31	Does not treat well children of earlier marriage		1 (1.4%)		
32	Does not want to have children yet	1 (1.4%)			
33	Is sentenced to prison	1 (1.4%)			

If we look at the top five complaints divided by sex and district, the following picture appears. To start with the top five grievances forwarded by men in Cianjur about their wives: disobedience tops the list with 37 percent, followed by did not marry the right one (*bukan jodoh*; 13.7 percent), my wife migrated to work (13.7 percent), my wife is overtly jealous (12.3 percent), and finally, *ex aequo*, adultery and leaving the house without permission (both 11 percent). In Bulukumba the picture is slightly different, as no single grievance stands out as much. Leaving the house without permission tops the list of the husbands' grievances in Bulukumba with 16.7 percent. This is followed by disobedience, materialistic behaviour, incurring debts, and arranged marriage completing the top five, all with 9.3 percent.

The concept '*jodoh*', mentioned by 10 men in Cianjur, is not mentioned at all by men in the Bulukumba files. This is remarkable, since Idrus in her anthropology of Bugis marriage has stressed the importance of this concept in South Sulawesi (Idrus 2003: 67-69). Another difference is a significant lower number of grievances related to the wife's labor migration in Bulukumba (4.7 percent) than in Cianjur (13.7 percent). Indeed, in Cianjur women more often migrate to work abroad than men, whereas in Bulukumba it is men or whole families do so more often.[16] Whereas migrants from Cianjur primarily take

16 According to data of the Office of the Working Force and Transmigration (*Dinas Tenaga kerja dan Transmigrasi/Disnakertrans*) in 2012, 6591 of the migrant workers in Cianjur were women and 1911 men. http://www.bnp2tki.go.id/statistik-penempatan/6779-penempatan-berdasar-daerah-asal-kotakabupaten-2011-2012.html.
In South Sulawesi 1,045 of the migrant workers were women, and 2,356 men http://bppkbsulsel.files.wordpress.com/2011/04/data-statistik-gender-tahun-2009.pdf.

jobs as domestic workers in the Arabian Peninsula, most workers in South Sulawesi work in the plantations of Malaysia.[17]

Let us now turn to women and the top five grievances they put forward about their husbands during the court process. Beginning with Cianjur, two grievances stand out. Most women complained about the fact that their husband had married, or intended to marry, another woman (30.1 percent), or put forward that their husband had already informally divorced them (again 30.1 percent). These two main reasons were followed by lack of maintenance (26 percent), domestic violence (16.4 percent), and finally, not *jodoh* (13.7 percent). By comparison, in Bulukumba the top five is as follows: transgressing the *taklik al-talak* (30.2 percent), domestic violence (30.2 percent), lack of maintenance (25.6 percent) her husband had entered, or had the intention to enter a polygamous marriage with another woman (18.6 percent), adultery and migration (both 11.6 percent).

The differences between the two districts are striking. In Cianjur, an out-of-court *talak* divorce is one of the main grievances put forward by women, whereas in Bulukumba, I did not find any out-of-court divorce grievance in the court files. It is true that in some cases, as in Cianjur, Bulukumba men returned their wife to their parents-in-law, but apparently the social meaning of this act differs between the two regions. The act of returning the wife to the parents is considered in Cianjur to constitute a socially acceptable divorce in itself, in Bulukumba it seems to suggest an intention to divorce only. This absence of out-of-court divorce is an important difference, because it means that, unlike women in Cianjur, the women who are returned to their parents in Bulukumba are considered still married and not marriageable.

Another striking difference is that women in Bulukumba put forward their husband's breach of *taklik al-talak* as grievance and proof of their broken marriage, whereas in Cianjur *taklik al-talak* was absent from the court files. A third difference is the absence of the concept of *jodoh* in Bulukumba (in Cianjur 13.2 percent), as already signalled in the male-petitioned cases. The fourth difference is the relatively high amount of domestic violence-related grievances in Bulukumba (30.2 as compared to 16.4 percent). It is unclear why the number of domestic violence-related grievances is high in South Sulawesi, but perhaps they are related to the strong emphasis on the protection of *masiri* (honor) in the region (see Idrus 2003).

The analysis of the court files above allows us to make some generalizations regarding the strategies employed by men and women in the court room. In the courtrooms of both Cianjur and Bulukumba, a significant number of husbands who are in the process of both *talak* and *gugat cerai* divorces depicted their wife as disobedient and leaving the house at will. These men clearly

17 In 2010, 81 percent of the Migrant Workers originating in South Sulawesi worked in Malaysia. See http://bppkbsulsel.files.wordpress.com/2011/04/data-statistik-gender-tahun-2009.pdf.

appeal to their position as head of the family and to the ideal of a humble, subservient wife. Wives also appeal to their husband's position as head of the family, but in rather different ways. They stress that leadership comes with responsibilities and they consider a lack of success in providing for the family, fooling around with other women, and violent behaviour as proof of their husband not doing a good job as a man. In Bulukumba this seems to be more the case than in Cianjur. In Cianjur women more often display acceptance of their fate: 'we were just not meant to be.'

The negative images men and women give of their spouses in divorce cases imply that they have a certain, ideal type of wife or husband in mind. It is possible to depict this ideal by replacing the negative traits with their antonyms. An ideal wife emerges who is obedient, does not leave the house without prior notice, is not too materialistic and not too jealous. The ideal husband provides sufficient income, is not violent towards his wife, and does not wish to marry anyone else. In Bulukumba a good relationship with parents-in-law seems to be of greatest importance, whilst in Cianjur it is essential that the spouses are convinced they were made for each other.

9.4 Broken marriage

Although the importance of *jodoh* may vary in the courtroom, the lack of 'love' and 'affection', plays a central role in the legal justification of the judge in divorce cases. Both the Islamic courts of Cianjur and Bulukumba typically argue, based on Article 3 of the Compilation of Islamic Law, that a marriage must be based on peace, love and compassion (*sakinah, mawaddah, warahmah*). When these ingredients are lacking the marriage must be considered broken (*pecah*). In practice, no matter whether the wife or the husband petitions the divorce, the judge will grant the divorce if the petitioner is determined to end the marriage. Such determination is typically considered sufficient proof that the marriage is broken. For instance, the Islamic court of Cianjur concluded in a *gugat cerai* case that the fact that the court could not convince the petitioner to withdraw the case was a strong indication that the goal of a peaceful, loving and compassionate marriage had not been achieved, and that the marriage was broken.[18]

In fact, the Supreme Court argued in a judgment of 18 June 1997 that 'if the hearts of the two parties are already broken, the marriage cannot be repaired when [only] one of the parties wants to heal the marriage, because when the marriage is continued, the [other] party who wants to break up the

18 Case 357/Pdt.G/2007/PA Cjr.

marriage will do anything possible to undermine the marriage.'[19] In a similar manner the Islamic court in Cianjur argued in a divorce case petitioned by the wife in which the husband did not agree to the divorce,[20] that a divorce petition in itself is a strong indication of a broken marriage:

> 'Considering that […], the essential goals of marriage such as prescribed by the sharia and the abovementioned legal provisions, can only be accomplished when the two parties, husband and wife, stand together to create and maintain them. Hence, when it appears that one of the spouses, or both, have the desire to divorce, than maintaining such marriage (*rumah tangga*) will be a work without end (*pekerjaan sia-sia*) and without avail. That is why divorce will bring more advantages (*maslahat*) than disadvantages (*mafsadat*) to them.'

As a result of this lenient application of the formal divorce grounds in the Marriage Law, cases in which the court rejects a petition for divorce are scarce. The next case is such an atypical case.[21] Its analysis serves as an indication of how extreme the circumstances must be before the Islamic court rejects a divorce case.

9.4.1 The case in which the petitioner was terminally ill

The petitioner was a man of 89 years old who, as a local businessman and founder of two Islamic institutions, was a wealthy and influential man in Bulukumba. The entire case was handled by his legal representative, as the petitioner was too ill to appear in court in person. The defendant, a woman of 35 years old with only senior high school education, defended herself in court, and did remarkably well. On 12 January 2010, the petition for a *talak* divorce was send to the Islamic court of Bulukumba. The petition, however, puts forward the most common claims in *talak* divorce cases.

The petitioner married the defendant in 1986,[22] and a daughter was born out of the marriage. Since January 2009 the marriage had been unstable (*goyah*), and as a consequence quarrels and disagreements frequently occurred. The disagreements concerned the defendant's tendency to leave the home without her husband's prior consent and neglect of her marital duties. In November the quarrels reached the snapping point when the defendant refused to listen to any advice, left the home without permission from her husband and his family and did not return. As a result the couple had lived separated for two

19 Supreme Court judgment 534/K/AG/1996 as cited in the judgment of the Islamic High Court of Makassar 113/Pdt.G/2009/PTA.Mks concerning the judgment of the Islamic court of Bulukumba 63/Pdt.G/PA.Blk of 30 June 2009.

20 Islamic court of Cianjur, Case 98/Pdt.G/2007/PA Cjr.

21 Islamic court of Bulukumba, Case 18/Pdt.G/2010/PA.Blk.

22 It means that she married at the age of 12 and still obtained a marriage certificate.

months. The attitude and acts of the defendant had caused physical and psychological harm to the petitioner (*mengakibatkan pemohon menderita lahir dan batin*) and therefore the petitioner had come to the conclusion that the marriage was already broken (*pecah*) and could not be repaired.

The divorce petition was based on the legal ground of continuous strife allegedly caused by the wife's disobedience, such as leaving their home without notice, neglecting her marital duties and refusing to take her husband's advice. Up to this point the case is a very common one. The defendant's first step, however, was rather exceptional: before starting with her response (*jawaban*), the unrepresented defendant took exception (*eksepsi*). The exception was based on the weak physical and psychological condition of the petitioner, which according to the defendant made the power of attorney he had signed dubious (*di luar akal sehat*). The petitioner's lawyer responded that the exception had to be rejected (*dikesampingkan*), as his client's physical condition did not reduce his right to legal representation and his right to perform legal acts. The lawyer stated that the power of attorney was in order, as it was signed with the petitioner's fingerprint, legalised by a notary, and subsequently listed at the Islamic court. The reply (*replik*) of the defendant held that the power of attorney concerned was contrary to the meaning and purpose of Article 1320 of the Civil Code (KUHP), which requires that a person must be capable (*cakap*) to perform legal acts. The defendant considered the fact that the petitioner, someone who is educated and has an autograph, used a fingerprint to sign as proof of the lawyer's deceit (*rekayasa*) and bad faith (*itikad buruk*), revealing his intention to take control of the possessions of the petitioner at the expense of the defendant. The court argued that the issue of the fingerprint alone was insufficient proof of the alleged deceit and that therefore the exception was rejected.

Hence, the *talak* divorce case was accepted and the court process could proceed. The defendant presented her response, which can be summarized as follows. The defendant claimed she had not been disobedient, always took care of her husband, and nursed him when he fell ill. She never left the house with the intention to leave her husband, but was locked out by her own daughter and son-in-law, who lived in the same house with the petitioner and defendant. She made the accusation that the entire case was based on the bad faith (the defendant used the Dutch term *kwader trouw*) of her own family and in-laws, who were attempting to control her husband's entire estate. She claimed that they had even threatened to kill her.

Both parties brought witnesses to the court. Based on these witness accounts, the court tried to unravel three issues: whether the defendant had neglected her duties, whether one could speak of marital strife between the petitioner and the defendant, and whether the defendant had left the petitioner or was locked out. Concerning the first issue of neglect of marital duties, the court considered the claim that the wife frequently left her home in the evening proven by witness accounts. However, since she always returned to take care

of her ill husband, this fact was not considered to constitute neglect of her husband. Hence, in fact, the court ruled that leaving the home without permission can be permissible behaviour for a wife, and in itself does not necessarily render a wife legally disobedient (*nusyuz*).

Concerning the claim of continuous strife, according to all witness accounts the petitioner lost his capacity to talk prior to 2009, the date when the alleged quarrels started. The court argued that since the petitioner's condition was such that he was unable to talk, he had to be considered unable to quarrel as well. As a consequence, the court considered the claim of continuous strife unproven. That left the petitioner with the third issue of the defendant leaving her husband. The court considered the defendant's claim that she was locked out to be proven by the witness accounts. Moreover, her daughter and son-in-law had moved the petitioner to the home of the defendant's son-in-law, and therefore the current separation between the petitioner and defendant could not be attributed to the defendant, who, moreover, had declared her readiness to take care of her ill husband. Consequently, this separation did not constitute a reason for divorce. Hence, all three claims were rejected by the court. The court argued that none of the legal divorce grounds had been met, and that therefore the *talak* divorce petition was rejected. The defendant won the case.

The case is extremely atypical, and not only because the divorce was rejected, or because of the petitioner' age. The case, a very complicated one, had been won by a woman with only high school education, defending herself against powerful in-laws and an educated lawyer. Although it is likely that she received legal advice, considering her use of Dutch legal terms and knowledge of the procedural possibility of taking exception, it still is striking that she managed to prevent a divorce.

9.4.2 No-fault divorce

In cases based on continuous strife, it is difficult to establish who is at fault. Moreover, Supreme Court case law has changed virtually all 'continuous strife' divorces into no-fault rulings. Professor Abdul Manan, Supreme Court judge of the Islamic court chamber,[23] contends that the Supreme Court has effectively replaced the legal divorce grounds of the 1975 Government Regulation on the Implementation of the Marriage Law and of the 1991 Compilation of Islamic Law with a single concept: broken marriage. He explained to me that: 'hence, in my view there are no longer legal [divorce] grounds like those listed in Article 19. One legal ground is enough: *broken marriage* (he used the English term).' In such cases the judge ought not to decide who is at fault: 'the

23 Interview with Judge Abdul Manan, Supreme Court, Jakarta, 11 August 2011.

Supreme Court has ruled that the judge must not decide who is at fault, but only establish that the marriage is broken (*pecah*) – *broken marriage*.'

According to judge Abdul Manan, as a standard (*patokan*) the Islamic courts look at five criteria. First, they examines whether there has been a (failed) attempt to reconcile the spouses. Second, whether the spouses live separately. Judge Abdul Manan stated that contrary to what is stated in the 1974 Marriage Law and the standard *taklik al-talak* (see Chapter 3), a three-month separation suffices:

> 'according to case law of the Supreme Court three months is enough, three months living separated, a three months minimum – I mean. Thus, although the law stipulates two years, three months is enough.'

The other criteria judge Abdul Manan mentioned were: third, good communication between the spouses no longer exists; fourth, the spouses are neglecting their duties as wife and husband, and do not provide maintenance or affection; and fifth, inappropriate relationships are at play. By silently introducing the concept of broken marriage as the central divorce ground, the Supreme Court has significantly changed the rules of the game in judicial divorce processes.

There are handful of Supreme Court judgments laying the groundwork for the 'broken marriage' principle in Article 19(f) divorces. The earliest I could find dates from 5 October 1991.[24] In a critical paper on the disadvantages of no-fault divorces published on the website of the Islamic chamber of the Supteme Court, Muh Irfan Husaeni, judge of the Islamic court of Painan, provides a solid analysis of this case, which can be summarized as follows.[25]

The case originated from the Islamic court of Pariaman, West Sumatra, which in 1989 decided to grant a *talak* divorce. The petitioner claimed that there was continuous strife caused by the unfounded jealousy of his wife. In 1987 she left the house taking her belongings with her and did not return. The defendant claimed that she fled the house as her husband had threatened and hit her. As she considered herself not at fault in leaving her husband, she made a counterclaim demanding child support, due maintenance, expenses for medical treatment, spousal support during the *iddah*-waiting period and the consolation gift of *mut'ah*. The court argued that the defendant had been *nusyuz* as she had demonstrated her bad intentions by taking her belongings with her when she left, and it rejected her counterclaim. Permission for a *talak* divorce was granted. In appeal, the Islamic high court of Padang argued that the husband's behaviour was the cause of his wife leaving, and that as a result

24 Supreme Court case 38/K/AG/1990.

25 I base my analysis of this case on Muh Irfan Husaeni's paper: 'No Fault Divorce dalam Perkara Perceraian di Pengadilan Agama. (Menyoal kalimat "…maka tidak perlu lagi dipertimbangkan siapa yang bersalah …" Sebuah kajian akademik)', published online on 30 December 2011, http://badilag.net/artikel/9354-no-fault-divorce-dalam-perkara-perceraian-di-pengadilan-agama-oleh-muh-irfan-husaeni-sag-msi--3012.html.

she should not be considered *nusyuz*. Moreover, the Islamic high court argued that since the petitioner himself was the cause of the continuous strife, he could not base the divorce case on this ground, and therefore his petition ought to be rejected. What ought to happen was a *syiqaq* divorce in which two family members as representatives of each party (*hakam*) tried to work out a solution.

The petitioner took the case to appeal in cassation, as according to him the high court had failed to apply the law correctly. First, he argued, the Islamic high court had not recognized the defendant's confession or witness accounts about the continuous strife. Furthermore, it had neglected the fact that the defendant's claim of threats and maltreatment by the petitioner lacked evidence. Finally, the high court's argument that the petitioner's own behaviour was the cause of the continuous strife and therefore could not be the basis of his divorce case was erroneous.

The Supreme Court agreed that the law was not applied correctly by the Islamic high court of Padang, but mainly because the high court had tried to establish who was at fault (*siapa yang salah*). It considered that it is sufficient in cases based on Article 19(f) to establish the occurrence of continuous strife within the marriage. It argued that it is not appropriate (*patut*) to hold one of the parties responsible for the marriage falling apart (*pecahnya perkawinan*), as this may be expected to have a negative impact on the relation between the two parties and on their children. Subsequently, it overturned the judgment of the high court of Padang and decided *ex officio* to grant the petitioner the *talak* divorce, to award the defendant spousal support during the *iddah*, and to put the obligation on the petitioner to provide child support until his child is a legal adult.

Ever since, Article 19(f) divorces have been increasingly treated as no-fault divorces based on the concept of 'broken marriage.' The concern judge Muh Irfan Husaeni forwarded in his paper was that by insisting that all Article 19(f) divorces must be considered no-fault divorces, the Supreme Court totally disregards the feelings of the spouse who is abandoned, the wife and children who have not been taken care of, victims of domestic violence, and wives who find out that their husband informally married another woman. According to him, a ruling 'without establishing who was at fault' does not reflect the feelings of justice in society concerning such cases. As a result, the Islamic court turns into a divorce registration office (*kantor isbath cerai*).

I agree with the observation of judge Husaeni that Islamic courts have been turned into divorce registration offices. In fact that is their main function and the one they are best at. We have also seen above that in exceptional cases the courts do reject a divorce suit and not only on procedural grounds. Moreover, if post-divorce rights are part of the claim or counterclaim, the Islamic court still plays its true role of judge. In those cases the issue of fault becomes relevant again and especially the concept of disobedience (*nusyuz*).

9.5 The narrowing limits of disobedience (*nusyuz*)

9.5.1 *Nusyuz* in *talak* cases

Another consequence of the no-fault divorce judgment is that the legal consequences of the wife's disobedience have been limited, as in most cases the court no longer establishes who is at fault. In the previous section we have also seen how the Supreme Court did not consider the wife's act of leaving the house as an act of disobedience in itself, but as a matter that has to be viewed in the whole context of the marriage concerned. The Supreme Court judgment of 18 June 1997[26] is more specific and rules that it is neither necessary to establish who caused the quarrels, nor to establish which spouse left the other. This contradicts traditional *fiqh,* as a wife leaving the house was traditionally considered a clear case of *nusyuz*.

During my field research I was particularly interested in post-divorce rights and as a result, I have collected mainly divorce cases, which include a counterclaim by the wife. I have found that, provided administrative and procedural requirements were in order, the Islamic courts usually granted spousal support and *mut'ah* claim in *talak* divorces, even if the husband and his witnesses accused the wife of disobedient behaviour, and sometimes even in cases where the wife was absent from the court process. One may conclude that in *talak* divorce cases, the Islamic court in Cianjur and Bulukumba will only consider the wife to have been *nusyuz* in extreme cases.

In fact, the next case[27] is the only example of all *talak* cases I possess, in which the judge established the wife's behaviour to be *nusyuz*. The petitioner was a police officer who requested permission to divorce his wife, a primary school teacher. The couple was married in 2002 and had a daughter together. When the petitioner was sent on duty to Bulukumba, his wife did not feel comfortable there and returned to her previous job in Bone. This caused tension, which increased when the wife accused her husband of adultery. Ironically, she was herself caught with another man. According to a witness account, the petitioner had discovered the presence of a man in the defendant's house and organized a raid in which he, the petitioner, and four others participated. They forced the door and found the defendant wearing only a sarong in the company of a man wearing only a towel. The defendant and the man concerned were brought to the police, where they signed a confession of adultery.

The defendant responded that she had signed the statement because she was pressured to do so and that the man concerned in fact was a relative (third cousin) and a colleague. He had accompanied her to work, and then to visit

26 Supreme Court judgment 534/K/AG/1996.

27 Case 75/Pdt.G/2009/PA.Blk, decided by the Islamic court of Bulukumba on 16 November 2009.

her sick grandmother, and during the raid had happened to take a bath. The petitioner denied all of this, as he had never seen the man before. The defendant subsequently replied that she did not want a divorce, but since the petitioner insisted, she made a counterclaim consisting of *mut'ah*, spousal support during the *iddah*, due maintenance, custody over her child, child support, and her dower. The petitioner responded that he was willing to provide child support and to hand over the dower, a cacao garden near his parent's house, but not to pay any maintenance to his wife as he claimed that she had been *nusyuz*. Furthermore, the petitioner insisted that he – not the defendant – should obtain custody over their daughter. The court granted the divorce as the marriage obviously was broken. Additionally, the court did consider the fact that the defendant was found half-naked with another man, while insufficient proof of adultery, was sufficient proof of *nusyuz.* As a consequence, the court rejected the defendant's claims concerning due maintenance, spousal support during the *iddah*, and *mut'ah*, and she lost her rights to these.

That brings us to the final issue of custody. The court considered that the defendant was a good mother (*ibu yang baik*) as there had been no indication that she would neglect her child. In view of the young age of the child and the provisions in the Compilation of Islamic Law concerning children below the age of twelve years, the court granted custody of the child to the defendant, without diminishing the right of the father to have the opportunity to show his affection (*menyalurkan kasih sayangnya*) towards her. Finally, child support was granted by the court, and set rather high at Rp 700,000 per month, considering the petitioner had stated that he was only willing to pay Rp 200,000, while the defendant had demanded Rp 750,000. However, the court argued that it was a reasonable sum considering the petitioner was a policeman with a stable income.

The case above illustrates that in an extreme case the Islamic court of Bulukumba did establish a wife to have been *nusyuz* and as a consequence she lost some of her post-divorce rights in a *talak* divorce. However, the case also indicates that the court does not automatically consider women who are caught with another man to be bad mothers; it just makes them *nusyuz*. Yet again, the judges took the whole context in which the disobedience occurred into account when they decided to grant a *nusyuz* wife custody over her child.

9.5.2 *Nusyuz* in *gugat cerai* cases

The legal position of the wife is different in wife-petitioned cases. In these *gugat cerai* cases women do not have spousal support rights at all, and as a result spousal support claims are generally absent. However, recent changes in legal doctrine may have increased the rights of women in female-petitioned divorces, and once again *nusyuz* is the central concept. I must confess that in the first instance Islamic courts of Cianjur and Bulukumba I did not find any *gugat*

cerai cases in which the petitioner was granted spousal support. However, in an interview with the head of the Islamic high court of Makassar, Judge Dr. H. M. Hasan Muhammad,[28] I presented an example of just such a case, which originated in the Islamic high court of Surabaya[29] and asked his opinion. To my surprise, he pointed out to me that only recently the higher echelons of the Islamic court had reached a consensus about this issue, meaning that under certain conditions women do not lose their rights on *mut 'ah* and spousal support in *gugat cerai* cases. Judge Hasan Muhamad explained that:

> 'the judges that participated in the seminar agreed that, even though it concerns *gugat cerai*, if the conditions in the case are such, we will still impose an obligation for the husband to provide spousal support during the waiting period, *mut'ah*, clothing (*kiswah*) and housing (*maskan*).'

He explained that the participants in the seminars were judges and clerks on the level of the Islamic high court, and admitted that the new doctrine had not yet penetrated to the first instance Islamic courts. However, he was a strong supporter: 'I have personally done so [adjudicated such a case], although the petitioner had not claimed it in her petition, we sentenced the husband to provide *mut'ah*, *kiswah* and the like.' He illustrated the conditions under which the wife may keep these rights:

> 'If the legal ground is marital strife we look at who caused the strife. If the cause of marital strife is the oppression (*tekanan tekanan*) of the husband – then we will act. The same goes for maltreatment, like hitting, lack of household money or maintenance, marrying again. That is a different kind of marital strife than when the wife is adulterous or leaves the home too often. […] The clearest case is when the cause is domestic violence towards the wife […]. The husband can even be reported to the police for criminal prosecution.'

One may conclude that after the introduction of the no-fault divorce in the 1990s, we may have just witnessed the birth of another legal innovation: the concept of the *nusyuz* husband. Whereas previously men who behaved badly within their marriage could easily get away with it by avoiding the court, and, by so doing, made sure that the wife petitioned the divorce and as a result

28 Interview with the head of the Islamic high court of Makassar, Drs H. M. Hasan Muhammad, Makassar, 26 July 2011.

29 Case 11/Pdt.G/2008/PTA.Sby. In this case a wife petitioned for divorce and claimed among other rights *mut'ah* and spousal support during the *iddah*. The first-instance Islamic court rejected this claim, but the high court overturned the judgment and decided that the wife had not been *nusyuz* as she left home and petitioned for divorce because of physical abuse and sexual affairs conducted by her husband. The court therefore ordered the defendant to pay a sum of *mut'ah* and spousal support. One judge had a dissenting opinion and argued that the 1991 Compilation of Islamic Law is clear on this matter, which in his eyes means that women lose those rights when they petition for divorce.

lost her spousal post-divorce rights, in this configuration he must pay. When the wife's *nusyuz* is clearly established, she will still lose her rights, but it seems that the limits of the wife's *nusyuz* have narrowed down whilst the Islamic courts have just opened up the possibility of men's *nusyuz*. This could mean new steps towards equality. However, case law will determine how this newborn concept will develop, as for the moment, at least in the Islamic courts of Cianjur and Bulukumba, it has not taken root yet.

9.6 INCONSISTENT POST-DIVORCE JUDGMENTS: CIVIL SERVANTS AND DUE CHILD SUPPORT CASES

Although no-fault divorces have become the norm in the Islamic courts, there are also matters where judgments are much more inconsistent. One of these areas concerns the competence of the Islamic courts in post-divorce cases concerning civil servants; more specifically, the competence to establish and order the husband to pay spousal and child support based on the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (GR 10/1983; see section 4.4.4). The issue at play is that the Supreme Court has ruled that all post-divorce support matters concerning civil servants fall to the administrative courts and not the Islamic courts.[30] The first-instance Islamic courts, however, typically accept cases of civil servants together with their post-divorce support claims, especially when claims are based on the 1991 Compilation of Islamic Law and not GR 10/1983.

For women and their children, a claim based on the Compilation of Islamic Law usually means weaker rights to spousal and child support than a claim based on GR 10/1983. According to GR 10/1983, in *talak* cases women without children have a right to a half of their husband's salary until they remarry and one third if they have children, plus an additional third in child support if the children reside with her. In *gugat cerai* cases they lose spousal support rights, but the child support remains one third of the salary. Unfortunately, it appears that many wives of civil servants do not know what their rights are, and if they do, they appear not to know how to proceed. When wives of civil servants do not make a claim based on GR 10/1983, judges typically base their judgment on the Compilation[31] which means that enjoyment of the right to spousal support lasts until the *iddah* waiting period ends, and not until remarriage as under GR 10/1983. That is an enormous difference.

30 Judgment of the Supreme Court 11/K/AG/2001 of 10 July 2003.

31 For instance, in 2006, the Islamic court of Cianjur only in two of the 12 *talak* cases involving a civil servant ordered the payment of one third of the husband's salary to the ex-wife. In these two cases the wife had made the claim based on GR 10/1983, whilst in the ten other cases the women concerned only made a *nafkah iddah* claim based on the KHI.

Nonetheless, I came across cases in the Islamic courts in which women did make a claim based on GR 10/1983 and the court granted it. The following judgment of the Islamic court of Cianjur is such a case.[32] The court ordered the petitioner to pay the defendant spousal maintenance during the *iddah* (one third of the salary of the petitioner during those three months); *kiswah* (Rp 250,000), and *mut'ah* (Rp 2 million). In addition, the court ordered the petitioner to pay the defendant a monthly sum of a third of his salary as long as she remained unmarried. The court order concerning spousal support of one third of the salary during the *iddah* is a clear mix: the court applied a norm from GR 10/1983 to a rule taken from the Compilation. In contrast, in a civil servant divorce case in which the wife claimed spousal support based on GR 10/1983, the Islamic court of Bulukumba decided that it had no jurisdiction to divide a salary and that the claimant should refer to the competent authority.[33]

A similar inconsistency in judgments can be found in cases pertaining to due child support. One may expect that due child support is treated in the same manner as due maintenance of the wife, since both concern the husband's support obligations. In case of maintenance of the wife, the Islamic courts can and regularly do impose the obligation on a husband to pay a certain amount of due maintenance. However, the Supreme Court argued in 2004, and again in 2005, that child support should be treated differently and based on traditional *fiqh*. It ruled that child support due during the marriage cannot be claimed in a divorce case, as this does not constitute a debt.[34] The Islamic court of Cianjur cited the Supreme Court judgment in a case of 2007[35] in which it rejected the petitioner's claim to due child support based on the argument that:

> 'even when it can be established that the defendant, as the father of two children, has been negligent with regard to his obligation as a father of providing maintenance for his children, the court considers this [child support] to be an obligation which is meant to be enjoyed by the children (*lil intifa'*) which does not result in ownership rights (*litamlik*), and therefore the negligence of the father in fulfilling his obligation [to provide for his child] cannot be claimed in court.'

In a judgment a year earlier,[36] the same court did grant the petitioner's claim to due child support. In this case the male petitioner had admitted that he had not provided child support, because his child – still a new-born baby – had been placed under the care of their grandmother, his mother-in-law. The

32 Islamic court of Cianjur case 43/Pdt.G/2007/PA.Cjr decided on 17 February 2007.
33 Case 249/Pdt.G/2010/PA.Blk decided on 27 December 2010.
34 Judgments of the Supreme Court 24/K/AG/2003 of 8 January 2004 and 608/K/AG/2003 of 23 March 2005. The *fiqh* cited by the Supreme Court was Kitab Al Fiqhi al Islamiyu wa Adillatuhu, Juz VII, pp. 829.
35 Islamic court of Cianjur case 381/Pdt.G/2007/PA.Cjr.
36 Islamic court of Cianjur case 124/Pdt.G/2006/PA.Cjr.

Islamic court argued, that 'no matter where the child resides, the Compilation clearly stipulates the obligation of the father to provide for his children – let alone a new-born.' Therefore it considered it 'appropriate and fair' to order the petitioner to pay an amount of due child support of Rp 2.5 million.

Recently, two judgments of Islamic high courts have followed the case law of the Supreme Court andit is likely that in the future, judgments on this issue will become more consistent.[37] I believe that this development is harmful to the legal position of women pertaining to child support, and potentially for children, because enforcement of child support is already problematic, as I have demonstrated in Chapters 6 and 8.

9.7 Equality in marital property: men and women struggling to claim their rights

As I have argued in Chapters 6 and 8, and elsewhere (Huis 2010), rules regarding joint marital property are potentially easier to enforce than monthly support obligations, because they concerns a single act of handing over rights to property. However, in the claiming process providing evidence can be difficult, because of the Islamic courts' much less lenient attitude towards proof when it concerns movable and immovable property. The claimant is required to provide a clear description of the property. In case of land, this means describing its boundaries and providing legal proof of ownership. If it involves valuable movable objects, the claimant must list brand name, type and estimated value, and again provide legal proof of ownership. In both cases, the purchase of the property must be proven to have taken place during the marriage.

For many men and women this is a difficult task, especially when they have left their marital home without taking the evidence with them. For instance, in a divorce case in which the defendant claimed marital property, the Islamic court of Bulukumba rejected the defendant's claim on a tractor, refrigerator and TV. The claim was considered obscure (*obscuur libel*), because the claimant did not manage to give clear specifications.[38] In another *talak* divorce case in Bulukumba[39] the defendant claimed marital property consisting of a house, land, and garden purchased in 2005 and fully paid for in 2006. The claimant had provided details about the location and the boundaries. The paper evidence she presented was a photocopy of a property tax return (*SPPT pajak bumi dan bangunan*). Additionally, two of the four witness accounts fully supported her claim, whereas the third witness stated that he did not know,

37 It concerns two judgments by the Islamic high court of Surabaya: 132/Pdt.G/2009/PTA.Sby and 79/Pdt.G/2010/PTA.Sby.

38 Case 40/Pdt.G/2009/PA.Blk decided on 23 June 2009.

39 Case 243/Pdt.G/2010/PA.Blk decided on 5 January 2010.

and a fourth said that the land was not purchased but a gift. The court rejected the claim because the copy of the tax return of the property tax was considered insufficient legal proof of ownership.[40] In a similar case in Cianjur, the claimant (the wife) presented two copies of a tax return, but the Islamic court rejected the claim on the same ground of 'insufficient proof of landownership as is meant in the Agrarian Law of 1960.'[41]

The Islamic courts tend to be much more lenient about legal proof in marital property cases when it concerns monetary income. In the second marital property case in Bulukumba above, the claimant also claimed half of the income (Rp 18 million) her husband had earned in Malaysia. He replied that he had spent almost all of his earnings in Malaysia, and the residue of Rp 3 million on red bricks, an act which had infuriated his in-laws, who paid him a visit bringing their cleavers (*parang*). The Islamic court argued that through his reply the petitioner had admitted his wife's claim that this sum had existed, and established that the Rp 18 million was marital property, half of which had to be paid by the husband to his wife. Apparently, the claimant neither had to prove what was left of the 18 million nor whether the husband's spending had been unreasonable.

In Cianjur I came across a very similar case with one major difference.[42] Here the claimant was the husband and his wife the migrant worker. The petitioner of divorce was a woman who had been recruited to work in Saudi Arabia. Her husband stayed behind and in her absence married another woman. This put a lot of stress on the marriage and the wife decided to petition for a divorce. In the counterclaim the husband demanded Rp 3 million as part of his right to marital property. His wife claimed that she had earned Rp 18 million during her stay in Saudi Arabia, but had spent 10 million to pay her recruiter and had given the residue to her mother who had spent it on building a house. The court, however, argued that it was convinced that the petitioner had brought sufficient income from Saudi Arabia to justify a claim of 3 million as the husband's share of marital property. Again, the Islamic court did not require bank accounts or other paper proof of the current finances. The court considered the wife's confession that she had indeed earned the money sufficient grounds to grant the husband's claim, disregarding her claim that it had all been spent. Compared to the non-monetary cases, the lenient attitude towards legal proof is striking: in the monetary cases no paper evidence of the property was required in the context of the existence of partial confessions, whereas in the immovable and movable property cases witness evidence was useless without the right paper evidence being presented.

40 The Supreme Court used the same argument in judgment 767/K/Sip/1970 of 13 March 1971.

41 Case 98/Pdt.G/2007/PA.Cjr.

42 Case 318/Pdt.G/2008/PA.Cjr decided on 27 August 2008.

9.8 Conclusion

The legal analyses I have presented in this chapter indicate that, generally speaking, there is considerable room for legal innovation in the Islamic courts of today. Nonetheless, it is much more difficult to say whether the Islamic courts with regard to women's divorce and post-divorce rights are developing in a clear-cut moderate or conservative direction, as the developments vary per legal issue, or even sub-issue. The registration of marriage cases reveals a lenient approach to witness evidence, often out of empathy with the women concerned, but this is combined with a stringent attitude towards falsified documents and a strict conservative stance towards the religious requirements of a Muslim marriage – even if non-compliance was caused by a lack of knowledge. The same ambiguity can be found in the Islamic courts' attitude towards polygamy. Whilst there are indications that at least a number of judges are becoming more lenient towards the limitations set by the Marriage Law in their handling of polygamy requests (see Nurlaelawati 2013; O'Shaughnessy 2009), in marriage registration cases most judges are still careful not to accidentally legalize an informal polygamous marriage in the process. The limits of the Islamic courts' legal doctrine are shifting, but its tradition remains the judges' first point of reference.

In some cases the Islamic courts have stretched the legal provisions to their very limits. The inclination of the Islamic courts' policy to primarily grant Article 19(f) divorces on the divorce ground of continuous marital strife has rendered the eight other divorce grounds irrelevant. What is more, the legal concept of 'continuous strife' has been turned into a no-fault divorce, meaning that it is sufficient for the parties to demonstrate that the marriage is broken. As a consequence, getting divorced has become very easy, for both men and women. A notable illustration of this is that in a number of cases the judge considered the divorce petition itself sufficient proof of a marriage broken beyond repair.

Another consequence of no-fault divorce is that the Islamic court judge is not required to blame the broken marriage on the immoral behaviour of one of the parties. The danger is that as a result judgments fail to represent local feelings of justice, especially in cases of adultery and domestic violence, where the victim may feel a strong need to have the perpetrator held publicly accountable for his behaviour and the divorce. In these kinds of no-fault cases, the goal of a peaceful divorce for the sake of the children clashes with a sense of injustice that the judge did not address such problems in the public reading of the judgment.

However, one must realize that most court sessions are closed hearings and, within the framework of a no-fault divorce, judges have sufficient leeway to lecture the spouses about their behaviour. Thus, whilst one might expect that introducing concepts such as 'no-fault divorce' and 'broken marriage' has led to morals taking a less central position during the court process, this

is clearly not so. A considerable number of the court cases I have attended and files I have collected were filled with mutual accusations about immoral behaviour. Those accusations appeal to general social ideas of what a good husband and wife ought to look like, or their own speculation about judges' opinions. Thus, even though I understand why O'Shaughnessy concluded that not much has changed since 1974 in the Islamic court rooms with regard to the positioning and treatment of women in divorce cases, I do not agree.

Indeed, women are still accused of disobedient behaviour by their husbands and, moreover, women who insist on divorce still run the risk of being lectured by judges to be more patient, accept a 'corrective tap,' or the presence of a second wife. Judges who did so told me that the insistence on the wife's patience in fact is part of the reconciliation attempts that judges are legally obliged to carry out throughout the divorce process; a procedural obligation in which women indeed seem to be targeted more often than men. In a similar manner, research focusing on the treatment of women in divorce cases in which domestic violence plays a role found that judges' behaviour towards the female victims is often insensitive (see Irianto & Cahyadi 2008; Irianto & Nurtjahyo 2006).

The Islamic courts' five criteria in establishing a broken marriage, which were developed by the Islamic chamber of the Supreme Court clearly indicate that the Islamic courts have no intention to refrain from involving themselves in such moral issues, e.g. regarding the marital duties of the spouses, or disturbance from outsiders (adultery, polygamy, in-laws). Judges typically delve into the spouses' personal lives, giving each spouse and their witnesses sufficient room to air the details pertaining to the flaws and behaviour of the other party, lecturing them in passing about the ups and downs of a marriage, their marital rights and duties, including the wife's duty to respect her husband and – if he is present at all – the husband's responsibilities towards his family. Hence, although much has changed with regard to the legal grounds for divorce, the court process itself as it manifests itself in the courtroom has not changed quite as much.

Nonetheless, I hold that significant legal changes do take place in the Islamic courts. It does not so much occur in the interactions between the actors in the courtroom, but in the details of the legal justifications in the court judgments. I agree with O'Shaugnessy that a strong emphasis on the wife's disobedience and disrespect for her husband remains, but I believe I have sufficiently demonstrated that significant changes have occurred in the legal consequences that the Islamic court attaches to such disrespectful behaviour. If we define *nusyuz,* the Muslim legal term pertaining to such disrespectful or disobedient behavior, as 'disobedient behaviour towards the spouse with legal consequences', than it becomes apparent that the Islamic courts have narrowed the limits of what constitutes *nusyuz* for women, as in most cases there are no legal consequences attached. In almost all *talak* court files I have collected, judges granted spousal support and *mut'ah*, even if witnesses had

confirmed behaviour which traditionally is considered disobedient, such as, for instance, leaving the house without permission.

A slightly different situation occurs when one looks at wife-initiated divorces. The Compilation of Islamic Law has laid down the traditional legal consequences for a woman when she petitions for a divorce: she loses her rights to maintenance during the waiting period and her right to *mut'ah.* One could confuse those legal consequences with *nusyuz*, but actually they are based on the fact that such a divorce is considered final (*ba'in*). In recent cases a number of Islamic high courts have ruled that women do not lose these rights when they are not *nusyuz*, and when the divorce had to be attributed to their husband's negative behaviour. In other words, the judges attached legal consequences to the inappropriate behaviour of husbands; they were considered to have been *nusyuz*.

We have seen that there are indeed voices urging the introduction of male *nusyuz* through the codification of Muslim family law (see Chapter 4) and these judgments perhaps form legal innovations in anticipation of such legal changes; all the more since they seem to reflect the consensus in the higher echelons of the Islamic courts. Thus, this return of *nusyuz* in court judgments may contribute to more equality, in the sense that it applies to both men and women. At the same time, it may jeopardize the concept of no-fault divorce. The Islamic courts will only consider the husband's *nusyuz* if he clearly transgressed the limits of decent behaviour, *and* his wife did not so. It thus may mark the return of the 'at-fault' husband in no-fault divorces.

There are also examples of the introduction of conservative *fiqh* rules through case law, one of which is the Supreme Court's 2005 judgment pertaining to due child support. The decision has the consequence that the father can be ordered to pay child support, but the due payments cannot be enforced through the Islamic courts. Several Islamic high courts and first instance courts have followed the Supreme Court judgment, and therefore I have reason to fear that Supreme Court case law may undo what the Constitutional Court, in its controversial ruling concerning the legal relation and legal responsibility of a biological father to children born out of wedlock has attempted to achieve: ensuring that men take responsibility for their children.

It is hard to generalize about the developments in the administration of justice in the Islamic court. They are characterized by both lenient judgments and strict application of rules, depending on the subject. The norms judges apply are not fixed and move slowly towards more equality, sometimes stretching to the limit, without giving up the patriarchal basis of the Indonesian family and the Islamic basis of Muslim family law. Thus, the court hearings are still characterized by women defending themselves against accusations of being bad mothers and wives, and men who are blamed for being irresponsible womanizers. At the same time much of the dynamics take place in the legal details of legal justifications pertaining to divorce. Read carefully and

one may discover legal innovations like the return of the at-fault husband in no-fault divorces and the birth of the *nusyuz* man.

10 Conclusion

This study has approached the Islamic court from various angles in order to illuminate its workings, position and role in Indonesia in new ways. In so doing, I have followed Cotterrell's suggestion that 'a full analysis of law must take account of both its reality as an agency of government […] and its dependence on social and cultural conditions beyond its control' (1986: 72). I believe that this is evident in case of a study about Islamic courts in Indonesia. Islamic court judges in Indonesia are legally required by the 1991 Compilation of Islamic Law to take into account specific social and cultural contexts in their adjudication. Moreover, we have seen how the Islamic courts have generated strong political and religious symbolism from supporters of Muslim organizations in Indonesia, who have viewed the Islamic courts as bastions of Islamic law. In order to explore the governmental, political, social and cultural factors influencing the functioning of the Islamic courts, this study drew from approaches and methods derived from legal and political history, LGD, anthropology, sociology, and law. Through this interdisciplinary approach I have attempted to 'create knowledge which transcends partial perspectives' (Cotterrell 1986: 72).

I have examined four dimensions of the Islamic courts in Indonesia. The first dimension concerned the role the courts play in the protection of women's divorce and post-divorce rights. Women may access Islamic courts in divorce matters because they are legally required so by law, but also because the consequences of a formal or informal divorce for them are more serious than for men and they want to claim spousal support, child support, or their part of the joint marital property. Thus, the Islamic courts potentially have an important function in protecting women from some of the negative consequences of divorce.

The second dimension concerns the adjudication by Islamic court judges. A judge has the responsibility to give judgments in particular cases that not only provide redress from a rule-of-law perspective, but that also will consider the context of the particular case and local feelings of justice in society (Cf. Bedner & Vel 2010). Moreover, distinctive mechanisms are at play in a legal institution that applies norms originating in three legal traditions, i.e. Islamic, civil and customary law,.

Thirdly, I explored the special legal, political and social dynamics Islamic courts have historically generated. They are a dual symbol of the formation of state control over Islamic matters and the Islamization of the state. Local

religious authorities in different regions have reacted differently to those processes. Fourth, through legal interpretations, the Islamic courts transmit and transform the family law norms established in law and religion, which subsequently, through the 'shadow of the law' (Mnookin & Kornhauser 1979), have the potential to transform individual and shared norms and values of members of a society, a local community, a clan, a marital union, and a gender (Peletz 2003). Thus the Islamic courts may be seen as an instrument of the government in its state- and nation-building efforts. In this concluding chapter, I will bring those dimensions together, in an attempt to provide a four-dimensional picture of the Islamic courts' performance in realizing and protecting women's divorce and post-divorce rights.

10.1 Colonial History Revisited

10.1.1 Jurisdictional limitations of the Islamic courts

In the historical component of this study I have assessed the Islamic courts' relative jurisdictional position in the legal systems of the VOC (1609-1800), the Netherlands Indies (1800-1945) and the Republic of Indonesia (1945-present). One of my main suggestions in this historical part of the research is that the jurisdictional conflicts between the colonial courts and the traditional indigenous Javanese priest councils should be given a more prominent position in studies concerning the history of the Islamic courts in Indonesia.

The Dutch take-over of the administration of the bankrupt VOC[1] in 1800 marked the formal birth of the Netherlands Indies as a colonial state, and an official part of the Netherlands (since 1815, the Kingdom of the Netherlands). The Netherlands Indies (and the British during their interregnum from 1811-1816) organized a parallel Dutch and Indigenous government on Java, unified the legal system and established district *landraad* courts, initially without regulating the relative jurisdiction between the *landraad* and the Javanese Islamic courts, which the Dutch called *priesterraden* (priest councils). In 1835 the Supreme Court (*Hoge Raad*) issued a ruling on the issue stating that the priest councils on Java were not part of the colonial judicial system. The colonial government without delay undid this judgment and issued the 1835 Resolution concerning Judgments in Civil Actions Resulting from Disputes among the Javanese (S 1835/58), which plainly established that the priest councils held judicial powers over marriage; divorce; and inheritance disputes concerning the Javanese population. S 1835/58 also ruled that judgments by the priest councils were only enforceable after an *executoirverklaring* had been issued, a statement of the *landraad* that a priest council's judgment should be

1 The VOC' bankruptcy took place in 1798, the Dutch take-over of its assets in 1800.

executed. The jurisdiction of the priest councils was formally retained, but less precisely described in the proto-constitution of the Netherlands Indies (RR of 1854): 'their religious laws, institutions and customs are to remain in force.'

Even after the 1882 Priests Councils Regulation (S 1882/152) made priest councils a formal part of the judicial system, the *landraad* gradually denied the enforceability of the priest council's court orders in cases involving property and ordered a retrial at the *landraad*. In most cases the retrial was endorsed by the Dutch magistrates of the high court and the Supreme Court. This suggests that the idea that property matters should not be part of the priest councils' jurisdiction was already part of legal doctrine at a time when, according to best academic knowledge, the *adat* law school was not yet dominant. Of course, this does not necessarily imply that the priest councils no longer adjudicated property cases, but it does mean that their judgments were not recognized, and could no longer be enforced by the colonial legal system.

Many of the judgments limiting the priest councils' jurisdiction in property cases predate the rise of the *adat* law school in the early twentieth century, let alone the issuance of S 1937/116, which introduced the controversial jurisdictional chapter of the 1931 *Penghulu* Courts Regulation in the Netherlands Indies, formally establishing the *landraad*'s jurisdiction in all property disputes between Muslim Javanese, including those pertaining to family law and inheritance matters. However, from the perspective of legal practice, the introduction of S 1937/116 did not constitute a major legal, doctrinal change, even if the explicit choice of the government to favor *adat* law in property matters was a significant political event.

In fact, well before 1937 case law from the 'Dutch' secular branches of the legal system only recognized the priest council's competence to issue declaratory decisions, or *fatwa* in property cases. Thus, its main judicial task was reduced to giving final judgments in divorce cases petitioned by women, since men could initiate divorce without judicial involvement through the *talak*. Lev has suggested that because *adat* was and remained largely alien to the *landraad* judges, and the *landraad* itself largely foreign to Javanese Muslims, the *adat* argument to legitimize the transfer of the Islamic courts' jurisdiction in property matters to the *landraad* was not very convincing (Lev 1972: 26). This leads to an alternative view that S 1937/116 was last in a long chain of victories for the secular branches of the colonial court over their religious colleagues, the *penghulus* of the priest councils, a process that – unlike the political and legislative debates on the issue – probably had not much to do with a preference for *adat* law, but involved issues such as preference, bias, and ultimately, control.

10.1.2 Van den Berg's and Snouck Hurgronje's similar attitudes towards Islamic law

A secondary, but from a historian's perspective significant finding can be drawn from this assessment of the colonial *adat* vs. Islam debate in the late nineteenth and early twentieth century. From a family law perspective, the differences between Van den Berg, associated with the *receptio in complexu* theory that takes Islamic law as the main source of indigenous law, and his successor Snouck Hurgronje, creator of the reception theory which takes *adat* law as its basis, are much less profound than historians have suggested so far (see Nurlaelawati 2010: 46 and 47, Roff 2010: 456; Dijk 2005: 134 and 135). Van den Berg's stance is a very legalistic or positivist one: sharia applies to the Javanese because they are Muslims. Snouck Hurgronje takes a more empirically-based stance, resembling Ehrlich's concept of 'living law': in Javanese social life, most matters are not governed by Islamic norms but *adat*, therefore *adat* law should apply. Hence, after filtering out their legal ideas from all their differences and antagonisms, a very similar position emerges.

Even though Van den Berg's and Snouck Hurgronje ideas and starting points seem irreconcilable, in fact they are. As a legal positivist Van den Berg considered that statutory law such as the Criminal Code of 1873, for example, had primacy over all indigenous law, including Islamic law. Much like Snouck Hurgronje, he considered that Article 78(2) of S 1855/2, and its clause 'old institutions and customs' (*oude instellingen en gebruiken*) had primacy over *fiqh* in Muslim family law matters on Java. Ironically, Snouck Hurgronje took a 'scripturalist' stance in those Muslim family law matters he considered to be the realm of Islam, whether they concerned alleged inaccurate interpretations by Van den Berg, or a lax application of *fiqh* norms by the *penghulus*, which leniency he typically condemned. This all suggests that in future research the stereotypes of an Islam-favoring Van den Berg and an *adat*-supporting Snouck Hurgronje require some adjustments.

10.2 The Islamic courts and state formation

In Chapter 1, I adopted Peletz's suggestion that the Islamic courts and their adjudication are essential to the process of state formation, as they potentially penetrate deeply into communities, generating individual rights and obligations based on national citizenship rather than membership of a certain ethnicity, class, kin, or gender. In Chapters 6 and 8 I have analyzed the results of empirical research in Cianjur and Bulukumba about the function and performance of the Islamic courts in those districts. Taking into consideration local cultural and historical contexts, these analyses reveal the extent to which community members in both districts generally speaking act according to their statutory

rights and obligations regarding marriage and divorce, and consider why they act that way.

Starting with Cianjur, I have demonstrated that the Islamic court's authority is challenged by a rival Islamic normative system, leading to a situation in which most couples divorce out-of-court in violation of statutory provisions stipulating a judicial divorce. This situation is a clear negative indicator for state formation. Chapter 5 demonstrates that in order to maintain their standing and religious authority within their community in the face of an increasingly nationally-oriented Islamic court system, local *ulamas* and local KUA officials, most commonly also recruited from the ranks of influential traditional *ulama* and *kyai* families, have created parallel authorities in family law matters. These resemble states within the state and challenge the authority of the state Islamic court. Hence, the *ulamas* and *kyais* of West Java continue to perform their traditional roles in marriage and divorce in violation of statutory law and in competition with the Islamic court. A situation has developed in which those actors, who traditionally most vocally supported the Islamization of the state and a national imposition of sharia, are in actual fact denying the state's authority in the most essential Islamic matters. In this way they work against the state's nation- and state-building projects aimed at creating modern, national citizens who abide by national law.

In comparison, the Islamic court in Bulukumba has a much more entrenched position in society, as in Bulukumba it is generally considered to be the single, rightful institution for divorce. It is likely that these differences with Cianjur are the result of the Islamic court's distinct historical trajectories, as well as the traditionally less autonomous position of Bulukumba's local *ulamas* and *kyais*. Moreover, the growth of the class of *ulamas* and *kyais* in Bulukumba is a recent development. Historically they are more oriented towards the indigenous rulers and the state, as the state is the main vehicle to enhance their role and standing in society.

The Islamic court in Bulukumba is clear about the position of *adat* in its judgments: only when *adat* does not conflict with Indonesian Muslim family law will it be considered in judgments. Through each divorce case in which the Islamic court's legal doctrine is endorsed at the expense of other norms, the court transfers the message that statutory law is superior to other norms that exist in society. We have seen the example of the court's denial of the husband's demand that *mahr* must be returned after divorce, or the court's dismissal of a claim that a wife had been *nusyuz* and therefore had no right to maintenance. In the words of Cotterrell, such invocation of legal norms 'feeds into citizens' perceptions of law' (Cotterrell 1986: 301).

There is a correlation between the performance of the Islamic courts and state formation. Since in Bulukumba the Islamic court is addressed by a much larger portion of the population than in Cianjur, the effect of its every day adjudication processes on society can also be expected to be more profound. Conversely, the fact that enforcement of post-divorce rights, especially child

support, is unattainable for most women must be considered a negative indicator of state formation. Just as law invocation, enforcement is a mechanism by which legal doctrine and ideology are produced and disseminated and, what is more, imposed onto other normative orderings. Nurlaelawati has blamed the lack of law-abiding behaviour in West Javanese citizens on a lack of enforcement and law invocation by judges of the Islamic court (Nurlaelawati 2010: 224). I would add that the competition posed by autonomous *ulamas* in Cianjur and local KUAs, the operation of which also heavily draws on local *kyais* and *ulamas* complicates, and perhaps even, delays the nation-state formation process.

10.3 Continuities and changes in the development of Indonesian Muslim Family law

In Chapters 3 and 4 I have approached the historical development of Muslim family law in Indonesia as a series of changes and continuities that took place within a judicial tradition of the Islamic courts, meaning that legal changes always build on existing practice, and that legal practice is based on certain origins. In Chapter 3, I have suggested that it is useful to locate the judicial tradition's origins in the traditional adjudication by the Javanese Islamic judges or *penghulus,* and not solely in *syafi'ite fiqh.*

An obvious complication of such an approach is the lack of primary sources, and the consequent reliance on colonial descriptions of the *penghulu* courts and on colonial compilations of indigenous Islamic law, the most notable of which is the 1760 *Compendium Freijer*. I have attempted to overcome this problem by focusing on the reappearances of four concepts that are considered characteristic of Indonesian Muslim family law today: the *taklik al-talak* (conditional divorce), the distinctive *syiqaq* procedure in which the *penghulu* court rather than the husband divorces the couple after reconciliation has failed, a lenient application of the *fasakh* procedure for divorce, and communal marital property. All four concepts appear in eighteenth- and nineteenth-century colonial sources as part of the *penghulus'* administration of justice, and therefore I have argued that their application and codification in the twentieth and twenty-first centuries must be seen as continuity rather than change.

Nonetheless, I have also shown that major reforms with regard to Muslim family law have taken place. This was possible because the legislator retained the religious core of each of the reformed Islamic norms. Such reform process corresponds with Karl Renner's observation that legal concepts can adapt to changed social circumstances without necessarily changing in form or structure, and can even fundamentally change their social function without changing their form (in Cotterrell 1986: 54). In Indonesia far-reaching reforms of the Marriage Law have taken place without secularizing the main concepts of Muslim family law. Islamic concepts were preserved, but made conditional

to other norms which were considered more in line with modern times and government policies. Hence, the *talak* became a judicial divorce, polygamy was made conditional to strict limitations and subjected to a judicial procedure, and the minimum age of marriage was raised for men and women.

Of course, the political context in which the 1974 Marriage Law was adopted also plays a vital role in terms of the possibility of legal change. By 1974, the authoritarian New Order and its initially secular paradigm had pushed political Islam on the defensive, and the substance of the 1974 Marriage Law was probably the best result the supporters of Islamic law could negotiate during that time. When, in the 1980s, the policies of the New Order again became more Islam-oriented, even if still 'on terms set by the State' (Bowen 2003: 254), no more major reforms of Muslim family law took place, at least not through legislative process.

Of course the 1991 Compilation of Islamic law was a major event, as for the first time in Indonesia substantive Muslim family law norms were selected and laid down by the central government. From the perspective of the development of legal doctrine within the Islamic courts, however, the Compilation of Islamic Law is *not* innovative, as it primarily laid down the Islamic courts' doctrine of that time, which includes *fiqh*, *adat* law norms, and the provisions of the 1974 Marriage Law. From the perspective of *syafi'ite fiqh*, however, these codifications appear innovative, as a comparison with *fiqh* unveils these historically grown and sometimes fundamental differences between the Islamic courts' tradition and the tradition of *syafi'ite fiqh* (see Nurlaelawati 2010; Hooker, M.B. 2008).

The substantive legal changes in the Islamic courts' doctrine since the 1990s, are not only the consequence of case law of the Supreme Court and the Constitutional Court, but also of every day adjudication processes. As demonstrated in Chapter 9, judges apply the concepts of no-fault divorce and broken marriage consistently, meaning that they must be considered to have become part of the Islamic courts' legal doctrine.[2] The concept of no-fault divorce means that the issue of a wife's disobedience (*nusyuz*) has become less important in divorce and, indeed, it appears that the limits of what the court considers *nusyuz* behaviour have been narrowed. The Islamic courts generally do not act on the husband's accusations of *nusyuz* behaviour of his wife and still grant women their spousal post-divorce rights in *talak* divorces. A new development, but not yet part of legal doctrine, as this concept is seldom applied, is the concept of the husband's disobedience (*nusyuz*) in wife-petitioned *gugat cerai* divorce cases. Islamic courts have argued that, as a consequence of the husband's disobedience, the wife has the same rights on spousal support in *gugat cerai* cases as she has in *talak* divorce cases: the *mut'ah* consola-

2 This also proves the usefulness of differentiating between norms applied by the Islamic court, by using the 'Western' concept of legal doctrine, and *fiqh*, since no legal scholar, *ulama* or Islamic court judges will consider broken marriage and no-fault divorce part of *fiqh*.

tion gift, and maintenance, clothing and housing during the *iddah* waiting period. This may indicate that also regarding the the rights to spousal support the legal doctrine in the Islamic court is 'inching towards equality' (see Cammack 1999).[3]

This is not to say that the Islamic courts are heading towards equality or are becoming less conservative on all issues. Nurlaelawati has described how the Islamic courts have also become more lenient on the issue of polygamy, yet with the opposite result: less equality (Nurlaelawati 2013). Another example of conservatism is the Islamic courts' strict application of the rule that marriages must be concluded according to religious requirements, with the result that marriages that have been concluded many years ago are declared invalid, The Supreme Court has passed a judgment, based on *fiqh*, that a father's obligation to pay maintenance to his children does not imply that non-payment of such maintenance places the father in debt to the mother.

Still, on the whole, most trends in the Islamic courts' adjudication do not indicate that the Islamic courts have lost their relatively liberal character after *Reformasi.* On the contrary, they point at a number of legal changes which will move the Islamic courts' legal doctrine again a bit further from traditional *fiqh.* Nonetheless, legal reform within an Islamic judicial tradition can never be completely rational in Max Weber's sense, since it must always be based on the core Islamic norms and values to maintain an Islamic character. For this reason, it is unlikely that the consistently applied concepts of no-fault divorce and broken marriage will be codified at some point soon, as they would immediately spark controversy because of their non-*fiqh,* Western origins. Hence, there is a subtle difference with Karl Renner's observation in 1949 that law can adapt to changed circumstances without changing its form. In the case of Indonesian Muslim family law, it is the other way around: the form of the core Islamic concepts cannot change too much, regardless of changed social circumstances. The reason for this is that such changes would jeopardize the law's religious character. However, the legislator, by making the core Islamic norms conditional to external norms, and the judge by application or non-application of those norms with due consideration of changed social circumstances, can change their legal and social functions to a large extent.

3 Mark Cammack uses the phrase with regard to inheritance law.

10.4 Women's access to the Islamic courts

10.4.1 Women's rights to divorce

One of the core questions of this study concerned the functioning of the Islamic courts in protecting women's divorce and post-divorce rights. A comparison between Cianjur (Chapter 6) and Bulukumba (Chapter 8) allows me to put forward a number of plausible generalisations about this functioning. The Islamic courts are mainly divorce courts, and women approach them mostly in order to petition a divorce. Moreover, the legal analysis of the Islamic courts' judgments in Chapter 9 demonstrates that Islamic courts in all but very rare cases will grant a divorce, and that they increasingly base their judgments on the concepts of 'no-fault divorce' and 'marriage breakdown', rather than on the statutory legal grounds in the 1974 Marriage Law. The sidelining of the formal divorce grounds are not arbitrary judgments, as their consistent application clearly indicates that they are part of legal doctrine. Although the concepts of no-fault divorce and marriage breakdown are in conflict with statutory norms requiring an at-fault divorce, the outcome of a divorce process at the Islamic courts is very predictable: if reconciliation efforts fail, the courts will grant a divorce. This means that regardless a woman's social position within her local community, clan, or marriage, from a legal perspective she has an equal position in divorce. This means that women living in unhappy marriages who access the Islamic court may do so in order to circumvent traditional, religious or *adat*-based, patriarchal ideas about marriage and divorce.

The lenient approach towards divorce is the same in both districts and judges consistently and routinely grant divorces to male and female petitioners. However, it appears from the divorce surveys conducted in the framework of this research, that there are major differences in social divorce practices between the districts. In Bulukumba a large majority of the population follows the legal requirement of judicial divorce, whereas in Cianjur only a minority of women were divorced through the district Islamic court. In Chapters 6 and 8 I have found plausible explanations for this difference in divorce behaviour. In Bulukumba a woman can only obtain 'clean' status in the eyes of the community through a judicial divorce at the Islamic court, whereas in Cianjur there is no social stigma attached to an informal divorce, and men and women can easily remarry informally through a local *ulama*, or semi-formally, through an official of the KUA who can arrange a marriage certificate without having received a divorce certificate of the Islamic court first.

Thus, it follows that informal divorce is a viable alternative for women in Cianjur, which has the advantage of not requiring any paperwork and court hearings – in fact, women's access to divorce is not restricted. Elsewhere, Bedner and I have argued that the availability of informal marriage and divorce actually may increase freedom of women to mingle with young men,

since transgressions of the boundaries of proper social conduct can be 'solved' by an informal marriage and easy divorce (Bedner & Huis 2010). The explanation of the existence of competing institutions willing to conclude informal marriages and divorces still leaves us with the question of why such a system is generally accepted in Cianjur, and in Bulukumba much less so.

10.4.2 A historical explanation of the different attitudes towards judicial divorce in Cianjur and Bulukumba

The different historical trajectories of the Islamic courts in West Java and Bulukumba may provide a more structural explanation for this different attitude towards informal divorce. Chapter 5 describes how in mid-nineteenth century West Java a long and symbiotic relationship among the colonial state, the indigenous *priyayi* rulers, and a landowning class of *ulamas* and *kyais* came to an end, when the colonial government tried to get a grip on the autonomous class of *ulamas*. Through regulation, taxation and licensing the colonial government attempted to limit the number of *ulamas* as well as their combined religious, political, economical and educational roles in the country side. This resulted in a tense relationship between autonomous *ulamas* on the one hand, and the colonial government and the *priyayi* elite, including the *penghulus*, on the other. Despite the policies of the colonial government, the *ulamas* managed to maintain their position, by retreating into their local communities in the country side, focussing economically on the rice trade, and religiously on Islamic boarding schools and every day religious issues, including family law issues. As a result, many *ulamas* became autonomous, in the process of minimizing state influence on local communities. After independence the Ministry of Religious Affairs incorporated many *ulamas* into its ranks, but it did not manage to change their autonomous behaviour in everyday religious matters, since many of them still view the Islamic courts as competition to their interests and religious authority.

Chapter 6 describes a quite different trajectory in Bulukumba. Here, *ulamas* were generally part of the traditional nobility-based government who, like the *penghulus* of *priyayi* background on Java, were linked through the local political elites to the colonial government. In South Sulawesi an autonomous *ulama* class did not develop until well into the twentieth century, when the large Muslim organizations gained influence. Thus, I hypothesise that the autonomous *ulamas* in Bulukumba were not defending a traditionally established position, but were involved in a struggle to gain a more influential position, and that the state was viewed as a – or perhaps *the* – instrument to achieve this.

Moreover, the colonial government had not recognized the jurisdiction of the Islamic courts in South Sulawesi over divorce, and considered this a matter for the *adat* courts. After independence Muslim organizations urged

the government to establish Islamic courts in South Sulawesi. Thus, whereas many *ulamas* in Cianjur perceive the court as a symbol of state control over Islam, working against their interests and their strong local position in religious affairs, in Bulukumba it is likely that they perceived the Islamic court as a state-sanctioned Islamic institution working in their interests against *adat* and nobility rule. In short, historically the starting points in both districts were quite the opposite: in Cianjur autonomous *ulamas* and the Islamic court were competing institutions, whereas in Bulukumba both were new, with a relationship of mutual support.

10.4.3 The Islamic courts and post-divorce rights

Post-divorce rights are different in nature than divorce rights, since no legal requirement exists to bring post-divorce claims to the court. Thus, post-divorce rights mostly appear in a divorce petition when one of the spouses decides to claim them. Bearing this obvious but significant truth in mind, a number of generalisations can be made concerning the Islamic courts' role in realizing women's post-divorce rights.

First, a small minority of women in Cianjur and Bulukumba claim post-divorce rights during the divorce process. The divorce surveys in both districts indicate that women know that they are entitled to them, so lack of knowledge is not the issue. Spousal support rights in *talak* divorces, consisting of the consolation gift of *mut'ah* and the husband's continued obligation to provide maintenance, housing, and clothing during the three months waiting period (*iddah*) after a *talak* divorce, are the post-divorce rights that women claim most. Claims for child support and joint marital property are relatively rare. In Bulukumba women often make claims for the dowr (*mahr*) whereas such claims are almost absent in Cianjur. This is related to the custom in South Sulawesi of giving land, trees or other standing crops as *mahr*, often without fulfilling the legal formality of a property transfer. In such cases the Islamic court issues a statement on the *mahr* properties and orders the ex-husband to hand it over to his ex-wife.

The non-claiming practice by divorced women is related to economic realities, local custom and practices regarding divorce and post-divorce rights, as well as the availability of alternative support. I have argued that in claiming post-divorce rights women are influenced by complex factors: a cultural preference toward resolving matters privately; the tendency to view payment of child support as a religious matter, not so much a legal obligation; psychological barriers to facing the husband; empathy with a former husband who is poor himself; the desire and ability to take care of their family alone; but also to the attitude of the court itself encouraging couples to arrange their matters informally.

In a cost-benefit analysis, women would weigh the chance of successful redress with the level of agency and costs involved, but also with the socio-economical realities and psychological, cultural and personal considerations above. If women expect that too much effort would be needed for too few benefits, they naturally refrain from claiming their rights. The expected costs, effort and success of an enforcement process play a significant role too. Women will not put much effort into claiming monthly child support if it is public knowledge that one can easily ignore court orders concerning child support, because enforcement mechanisms are difficult to access. The spousal support court orders are enforced as the Islamic courts in Cianjur and Bulukumba order the husband to pay the three months sum, prior to pronouncing the *talak*. However, enforcement of child support orders is non-existent, and enforcement of marital property matters relatively expensive.

Expectations of the efforts needed for, and the outcome and benefits of, a judicial process were not the only factors women in Cianjur and Bulukumba took into account in their decisions. A woman's decision not to claim post-divorce rights is often also motivated by the wish to live a life independent of her former husband, or by empathy with the former husband's difficult economical situation. One of the remarkable findings of the divorce surveys is that many women have the opportunity to remain independent from the ex-husband's support. A majority of respondents in Cianjur and Bulukumba stated that, in their perception, divorce had not negatively affected their economic situation. Interviews with divorcees revealed that in both districts women can fall back on family for support and, moreover, that divorce made them available for the labor market again. Of course, the situation can be quite different for women who cannot fall back on their family for support. Nonetheless, one must be careful not to overstate the role of the Islamic court in society as regards post-divorce matters, and one must also be careful not to overstate the role of post-divorce rights in poverty reduction, as many lower-class women have their own income and are furthermore supported by their parents or other family members.

We have established that most women do not claim child support rights. However, when they do so the Islamic court mostly endorses the claims, with the proviso that the courts' decision tends to follow the husband's rather than the wife's description of his financial situation and ability to pay. According to judges I interviewed this is in order to increase the chance that the husband executes the court order, in view of the absence of an adequate enforcement mechanism. Hence, not only is the petitioners' behaviour influenced by the problem of enforceability of court judgments, but also the substance of Islamic courts' judgments themselves.

Forcible execution orders are relatively expensive as they involve informal payments to the police. The stronger the expected resistance, the more expensive enforcement becomes. This means that only in cases in which sufficient property or money is at stake are people willing to set the machinery of the

legal system in motion by taking legal action to enforce their rights. It also indicates that resistance to court orders can be an effective means to frustrate the end goal of a legal process, protection against the financial consequences of a divorce. For most women 'real legal certainty' (Otto 2002) is beyond their reach.

The Islamic court in Bulukumba has attempted to improve the enforcement situation by involving the military, who, to be sure, are always placed under the supervision of the police to ensure compliance with the formal procedures. Thus, deterrence is used in order to curb resistance. The Islamic court claims that the threat of military force has been mainly persuasive, actually resulting in less use of physical force during forcible executions. The use of the military does not change the accessibility of enforcement: they too must be paid, but the threat of military coercion, combined with the fact that the military are generally more respected than the police in Indonesia, seems to have increased the effectiveness of enforcement.

To summarize, the Islamic courts' performance in post-divorce matters is much less positive than in divorce cases. One may explain the situation purely in rule-of-law terms, by stressing the problem of inadequate enforceability of those rights. Indeed, enforceability is an important factor, which women take into account when they decide whether or not to make a claim, and which influences the behaviour and advice of court personnel towards court clients – and even the content of court judgments. However, an inadequate enforcement mechanism is not the only reason women do not claim post-divorce rights: cultural, financial and personal considerations also play a role, and moreover many women cope well without post-divorce rights.

10.5 The Islamic courts, the prospects of family law reforms and women's rights

This leaves us with the question what the prospects of family law reforms are. As the rejection of the proposed reforms in the 2004 Counter Legal Draft has indicated, it is very unlikely that international norms regarding women's equal rights, such as those formulated in CEDAW (which Indonesia formally adopted in 1984), will actually be adopted in a new Muslim marriage law any time soon. However, it is also safe to state that the political changes during the *Reformasi* have not caused a backslide with regard to the Islamic courts' relatively liberal interpretations of women's rights in marriage and divorce. There is much continuity in legal practice.

That of course does not answer the question whether there are any indications of future family law reforms. In this study I have argued that history has taught us that past successful reforms had to remain within certain boundaries of the judicial tradition of the Islamic courts to be acceptable. Most

profound family law reforms date back to the 1974 Marriage Law when the New Order regime had put Muslim parties on the defense. The rather conservative 1991 Compilation of Islamic Law was not to passed through Parliament by the New Order regime because of fears for controversies. For the same reasons the three Muslim family law Bills have been shelved by Indonesian governments during and after *Reformasi.* It seems that the prospects for reforms are bleak.

However, this study has demonstrated that, while proposals concerning legislative reforms always spark controversy, significant legal change does take place through the Islamic courts' every day adjudication processes. In fact, as many of those legal changes go rather unnoticed, the potential for legal change is larger within the Islamic courts than within Indonesia's Parliament. Yet, the doctrinal changes in Indonesia's Islamic courts' tradition are ambiguous, as a rebalancing of the main forces that exist within the courts is taking place: one inching towards more equality, the other towards a more Islamic identity. These forces are not necessarily countervailing as convergence between the two does take place. Only time will tell whether the Islamic courts' tradition is lenient enough to unite them.

Summary

Indonesia's legal system includes religious courts for Muslims, in this book referred to as Islamic courts, which have the power to adjudicate disputes between regarding family law, inheritance law, Islamic banking, religious gifts (*shadaqah*, *infaq*) and religious endowments (*waqf*). The Islamic courts are national courts subject to national legislation and administratively they reside under the Supreme Court. There is a possibility for appeal to Islamic high courts and for appeal in cassation to the Supreme Court.

Chapter 2 of this book explains how the nineteenth-century Javanese Islamic courts were incorporated into the legal system of the Netherlands Indies and how the present-day Indonesian Islamic courts developed out of them. Chapters 3 and 4 describe how an Indonesian Islamic judicial tradition developed within the Islamic courts. Just as other legal traditions it is built on traditional norms and only gradually reformed itself through everyday adjudication processes and legislative reforms. The present thesis argues that rather than being the result of reinterpretations of Islamic classical doctrines by progressive *ulamas* present-day Indonesian Muslim family law has been developed within the judicial tradition of the Islamic courts. Moreover, the legislator has only once introduced major substantive legal reforms: in 1974 through the Marriage Law.

Family law is a field which regulates the relationship between the sexes and therefore it is fodder for debates between conservative and reform-minded Muslims. The 1974 Marriage Law introduced a number of important reforms (e.g. obligatory judicial divorce, restrictions on polygamy, minimum age of marriage) that challenge traditional interpretations of classical Islamic law held by conservative *ulamas*. The same Marriage Law, however, left most substantive Muslim family law matters unregulated, and thus allowed for a continuation of the judicial tradition of the Islamic courts. The 1991 Compilation of Islamic Law codified the norms of this tradition. 'Liberal' *ulamas* and so-called 'Muslim feminist' have challenged those traditional interpretations with a counter-discourse consisting of more gender-equal interpretations of the Islamic sources. Other women's rights organizations point at the discrepancies between Indonesian family law and the constitutionally guaranteed equality of men and women. The Islamic judges are confronted with these and other views in the court room, and they must balance them when deciding the cases before them. These everyday judicial processes result in subtle legal changes (Chapter 9).

This study has researched the extent to which Muslims in Indonesia comply with the 1974 Marriage Law and petition their divorce at the Islamic courts, as they are legally required, and how the Islamic courts adjudicate those cases. Many Muslims in Indonesia ignore statutory family law, avoid the Islamic courts and marry and divorce according to local custom, whose contents may be at variance with both state law and classical Islamic norms. The role and functioning of the Islamic courts are negatively affected when most members of a community challenge the statutory requirement of judicial divorce. When, conversely, the majority of members of a community divorce at the Islamic court and implement its judgments this is indicative of the primacy of statutory law over other normative orderings in that community. In either case the judgments of the Islamic courts have the potential to transform local customs by offering the members of local communities the opportunity to settle a dispute outside of the customary normative frameworks.

This especially applies to divorce matters, as women's statutory rights to divorce are much broader than they are in classical Islamic doctrine and in most customary normative orderings in Indonesia, while men's rights are more limited. The 1974 Marriage Law stipulates the obligation for Muslims to file a petition for divorce at the Islamic court. The Islamic court decides in court hearings whether legal grounds for divorce have been met. These divorce grounds are equal for men and women, and both men and women can petition for a divorce. The normative tensions between these provisions and the male absolute right in classical Islamic doctrine to divorce one's wife out-of-court through pronunciation of the *talak* are obvious.

The bulk of the case load of Islamic courts, about 90 percent, consists of divorce cases and another eight percent are requests to establish the validity of an existing marriage (*isbath nikah*). These often also concern divorce, as *isbath nikah* is a requirement for those who want to obtain an official divorce in case of an unregistered marriage (see Chapters 4 and 9). Altogether, women's divorce rights are an apt lens for the study of the Islamic courts.

Through field research in the districts of Cianjur in the province West Java (Chapter 6) and Bulukumba in the province South Sulawesi (Chapter 8) this study has assessed the extent to which the population in these districts gets divorced in compliance with the 1974 Marriage Law and petitions for a divorce at the Islamic court. Again, this compliance figure is an indication of the level of legal awareness within a community concerning statutory family law. Hence, I conducted a divorce survey in both districts among divorced women. In Bulukumba 72.5 percent of the respondents answered that they divorced through the Islamic court, while in Cianjur only 14 percent did so. This enormous difference implies an equal difference in the position of statutory divorce law between both districts.

The continued social relevance of the male out-of-court *talak* in Cianjur is a direct explanation for its low compliance figures. In Bulukumba the out-of-court *talak* has lost much relevance and carries a stigma. In Cianjur it is no

problem for a woman who divorced out of court and wants to remarry to find an Islamic cleric willing to marry her, whereas in Bulukumba divorced women are considered to be marriageable only when they have proper divorce papers. Without a court divorce their status has not yet been 'purified.' A possible cultural explanation is that in Bulukumba many men traditionally migrate to find work elsewhere, leaving their wife behind in the home village. A husband who has not been heard of for years may suddenly return to his home village and still consider himself to be married. Women who consider themselves to be socially divorced in such cases may attempt to get an official divorce certificate in order to avoid complications when the former husband returns.

There is also a historical explanation for the differences in compliance in both districts, which relates to a different development of the relations between the central (colonial) government, the indigenous elite, the Islamic courts and *ulamas*. In nineteenth-century West Java an influential class of autonomous *ulamas* developed, which opposed the government's interference into the Islamic affairs of local communities. Ever since the formal incorporation of the Islamic courts into the colonial legal system (in 1882) many *ulamas* in West Java have viewed the Islamic courts as mouthpieces of the central government instead of a genuine Islamic institution. By contrast, in South Sulawesi it was not until well into the twentieth century that an influential class of autonomous *ulamas* developed. This class did not oppose the government but attempted to increase its influence by participating in the state. Moreover, the Islamic courts that existed in South Sulawesi during the colonial era were never formally incorporated into the colonial legal system. When in the 1950s the national government decided to establish Islamic courts in every district outside Java, the *ulamas* in South Sulawesi were in full support. Because of their different historic trajectories, the Islamic court in Bulukumba is more entrenched and has generated more popular support than the Islamic court in Cianjur (see Chapters 5, 7 and 10).

In addition to an assessment of the use of the courts and an analysis of their position in their local communities, this book looks into the development of Muslim family law through its application by the Islamic judges. As has been said before, the Islamic court applies many gendered family law provisions, whose meaning and implications are contested – not only by divorcing spouses, but also by politicians, *ulamas*, Muslim organizations, NGOs and others. Since the 1974 Marriage Law was enacted, no major Muslim family law reforms took place at the national level, as every attempt to do so met fierce resistance from the major national Muslim organizations (Chapter 4).

This book demonstrates that in comparison to the legislator, the Islamic courts have more room to bring about legal changes through reinterpretations of Islamic concepts in everyday adjudication processes. An example of such legal change is the reinterpretation of the concept *nusyuz*, which can be defined as 'neglect of marital duties' but more commonly is translated with 'dis-

obedience.' A wife who has been proven to be *nusyuz* loses her right to maintenance from her husband. Husbands frequently consider their wife *nusyuz* because she performs activities for which they think she needs his permission; e.g. going to the market, or visiting friends. The Islamic courts in Indonesia, however, do not apply such a broad definition and only in exceptional cases declare a wife to be *nusyuz*. Recently, the Islamic court even judged that in cases of domestic violence and gross negligence men can be declared *nusyuz*; with the legal consequence that the wife who petitioned the divorce keeps her maintenance rights during the waiting period following the divorce (see Chapter 9).

Other examples provided in Chapter 9 also illustrate that judgments of the Islamic court may differ substantially from provisions in national legislation, traditional Islamic doctrines, and local customs and traditions. Nonetheless, because they also issue conservative judgments on other issues, the general development of doctrine within the Islamic courts cannot be characterized as fully reform-minded or moving towards gender-equality (Chapter 9).

Finally, this study looks into the role of the Islamic courts in protecting women and children from the negative effects of a divorce. There is consensus among policy makers, donor organizations, and activists that the Islamic courts should protect women and children from adverse economic consequences of a divorce. The case studies of Cianjur and Bulukumba have explored the vulnerability of women and children in this regard and the extent to which Islamic courts are able to provide protection against possible negative financial effects of a divorce (Chapters 6 and 8).

The 1974 Marriage Law does not specifically regulate post-divorce spousal support and in practice the rules concerned are still based on Islamic doctrine. The wife has only a right to spousal support, or better, the husband is obliged to provide maintenance, during the waiting period for a non-final divorce (*talak raji'i*). When the waiting period of three months ends without reconciliation of the spouses, the divorce becomes final and the husband is no longer responsible for the maintenance of his former wife. The 1974 Marriage Law does mention the obligation of the father to provide maintenance for his children, but does not provide a more specific child support regulation.

Both in Cianjur and Bulukumba the number of post-divorce support claims are limited and only 3 percent of the total number of divorce petitions include spousal support claims. One reason for the low number of spousal support claims is that divorces petitioned by the wife are automatically final divorces for which the husband has no maintenance obligation during the three-month waiting period. The figure for child support claims in Cianjur is similar (3 percent) and it is even lower in Bulukumba (1.5-2 percent). An explanation for these low numbers is the Islamic courts' lack of enforcement mechanisms regarding post-divorce support cases. An ex-wife can only pray that her former husband actually pays the amount of child support established by court order. An additional explanation is that the Islamic courts tend to discourage women

from filing support claims and appeal to the cultural preference to make out-of-court agreements.

Moreover, the financial consequences of divorce are not as dire as many think, at least not in the perception of divorced women themselves. A large majority of respondents in Cianjur (66 percent) and Bulukumba (94 percent) answered that divorce did not affect them financially. Most women can rely on family support after a divorce and most of them commonly return to their parents' house at least temporarily. Many women who were housewives during their marriage find a job after divorce, while family members take over the (day) care of their children. Finally, even if divorced women are not entirely without stigma, they remain desirable marriage candidates. In both districts women generally remarry not long after a divorce, which means that for most women the adverse economic consequences of divorce are only of a temporary nature. Thus, the Islamic courts' role in providing financial protection for women and children is not only limited due to a lack of enforcement mechanisms, but also because most women can rely on non-state social safety nets.

Samenvatting (Summary in Dutch)

De islamitische rechtbanken en het scheidingsrecht voor vrouwen in Indonesië. De casus Cianjur en Bulukumba

Het Indonesische rechtsstelsel kent speciale religieuze rechtbanken voor moslims (*pengadilan agama*), in dit boek aangeduid met islamitische rechtbanken, die exclusieve jurisdictie bezitten op het gebied van familierecht, erfrecht, islamitisch bankieren, religieuze schenkingen en religieuze nalatenschappen voor moslims. Deze islamitische rechtbanken zijn nationale rechtbanken waarop nationale wetgeving van toepassing is en die bestuurlijk onder het hooggerechtshof vallen. Er is een mogelijkheid tot beroep bij provinciale islamitische gerechtshoven en uiteindelijk beroep in cassatie bij het hooggerechtshof.

Hoofdstuk 2 van dit boek beschrijft hoe in de negentiende eeuw de Javaanse islamitische rechtbanken in het Nederlands-Indische rechtsstelsel werden opgenomen en hoe daaruit de huidige nationale islamitische rechtbanken zijn ontstaan. Hoofdstukken 3 en 4 beschrijven hoe zich een Indonesische islamitische rechtstraditie heeft ontwikkeld die net als andere rechtstradities voortbouwt op traditionele rechtsnormen, maar zich ook constant heeft vernieuwd door middel van rechtspraak en wetgeving. Het boek stelt dat het huidige Indonesische materieel familierecht voor moslims eerder op deze traditie binnen de rechtbanken is gebaseerd dan op interpretaties van klassiek islamitisch recht door *ulama's*. De wetgever heeft slechts eenmaal grote hervormingen doorgevoerd, middels de Huwelijkswet van 1974.

Familierecht is bij uitstek een rechtsgebied dat de verhouding tussen de sekses regelt en als gevolg daarvan voer voor verhitte debatten tussen hervormers en conservatieven. De Huwelijkswet heeft een aantal hervormingen geïntroduceerd (bijvoorbeeld uitsluitend rechterlijke echtscheidingen, beperkingen op polygamie), die op gespannen voet staan met traditionele interpretaties van islamitisch recht door de conservatievere *ulama's*. Dezelfde Huwelijkswet heeft echter ook vastgehouden aan de traditionele interpretaties van islamitische doctrines die uiteindelijk in 1991 in de Compilatie van Islamitisch Recht zijn vastgelegd. Deze conservatieve interpretaties worden betwist door 'liberale' *ulama's* en de zogenaamde 'moslimfeministen' die meer gendergelijke interpretaties van islamitische bronnen propageren. De niet-confessionele vrouwenrechtenactivisten wijzen weer op de discrepanties van het bestaande familierecht met de grondwettelijke gelijkheid tussen man en vrouw. In de rechtzaal weegt

de islamitische rechter deze normen tegen elkaar af en doet een uitspraak. De dagelijkse rechtspleging kan zo subtiele veranderingen teweegbrengen (hoofdstuk 9).

Deze studie heeft onderzocht in hoeverre moslims in Indonesië zich aan de Huwelijkswet houden, of ze inderdaad hun echtscheiding aan de rechter voorleggen, en hoe de islamitische rechter in deze zaken oordeelt. De mate waarin binnen een lokale gemeenschap de nationaalrechtelijke normen worden betwist beïnvloedt de positie en het functioneren van de lokale rechtbank binnen die lokale gemeenschap. Veel moslims in Indonesië trekken zich weinig aan van het nationale familierecht en de islamitische rechtbanken en trouwen en scheiden volgens de lokale normen van het *adatrecht*, normen die kunnen afwijken van zowel nationaalrechtelijke als traditionele islamitische normen.

Het aandeel van de lokale islamitische rechtbank in het beslechten van familierechtelijke zaken en de mate waarin haar uitspraken geëerbiedigd worden geven vooral een indicatie van de status die het nationale recht heeft ten opzichte van andere normatieve verbanden binnen een gemeenschap. De rechtspraak van de islamitische rechtbanken heeft op zijn minst de potentie om het karakter van lokale gebruiken te veranderen. Bovendien biedt de lokale islamitische rechtbank een mogelijkheid voor personen om een geschil buiten de lokale traditionele normatieve kaders te beslechten.

Dit geldt vooral bij echtscheidingen, aangezien voor vrouwen het recht op een echtscheiding in het statelijke recht veel groter is dan traditioneel het geval was. De huwelijkswet van 1974 bepaalt dat eenieder die wil scheiden een verzoekschrift tot echtscheiding voor de rechter moet indienen. De rechter beslist of aan de wettelijke gronden voor een echtscheiding is voldaan. Deze wettelijke gronden zijn voor mannen en vrouwen (en voor moslims en niet-moslims) gelijk en zowel de echtgenoot als de echtgenote kan een verzoekschrift tot echtscheiding indienen. Deze wettelijke bepalingen staan op gespannen voet met de islamitische doctrine die bepaalt dat de man zijn huwelijk zonder tussenkomst van de rechter eenzijdig kan ontbinden door de *talak* (verstoting) uit te spreken over zijn vrouw.

Het overgrote deel – ongeveer 90 procent – van de werklast van de islamitische rechtbanken in Indonesië betreft echtscheidingszaken, en nog eens acht procent bestaat uit verzoekschriften tot rechterlijke huwelijksbevestigingen (*isbath nikah*). Deze verzoekschriften houden vaak ook verband met een geplande echtscheiding (zie hoofdstukken 4 en 9). Het echtscheidingsrecht voor vrouwen biedt dus een goed perspectief op de praktijk van de islamitische rechtbanken.

Deze studie heeft met behulp van veldonderzoek geanalyseerd in hoeverre de bevolking in de districten Cianjur (in de provincie West Java; hoofdstuk 6) en Bulukumba (in de provincie Zuid Sulawesi; hoofdstuk 8) zich aan de Huwelijkswet houdt en zich voor een echtscheiding tot de rechter wendt –zoals wettelijk is vereist. Een dergelijk onderzoek naar de echtscheiding in de praktijk geeft een indicatie van de mate waarin de familierechtelijke bepalingen

zijn doorgedrongen in het rechtsbewustzijn van de bevolking in de betreffende districten. Uit de twee enquêtes gehouden in het kader van deze studie blijkt dat in Bulukumba 72,5 procent van de (gescheiden) respondenten een echtscheiding voor de rechtbank heeft verkregen, terwijl het in Cianjur maar 14 procent is. Dit enorme verschil duidt op een even groot verschil in de status van het statelijke scheidingsrecht tussen beide districten.

Een directe verklaring is dat in Cianjur de buitengerechtelijke *talak* nog sociaal relevant is, terwijl in Bulukumba deze sterk aan relevantie heeft ingeboet en een sociaal stigma met zich meedraagt. Zo kan een buitengerechtelijk gescheiden vrouw in Cianjur vrij gemakkelijk islamitische geestelijken vinden die haar willen hertrouwen, terwijl dat in Bulukumba veel moeilijker is en een vrouw pas weer huwbaar geacht wordt na een echtscheiding die is bekrachtigd of uitgesproken door de rechter. Zonder rechterlijke echtscheiding is de status van een buitengerechtelijk gescheiden vrouw 'nog niet gezuiverd.' Een culturele verklaring hiervoor is dat in Zuid Sulawesi veel mannen tijdelijk migreren om werk te zoeken terwijl de echtgenotes thuis achterblijven. Een echtgenoot die een tijd niet van zich heeft laten horen kan altijd nog terugkeren en een formele echtscheiding kan dan complicaties bij een onverwachte thuiskomst helpen voorkomen.

Een historische verklaring heeft te maken met de uiteenlopende historische verhoudingen tussen de nationale (koloniale) overheid, de inheemse elite, islamitische rechtbanken en autonome *ulama's* in beide districten. In Cianjur is vanaf het midden van de negentiende eeuw een autonome klasse van *ulama's* ontstaan die zich verzette tegen overheidsbemoeienis van de koloniale overheid en zeggenschap wilde houden over islamitische zaken die de leden van de lokale gemeenschappen aangingen. De islamitische rechtbanken op Java werden door de koloniale overheid in het rechtssysteem opgenomen en werden (en worden) mede daarom door veel van de *ulama's* in West Java als verlengstuk van de nationale overheid gezien, in plaats vaneen islamitische instelling. In Bulukumba is pas na de onafhankelijkheid in 1945 een klasse van autonome *ulama's* ontstaan en deze heeft vooral geprobeerd haar positie te versterken door actieve deelname aan het overheidsbestuur. In Zuid Sulawesi zijn de bestaande islamitische rechtbanken formeel nooit opgenomen in het koloniale rechtsstelsel. Pas nadat eind jaren vijftig nieuwe regelgeving de oprichting van islamitische rechtbanken buiten Java regelde in het inmiddels onafhankelijke Indonesië, werden er in Zuid Sulawesi op Javaanse leest geschoeide islamitische rechtbanken opgericht – met instemming van de lokale *ulama's*. Door deze ontwikkelingen is er in Bulukumba meer steun van de *ulama's* en de lokale gemeenschappen voor de islamitische rechtbanken dan in Cianjur (zie hoofdstukken 5, 7 en 10).

Naast de rol van de islamitische rechtbanken in de echtscheidingspraktijk en hun positie in de samenleving bespreekt dit boek de ontwikkeling van het recht dat wordt toegepast door de islamitische rechter. Zoals gezegd zijn bepalingen in het islamitische huwelijks- en scheidingsrecht vaak seksegebon-

den (*gendered*) en worden hun implicaties vaak betwist – niet alleen door echtgenoten onderling, maar ook door politici, *ulama's*, moslimorganisaties, en non-gouvernementele organisaties. Het recente verleden heeft aangetoond dat het sinds de Huwelijkswet van 1974 voor de wetgever politiek niet haalbaar is om het materieel islamitisch familierecht ingrijpend te hervormen en pogingen daartoe zijn steevast op verzet van invloedrijke moslimorganisaties gestuit (hoofdstuk 4).

Dit boek laat zien dat in vergelijking met de wetgever de islamitische rechter meer ruimte heeft om veranderingen door te voeren in de dagelijkse rechtspraktijk van het familierecht voor moslims, door herinterpretatie van islamitische bepalingen. Een voorbeeld van een dergelijke bepaling is *nusyuz*, wat het beste kan worden gedefinieerd als 'veronachtzaming van de huwelijkse plichten', maar dat in Indonesië en elders vaak met 'ongehoorzaamheid' wordt vertaald. Wanneer de echtgenote aantoonbaar, en zonder legitieme redenen, haar echtelijke verplichtingen heeft veronachtzaamd, dan verliest zij haar recht op levensonderhoud. Een man kan zijn vrouw al *nusyuz* vinden als zij regelmatig zonder zijn toestemming handelingen verricht waarvan hijzelf vindt dat ze die nodig heeft, zoals naar de markt gaan. De islamitische rechter in Indonesië verklaart echter zelden een vrouw *nusyuz*, en zeker niet in gevallen waarin de betreffende vrouw haar echtgenoot niet om toestemming vroeg alvorens buitenshuis een activiteit te ontplooien. In extreme gevallen, zoals geweld of verwaarlozing, kunnen nu juist mannen *nusyuz* verklaard worden door de rechter en behoudt de vrouw die een echtscheiding aanvraagt haar recht op alimentatie tijdens de wachtperiode (hoofdstuk 9).

De voorbeelden in hoofdstuk 9 tonen aan dat de interpretaties door de islamitische rechtbanken in aanzienlijke mate kunnen verschillen van nationale wetgeving, traditioneel-islamitische opvattingen, en lokale gewoonten en gebruiken. Toch kunnen deze ontwikkelingen in de rechtspraktijk niet eenduidig als hervormingsgezind of vrouwvriendelijk worden getypeerd, aangezien er ook conservatieve tendensen zijn waar te nemen (hoofdstuk 10).

Ten slotte heeft deze studie bekeken wat de rol van de islamitische rechtbank is in het beperken van de gevolgen van een echtscheiding voor vrouwen en kinderen. Onder beleidsmakers, donoren en activisten bestaat er een consensus dat de toepassing van het scheidingsrecht door de rechter vrouwen en kinderen zou moeten kunnen beschermen tegen de negatieve economische gevolgen van een echtscheiding. In de eerdergenoemde gevalsstudies naar de positie en het functioneren van de islamitische rechtbanken in Cianjur en Bulukumba is ook onderzocht in hoeverre vrouwen en kinderen inderdaad kwetsbaar zijn na een echtscheiding en in hoeverre de islamitische rechtbanken in staat zijn om hen te beschermen tegen negatieve financiële gevolgen (hoofdstukken 6 en 8).

Partneralimentatie is een van de zaken die de Huwelijkswet niet specifiek regelt en die op traditioneel-islamitisch recht is gebaseerd. De vrouw heeft alleen recht op alimentatie, of beter gezegd de man heeft alleen de verplichting

tot het geven van levensonderhoud, tot de wachttijd voor een herroepbare echtscheiding is verstreken. Pas als de echtscheiding onherroepbaar is geworden heeft de man niet langer de verplichting om in het levensonderhoud van zijn voormalige echtgenote te voorzien. Verder noemt de Huwelijkswet de algemene verplichting van de vader om voor zijn kinderen te zorgen maar kent zij geen specifieke kinderalimentatieregeling.

In zowel Bulukumba als Cianjur wordt een beperkt aantal alimentatieverzoeken bij de islamitische rechtbank ingediend. Slechts in ongeveer 3 procent van het totale aantal echtscheidingszaken wordt om een beschikking tot partneralimentatie verzocht. Dit heeft deels te maken met het feit dat alle door vrouwen ingediende verzoekschriften tot echtscheiding resulteren in een onherroepbare echtscheiding en de ex-echtgenoot dus geen verplichting tot onderhoud tijdens haar wachttijd heeft. Wat betreft kinderalimentatie is dit cijfer in Bulukumba met 1,5 tot 2 procent zelfs nog iets lager en in Cianjur met 3 procent ongeveer gelijk. Een van de verklaringen voor dit lage cijfer is het gebrek aan mechanismen om de verplichting af te dwingen. Een vrouw moet maar hopen dat haar ex-echtgenoot de kinderalimentatie overmaakt. De islamitische rechtbanken ontmoedigen vrouwen ook om een verzoekschrift voor een alimentatiebeschikking in te dienen door er bij vrouwen op te hameren dat informele afspraken moreel te prefereren zijn.
Overigens blijken de financiële gevolgen van een echtscheiding mee te vallen – in ieder geval in de perceptie van de vrouwen zelf. Een meerderheid van de respondenten in Cianjur (66 procent) en Bulukumba (94 procent) geeft aan dat de echtscheiding voor hen persoonlijk geen negatieve financiële gevolgen had. Een verklaring hiervoor is dat vrouwen in beide districten na een echtscheiding terug kunnen vallen op familie en meestal weer bij haar ouders gaan inwonen. Bovendien speelt mee dat niet-werkende vrouwen na een echtscheiding beschikbaar komen voor de arbeidsmarkt en vaak gaan werken terwijl een familielid op de kinderen past. Ten slotte, hoewel er wel degelijk een stigma bestaat voor gescheiden vrouwen, betekent dit niet dat zij niet gewild zijn als echtgenote. In beide districten is hertrouwen na een echtscheiding de norm, waardoor voor de meeste vrouwen langdurige negatieve financiële gevolgen van een echtscheiding uitblijven. Naast de beperkte mogelijkheden om een vonnis ten uitvoer te leggen is er dus een andere reden waarom de rol van de islamitische rechtbanken in het beperken van de negatieve gevolgen van een echtscheiding beperkt is: de aanwezigheid van niet-statelijke sociale vangnetten voor vrouwen met kinderen.

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Curriculum vitae

Stijn Cornelis van Huis was born in Utrecht, the Netherlands on 23 February 1977. Soon after birth his family moved from Vreeswijk to Castricum where he followed primary education. From 1985-1988 Stijn's family moved to Salatiga, Indonesia, when Stijn's father participated in a development cooperation project with the task to design a new Physics curriculum at Universitas Kristen Satya Wacana. During this time Stijn partly followed primary education, at the Sekolah Dasar Kristen Labaratorium and partly was home schooled (Wereldschool, IVIO). In 1988 the family Van Huis returned to Castricum where Stijn completed primary education, and secondary education at Het Bonhoeffer College.

In 1996 he enrolled in Russian Studies at Leiden University, and in 1997 completed a Russian language course in Odessa, Ukraine. During his stay in Odessa he found out his heart lay elsewhere and not long after he decided to quit Russian Studies. As it appeared, his affinity with Indonesia was stronger. In 2005 he obtained his Drs/MA-degree in 'Languages and Cultures of Southeast Asia and Oceania' (TCZOAO), Faculty of Arts, Leiden University with a thesis on the link between the international discourse on indigenous peoples and the discourse on *adat* communities' rights in Indonesia.

Between 2005 and 2008 he was research assistant in several projects at the Van Vollenhoven Institute for Law, Governance and Development (VVI). He started his PhD research on the Islamic courts in Indonesia at the VVI in 2008. During his PhD research he took part in the Netherlands Interuniversity School for Islamic Studies and the PhD program of the Meijers Research Institute and Graduate School, Faculty of Law, Leiden University. In addition, he was junior researcher in two projects: the Access to Justice in Indonesia project, which was a cooperation between Indonesia's National Planning Agency, World Bank, UNDP and Leiden University; and the Islam Research Project of the Dutch Ministry of Foreign Affairs.

Stijn Cornelis van Huis is currently a research fellow in Southeast Asian History at the Institut für Asien- und Afrikawissenschaften (IAAW), Faculty of Philosophy, Humboldt Universität zu Berlin, where he does research on case law concerning Islamic courts in the Netherlands Indies. He has published several articles and research reports on the subjects of Islamic courts, Muslim family law and *adat* law in Indonesia.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2013, 2014 and 2015

MI-224 A.F. Rommelse, *De arbeidsongeschiktheidsverzekering: tussen publiek en privaat. Een beschrijving, analyse en waardering van de belangrijkste wijzigingen in het Nederlandse arbeidsongeschiktheidsstelsel tussen 1980 en 2010*, (diss. Leiden), Leiden: Leiden University Press 2014, ISBN 978 90 8728 205 9, e-ISBN 978 94 0060 170 3

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